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in the Law-Making Procedure

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Criminal Preventive Risk Assessment in the Law-Making Procedure

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Foreword

When introducing new legislation there is always a risk that the new law will create conditions and opportunities possibly subject to criminal abuse. This mechanism of risk and opportunity creation is of essential importance in those fields where substantive and strategic incentives may trigger economic exploitation through organised and transnational crime. The creation of such incentives can be thought of not only on the level of the European Union regulations but also within the framework of national legislation and local administrative law.

Traditional crime prevention strategies (individual centered approach, situational approach, community crime prevention approach) do not seem to fit accurately into crime areas that are characterised by economic rationality, the rational actor and illegal profits. Furthermore, these approaches are cannot easily be linked to the legislative process.

It is rather common to annex criminal statutes to various laws in order to criminalise and penalise those acts which should be prevented at large through the specific legislation or are thought to counteract the goals of the legislation in question (for example environmental law, subsidy fraud, etc.). This approach in responding to a perceived potential of criminal abuse requires precise and in-depth knowledge of such possible criminal opportunities. This approach is also in need of substantial criminal justice resources. Prevention per se is not likely to be achieved by this method which essentially relies on traditional concepts of deterrence. Therefore, it seems more reasonable and more effective to design and develop instruments suited to prevent possible criminal abuse of new opportunities through integration into the legislative process. In order to do that anticipatory risk assessment is needed during the process of law-making.

The European Commission has recently taken up the issue of criminal preventive risk assessment in the law-making-procedure and has launched a research project on this subject in the context of the FALCONE pro-

gramme. One of the aims of the study was to analyse whether and to what extent such anticipatory risk assessment has been the subject of political and scholary debate in the member states. Furthermore, the different approaches to risk assessment as they have already been implemented or, at least, discussed in the different states were summarized and systemized in a theoretical comparison.

The editors would like to thank the European Commission for the cofunding of this research project. We also thank the participating authors for their contributions which in some cases had to work out their country reports without having the opportunity to rely on a plenty of relevant literature. We have learned by our work that the idea of a criminological risk assessment, notwithstanding manifold problems, could be a promising approach, in particular for a better crime prevention (not only) in the field of organised crime that has not yet been explored to a satisfactory extent in most of the E.U. member states; indeed, in some states it has not been addressed at all.

Freiburg, January, 2002 The editors

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1. Introduction

The issue of crime risk assessment and relationships between legislation or law-making on the one hand and crime as well as crime risks on the other hand, point to various perspectives and theoretical frameworks that until today have not been explored to a satisfying extent. Among such perspectives we find crime prevention, the legal and constitutional doctrines of criminal legislation (in particular as regards assumptions of constitutional obligations of refraining from threatening criminal punishment for certain behaviour), prediction (of risks and with that the prediction of macro-phenomenon), the concept of risk and with that not only the concept of the risk society but also the concept of probability; we find then the perspectives of crime policy making and sociological theories of creation of laws, finally implementation of policies and evaluation of policies (and legislation). In fact, the topic has to be placed also in the framework of crime policy at large as it lends itself to a process of a "dialogue on risks"[1] which is opposed to "democracy at work" type crime policies spreading rapidly in the last decades[2]. Moreover, the discourse on risk, crime and legislation may also be put into the general framework of regulation and deregulation. With that a rather old and conventional concept, extensively discussed in criminology can be invoked, namely the concept of decriminalization, and furthermore depenalization. Deregulation points to the market society and to the regulatory power of the free market which according to neo-liberal concepts suffices to produce good results[3]. Decriminalization, on the other hand, certainly is connected to political approaches which are quite distinct from market concepts but hold that other political programmes than those based on criminal law are more successful in responding efficiently to crime. It is of course a simple question which lies at the centre of all of that and this simple question concerns how crime can be prevented or how crime problems can be reduced through concentrating efforts on the process of legislation and law-making. However, with those different perspec-

[1] Kunz, K.-H.: Bürgerfreiheit und Sicherheit. Perspektiven von Strafrechtstheorie und Kriminalpolitik. Bern 2000, p. 73.

[2] Beckett, K.: Making Crime Pay: Law and Order in Contemporary American Politics. Oxford 1997; Beckett, K.: Political Preoccupation with Crime. Overcrowded Times 8(1997), pp. 1, 8-11.

[3] See for a critical assessment Garland, D., Sparks, R.: Criminology, Social Theory and the Challenge of Our Times. In: Garland, D., Sparks, R.(Eds.): Criminology and Social Theory. Oxford 2000, pp. 1-22.

tives and disciplines that come along with the question of crime prevention the problem becomes multi-faceted and difficult to conceptualize. The difficulties increase of course when considering the "crisis of risk-assessment" which has been identified in newer approaches to risk analysis and risk research[4] as well as in approaches that treat risk as a "social construct" which is subject to processes of definition and bargaining[5].

Prevention of crime in fact concerns a task which is assigned to a multitude of formal and informal institutions and societal arrangements. Traditionally, prevention of crime and prevention of crime through legislation is adopted as a crime policy technique for several reasons.

- First, economic grounds speak in favour of not waiting until a problem has developed into a full blown resource devouring phenomenon.
- Second, seen from a basic rights perspective it seems preferable to investigate primary prevention instead of using criminal sanctions, in particular imprisonment, as a means to prevent serious crime on the levels of secondary or tertiary prevention; while moving towards criminal sanctions infringements on civil rights become more probable.
- Third, as Joanna Shapland has stated in the paper on England[6], legislation and the creation of laws have become a routine political response to crime problems in modern societies: crime problems are responded to by criminal legislation. With making the legislative response a mere routine the danger of neglecting preventive concerns emerges.

Prevention research has up to now come up with rather promising results[7]. It is certain that preventive activities and measures carry a better cost-benefit ration than criminal law based preventive measures. The European Union has taken up the issue of prevention of crime in particular as regards organized and economic crime, although studies carried out so far have yielded rather poor results from an evaluation perspective[8]. Furthermore, the "Action Plan To Combat Organized Crime of the European Union" of

[4] Bechmann, G. (Ed.): Risiko und Gesellschaft. Grundlagen und Ergebnisse interdisziplinärer Risikofroschung. Opladen 1993.

[5] Tierney, K.J.: Toward a Critical Sociology of Risk. Sociological Forum 14(1999), pp. 215-242, p. 217.

[6] See the English report, Shapland, J. in this volume.

[7] Waller, I., Sansfacon, D.: Investing Wisely in Crime Prevention. Bureau of Justice Assistance, Washington 2000.

[8] See eg. P.E.A.C.E: More Prevention, Less Crime. A Comparison of European Policies. Palermo 2000.

1997, clearly states also that legislation should not invite fraud or other undue exploitation (p.2)[9]. On the other hand, voices are raised which advise to be rather cautious in the trust in high level and long term planning as progress in crime control is achieved more through piecemeal and small improvements than through "single dramatic decisions"[10].

Insofar, it seems promising to study questions and areas that intend to explore particular aspects of the prevention issue. The question of how and to what extent legislation might be shaped in order to maximize preventive effects (through reducing crime inducing or encouraging effects) seems particularly promising as prevention built into legislation (other than criminal legislation of course) certainly belongs to those mechanisms which can be located among primary preventive activities (which have according to existing evaluation research the most favourable returns).

However, the question of how the legislative process can be organized and how the content of legislation must look like in order to avoid crime encouraging effects on the one hand and to make sure that relevant information is introduced into the legislative process has, until now, not yet been placed under indepth research. It is even fair to say that this area of prevention has been rather neglected as an area of research. This is demonstrated in virtually all reports that have been received from European Union member countries. It is argued in general that such preventive approaches have certainly a lot of merits but that the approach, until today, has not been discussed and considered as a serious alternative to conventional law making. Moreover, it has to be studied whether under conditions of postmodern societies and the emerging move to "pluralistic responsibility" for crime and crime prevention (J. Shapland in this volume[11]) the ability to predict effects of legislation on crime has been affected as to create serious impedements with regard to the whole undertaking of crime prevention through crime risk assessment in legislation. It is certainly true that during recent decades the capacity of the state to develop and to enforce regulatory legsilation which becomes effective in containing or reducing crime has come under serious doubts[12] and it is clear from past and ongoing research that much of the regulatory powers of the nation state has moved either

[9] See also the decision of the European Council as of December 21, 1998.

[10] Törnudd, P.: Facts, Values and Visions. Essays in Criminology and Crime Policy. Helsinki 1996, p. 116.

[11] Loc. cit.

[12] See eg. Garland, D.: The Culture of High Crime Societies: Some Preconditions of Recent "Law and Order" Policies. BritJCrim 40 (2000), p. 347-375.

upwards to supra-national or international levels, downwards to local communities or has just faded away as a result of transnational economic structures which neutralize the nation states' regulatory capacity. Furthermore, economic and other social sciences have elaborated those problems which are associated with attempts to predict macro-phenomenon over an extended period of time. The problem located in this field certainly is also reflected in the criticism that there will be no way of finding feasible procedures and theories which allow for the production of "crime proof laws" (see in this respect the French report[13]). The idea of "crime proof laws" points then to governance and in particular also to new forms of governance developing in European societies. It points also to the fact that there are always two types of costs associated with (crime) risk: there are the costs of risks themselves (that can evidently turn into damages) and there are the costs of avoiding risks (as any policy that is implemented to create obstacles to commit crimes will first, produce direct costs and second, lead into indirect costs and other risks (positive and value producing activities) will be prevented)[14] and with that a situation arises where the question of finding a balance between risk and risk avoidance costs has to be put forward.

But, a review of studies on the relationship between risk and organized/economic research certainly reveals that the law itself as a source of risks is very rarely considered and almost never made part of analytical and theoretical and empirical risk assessment[15].

2. Legislation and the Feasibility of Crime Risk Assessment in Europe

As regards legislation, the role and function of legislation in member countries of the European Union there exists, of course, similarities which reflect basic principles in organizing state powers in societies subject to the

[13] See the French report, Kletzlen, A. in this volume.

[14] Krier, J.: Risk and the Legal System. In: Annals 545(1996), pp. 176-183, p. 177.

[15] See eg. International Crime Threat Assessment. Washington, December 2000; den Boer, M. et al.: Controlling Organized Crime: Organisational Changes in the Law Enforcement and Prosecution Services of the EU Member States. Final Report Project 98/Fal/145 Maasstricht http:// www.eipa.nl/; Queloz, N., Borghi, M., Cesoni, M.L.: Processus de Corruption en Suisse. Helbing & Lichtenhahn: Bale, Geneve, Munich 2000.

principles of democracy and the rule of law[16]. It is in the particular separation and division of powers which make legislation a distinctive function within the structure of state organized societies with parliaments being responsible for passing and enacting laws, as well as the executive powers being responsible for implementation of laws and law enforcement.

Furthermore, European Union member countries are quite similar insofar as the political systems quite automatically – as Joanna Shapland in the English report[17] has put it – seek to respond to social and newly detected social, crime or other problems by way of introducing legislation. This corresponds also to the principle of division of power which as a structural element of governance in the modern societies introduces legislation which guides administration and executive powers on the one hand and which leads courts of law in controlling executive orders and executive behaviour on the other hand.

The European systems of legislation are quite similar and in general refer to a system of problem analysis, drafting, controls and discussion which have at least two important aspects in common. First, laws are developed and drafted within a professional structure of committees and ministerial administration and, second, in order to rally for political and practical support and in order to cope with critics etc., drafts are usually sent out to those institutions and professional organizations which will be responsible for implementation of the law and reactions towards the drafts are sought through public hearings etc[18].

The Belgian report[19] eg. describes in detail the various checks a draft bill goes through and what type of checks regularly are introduced. In European countries the most common checks concern conformity with the national constitution as well as conformity with international (or European) treaties and provisions that are binding national parliaments in creating national law. However, the reports contain also various examples of using ad hoc committees of experts or special investigatory or inquiry commissions which are established for specific law projects, either within the adminis-

[16] See Karpen, U. (Ed.): Legislation in European Countries. Baden-Baden 1996, with a complete overview of the legal and political framework of legislation in Europe.

[17] Loc. cit.

[18] Karpen, U.: Resume. Less Quantity – More Quality. Some Comparative Aspects and Results of the Symposium. In: Karpen, U. (Ed.): Legislation in European Countries. Baden-Baden 1996, pp. 479-490.

[19] See the Belgian report, Fijnaut, C., Daele, D.V., Goossens, F. and Dyck, S.V. in this volume.

trative and political structure or on a statutory basis. With this structure of organizing legislation there are also some well constructed paths which may be used to analyze crime risks and to enter such analyses into the legislative process.

There is a second similarity which demonstrates that European countries have, for some time, been seriously considering the risk of deviation from newly enacted laws. The concept of "side criminal law" (Nebenstrafrecht) which comes with laws in almost all areas of legislation has been developed in order to stabilize legislation and to prevent by way of threatening criminal sanctions such behaviour deemed to counteract the specific goals of the law in question. However, the perspective taken up with this type of stabilizing side of criminal law is different. With this kind of regulatory "criminal" law the focus is on behaviour which is seen as counteracting the goals of legislation. The focus is not on how and to what extent the law itself might contribute to crime. But, it goes without saying that such a perspective of anticipating crime risks could be easily added to a legislative process where crime and crime prevention, in principle, is considered as being important. The vast use which is made of such "side criminal law" in fact has contributed also to what became known as inflationary processes in criminal law and criminal sanctions during the last thirty years.

The reports certainly display a common theme insofar as economic and organized crime are mentioned, when types of crime are discussed which should be considered in crime risk assessment prior to legislation. With this the focus is put on laws that are relevant for the emergence of economic and organized crime; economic and organized crime are at the centre of attention because of several reasons. Among those reasons first of all the profit orientation of organized and economic crime has to be mentioned. Profit orientation makes such crimes more predictable than ordinary crimes, in particular violent and street crimes. Furthermore, organized crime and economic crime are placed among those crime types which cause extreme damages and carry, according to professional evaluation, extended risks for the social fabric at large. However, it is in fact in those areas where organized and economic crime is most likely influenced by legislation (economic and environmental laws or laws that are part of the political economy) that a new type of law and a new type of legislative technique has spread, which has created problems for introducing crime risk assessments during the phase of legislation. This new type of law concerns laws which are open either through leaving administrative bodies room to fill in

administrative decisions or through using open and vague terms which are then closed down by administration or courts of law. Two reasons explain why such new types of crime legislation emerges. Environmental and economic criminal law interfere in complex environments (i.e., industrial and commercial systems) which in turn are deeply interrelated with other important sectors of society, in particular the political and state administration systems. Invoking criminal law in such a context one has to consider from the very beginning that important functions of the economic and commercial systems may be affected and that side-effects may occur with respect to other sectors of society (this certainly can be linked back to what has been outlined earlier as risk avoidance costs). Intertwining criminal law and criminal justice on the one hand, administrative law and administrative decision-making on the other hand creates dependencies which determine the degree to which environmental criminal law may be enforced at all and the outcomes which law enforcement in such areas may have.

The reports which come from various regions of Europe including Scandinavian countries, England/Wales, countries of southern and western Europe demonstrate, first of all, that there exist enormous differences as regards the extent and the nature of theoretical and political reflections on the relationship between legislation and crime. While corresponding studies and considerations are known in particular in the North and in the West of Europe it seems that the southern parts of Europe do not yet reflect this type of research and thinking, on planning and organizing legislation along crime prevention criteria and procedures. However, such differences certainly correspond to differences that can be found in the fields of crime research in general[20].

Moreover, it is evident that the extent and the nature of thinking on and organizing risk assessment within the framework of legislation are also dependent on the existence of crime prevention organizations and crime prevention activities as well as political approaches which insert crime prevention into crime policy at large and which have been established well in advance of detecting risk assessment in legislation as a prevention technique. It is, in particular here, where we find basic differences between regions in Europe. So, eg. the Crime Prevention Councils in Scandinavian countries certainly had a major impact on the successful reception of the

[20] See the overviews (on European countries) in Robert, Ph. (Ed.): Crime and Prevention Policy. Freiburg 1993, as well as in Van Outrive, L., Robert, Ph. (Hrsg.): Crime et Justice en Europe depuis 1990. L'Harmattan: Paris 1999.

general idea to implement risk assessment and with that new crime prevention tools in the political field. Another aspect which is important when explaining differences between European countries concerns investments made in and experiences drawn from procedures such as the Environmental Impact Assessment as well as the Technological Impact Assessment[21]. These assessment techniques are largely a product of technological highly developed countries which, in addition, have been under an important influence of environmental political movements.

In Germany, a particular approach called "Gesetzesfolgenabschätzung" (Risk Assessment of Legislation) has been developing (over the last three decades) which makes use of "Environmental Impact Assessment" Techniques and attempts to extend such specific approaches to legislation at large[22]. With the concept of "Environmental Impact Statements" a rather successful approach emerged that was also adopted in International Treaties and Conventions[23]. However, what has been argued in this context concerns is that method of Impact Assessment amounts to not more and not less than pointing back to the ordinary democratic process (in terms of providing for opportunities to lead a rational and political discourse on risks, dangers and methods to avoid such dangers and risks[24]). This again points towards the obvious links between risk, determination of risk, acceptance and social integration, democratic structures and political decision-making processes.

But, as been pointed out by the English report for England/Wales[25]- and what can be noted for Europe at large - until now there has been no public and active debate on crime risks which can be attributed to new legislation. The main reason for that evidently concerns the lack in pressure groups which could have fueled a debate on potential relationships between legislation and crime. Another aspect of explaining the lack of attractiveness of exploring indepth the relationship between legislation and crime can perhaps be found in the changes in the eighties and nineties which made legislation a kind of rapid political response to social, economic or other

[21] Hennen, L.: Technikkontroversen. Technikfolgenabschätzung als öffentlicher Diskurs. Soziale Welt 45(1994), pp. 454-479.

[22] For more details, see the German report, Kilchling, M. and Braun, E. in this volume.

[23] Gimpel, J.: The Risk Assessment and Cost Benefit Act of 1995: Regulatory Reform and the Legislation of Science. Journal of Legislation. Notre Dame Law School, 23(1997), pp. 61-91, p. 65.

[24] Hennen, L.: Opus cited 1994.

[25] Loc. cit.

problems driven by the media and public demand for rapid solutions of problems. With such developments the focus of the legislative process switches from providing solutions to objectively understood social problems to providing answers to public demands and solutions to satisfy perceptions of rapid and efficient responses.

3. Legislation, Crime, and Crime Prevention

Summarizing the reports so far, the starting point always must be where and through what mechanisms crime inducing effects are inserted by way of legislation. This is related to the concept of risk, of course, and with that to a definition of risk. Risk evidently points to the future and includes therefore an element of prediction[26], and risk is also linked to perceptions of seriousness, as it is not every negative consequence which sould be considered but only such effects that are serious enough to justify planning and prevention[27]. In fact, it is contextualisation which makes the concepts of risk, danger and dangerousness useful and meaningfull concepts. Without this (theoretical and analytical) context, these terms have little meaning of their own[28]. Thorough analysis of this process indeed is needed in order to assess the potential impact of changes in institutional and other arrangements of legislation on crime rates and/or negative consequences resulting from crime.

- Legislation is sometimes very simply a precondition of crimes and criminal behaviour with legislation providing for opportunities of subsidies representing evidently the most prominent example on national and European levels. In fact, the Gabert Report of 1984, points out very clearly how legislation and fraud are related to each other[29]. The report draws the conclusion that it is, first of all, the complicatedness of regulations which produce incentives to commit fraudulent practices[30], second, differences in implementation structures are mentioned as facili-

[26] Prins, H.: Risk Assessment and Management in Criminal Justice and Psychiatry. The Journal of Forensic Psychiatry 7(1996), pp. 42-62.

[27] See also EMCDDA: Guidelines for the Risk Assessment of New Synthetic Drugs. Luxembourg 1999.

[28] Prins, H.: opus cited 1996. P. 45.

[29] European Parliament: Working Documents 1983-1984, Report on Behalf of the Budgetary Control on Fraud against the Community Budget; Document 1-1346/83.

[30] See also Vervaele, J.A.E.: Fraud Against the Community. The Need for European Fraud Legislation. Deventer, Boston 1992, p. 77.

tators of fraud. What is evident, is the low priority fraud has had up to now on law enforcement agendas in virtually all European countries[31].

- National reports (Sweden[32]) point to interaction effects – eg. between different (sub-) systems of rules and regulations in accelerating or slowing down the spread of certain types of crimes (in particular, economic and black market related types of crimes).
- Moreover, legislation may affect opportunity structures and thus lead to new incentives for crimes. As is pointed out in the German report[33] such changes in opportunity structures may be the result of prohibitive effects of legislation making certain goods, services and commodities either completely illegal or very expensive. Good examples can be drawn from those areas of behaviour where regulation rapidely develops into the creation of black markets or the expansion of black markets[34]. Such processes could be observed with tobacco smuggling which became a trafficking commodity in Sweden after serious increases in taxes (on tobacco) or in the New Bundeslaender of the Federal Republic of Germany where after re-unification, evidently as a consequence of interactions between new smuggling opportunities arising with abolition of tough border controls. Serious economic problems developed as well, as poverty and marginal groups (ethnic minorities) were ready to get involved in illegal activities and a black market in smuggled and untaxed cigarettes developed rapidely[35].
- Dislocation effects have to be considered, too. Legislation may in certain fields, lead to intended consequences but at the price of dislocating problem behaviour and negative phenomenon to other social fields. Dislocation effects are a well-known phenomenon in crime prevention research and concern a traditional assumption when controlling the positive effects of crime prevention programmes. However, there has been until now, no empirical research which could demonstrate what

[31] Vervaele, J.: La fraude communautaire: un défi pour l'intégration européenne ou sa défaite? La pratique du droit pénal dans une semi-fédération comme l' Union Européenne. In: Fijnaut, C. et al.(Eds.): Changes in society, crime and criminal justice in Europe. Volume II, Antwerpen 1995, pp. 39-71.

[32] See the Swedish report, Korsell, L.E. in this volume.

[33] Loc. cit.

[34] Salama, P., Schiray, M.: Drogues et Developpement. Revue Tiers-Monde. 33 (1992), pp. 482- 719.

[35] Lehmann, B.: Bekämpfung vietnamesischer Straftätergruppierungen in Berlin. der kriminalist 30 (1998), pp. 50-58.

type of effects can be expected in economy and commerce. As regards black markets, there is certainly evidence that market mechanisms lead to the search for adjustments which again reduce transaction costs.

- An effect quite similar to that of dislocation concerns the attraction effect. Legislation may produce differences as regards the legal situation in other countries wnad with that may provide more favourable conditions for crime than in neighbouring countries. This effect is especially interesting for the European Union and general European Union policies, which focus in a certain way on supra-national or harmonized laws that minimize the effects of dislocation or attraction.

The response to known crime risks certainly consists of attempts to neutralize such risks. For the purpose of legislative practice this can mean only that when drafting laws those responsible for drafting and putting the law into effect adopt also a responsibility for considering not only

- intended effects of legislation,

but also

- unintended or unwanted effects of legislation or general policies.

Unintended effects of political programmes or legislation do not really point to a new concept. On the contrary, evaluation and implementation research has for some decades dealt with unwanted effects and in particular with the question of how such unwanted effects can be accounted for in evaluation research. From this perspective the concept of unwanted effects primarily was located in the theories devised to describe and explain how and why certain political concepts and programmes work and why certain outputs must be expected when implementing a political or legal programme.

4. Crime Prevention, Crime/Safety Related and Other Political Infrastructures

The analysis has to focus then on information which has been made available in most of the country reports, on those elements in the political, professional and institutional infrastructure of the state which can in principle be made operative for the goal of crime risk assessment and the channelling of such assessments into the democratic process of legislation. The elements which have to be considered, partially reflect conventional law

making, partially well established approaches to crime prevention and strategic observation of risk groups and finally advisory devices in the political system. We find e.g.:

- Expert commissions which are established in order to advise particular ministers or the government in questions e.g. related to the economy, financial or monetry issues (e.g. "Rat der Wirtschaftsweisen" in Germany);
- Institutes or organizations which collect and analyze strategic information which concerns e.g. internal or external security, military options etc (e.g. civil or military secret services)[36];
- Well established institutions e.g. auditing services and procedures focus traditionally on the control of expenditure behaviour of state administration and the government and, in fact, are highly effective in revealing (post facto) misspending and abuse of financial resources;
- Crime prevention or other crime related advisory bodies such as e.g. the National and Scandinavian Crime Prevention Councils which in Scandinavian countries have been established with a view to collect data and to analyze crime and prevention problems in the society and to suggest remedies and to provide for a basis of discussion of such problems.
- In some countries, organizations have been introduced which have been entrusted the task of evaluating legislation (ex post facto). Here, e.g. the 1999 legislation in Belgium can be mentioned which establishes a procedure for evaluating Belgian legislation. We find then in some countries obligations for the evaluation of outcomes of specific laws (in particular laws that allow for invasion of privacy through modern means of surveillance).

The issue of crime risk assessment and the general relationship between legislation and/or regulatory systems and crime (in particular economic and organized crime) has been made a topic in particular through European Union led policies on economic and organized crime and related legislation. The continuing debate on money laundering, subsidy fraud, drug trafficking and trafficking in humans as well as related policies and legislation, to name but a few topics, have increased everywhere in the European Union the awareness about the problems linked to these phenomenon and

[36] See eg. Black, C., Beken, T.V., Frans, B., Paternotte, M.: Reporting on Organised Crime. A Shift from Description to Explanation in the Belgian Annual Report on Organised Crime. Antwerpen 2001.

certainly have also contributed to establishing a political agenda with prevention of these problems receiving top priority. The continuing discussion of these issues obviously also leads to an awareness about how legal/normative structures and serious organized and economic crime are intertwined. In particular, the money laundering issue and anti-money laundering policies together with drug policies on a national and European/international level have contributed to switching the attention to the fact that in crime causation a process becomes operative where a multitude of variables interact and that among contributors and inhibitors of crime there may be various variables that – seen from such variables alone – do not look suspicious. Therefore, e.g. the problematization of precursors of drugs certainly points to something which was introduced from the perspective of analyzing heroin and cocaine production and from the perspective of going beyond control of mere retail drug markets. However, the problem could have been also discovered when looking at precursors from a mere chemical perspective or from a policy perspective which deals with external economic exchange and laws that define what type of products are subject to official approval for export. It is here where also experiences made in the field of arms control can be considered and introduced. Arms control today cannot be implemented on the basis of simple and narrow information on technical arms alone. As various (neutral) technical items today are needed to produce arms in a technical sense and various (civil) commodities can be used in military arrangements (although the items in question have been produced for civil purposes first of all) controls of exports have to adopt a broader view on risks of abuse.

Nevertheless, e.g. the mechanisms as provided in GRECO and evaluation of GRECO member states in Europe from the perspective of corruption control has led also to the growth in the awareness of how legislation and regulations can be linked to crime such as corruption and that legislation in all fields has to be evaluated very carefully in order to provide for normative and social structures which discourage corruption and bribing in the political and in the economic sub-systems. The French report[37] lends support to the assumption that such infrastructures as regards control of corruption are indeed important to raise the awareness for the problem of crime risk assessment and to produce substantial and procedural knowledge which can be used in establishing crime risk assessment formulas in the legislative process.

[37] Loc. cit.

The Swedish concept of crime risk assessment, legislation and prevention demonstrates very clearly shows how and why during the last decades, ideas of risk assessment and crime prevention have spread and have been efficient in initiating experiments and institutionalization of crime prevention in the parliamentary and legislative process. The Swedish example demonstrates also a mechanism which is certainly creating important and significant obstacles in implementing a risk assessment policy. In devising legislation not only do crime prevention issues have to be considered but also possible impacts laws might have on integration policy, gender policies as e.g. policies attempting implementation of equality between women and men, as well as other fields considered to be important in creating risks and problems which must be avoided.

Following the Swedish line of reasoning we may assume that, first of all, the heavy increase in crime rates during the seventies and eighties and corresponding increases in feelings of unsafety, evidently made crime and crime policy a core political field.

Second, the response to these developments in crime and fear of crime then led to creating and implementing general policies of crime prevention.

Third, within the general structure of crime prevention, the narrower field of crime prevention through risk assessment in the legislative process emerged. However, impact assessment procedures, in general, are also important in understanding why crime risk assessment prior to enacting laws have attracted so much attention recently. Impact assessment belongs to a type of political instruments which at least express the states' interest in saving resources and in attempting to reach the best cost benefit rations when implementing policies.

These incremental steps certainly display a steady promotion of crime prevention as a indispensable tool in coping with crime problems (including both objective and subjective measures of crime problems). However, these steps also reveal what kind of problems occur with implementing prevention policies. The most eminent problem certainly consists of finding viable procedures and finally, institutions which adopt the goal of crime prevention[38].

In Germany, risk assessment has been developed in a principled way from the perspective of the above mentioned "Gesetzesfolgenabschätzung". Although with this concept of assessing the impact of legislation crime

[38] See e.g. National Council for Crime Prevention Sweden: Our Collective Responsibility. A National Programme for Crime Prevention. Stockholm 1997.

risks have never been included, in principle the general approach does not preclude crime risk assessments to be an integral part of assessing the overall impact of legislation. The models which have been developed in this approach are described indepthly in the German report[39] and concern

- an ex-ante procedure to assess effects of legislation on the basis of comparing potential consequences of various regulatory alternatives,
- an accompanying impact assessment procedure,
- an ex-post facto impact assessment.

The experiences made with these assessment procedures demonstrate according to the German report that such models can be implemented, but they demonstrate also that such impact assessment attempts are always at risk to fall prey to the enormous complexity of assumed correlations and possible interactions. It has been suggested therefore, that in particular the ex-ante assessment cannot be used in a routine way. Moreover, a concept of "law or legislation controlling" as an analogy to controlling implemented in industrial processes to ensure quality and cost benefits must be confronted with the model of democratic law making which assumes that the final decision on laws are made in parliaments.

5. The Legislative and Regulative Basis of Crime Risk Assessment in European Union Countries

In Sweden, crime risk assessment and crime prevention are dealt with in the "general directions to committees and Inquiries" (Committee Ordinance 1998) which are at the core of the Swedish legislative process. Similar is the concept of "Prüffragen für Rechtsvorschriften des Bundes" based on a decision of the Federal Government on December 11, 1984 in Germany[40]. In Belgium, this type of prospective evaluation of legislation is currently being discussed with a view to introducing a system of ex-ante evaluation. Here, a questionnaire is being devised, which is to be answered by those who introduce draft legislation in order to be able to assess possible impacts of the intended law in terms of costs, benefits etc. With such an ex-ante evaluation it seems clear that also the topic of crime risk assessment could be dealt with. Legislation is – according to the "Swedish general directions" – prepared in so-called committees which are set up in order to

[39] Loc. cit.

[40] For further details, see the German report by Kilchling, M. and Braun, E., (loc. cit).

study and analyze the need for and the conditions of new legislation. Such committees draft legislation which then is presented to the Parliament. Precursors of these ordinances are found in a set of rules issued in 1996. These ordinances stipulate that an analysis of the consequences of legislation is to be carried through when legislation will have an impact on crime and crime preventive efforts. Insofar, the situation in Sweden and other Scandinavian countries is different from what can be observed in other European countries. Although the general techniques of assessing impacts of legislation are available and well known crime risks are not mentioned in directives or regulations concerning the study of possible effects of laws. With extending the concept of impacts to crime and crime prevention it is not only direct effects on crime but also indirect effects on crime which come with legislation which could have effects on preventive activities and with that indirectly on crime which will be of interest for screening draft laws for risks. Such risk assessments in Sweden have to be established through committees especially entrusted this task. Formal requirements concern a description of what might be the consequences of legislation.

Finland[41] has adopted a similar process with formal directives issued by the Council of State for legislative drafting services. These directives point towards an assessment and forecast of the effects of the legislative instrument as well as subsequent studies and evaluation of the impacts of the legislative measure. The National Crime Prevention Programme, adopted in 1999, stresses that all committees and preparatory bodies dealing with legislative proposals have to consider the potential impact legaislation might have on crime.

6. What crime should be assessed and prevented?

When looking through the country reports it is evident that the focus is everywhere where crime risk assessment is discussed as an issue to be adopted in drafting legislation on economic crime and organized crime. The reasons why the focus is on these types of crimes have already been mentioned. They relate to profit-making as a crucial element in the causation of economic and organized crime and in the property of large parts of law making related to the political economy to affect opportunities of profit making.

[41] See the Finnish report, Leppä, S. in this volume.

However, preventing fiddles (tax and benefit fraud by individuals) is also being discussed in Scandinavian reports as well as prevention of crime in general.

7. Risk Assessment and Institutions

There are various approaches to the question of where and through what institutions crime risk assessments are made and how such assessments are channelled to policy makers. Introduction of the European currency may serve as an example. This example sheds some light on how such assessments are made, e.g., in Germany. Within the structure of the Federal Investigation Bureau (Bundeskriminalamt) workings groups, e.g., are studying potential risks associated with the introduction of the Euro beginning in year 2002, on the basis of what is called "Strategic Analysis of Crime". However, there is no formal mechanism that is used to put such knowledge to work in legislative bodies or in administrative bodies taking care of legislation, but, the traditional ways information and knowledge produced by police are used to provide for opportunities of access to such information for politicians, policy makers, members of the parliament or others, who could in principle be interested in such knowledge. It goes without saying, that the Bundeskriminalamt is not seen as neutral agency but as it is located within the structure of the Ministry of the Interior it is perceived to be bound by particular interest constellations arising out of political affiliation. In Denmark, similar functions as have been adopted by the Bundeskriminalamt in Germany are carried out by the Serious Fraud Office. Here, strategic data and information as regards economic and organized crime are collected and analyzed in order to be able to advise the Government in legislative and enforcement policies.

This ressembles a unit which was established within the Swedish police structure, a unit whose task is to carry out strategic analyses in the area of serious crime (in particular economic crime) in order to feed such knowledge back into the legislative process. However, this agency in Sweden seems to have had no influence at all on the legislative process.

Risk assessments may be entrusted to Committees like the one that has been established in Denmark[42] and which has the task to study risks and to recommend solutions to such risks.

[42] See the Dannish report, Kruize, P. in this volume.

In the Belgian report, an approach is described and analyzed which certainly has merits and should be considered as a useful way of producing risk related information and knowledge and inserting such knowledge into the legislative process. With a Royal Decree of 16 June 1995, an institutional framework was created with the purpose to evaluate the anti-trafficking in human policy and legislation[43]. This institutional framework serves to link various ministries and departments with information and interests in combatting trafficking in humans.

The French report points to something which on the one hand, certainly cannot be expected to become a routine approach but on the other hand, can under certain conditions produce useful results. This concerns experimenting with laws, be it that laws are put into effect in certain areas only, be it that laws are put into effect for a limited period only which then allows for thorough evaluation of the impact of such laws on crime and crime prevention.

Summarizing the reports, we may conclude that either ordinary commissions set up during the process of drafting laws may be assigned the task of crime risk assessments and introducing such assessments into the law making process or new institutions devised specifically for crime risk assessments can be assigned this task. Another way consists of conventional advising mechanisms which means that knowledge from outside (professional agencies etc. like, e.g., police) is provided for policy makers and members of parliament.

Until now, procedures have been formalized in some Scandinavian countries with issuing directives for the legislative process, which for the administrative bodies always included in the drafting process make it an obligation to consider crime risk assessments and to give, at least, reasons for not doing so. For the parliamentary process and for members of parliament such directives are not binding. This is evident. However, such directives may then serve for initiating a political debate on crime risk assessments in the parliaments.

8. Research on Implementation and Evaluation

Implementation research carried out in Sweden on the work of crime assessment committees revealed that in almost 60% of those cases where an

[43] For further details, see the Belgian report by Fijnaut, C. et al., (loc. cit).

inquiry was carried out possible impacts on crime and crime prevention were not studied. Besides these hints there has not been much available, in terms of empirical and theoretical studies, which is focussed on crime risk assessment and legislation. This is to be expected, as the political process of discussing such approaches has just commenced and is still not well developed in the South of Europe.

Research therefore, should concentrate in the future, on evaluation of operative procedures and models, as available in Scandinavian countries and as being implemented in Belgium.

9. Lessons to be Learned

Until now crime risk assessment in European countries was primarily implemented as an ex-post facto strategy. However, even as an ex-post fact strategy crime risk assessment is quite new and not yet well established. The ex-post facto strategy was not developed as a common and general device to draft legislation in a way which would minimize the emergence of crime risks but was focussed upon

- selected crime problems (e.g. money laundering, trafficking in humans)
- or/and was organized through traditional mechanisms of control as e.g. through systems of auditing that put the focus on cost-benefit and public expenditure.

Crime risk assessment in terms of substantial models and procedures in general is still based upon rather conventional approaches. Here we find:

1. Knowledge and information based strategies produced within those professional entities which deal with crime and crime prevention.
2. Strategic intelligence collection and analysis either in special units within ordinary police or through secret services.
3. Lack of procedures and mechanisms which provide for links between information producing services and the Parliament respectively commissions responsible for law making.

There must be subsequent research on implementation and the impact of laws (in terms of their effects on crime and crime prevention) in order to be able to have feedbacks. As there does not exist up to now reliable and valid knowledge as to how and with what precise effects crime prevention measures can be inserted in the legislative process implementation and evalua-

tion, research has to be carried out in order to build up a solid knowledge basis. Then, the focus must be on raising awareness and conscience as well as on the potential of reflexivity on the side of policy and law makers as regards the potential impact of legislation on crime and crime prevention.

The current state of prevention, legislation, crime risk assessment and its use in drafting legislation lead us to conclude that there are, in fact, some examples in Europe which may be seen as putting crime risk assessment at work. This is the case with the examples as set out in the Finnish and Swedish reports. On the other hand, the Impact Assessment approach as developed and rudimentarily put into action in Germany certainly must receive attention as it provides for the substance that can be used in the law making process. Moreover, seen from these examples it seems evident that the structure of the legislative process which demonstrates important similarities in Europe would in principle allow for introducing crime risk assessment techniques into the legislative and political frameworks and into the regulatory process, as it was possible on the one hand, in Scandinavian countries and as it was done quite successfully with respect to a selection of problems. However, the general problems remain: is it possible to predict crime problems within a complex set of variables, and, how should crime prevention be weighed against other evenly legitimate goals.

Belgium

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Contents

1. Introduction

This paper analyses the role of crime risk assessment in the Belgian legislative procedure. Only federal legislation will be examined; the legislation of the Communities and the Regions will be disregarded.[1]

We shall start by analyzing the federal legislative procedure (infra, II). We shall then examine whether and to what extent crime risk assessment is taken into account within this legislative procedure. As will be shown, up until now this has not been done in any sort of institutionalized way (infra, III). However, it should not be inferred from this that the federal legislator completely ignores crime risk assessment. The introduction and monitoring of legislation concerning trade in human beings on the one hand and games of chance and casinos on the other demonstrates that the federal legislator is all too aware of the potential abuse of legislation by criminal organizations (infra, IV).

2. The federal legislative procedure in Belgium

2.1. The initiative to bring legislation into effect

Article 36 Gec.G.W., stipulates that federal legislative authority is jointly exercised by the King, the Chamber of Representatives and the Senate. This means that a bill or a legislative proposal[2] must first be adopted by the Legislative Chambers before it receives the Royal Assent.[3] Article 75 Gec.G.W., adds that each of the three branches of the federal legislature has the right to introduce federal legislation. The King, the members of the Chamber of Representatives and the members of the Senate can therefore, in principle, take the initiative to put legislation to the vote.[4]

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[1] Belgium is made up of three Communities – the Flemish Community, the French Community and the German-speaking Community – and three Regions – the Flemish Region, the Walloon Region and the Brussels Capital Region. See Articles 2 and 3 of the *Gecoördineerde Grondwet* [Coordinated Constitution] (hereinafter abbreviated to Gec.G.W.).

[2] A legislative proposal is legislation introduced by one or more members of Parliament in one of the Chambers. As soon as one Chamber has adopted the proposal it becomes a bill. If the initiative comes from the government, however, it is called a bill once the King has signed it (J. VANDE LANOTTE, *Inleiding tot het publiek recht Deel 2. Overzicht van het publiek recht*, Bruges, Die Keure, 1997, no. 766, note 1343).

[3] A. ALEN, *Handboek van het Belgisch staatsrecht*, Deurne, Kluwer, 1995, no. 194.

[4] In the case of matters that come under the unicameral system, the Senate is not part of the legislature, however (infra, II.2.1.). The senators therefore do not have the right to introduce legislation concerning these matters (J. VANDE LANOTTE, *o.c.*, no. 824).

2.1.1. Legislation introduced by the King

In practice most legislative initiatives come from the King. In effect this means the government. Its legislative initiatives are called Bills. Before a bill is presented to Parliament it has already gone through various preparatory stages.[5]

The competent Minister draws up a draft bill, usually in collaboration with officials in his ministry. This draft is discussed in the Cabinet and is then sent to the Legislation Department of the Council of State for advice.[6]

The advice issued by the Council of State, which is not binding, is confined to an examination of the legal/technical and linguistic aspects of the draft bill. For instance, the text is checked for technical faults – such as overlaps, gaps or ambiguities – and whether it is internally consistent. The Council of State also examines the draft bill for compatibility with the Constitution, international treaties and universal legal principles.[7] The Council of State may not, however, give its opinion on the desirability of the proposed text.[8]

The advice of the Council of State may lead to the draft bill being amended. If so, the draft bill is usually discussed again in the Cabinet. It is then presented to the King to be signed. Once signed, the draft bill becomes a bill. The federal government will then submit the bill to the Chamber.[9]

The bill is then referred to the appropriate parliamentary committee, which usually discusses it in depth and, if necessary, introduces amendments. The competent committee convenes in the presence of the technically competent Minister, who is assisted by Cabinet staff or by officials in his department. The committee is also authorized to hold hearings with senior representatives in the field, academics or other experts.[10] After the

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[5] See A. ALEN, *o.c.*, no. 195; P. DELNOY, "Belgium" in U. KARPEN (ed.), *Legislation in European Countries. Proceedings of a Conference in Bad Homburg/Germany (Dec. 11-13, 1991)*, Baden-Baden, Nomos Verlagsgesellschaft, 1996, (74) 81.

[6] A. ALEN, *o.c.*, no. 195.

[7] Draft implementation decrees are also examined for compatibility with legislative instruments.

[8] J. VANDE LANOTTE, *o.c.*, no. 1171.

[9] A bill approving a treaty, however, is submitted to the Senate. It should also be mentioned that a bill that comes under the full bicameral system (infra, II.2.2.) may be submitted to either the Chamber or the Senate, at the discretion of the federal government (A. ALEN, *o.c.*, no. 195).

[10] This option is becoming more and more popular. See F. LEURQUIN-DE VISSCHER, "Pertinence et praticabilité des procédures d'évaluation des lois en droit belge" in B.

bill has been voted on in committee it proceeds to the plenary session of the Chamber. The bill is then debated and finally put to the vote.[11]

2.1.2. Legislation introduced by Deputies or Senators

The legislative initiative of one or more members of the Chamber of Representatives or the Senate is called a legislative proposal. Each legislative proposal should be considered by the Chamber to which it is submitted. This means that the plenary session of the Chamber in question should decide whether the proposal is to be debated or not.[12]

The advice of the Legislation Department of the Council of State is not, in principle, required for legislative proposals, as opposed to the procedure for bills.

A legislative proposal is first discussed in the appropriate committee of the Chamber of Representatives or the Senate. Once the committee has approved the legislative proposal it proceeds to the plenary session, where it is debated and then put to the vote. As soon as a legislative proposal has been approved in one Chamber it becomes a bill.[13]

2.2. Division of competence between the Chamber of Representatives and the Senate

Prior to 1993, Belgium had a full bicameral system. The Chamber of Representatives and the Senate were equal partners in the legislative process and therefore had the same competence. As a result, a law could only be adopted when the Chamber and the Senate agreed on the same text. This classic bicameral system meant that bringing legislation into effect was a time-consuming process, and also involved a certain amount of work being duplicated.[14] During the constitutional revision of 1993, which explicitly defined Belgium as a federal State[15], the bicameral system was therefore

JADOT and F. OST (ed.), *Elaborer la loi aujourd'hui, mission impossible ?* Brussels, Publications des Facultés universitaires Saint-Louis, 1999, (229) 230-231.

[11] A. ALEN, *o.c.*, no. 195-196; J. VANDE LANOTTE, *o.c.*, no. 825-828. See also R. DEBOUTTE and A. VANDER STICHELE, "L'élaboration de la loi au niveau des commissions parlementaires", in B. JADOT and F. OST, *Elaborer la loi aujourd'hui, mission impossible?* Brussels, Publications des Facultés universitaires Saint-Louis, 1999, 125-138.

[12] J. VANDE LANOTTE, *o.c.*, no. 830.

[13] See A. ALEN, *o.c.*, no. 195-196; *ibid.*, no. 830.

[14] J. VANDE LANOTTE, *o.c.*, no. 745 and 747.

[15] Article 1 Gec.G.W.

fundamentally reformed. The subject matter of a bill or legislative proposal that has been approved by one of the two Legislative Chambers now determines the passage of that bill or legislative proposal through Parliament. Here a distinction must be made between unicameral matters, full bicameral matters and partial bicameral matters.[16]

2.2.1. Unicameral matters

With regard to unicameral matters legislative authority is jointly exercised by the King and the Chamber. In accordance with Article 74 Gec.G.W., this system applies to the introduction of legislation in four areas.[17] In these areas the Senate therefore no longer plays a part in the legislative procedure.[18]

2.2.2. Full bicameral matters

With regard to full bicameral matters the Chamber and the Senate have equal powers. This means that a law that falls within the scope of this system cannot be given Royal Assent until both Chambers have approved the same text. In accordance with Article 77 Gec.G.W., this system, which is actually a continuation of the former bicameral system, is applicable to legislation on ten subjects.[19]

2.2.3. Partial bicameral matters

All matters that are not provided for in Articles 74 and 77 Gec.G.W., quoted above are treated as partial bicameral matters. When introducing legislation that comes under this system the main emphasis is on the Chamber of Representatives, while the Senate functions as the reflection assembly. This function implies that the Senate can amend legislation introduced, can debate proposed statutory provisions and, if necessary, make amendments to these, but that the Chamber has the final say.[20]

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[16] A. ALEN, *o.c.*, no. 199.

[17] The areas in question cover legislation concerning the granting of naturalization, the civil and penal responsibilities of the King's Ministers, the State budgets and accounts, and the establishment of the army quotas.

[18] A. ALEN, *o.c.*, no. 194 and 200.

[19] These include legislation relating to the revision of the Constitution; laws that affect the foundations of the Belgian State and the relationship between the federal government, the Communities and the Regions; laws relating to the approval of international treaties; and laws concerning the organization of courts and tribunals See *ibid.*, no. 201; J. VANDE LANOTTE, *o.c.*, no. 761.

[20] J. VANDE LANOTTE, *o.c.*, no. 751 and 763.

With regard to the procedure for bringing legislation into effect - in those areas that fall within the scope of the optional bicameral system - a distinction needs to be made between the case where the Chamber is the first to debate a bill or legislative proposal (II.2.3.1.) and the case where the Senate is the first to take any action (II.2.3.2.).

2.2.3.1. The right of evocation of the Senate

When a Chamber deputy or the King exercises the right to introduce legislation relating to a partial bicameral matter, the Chamber is the first to examine the legislative proposal or bill in accordance with the procedure outlined above. If the Chamber adopts the legislative proposal or bill, it is then sent to the Senate. At the request of at least fifteen senators the Senate can examine the bill.[21] If the Senate exercises this 'right of evocation', it then has sixty days either to decide against amendment of the bill, reject it in its entirety or amend it.[22] This right of evocation is basically intended to improve the quality of the legislation.[23]

In the event that the Senate decides not to amend the evoked bill or rejects it in its entirety, the Chamber will present it to the King to receive the Royal Assent. If, however, the Senate amends the evoked bill, it will then send the bill back to the Chamber.[24]

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[21] In accordance with Article 78 Gec.G.W., this request should be made within fifteen days of the bill being received.

[22] Article 78 Gec.G.W.; J. VANDE LANOTTE, *o.c.*, no. 766.

[23] Bill establishing a procedure for the evaluation of legislation. Proposal to set up a Legislative Evaluation unit within the offices of the Senate. Proposal to set up a Legislation Department at the Senate. Report on behalf of the Institutional Affairs Committee, issued by Mr Caluwé, *Parlementaire Stukken* [Parliamentary Documents] (hereinafter abbreviated to Parl.St.] Senate 1998-99, no. 1-955/3, 68.

[24] J. VANDE LANOTTE, *o.c.*, no. 766. In the latter case a distinction must be made, in accordance with Articles 78 and 79 Gec.G.W., between two possible options. The first option is that the Chamber accepts or rejects all or some of the amendments introduced by the Senate. In this case it will present the bill to the King to receive the Royal Assent. The second option is that the Chamber itself accepts new amendments to the bill. In this case the bill is sent back to the Senate. If the Senate subsequently adopts the bill, it is presented to the King to receive the Royal Assent. If, however, the Senate introduces new amendments, the bill is sent back to the Chamber. The Chamber will make a final decision on the bill and present it to the King to receive the Royal Assent (J. VANDE LANOTTE, *o.c.*, no. 766 and 769).

2.2.3.2. The right of the Senate to introduce legislation

The Senate has the right to introduce legislation concerning bicameral matters. Bills that are adopted in the Senate by virtue of this right are sent to the Chamber in accordance with Article 81 Gec.G.W.

The Chamber can then either adopt the bill and present it to the King to receive the Royal Assent, or reject the bill. Both decisions are final, so that in these cases the bill cannot be sent back to the Senate. If, however, the Chamber decides to introduce amendments, the bill is submitted once again to the Senate.[25]

2.3. Royal Assent, promulgation and publication of the Act

Once the bill has been debated and approved in the Chamber and, if necessary, in the Senate, it is presented to the King to receive the Royal Assent. This assent means that the King, as part of the legislature, declares himself in agreement with the bill presented by the Chamber(s). The Royal Assent is followed by promulgation, whereby the King, as head of the executive power, confirms the existence of the Act and orders that it shall be implemented. Following promulgation the bill formally becomes an Act. This Act does not become binding, however, until the tenth day following its publication in the *Belgisch Staatsblad* [B.S., Belgian Law Gazette], unless another period is specified in the Act itself or unless the King is empowered under the Act to determine the date on which it comes into force.[26]

3. Crime risk assessment in the federal legislative procedure

3.1. The discussion in legal doctrine

To date crime risk assessment in the context of the introduction of legislation as such has not been a popular theme in legal doctrine. In the past few

[25] In the latter case a distinction must be made between two possible situations. The first situation is that the Senate does not introduce amendments to the bill, and it is then presented to the King to receive the Royal Assent. The second situation is that the Senate does amend the bill. In that case the bill will be sent back to the Chamber. The Chamber will then either reject the bill in its entirety or present it, amended or otherwise, to the King to receive the Royal Assent. (*ibid.*, no. 767 and 769).

[26] See Article 4 of the Law of 31 May 1961, concerning linguistic usage in legislative matters, the drafting, publication and entry into force of Acts and bye-laws; J. VANDE LANOTTE, *o.c.*, no. 832-834.

years, however, there has been growing interest in the phenomenon of legislation as such and in the legislative process in a broader sense.[27]

It is laid down that it is the duty of the legislator to ensure that laws come into effect and hence effectively enforced. In the light of this, the development of a method for evaluating legislation is considered necessary. Such a method should make it possible to assess the effectiveness and efficiency of the legislation.[28] It should also make it possible to test the consequences of implementing a statutory regulation against the objectives underlying the regulation.[29] These aims can only be achieved if the legislator has an organization that perpetually carries out research on legislative evaluation in a professional and interdisciplinary manner.[30]

Up to now, however, there is no specific organization in Belgium that is charged with this kind of legislative evaluation. Moreover, the question as to which body could or should be assigned this task is not clearly answered in legal doctrine. On the one hand a proposal has been put forward to set up a committee for federal and other legislation within the Ministry of Justice.[31] On the other hand there is support for the argument that the evaluation of legislation cannot really be entrusted to a body within the executive power, but should be handed over to the legislature. According to the latter

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[27] A. ADAMS, "Wetgeving en beleid: pleidooi voor een heroverweging van de rol van het parlement in het wetgevingsproces en een systeem van wetsevaluatie", *Rechtskundig Weekblad* 1992-93, (1041) 1041. Legal doctrine has long shown an interest in the formal legist aspects of legislation – such as linguistic usage, style, structure, etc. See P. DELNOY, "Pour une nouvelle génération de légistes", *Journal des Tribunaux* 1979, 653-655; P. DELNOY, "Pour un (ou plusieurs) corps de légistes ?" in B. JADOT and F. OST (ed.), *Elaborer la loi aujourd'hui, mission impossible ?* Brussels, Publications des Facultés universitaires Saint-Louis, 1999, (197) 198-203.

[28] See for example A. ADAMS, *l.c.*, 1047-1049.

[29] H. COREMANS and M. VAN DAMME, *Beginselen van wetgevingstechniek en behoorlijke regelgeving*, Bruges, Die Keure, 1994, no. 126.

[30] See A. ADAMS, *l.c.*, 1050.

[31] J. GIJSSELS, "Een Comité voor Wetgeving", *Vlaams Jurist Vandaag* 1997, afl. 1/2, (6) 6; VLAAMSE JURISTENVERENIGING, "Uitnodiging en inleiding tot het maatschappelijk debat over recht en gerecht", *Vlaams Jurist Vandaag*, 1996, afl. 8, (1) 1. There used to be a Legislation Council within the Ministry of Justice. This Council was established by Royal Decree on 3 December 1911, and comprised lawyers who assisted the government and the Parliament in drafting bills and legislative proposals. However, the establishment of the Legislation Department within the Council of State resulted in the abolition of the Legislation Council by decree of the Regent on 28 August 1948 (see legislative proposal to establish a Legislation Council, *Parl.St.* Chamber 1996-97, no. 1071/1, 6-7).

viewpoint, the Chamber, the Senate and/or the King, as head of the legislature, would thus be called upon to perform this task.[32]

There is more consensus on the content and scope of legislative evaluation. It is pointed out, in particular, that the evaluation of legislation should be both prospective and retrospective. Prospective or *ex ante* evaluation means that the effects of proposed legislation are assessed beforehand, while retrospective or *ex post* evaluation is aimed at examining the effects of existing legislation.[33]

3.2. The political debate

The quality of legislation has also been attracting more attention in the political arena in recent years.[34]

For example, it was proposed in a legislative proposal of 10 June 1997, to set up a Legislation Council within the Chamber. This Council would be responsible for drafting legislative proposals, and would do so on the basis of the main points and objectives adopted by the Chamber in preliminary

[32] F. LEURQUIN-DE VISSCHER, *l.c.*, 241.

[33] See M. ADAMS and K. VAN AEKEN, *Evaluatie van wetgeving element van een wetgevingsbeleid. Nota voor the Senaatscommissie voor de Institutionele Aangelegenheden*. This policy document is published as an appendix to the Bill establishing a procedure for the evaluation of legislation. Proposal to set up a Legislative Evaluation unit within the offices of the Senate. Proposal to set up a Legislation Department at the Senate. Report on behalf of the Institutional Affairs Committee, issued by Mr Caluwé, *Parl. St.* Senate 1998-99, no. 1-955/3, 98-114.

[34] Besides the initiatives discussed here, two more legislative proposals should be mentioned for the sake of completeness. Firstly, the legislative proposal of 7 May 1992, which provided for a three-yearly evaluation of existing legislation and regulations by the Council of State (Legislative proposal to establish a three-yearly legislative evaluation, *Parl.St.* Chamber 1991-92 Buitengewone Zitting [Special Session] (hereinafter abbreviated to B.Z.), no. 439/1). This legislative evaluation was supposed to provide a summary of the legal standards that are wholly or partly superseded or that cause problems in the area of implementation, interpretation or application. This legislative proposal was never approved, however. Secondly, the legislative proposal of 25 April 1990, which was re-submitted on 25 May 1992 (Legislative proposal to insert Article 65*bis* and to amend Article 66 of the Rules of Procedure of the Chamber of Representatives, *Parl. St.* Chamber 1989-90, no. 1164/1 and 1991-92 B.Z. no. 481/1). This legislative proposal was intended to adapt existing legislation, in a regular and systematic manner, to any changes in the social and institutional context. It, too, was never approved, however. For an analysis of both legislative proposals, see the report prepared on behalf of the sub-committee of the Constitutional Revision Committee, charged with examining legislative proposals to introduce periodical legislative evaluation, *Parl.St.* Chamber 1991-92 B.Z., no. 439/2.

debates on such proposals. Furthermore, the Council would evaluate existing legislation and report its findings to the Chamber.[35] Going one step further, the Council would be able to formulate proposals, on its own initiative or at the request of the Chamber, to improve, supplement, simplify and codify existing legislation.[36] This legislative proposal has not yet been adopted.[37]

Of more importance is the bill establishing a procedure for the evaluation of legislation, which was approved by the Senate on 21 January 1999.[38]

Under the provisions of this bill the Senate, as the reflection assembly, is responsible for evaluating the existing federal legislation and reports annually on its activities in this area. This legislative evaluation will have to be carried out on the basis of two annual reports, one prepared by the *college van procureurs-generaal* [Board of Attorneys General] and the Attorney General to the Court of Cassation, and the other by the Council of State. These annual reports contain a summary of the federal legal standards that have caused problems for the courts and tribunals as well as for the Council of State in the past judicial year in terms of their application or interpretation. The intended legislative evaluation should result in the modification of statutory provisions that are wholly or partly contradictory or that have become obsolete. Another aim of the evaluation is that where the imple-

[35] This evaluation would take place on the basis of reports from the judiciary. A supplementary legislative proposal of 22 July 1997, provided for the presiding President of the Court of Cassation annually submitting a report to the Legislation Council on laws that have proved to be "deficient or otherwise inadequate" (Article 2 Legislative proposal on the assistance of the Court of Cassation with the legislative evaluation, *Parl.St.* Chamber 1996-97, no. 1151/1).

[36] Article 3 Legislative proposal to set up a Legislation Council, *Parl.St.* Chamber 1996-97, no. 1071/1.

[37] A legislative proposal of 10 October 1997, which aimed to set up a legislative technique department within the Chamber, was not approved either. The purpose of this department was to assist Chamber deputies with drafting legislative proposals. Staff in this department were supposed to ensure that the legislation was of a high quality, and also that it was consistent, accurate, clear and read well (single Article of Legislative proposal to insert in the Rules of Procedure of the Chamber of Representatives Article 65*bis* concerning the establishment of a "legislative technique department", *Parl.St.* Chamber 1996-97, no. 1098/1).

[38] Bill establishing a procedure for the evaluation of legislation, adopted in plenary session and sent to the Chamber of Representatives, *Parl.St.* Senate 1998-99, no. 1-955/5.

mentation, interpretation or application of certain legislation creates difficulties, this legislation should be amended.[39]

With a view to implementing this legislative evaluation the Senate's Institutional Affairs Committee approved a legislative proposal on 14 January 1999, to set up a Legislative Evaluation Department .[40] This department, which will comprise lawyers and other specialists, will be responsible for preparing the legislative evaluation outlined above.[41]

The whole procedure for evaluating legislation is not yet in effect, since the Chamber still has to pronounce on the bill approved by the Senate on 21 January 1999.[42] It should also be emphasized, on the one hand, that the procedure will be limited to an examination of the purely legal problems that occur when a certain piece of legislation is implemented and, on the other hand, that it is only intended to be an *ex post* evaluation of existing legislation.[43] The latter point does not mean, however, that there is no interest in the political arena in prospective evaluation of legislation.

The intention, therefore, is that the Senate's Legislative Evaluation Department mentioned earlier will also be responsible for the preparation of

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[39] Bill establishing a procedure for the evaluation of legislation, adopted by the Institutional Affairs Committee, *Parl.St.* Senate 1998-99, no. 1-955/4.

[40] As a result, a similar proposal to set up a Legislation Department at the Senate (*Parl.St.* Senate 1997-98, no. 1-839/1) was dropped. See Bill establishing a procedure for the evaluation of legislation. Proposal to set up a Legislative Evaluation unit within the offices of the Senate. Proposal to set up a Legislation Department at the Senate. Report on behalf of the Institutional Affairs Committee, issued by Mr Caluwé, *Parl.St.* Senate 1998-99, no. 1-955/3, 90.

[41] Proposal to set up a Legislative Evaluation unit within the offices of the Senate, adopted by the Institutional Affairs Committee, *Parl.St.* Senate 1998-99, no. 1-643/7. Besides having recourse to the Legislative Evaluation Department the Senate, with a view to preparing for the legislative evaluation, can, if necessary, consult external experts and/or instruct them to carry out studies. Moreover, there is nothing to stop the Senate from consulting the administrative organs that are involved in the implementation of legislation (Bill establishing a procedure for the evaluation of legislation. *Memorie van toelichting* [Explanatory Memorandum], *Parl.St.* Senate, 1997-98, no. 1-955/1, 5).

[42] See Article 2 of the Bill lifting the nullity of some bills (no. 0187/001) (II), *Parl.St.* Chamber 1999-2000, no. 0187/001. A number of amendments, mainly of a linguistic nature, have already been proposed in the Chamber. See Bill establishing a procedure for the evaluation of legislation, *Parl.St.* Chamber 1998-99, no. 1950/2.

[43] B. JADOT and F. OST, "Introduction générale" in B. JADOT and F. OST (ed.), *Elaborer la loi aujourd'hui, mission impossible?* Brussels, Publications des Facultés universitaires Saint-Louis, 1999, (7) 9.

the evaluation of bills and legislative proposals.[44] With this in mind, the proposed legislation will be assessed against a number of important quality criteria.[45] In the context of this paper three criteria are of particular importance. Firstly, the criterion of a clear purpose. This criterion requires that in the legislative process there is a clear understanding of the objective to be achieved. This assumes that the actual circumstances to which the legal requirement relates are clearly identified. The desired changes should then be specified, as well as details of how those changes can be brought about. Another important criterion concerns the practicability or the enforceability of the legislation. This implies that guarantees should be given that in practice the law will be (or will be able to be) put into effect. To this end, the question of whether the judicial and administrative system will be capable of implementing the statutory regulation properly will have to be taken into account. The third criterion is that of effectiveness and efficiency. This concerns the question of whether the draft legislation will be able to achieve its objective. Effectiveness should be linked to efficiency or expediency, however. Thus another requirement is that the legislation should be designed in such a way that maximum results can be achieved with the minimum of resources.[46]

On the other hand, prospective evaluation of legislation is attracting increasing attention in government circles. For instance, the general policy plan of the Ministry of Justice for the financial year 2000 holds out the prospect of the introduction of a system of *ex ante* evaluation. One specific idea is to have the author of a legislative proposal or bill complete a questionnaire. This questionnaire would contain elements that make it possible to improve the quality of legislation and would also have a bearing on the effectiveness and efficiency of the proposed legislation.[47]

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[44] Proposal to set up a Legislative Evaluation unit within the offices of the Senate, adopted by the Institutional Affairs Committee, *Parl.St.* Senate 1998-99, no.1-643/7.

[45] There are nine criteria: legal certainty, equality before the law, the principle of individual administration of justice, subsidiarity, a clear purpose, the principle of necessity, practicability, effectiveness and efficiency, and proportionality (see Proposal to set up a Legislative Evaluation unit within the offices of the Senate, adopted by the Institutional Affairs Committee, *Parl.St.* Senate 1998-99, no. 1-643/7).

[46] Proposal to set up a Legislative Evaluation unit within the offices of the Senate, *Parl.St.* Senate 1996-97, no. 1-643/1, 5-9.

[47] Draft general expenditure budget for the financial year 2000. General policy lines of the Ministry of Justice for the financial year 2000, *Parl.St.* Chamber 1999-2000, no. 0198/013, 46. The previous government had already promised a similar questionnaire. It also decided to appoint an editing committee and a commission, which would be re-

3.3. The present scope for crime risk assessment

The fact that there is not yet any institutionalized procedure for crime risk assessment under Belgian law does not mean that legislators do not already have some scope, in the course of the legislative process, for taking into account the risks of legislation being abused by criminal organizations.

In the first place, it should be mentioned that the Chamber and the Senate each have the right to hold an inquiry in accordance with Article 56 Gec.G.W. According to the Law of 3 May 1880, which was fundamentally amended by the Law of 30 June 1996, this right is exercised by the Legislative Chamber as such or by a committee of inquiry appointed by its members. In recent years the right to hold an inquiry has been increasingly used, particularly with a view to formulating preparatory policy-making recommendations.[48] The problems of the trade in human beings, which are discussed later in this paper[49], demonstrate that parliamentary committees of inquiry can make a significant contribution to the evaluation of legislation, albeit invariably on an *ad hoc* basis.[50]

Secondly, the *college van procureurs-generaal* [Board of Attorneys General], as head of the Public Prosecutor's Office, plays an important part in the evaluation of legislation, given that its task is to inform and advise the Minister of Justice, either officially or at his request, on all matters related to the work of the Public Prosecutor's Office.[51] The Board can notify the Minister of Justice of any problems that arise in the application of certain legislation. This regulation also gives the Minister of Justice the option of asking the Board's advice when new legislation is being prepared. Fur-

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sponsible for adapting and developing the legislative technique handbook. This initiative eventually resulted in a circular drawn up by the Council of State, *Wetgevingstechniek. Aanbevelingen en formules* [Legislative technique. Recommendations and formulas], the latest version of which is dated 1 March 1999. In this circular, rules and formulas are developed that aim to introduce more unity and coherence into legislative technique (Bill establishing a procedure for the evaluation of legislation. Proposal to set up a Legislative Evaluation unit within the offices of the Senate. Proposal to set up a Legislation Department at the Senate. Report on behalf of the Institutional Affairs Committee, issued by Mr Caluwé, *Parl.St.* Senate 1998-99, no. 1-955/3, 24-28).

[48] A. ALEN, *o.c.*, no. 192. See also K. DESCHOUWER, "Onderzoekscommissies en de politiek" in C. FIJNAUT, L. HUYSE and R. VERSTRAETEN (ed.), *Parlementaire onderzoekscommissies. Mogelijkheden, grenzen en risico's*, Leuven, Van Halewyck, 1998, (11) 29-31.

[49] Infra, IV.1.

[50] F. LEURQUIN-DE VISSCHER, *l.c.*, 231-232.

[51] Article 143*bis* §3 of the Judicial Code.

thermore, it should be mentioned that the Board reports annually on its activities to the Minister of Justice and that its report is also submitted to Parliament.[52] The report points out problems that occur in the application of certain legislation. The Minister of Justice and/or Parliament can then take the initiative to amend the legislation if necessary.

4. Capita selecta

The present lack of any institutionalized procedure for crime risk assessment in the introduction and evaluation of federal legislation does not alter the fact that the federal legislator is all too aware of the potential abuse of legislation by criminal organizations. This statement will be illustrated by means of two examples of recent legislation, namely the Trade in Human Beings Act of 13 April 1995, and the Games of Chance and Casinos Act of 7 May 1999.

Both of these Acts will be discussed along the same lines. First their content will be examined and then their introduction and retrospective evaluation will be analyzed. The details of this general framework will be somewhat different for the two Acts. Whereas the Games of Chance and Casinos Act of 7 May 1999 is, in itself, already an example of crime risk assessment, the Trade in Human Beings Act of 13 April 1995, is a conventional piece of criminal legislation. The latter is, however, one of a whole range of measures aimed at crime risk assessment.

4.1. Trade in human beings

4.1.1. The Law of 13 April 1995

In the early 1990s, there was growing interest both in the media and in Parliament for the threat posed by the internationally organized trade in human beings. This culminated in the Trade in Human Beings and Child Pornography Act of 13 April 1995.[53] This Act introduced the concept of 'trade in human beings' into Belgian legislation and made it a crime *sui generis* punishable under Articles 379 and 380*bis* of the Penal Code and under Article 77*bis* of the Aliens Act. This made up for the shortcomings of the existing legislation. For instance, there was an increase in penalty if the crime

[52] Article 143*bis* §7 of the Judicial Code.

[53] Trade in Human Beings and Child Pornography Act of 13 April 1995, *B.S.* 25 April 1995.

of trading in human beings was committed within the context of an association, criminal or otherwise (new Article 381*bis* of the Penal Code). The Law of 13 April 1995, also introduced a system of monitoring and evaluation of the fight against the trade in human beings.

In the next few sections the introduction of the Law of 13 April 1995, will be analyzed, and the system of monitoring and evaluation discussed. We shall also examine how much attention is devoted within this regulatory framework *sensu lato* to prospective and/or retroactive legislative evaluation with a view to crime risk assessment.

4.1.2. The introduction of the legislation

4.1.2.1. The parliamentary committee of inquiry on trade in human beings

The Law of 13 April 1995, is a direct consequence of the work of the 'parliamentary committee of inquiry charged with the inquiry into a structural policy with a view to the punishment and eradication of trade in human beings', which was set up on 23 December 1992, under the auspices of the Justice Committee of the Chamber of Representatives. This committee of inquiry was appointed in response to the social consternation aroused by the book '*Ze zijn zo lief, meneer*' ['They're so sweet, sir'] written by the journalist Chris De Stoop.[54] In his book De Stoop exposed the issue of the trade in women, and also the link between that trade and enforced prostitution, organized crime and corruption. He postulated that the existing legislation and policy initiatives were completely inadequate to combat these forms of crime.

The committee of inquiry began its task by defining the phenomenon of trade in human beings. Although the committee never explicitly used the term 'organized crime', it clearly placed trade in human beings within that context.[55]

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[54] C. DE STOOP, *Ze zijn zo lief, meneer. Over vrouwenhandel, meisjesballetten en de bende van de miljardair*, Kritak, Leuven, 1992, 284 p.

[55] For instance, the committee describes the "international nature" of the trade in human beings, mentions the "international and organized networks for trade in women", talks about the "Eastern European criminal organizations that focus on the trade in women in Belgium" and about the "environment of crime" within which it is all set up. See Report of the parliamentary inquiry into a structural policy with a view to the punishment and eradication of trade in human beings, *Parl.St.* Chamber 1991-92 B.Z., no. 673/7, 6 and 14-15.

Having examined the existing statutory instruments available, the committee felt that these were not in fact sufficient to combat trade in human beings, as defined by the committee, in an efficient and effective manner. In the area of international law the Convention of New York of 21 March 1950, on the prevention of trade in human beings and of the exploitation of the prostitution of others was the main instrument for tackling trade in human beings.[56] The committee found, however, that the Belgian legislator had not yet taken any sufficiently coherent or structured measures to implement this international agreement.[57] The most important provisions for combating trade in human beings in national legislation were in the first place the former Articles 379, 380, 380*bis*, 380*ter* and 380*quater* of the Penal Code, which concerned the punishment of the exploitation of prostitution. According to the committee, however, the element of 'trade' in women was substantially lost in the former interpretation of these Articles of the Penal Code. Furthermore, in the committee's view, the condition prescribed by law that the trade must take place "with a view to prostitution or vice" was interpreted too strictly in case law, with the result that certain forms of trade in women could not be punished.[58] It also felt that the context in which trade in human beings takes place had drastically changed since the aforementioned Articles in the Penal Code had come into effect.[59] Another important provision was Article 77 of the Aliens Act[60], which provided for the punishment of persons who render help or assistance to aliens entering or residing in the country illegally. Even this provision failed to

[56] *United Nations Treaty Series,* 1951, D. 96, no. 1342, 271-316. The treaty was approved by the Belgian legislator in the Law of 6 May 1965, *B.S.* 13 August 1965.

[57] Report of the parliamentary inquiry into a structural policy with a view to the punishment and eradication of trade in human beings, *Parl.St.* Chamber 1991-92 B.Z., no. 673/7, 17.

[58] Article 380*bis*, paragraph 2, of the Penal Code curbs trade in adults and minors with a view to prostitution or vice. The committee argued that courts and tribunals give "a more general interpretation" (by which it meant a 'narrow interpretation') to this provision. Although the Court of Cassation leaves some scope regarding the terms prostitution or vice, generally speaking the lesser courts argue that trade in women, for the purpose of enforced striptease or cabaret services, does not come within this category (*ibid.*, 17).

[59] "Whereas it mainly used to be a question of curbing the "white slave trade", nowadays we are dealing with a reverse movement in an almost completely changed international context." (*ibid.*, 88).

[60] The Aliens (Access, Residence, Settlement and Removal) Act of 15 December 1980, *B.S.* 31 December 1980.

combat trade in human beings properly in the committee's view, however, since certain forms of this activity, where use was made of legal documents, were not covered by this Article. The committee therefore considered it necessary to introduce legislation that recognized trade in human beings as a specific crime and where emphasis was placed on the *de facto* lack of freedom of the victims.[61]

These conclusions led to the legislative proposal on the prevention of trade in human beings[62], which formed the basis for the aforementioned Law of 13 April 1995. In the description of its tasks the committee had also explicitly stated, however, that the inquiry "will mainly focus on the structural aspects of the trade in human beings and on the networks that organize this trade".[63] It therefore not only prepared a proposal to amend criminal legislation, but also formulated a whole range of recommendations and proposals with a view to establishing a proper approach to the phenomenon of trade in human beings and its causes.[64] Within the context of this paper the proposals that aim to tackle trade in human beings preventively are of particular importance. The intended measures can be divided into two categories.

The first category concerns judicial and criminal policy. One of the points the committee made here was that both the police and the Public Prosecutor's Office should pay more attention to preparatory financial investigation as part of their investigations into networks of trade in human beings. According to the committee, this is because trade in human beings often goes hand in hand with fiscal or other forms of fraud and with money laundering.[65] The committee also thought that the prostitution trade should primarily be tackled using the weapon of social legislation. There should be more scope for "combating trade in human beings, which is often difficult to prove, by looking for evidence of flagrant violation of social legislation - evidence that

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[61] Report of the parliamentary inquiry into a structural policy with a view to the punishment and eradication of trade in human beings, *Parl.St.* Chamber 1991-92 B.Z., no. 673/7, 88.

[62] Legislative proposal on the prevention of trade in human beings, introduced by Mr Vande Lanotte, *Parl.St.* Chamber 1993-94, no. 1381/1-93-94, 2787.

[63] Report of the parliamentary inquiry into a structural policy with a view to the punishment and eradication of trade in human beings, *Parl.St.* Chamber 1991-92 B.Z., no. 673/7, 7.

[64] *Ibid.*, 7.

[65] *Ibid.*, 92.

is relatively easy to obtain".[66] According to the committee, this meant that the inspectorates of the Ministry of Employment and Labour should systematically monitor compliance with social legislation in the world of prostitution. In this way it would be possible "to use strong-arm tactics against all kinds of shady individuals or companies that provide an ideal marketplace for the trade in women".[67] Finally, the committee thought that a global approach to the problem of the trade in human beings should also be adopted via a systematic reorganization of the property market (hotels, brothels and cafés) where the trade in women and prostitution is centred.[68]

The second category of preventive measures concerns measures of an administrative nature. For instance, the committee advocated better coordination between the issue of residence permits and that of work permits, and hence for more collaboration between the various competent authorities.[69] Following on from this, the committee pointed to the need to drastically reduce both the number of documents and the ease with which they could be forged. These measures should make it considerably easier to combat the trade in human beings.[70] The various authorities should also work together more to monitor the employment of foreign workers so that any abuses can be tackled more effectively.[71]

4.1.2.2. The reaction of the government

The report by the committee of inquiry not only resulted in the aforementioned amendment of criminal legislation, but also prompted the govern-

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[66] An administrative approach, including administrative sanctions, also has the advantage that swift and efficient action can be taken. It seems to be common practice for the criminal milieu not to wait for the outcome of a criminal prosecution, but simply to move their operations elsewhere and thus elude any form of punishment (*ibid.* 19-20).

[67] *Ibid.*, 93.

[68] The committee called the huge profits that are made hiring 'shop windows' to prostitutes "a form of pimping" and proposed tackling the underlying networks of 'pimps' through measures such as administrative confiscation of property (*ibid.*, 94).

[69] In this context more systematic checks when issuing visas and transit visas are required so that a clearer link can be created between the issue of the visa and its use (*ibid.*, 99).

[70] *Ibid.*, 96.

[71] The committee pointed out the vulnerability of systems such as au pairs, marriages of convenience or adoption, and argued that stricter checks on the effective application of the existing regulations would be more important than introducing additional regulations (*ibid.*, 96).

ment to pursue a more specific policy, especially in the area of the prevention of trade in human beings. The preventive measures formulated by the committee of inquiry formed the logical starting point of this policy.

One measure that was introduced was the option of seconding tax officials to the Public Prosecutor's Office. These officials were supposed to assist the Public Prosecutors in conducting the financial analyses recommended by the committee.[72] In addition, with a view to ensuring better compliance with social legislation and the prevention of abuse in this area, a protocol was signed by the competent ministers on 30 July 1993, to improve the collaboration between the various social inspectorates and to coordinate their checks in all kinds of economic sectors.[73]

The preventive measures of an administrative nature that the committee proposed were also implemented to some extent. The government did acknowledge that "the networks conveniently used the gaps in the regulations concerning access to Belgian territory and concerning work permits".[74] In the light of this they therefore took action to ensure better harmonization of the residence and labour regulations. With the help of the Minister of Employment and Labour various amendments to Acts were put through and a cooperation agreement was worked out with the Regions for "coordination of policy on residence permits and on standards relating to the employment of foreign workers".[75] In addition, measures were taken with a view to reducing both the number of documents and the ease with which they could be forged.[76] One final important point is that the government emphasized the need for systematic investigation of organized trade in human beings. This investigation was entrusted to the Aliens Affairs Department and the Central Bureau of Investigations of the *Gendarmerie*.[77]

4.1.3. The retrospective evaluation of the legislation

In its report the Trade in Human Beings Committee proposed not only an amendment of criminal and other legislation and a series of preventive measures, but also emphasized the need for continuity in the policy to

[72] Trade in human beings – Reply from the government 12 July 1994, *Parl.St.* Chamber 1991-92, no. 673/9, 56.
[73] *Ibid.*, 58.
[74] *Ibid.*, 47.
[75] *Ibid.*, 62.
[76] *Ibid.*, 50, 63-64.
[77] *Ibid.*, 50, 63-68.

combat trade in human beings.[78] In the light of this the committee considered it necessary that the legislation and the other measures taken to combat trade in human beings should be evaluated systematically. The purpose of this evaluation should be to ensure that existing legislation takes account of the issue of trade in human beings in all its different modes and forms, and that criminal organizations are prevented from abusing the regulations.[79]

With this in mind the government was required to report annually to Parliament on the policy designed to combat trade in human beings.[80] Although this obligation was incorporated into Article 12 of the Law of 13 April 1995, to date the government has submitted just two reports.[81]

Secondly, an institutional framework was created by Royal Decree of 16 June 1995[82], in implementation of the Law of 13 April 1995, within which

[78] The committee felt that the trade in human beings was a structural and therefore a permanent problem, arising from the contrast between North and South: "As long as the causes are not eradicated, the phenomenon will remain. It is clear to all concerned that these causes, especially the inequality between rich and poor, will not disappear in the foreseeable future". The committee drew the following conclusion from this for the policy: "For evaluating the phenomenon of the trade in human beings this is the most important conclusion: combating the causes of this phenomenon will take many years' work". See Report of the parliamentary inquiry into a structural policy with a view to the punishment and eradication of trade in human beings, *Parl.St.* Chamber 1991-92 B.Z., no. 673/7, 15 and 83.

[79] *Ibid.*, 102-105.

[80] *Ibid.*, 102-103.

[81] The first government report to Parliament was presented in October 1996, while the second did not appear until March 1999 and related to the year 1998. No reports for the years 1997 and 1999 have been submitted as yet. The competent minister justified this omission by pointing out that quality should always take precedence over quantity. (See *Questions and Answers* Chamber, 1998-1999, 8 March 1999 (*Question* no. 2067 LANO)). The government reports also highlighted the importance of a preventive approach to trade in human beings. For instance, the government stated that "eliminating the factors that offer traffickers in illicit workers the opportunity to expand their networks" is a policy priority. The government also announced that it would be using the following 'lines of force of future government policy': prevention of abuse of the asylum application procedure, a reworking of the policy of removing illegal immigrants who are actively involved in the prostitution trade, and tackling the problem of marriages of convenience. See Report of the government on the prevention of the trade in human beings and the application of the Laws of 13 April 1995 (year 1998), *Parl. St.* 1999-2000, no. 0310/001, 8 and 43-44.

[82] Royal Decree of 16 June 1995, concerning the mandate and competence of the Belgian Federal Center for Equal Opportunities and Opposition to Racism (CEOOR) in the field of combating international trade in human beings, and implementing Art. 11,

the policy on combating trade in human beings was to be evaluated. As a first step an Interdepartmental Coordination Unit was set up to combat international trade in human beings. This unit is made up among others of representatives from the various competent ministries, the Public Prosecutor's Office, the State police and the relevant inspectorates. They meet at least twice a year and are responsible for exchanging information with a view to dismantling and eliminating the activities of the traffickers and their networks; evaluating the results of the fight against the trade in human beings; and providing assistance with proposals and recommendations concerning policy to combat trade in human beings. The unit must also furnish the Belgian Federal Centre for Equal Opportunities and Opposition to Racism (CEOOR) with the necessary information. In accordance with the Royal Decree of 16 June 1995, the CEOOR is responsible for permanently stimulating, coordinating and evaluating the policy to combat international trade in human beings. It produces an independent, public evaluation report on this policy annually[83], which is of course also submitted to the government. Besides writing these reports, one of the main tasks of the CEOOR is to prepare policy on combating trade in human beings. In its most recent report, for example, the CEOOR highlighted two major policy priorities. The first was that the asylum application procedure should be re-examined, since it was now being abused by traffickers in human beings to allow foreigners to stay in Belgium and work. Secondly, the CEOOR advised stricter and systematic control of the sectors most at risk to trade in human beings in order to improve the organization and controllability of these sectors.[84] The actual policy on combating international trade in human beings is, however, determined by the Interministerial Conference on Migration Policy.[85]

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§5, of the Trade in Human Beings and Child Pornography Act of 13 April 1995, *B.S.* 14 July 1995.

[83] These reports advocate devoting more attention to the preventive aspects of combating trade in human beings. For example, the main conclusion of the 1998 evaluation report is as follows: "Efforts must be made to eliminate the factors that help the organizers to develop their networks of trade in human beings and traffic in human beings". Based on this conclusion, the CEOOR makes some policy recommendations. See BELGIAN FEDERAL CENTRE FOR EQUAL OPPORTUNITIES AND OPPOSITION TO RACISM, *Strijd tegen de mensenhandel: Meer samenwerking, ondersteuning en engagement. Evaluatierapport over de evolutie en de resultaten van de bestrijding van de internationale mensenhandel.* Brussels, CEOOR, 2.

[84] *Ibid.*, 2, 33-36 and 40-46.

[85] See Articles 1, 2, 3, 5, 7 and 9 of the Royal Decree of 16 June 1995.

Thirdly, it should be mentioned that the Chamber appointed a Special Committee on Trade in Human Beings on 14 November 1996. This committee has the task of updating the recommendations of the original committee of inquiry and, where necessary, formulating proposals with a view to adapting legislation further. To this end, this special committee will examine in depth the aforementioned annual reports produced by both the government and the CEOOR.[86]

Finally, liaison magistrates are appointed in every judicial district and at every Attorney General's office with special responsibility for trade in human beings. They prepare a report every year, which includes proposals to the *college van procureurs-generaal* [Board of Attorneys General] to help combat the trade in human beings.[87] The Board incorporates these recommendations into its annual report; a separate chapter of this report is always devoted to the investigation and prosecution of traffickers in human beings.[88] Following on from this, a working group was set up in 1998, in an attempt to better coordinate the problem of trade in human beings. This working group is made up of representatives from the Ministry of Justice, the Criminal Policy Department of the Ministry of Justice, the Trade in Human Beings Unit, the *Gendarmerie*, the Judicial Police and the Board of Attorneys General.[89]

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[86] Discussion of the reports on trade in human beings. Report on behalf of the Special Committee, published by Messrs Didier Reynders and Daniël Vanpoucke, *Parl. St.* Chamber 1997-98, no. 1399/1, 2-3; BELGIAN FEDERAL CENTRE FOR EQUAL OPPORTUNITIES AND OPPOSITION TO RACISM, *o.c.*, 9.

[87] MINISTER OF JUSTICE, *Richtlijn van 31 mei 1999 houdende het opsporings- en vervolgingsbeleid betreffende mensenhandel en kinderpornografie* [Guideline of 31 May 1999 concerning investigation and prosecution policy on trade in human beings and child pornography], unpublished.

[88] The Board of Procurators General provides the Minister of Justice with an annual evaluation of the guideline concerning the investigation and prosecution of trade in human beings (See MINISTER OF JUSTICE, *Richtlijn van 31 mei 1999 houdende het opsporings- en vervolgingsbeleid betreffende mensenhandel en kinderpornografie,* unpublished). In addition to the inclusion of the theme of trade in human beings in the annual report, within the Board of Attorneys General the Attorney General of Liège, as a member of the Board, is specifically charged with monitoring the problems associated with the trade in human beings.

[89] COLLEGE VAN PROCUREURS-GENERAAL, *Jaarverslag 1998*, unpublished, 86.

4.2. Games of chance and casinos

4.2.1. The Games of Chance, Gaming Establishments and Protection of Gamblers Act of 7 May 1999

The gaming sector was long controlled by the Gaming Act of 24 October 1902.[90] This Act imposed an absolute ban on games of chance[91] and gaming establishments and was characterized by a purely repressive and punitive approach to the phenomenon.[92] Almost a century later the legislator enacted the Games of Chance, Gaming Establishments and Protection of Gamblers Act of 7 May 1999.[93] This Act[94] repealed the Law of 24 October 1902 and at the same time put emphasis on a more preventive, administrative control of the gaming sector and gaming establishments, including casinos. The penal approach is now regarded only as a secondary method.[95] The preventive and administrative approach involves restricting the number of casinos and introducing a licensing system for gaming establishments.

4.2.1.1. Restricting the number of casinos

As mentioned, the preventive and administrative approach to gaming establishments primarily manifests itself in the tight restrictions on setting up Class I gaming establishments, i.e. casinos[96]: they may only be opened in

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[90] *B.S.* 22 and 23 December 1902.

[91] Article 1 of this Act specified that the King could draw up a list of gambling machines whose use was still permitted under the conditions prescribed in the Act. Such a list was compiled in 1975 (Royal Decree of 13 January 1975 concerning the list of gambling machines whose use is permitted, *B.S.* 14 January 1975).

[92] See also the former Article 305 of the Penal Code, repealed by Article 73 of the Games of Chance, Gaming Establishments and Protection of Gamblers Act of 7 May 1999 (*B.S.* 30 December 1999) and Article 557, 3°, of the Penal Code. For a discussion of this Article and of the Law of 24 October 1902, see L. ARNOU, 'De strafbepalingen omtrent het kansspel. Overzicht van wetgeving en rechtspraak 1970-1993' in *Om deze redenen. Liber Amicorum Armand Vandeplas*, Ghent, Mys & Breesch, 1994, 1-48; A. DE NAUW, *Inleiding tot het bijzonder strafrecht*, Antwerp, Kluwer, 1998, no. 100-106.

[93] *B.S.* 30 December 1999. The entry into force of the Act will – according to Article 78 – be provided for by Royal Decree. The provisions in relation to the gaming commission, however, came into effect on 30 December 1999.

[94] For a discussion, see F. GOOSSENS, 'Nieuwe wet op de kansspelen', *Tijdschrift voor Wetgeving* 2000, afl. 1, I/17-I/19.

[95] Article 63-70 of the Law of 7 May 1999.

[96] Defined in Article 28 of the Act as: "establishments in which automatic and other games of chance permitted by the King are operated, and socio-cultural activities such as shows, exhibitions, congresses and catering activities are organized".

the nine municipalities stipulated in the Act. Moreover, only one casino may be operated in each of these municipalities.[97]

4.2.1.2. The licensing system

Another aspect of the preventive and administrative approach is a licensing system, which aims to control the problems of games of chance[98] and gaming establishments[99]. The underlying principle is that it is prohibited to operate – in any form, in any place and in any direct or indirect manner whatsoever – one or more games of chance or gaming establishments, unless these are permitted under the Law of 7 May 1999.[100] Gaming establishments may therefore only be operated if the games of chance concerned are permitted under the Act and if a license has been granted by the gaming commission.[101]

This commission plays a key role in the licensing system. It was set up under the auspices of the Ministry of Justice and comprises a Chairman-magistrate and representatives of the Ministers of Justice, Finance, Economic Affairs, Home Affairs and Health.[102] Its tasks are multifarious. In the first place, provided the statutory conditions have been met, it grants licenses – for a specific period of time – for Class I gaming establishments or casinos, Class II gaming establishments or slot machine arcades, Class III gaming establishments or drinking-houses, the exercise of professional activities in Class I or II gaming establishments and, finally, the sale, hire, lease, delivery, provision, import, export and production of games of

[97] Article 29 of the Law of 7 May 1999. The number of class II gaming establishments or slot machine arcades is also limited by the Act (Article 34).

[98] Defined in Article 2 of the Law of 7 May 1999 as: "any game or wager, in which a bet placed of whatever kind results in either the loss of that bet by at least one of the players or betters, or a gain of whatever kind for at least one of the players, betters or organizers of the game or wager, and in which chance is a secondary element in the course of the game, the designation of the winner or the determination of the amount of gain".

[99] Defined in Article 2 of the Law of 7 May 1999 as: "the buildings or places where one or more games of chance are operated". According to the same Article 'operate' means: "initiating or maintaining, installing or preserving one or more games of chance or gaming establishments".

[100] Article 4, paragraph 1, and Article 7 of the Law of 7 May 1999.

[101] Article 4, paragraph 2, of the Law of 7 May 1999.

[102] For the composition, tasks and authorities of the gaming commission, see Article 9-24 of the Law of 9 May 1999. See in particular Article 4, 9 and 10, §1 and §2, of the Law of 7 May 1999.

chance, as well as services relating to maintaining, repairing and fitting out games of chance. The licensing system therefore encompasses the establishments themselves as well as the staff and suppliers. The gaming commission is also authorized, based on a reasoned decision, to issue a warning, suspend or withdraw the license for a specific period and impose a temporary or permanent ban on operating one or more games of chance, if the establishment in question fails to comply with the law.[103] The commission can also receive complaints and must report any criminal offences it comes across to the Public Prosecutor.[104] If it discovers evidence of fiscal fraud or the preparation of fiscal fraud, the Minister of Finance must also be notified.[105]

4.2.2. The introduction of the legislation

The new legislation on games of chance and gaming establishments did not come into effect as a result of legal doctrine.[106] A few important policy initiatives on combating organized crime did, however, play a significant part in the discussion concerning how to deal with the gaming sector and the gaming establishments.

For example, the government's action plan against organized crime, published in June 1996, stated that the casino sector was particularly susceptible to the practice of laundering the proceeds from organized crime. The government also noted that there was no statutory framework for the activities of the casinos and that such a framework, which would include anti-money laundering measures, must be developed. The government further stated that, generally speaking, to effectively combat this form of crime more preventive measures were needed, hence adaptation of administrative law. The granting of operating licenses in certain economic sectors

[103] Article 21, 2°, of the Law of 7 May 1999.
[104] Article 15, §2, of the Law of 7 May 1999.
[105] Article 18 of the Law of 7 May 1999.
[106] As in case law, this is limited to interpretation of earlier legislation and mainly focuses on the fiscal aspects. In the recent doctoral thesis by Stessens, in which the preventive approach to money laundering – linked with organized crime – is discussed, the gaming sector is not identified as a problem area (G. STESSENS, *De nationale en internationale bestrijding van het witwassen. Onderzoek naar een meer effectieve bestrijding van de profijtgerichte criminaliteit*, Antwerp, Intersentia, 1997, 652p.).

was pointed out as an example.[107] Besides the government's action plan of June 1996, two types of annual reports should be mentioned.

First of all, there are the annual reports for Belgium on organized crime. These reports are prepared by the *Gendarmerie*, in collaboration with the Public Prosecutor's Office, the other police agencies and the national intelligence service. The following comment was made in the 1998 report: "The gaming sector is often presented, both in Belgium and abroad, as an effective channel for criminal organizations to launder proceeds from illegal activities. There is frequent speculation about the involvement of criminal groups in Belgian casinos, even in official publications. Bearing in mind the realistic prospects of being able to launder the proceeds from crime in casinos and the information we have on the subject at the moment, these allegations cannot be confirmed with any certainty, however".[108] This report also placed emphasis on a more administrative, preventive approach to organized crime, under whose sphere of influence games of chance were included.[109] As an example of such an approach, the report referred to the possibility of controlling certain economic sectors via licensing systems.[110]

Secondly, there are the annual reports of the Board of Attorneys General. In its 1997 report the Board clearly states that the aforementioned Law of 24 October 1902, was completely obsolete and was not a suitable instrument for countering the practice of using games of chance to launder the proceeds from other crimes. The re-regulation of the gaming sector and the casinos was therefore presented as one of the priority goals for 1998.[111] In its 1998 report, however, the Board once again pointed out that the Law of 1902 was completely obsolete and dysfunctional.[112]

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[107] X., *Actieplan van de regering tegen de georganiseerde criminaliteit,* unpublished, June 1996, 5, 8 and 13-14.

[108] X., *Jaarrapport 1998 over de georganiseerde criminaliteit van 1997*, unpublished, 1998, 82-83.

[109] It should be mentioned however that quantitative research does not absolutely prove that there is a problem of organized crime in relation to games of chance.

[110] X., *Jaarrapport 1998 over de georganiseerde criminaliteit van 1997,* unpublished, 1998, 99-100.

[111] COLLEGE VAN PROCUREURS-GENERAAL, *Jaarverslag 1997*, unpublished, 38-39.

[112] COLLEGE VAN PROCUREURS-GENERAAL, *Jaarverslag 1998*, unpublished, 96-98. It is worth pointing out that, although the fight against financial, economic and fiscal crime is included in the priority objectives for 1999, casinos are not specifically mentioned in connection with these forms of crime. This is in line with the wording of the government's action plan against economic, financial and fiscal

These policy documents clearly left their mark on the passage of the Law of 7 May 1999 through Parliament. The legislation was introduced by Senator Weyts, who presented a legislative proposal on gaming on 23 September 1996. By his own account, he had consulted specialists in the Ministries of Finance and Justice on the matter.[113] In the Explanatory Memorandum to his proposal Weyts, echoing the Board of Attorneys General, indicated that his legislative proposal was prompted by the conclusion that the Law of 24 October 1902 was out of date.[114] He also stated that "it is no secret that the casino world, with or without the knowledge of the casino managers, is potentially a favoured target for illicit practices, such as the laundering of 'dirty' money. The primary objective of the most progressive legislation and regulations is to eliminate organized crime from the gaming world".[115] Without explicitly using this word, Weyts – who, in principle, proceeded on the assumption that games of chance are prohibited unless permission is granted – proposed a preventive approach to the problem of games of chance:

1 each activity connected with games of chance must be licensed;

2 the issue of a license must be based on thorough investigation, which must guarantee the integrity of the legal entity, natural persons and resources (cash and goods) concerned;

3 potential staff must be vetted; and

4 all gaming equipment must be examined before it is put on the market.[116]

The government introduced an amendment to this legislative proposal that actually amounted to a completely new text. The amendment was adopted and the text served as the basis for the debate in Parliament. The government's amendment was based on a study by the Criminal Policy Department of the Ministry of Justice[117], dated April 1996, about games of chance and the psycho-social aspects of gambling, and also on the findings of a working group of representatives from the Ministry of Justice, the

crime (July 1997), in which new legislation on casinos is not considered a priority point of action.

[113] Legislative proposal on gaming, *Parl. St.* Senate 1998-99, no. 1-419/17, 1.

[114] Legislative proposal on gaming, *Parl. St.* Senate 1995-96, no. 1-419/1, 1.

[115] *Ibid.*, 2-3.

[116] *Ibid.*, 2-3.

[117] A policy-support unit under the auspices of the Ministry of Justice.

Criminal Policy Department, the Board of Attorneys General, the Judicial Police and the Ministries of Economic Affairs and Finance, plus a researcher from the University of Liège.[118] The government also began making enquiries in the sector concerned, the Communities and the Regions, and among burgomasters and all kinds of committees that had in the past witnessed the problems associated with games of chance at close quarters.[119] The government's proposal did not deviate from that of Senator Weyts, in that they shared the same underlying principle. This was that the aim of the legalization of gaming establishments, such as casinos, and the development of a general statutory framework for games of chance is to organize a sound system of checks on all gaming activities and to identify, prevent and combat possible undesirable side effects (gambling addiction, money laundering, crime, financial and fiscal fraud) in an efficient manner.

Once the government's amendment had been adopted,[120] the debate turned to the number of casinos. As indicated earlier, the municipalities where a casino may be established and the number of casinos are subject to restrictions. During the preparatory stage these restrictions were justified by referring to recent studies – not specified in any further detail – which allegedly prove that gaming establishments are a potential hotbed of crime.[121] Representatives from Ladbrokes and Shandwick, as well as burgomasters of cities where casinos are located, were heard.[122] The Senate's Finance and Economic Affairs Committee also spoke to former gambling addicts, social workers, self-help groups, providers of games of chance and the Ministers of Finance, Justice and Health.[123] Despite the insistence of Deputy Eerdekens, no hearings were held with the Minister of Finance, a senior official at the Special Tax Inspectorate, the chair of the Senate's committee of inquiry on organized crime or with the Board of Attorneys

[118] Legislative proposal on gaming, *Parl. St.* Senate 1997-98, no. 1-419/4, 23.
[119] Legislative proposal on gaming, *Parl. St.* Senate 1998-99, no. 1-419/17, 22.
[120] Whereupon the debate in Parliament mainly shifted to the problems of addiction and the strategy in this area. Judging by the preparatory work, this relied partly on studies by the Criminal Policy Department and a draft resolution originating from the Social Affairs Committee (Legislative proposal on gaming, *Parl. St.* Senate 1998-99, no. 1-419/17, 33-35 and 104). The debate eventually resulted in the Articles 54-62 of the Law of 7 May 1999.
[121] Legislative proposal on gaming, *Parl. St.* Senate 1998-99, no. 1-419/17, 121-122.
[122] Legislative proposal on gaming, *Parl. St.* Senate 1998-99, no. 1-419/17, 35-39.
[123] Legislative proposal on gaming, *Parl. St.* Chamber 1998-99, no. 1795/8, 3 and Parliamentary Proceedings Senate 27 October 1998, 6244.

General[124], even though all of these people were expert witnesses on the subject of organized crime. The text of the government's amendment was sent to the Attorney General of Liège, who, within the aforementioned Board, is charged with monitoring the problems associated with casinos. She responded to this with a short letter.[125]

4.2.3. The retrospective evaluation of the legislation

The Law of 7 May 1999, will be evaluated retrospectively in two ways. Firstly, each annual report of the Board of Attorneys General will devote attention to the gaming sector and hence to the effectiveness and efficiency of the Law of 7 May 1999. The aforementioned gaming commission also has an important part to play in this respect,[126] in that it has to report annually on its activities to Parliament and to the Ministers of Economic Affairs, Home Affairs, Finance, Justice and Health. It also has to monitor application of and compliance with the Act and, at the request of the Ministers concerned or of Parliament, issue advice about legislative or regulatory initiatives concerning matters referred to in the Law of 7 May 1999.

5. Conclusion

In the past few years the quality and the evaluation of federal legislation has become the focus of attention. Despite various proposals and plans, there is not yet any institutionalized procedure for crime risk assessment. The introduction and the retrospective evaluation of legislation concerning trade in human beings on the one hand and games of chance and casinos on the other demonstrates, however, that the federal legislator is all too aware of the potential abuse of legislation by criminal organizations. These two case studies are merely intended as an example. There are other examples that could have been mentioned as well, such as legislation concerning the strategy on illegal contracting or the battle against the use of hormones in the meat industry.

The experience gained from studying these two cases could, in our view, be put to good use in developing and refining the existing proposals regarding the evaluation of legislation. In this respect crime risk assessment

[124] Legislative proposal on gaming, *Parl. St.* Chamber 1998-99, no. 1795/8, 8-9.
[125] Legislative proposal on gaming, *Parl. St.* Chamber 1998-99, no. 1795/8, 10 and 12.
[126] See Art. 16, Art. 20, paragraph 1, and Art. 20, paragraph 2, of the Law of 7 May 1999.

deserves to receive more attention than is the case at present. The question then arises as to what specific form this risk assessment should take, while the opportunities for using it systematically should also be explored. Another crucial question is who should be responsible for crime risk assessment. Should it be a department within the Ministry of Justice and/or should Parliament be involved? The two cases studied in this paper do not provide an answer to this question. Further research is required, which is outside the scope of this paper. This does not alter the fact, however, that it is essential, in our view, that the body given responsibility for crime risk assessment will have to maintain systematic and streamlined contact with the departments responsible for implementation and enforcement of legislation. This is because the form crime risk assessment takes will have to be partly determined by the experience that bodies such as the police, the inspectorates, the Public Prosecutor's Office and the judiciary have gained with the legislation in question.

Denmark

PETER KRUIZE

Contents

1. Introduction

In the Action Plan To Combat Organized Crime of the European Union (1997) it is stated, that "prevention is no less important than repression in any integrated approach to organized crime". And further: "It is particularly important that legislation does not invite fraud and other undue exploitation. The Member States and, where applicable, the institution issuing such rules should ensure that this is not the case." (p. 2). How the Member States should avoid that legislation is abused for purposes of fraud is not specified in the Action Plan.

In 1999 Heuni, the European Institute for Crime Prevention and Control, published a paper (no. 11) called Anticipating instead of Preventing: Using the Potential of Crime Risk Assessment in Order to Minimize the Risks of Organized and Other Types of Crime. This paper refers to a United Nations resolution of 1997 (Elements of responsible crime prevention: standards and norms) which stresses upon the same issue. "The concept of crime prevention should not be limited to conventional forms of crime ... but should encompass new forms of crime, such as organized crime, terrorism, illegal trafficking in migrants, computer and cybercrimes, environmental crime, corruption and illegal commerce related to the acquisition and development of weapons to mass destruction." (Leppä, 1999, p. 4).

Risk assessment is a known phenomenon, but there are hardly any documented examples of assessing crime risks in the legislative process. In the Heuni paper Seppo Leppä makes an effort to conceptualize the idea of crime risk assessment (CRA). Inspired by the Environmental Impact Assessment he has designed a hypothetical model for Crime Risk Assessment. Leppä proposes the following model (1999, p. 10):

(i) The examination of the objectives of the proposed legal reform project;

(ii) The identification of its adverse impacts, i.e. of crime risks connected with the proposed reform;

(iii) The retrieval and the presentation of the baseline data;

(iv) The interpretation and evaluation of the weight of the adverse impacts; developing ways and means of migrating the problem, including suggestions for monitoring the impacts and auditing the success of the program;

(v) The merger of the conclusions emanating from the CRA process with the text of the law reform before a final decision is taken.

The idea of CRA is still premature, and one of the objectives of this project is stocktaking what instruments are already available – considered or implemented – in the Member States of the European Union in respect to crime risk assessment and the legislative process. Before answering this question for Denmark, first the legislative process in Denmark will be briefly presented.

2. Legislative Process in Denmark

The present Danish Constitution (*Grundloven*) was adopted in 1953, but most of the important principles date back to the first democratic Constitution of 1849 (Langsted et al., 1998). According to the Constitution, the Government[1] (§21) as well as Members of Parliament (MPs)[2] (§41) have legislative powers.

This includes that law reforms may be proposed by the Government as well as by MPs. The majority of law reform proposals are initiated by the Government (see Table 1). There may be various reasons for reforming existing laws. As a result of membership in many international organizations, Denmark is sometimes obliged to reform existing or create new acts. This goes especially for directives of the European Union. Another reason for law reform are problems experienced in society, changes in society (for instance because of technological innovations like the Internet) et cetera.

An example is the so-called Centros case. In 1999, the EU-Court decided that an English company should have the right to set up an office in Denmark without fulfilling the obliged capital of 125,000 Danish Crowns (approximately 17,000 Euros). The Danish authorities had refused to register the company, because the English company did not carry out any business in Denmark. The Danish office of the English company was set up by two Danish citizens. The authorities considered the risk for economic crime to be high. The Danish State was, however, overruled by the EU-Court with reference to the right of free settlement for companies within the EU. To prevent future incidents the Danish Government has prepared a law proposal to avoid these kinds of practices (Ravn, 2000, p. 163).

[1] Denmark is a Monarchy and the Constitution speaks often of the King. However, the King (or Queen) has no political responsibility (§13 of the constitution), and therefore a Minister has to sign law reforms as well.

[2] The Danish Parliament consists, since 1953, of one Chamber (*Folketinget*). The Parliament counts 179 members.

Proposals by a Minister / the Government to reform legislation are prepared by civil servants of a Ministry or in cooperation of several Ministries. However, a minister may decide to install a Special Committee (*særlig udvalg*) or request a Standing Committee to prepare a proposal. Standing Committees are a common phenomenon in Denmark, like the Penal Law Committee (*Straffelovrådet*). A Special or Standing Committee consists mostly of civil servants as well as external experts. Commonly the Committee writes a White Paper (*Betækning*). This paper may include a proposal for law reforms. It is, however, also possible that the committee concludes that reforms are not necessar. The Committee tries to reach a consensus, but it is not unlikely that some members might insist on formulating a minority standpoint in the White Paper.

There are no clear guidelines whether a Special Committee is installed, or if a Standing Committee is involved. Relatively simple cases are generally handled by the Ministry directly, but sometimes in more complicated cases the Ministry may decide not to install / involve a Special/ Standing Committee. Political opportunity appears to be the most valid explanation for this phenomenon.

The Ministry may decide to follow the suggestions of the committee, but is not obliged to do so. The responsible Minister informs his colleagues at the weekly meeting[3].

In case a MP wishes to deliver a law proposal (s)he may work without any support of the Government and Ministries. Another way to exercise legislative powers is to demand the Government to prepare a law proposal. This may be the case, when the majority of Parliament supports this demand.

A law proposal has to be discussed three times in Parliament. During the first session only principal issues are discussed. After this session the proposal is normally sent to a Committee of Parliament[4]. In this Committee the law proposal is discussed in detail. The second discussion in Parliament opens the possibility to propose changes to the original text. After this session the law proposal, plus amendments, is discussed again in the Com-

[3] The constitution officially demands that all law proposals of the Government are negotiated in the so-called State Council, which consists of the King and Ministers (§19).

[4] To improve efficiency Parliament has created several Committees. Political parties are represented in such a committee by one or more Members of Parliament. A committee focuses on a specific area (for instance, a Commission for Legal Issues – *Retsudvalget).* In rare cases Parliament may decide not to involve a Committee.

mittee of Parliament, and afterwards it is sent to Parliament for the third, and final session. Also, during the last session changes may be proposed, but in the end MPs have to vote the (revised) law proposal as such.

There has to be at least two days between the respective sessions in Parliament. Only in exceptional cases may the process be speed up.

A law proposal may be accepted or rejected by the majority of Parliament. The Danish Constitution contains, however, an escape for the minority. According to §42 of the Constitution, Members of Parliament may demand a referendum on the accepted law proposal[5] if they have the support of at least one-third of the members.

It is not always certain that a law proposal will be actually accepted by Parliament. The odds for proposals by the Government are better than those of MPs, which is not unexpected since the Government, in general, may count on the support of the majority of Parliament. In Table 1 the number of accepted / rejected law proposals by the Government and by MPs are given for the years 1997 and 1998.

Table 1: Accepted and Rejected Law Proposals by the Government and MPs

	Accepted		*Rejected*		*Total*	
	1997	1998	1997	1998	1997	1998
Government	89	98	73	6	162	104
MPs	0	1	32	15	32	16
Total	89	99	105	21	194	120

Source: Table created on the basis of information by the Yearbook of Parliament (*Folketingstidende – Årbog og Registre, 1998*)

The numbers show, that law proposals by MPs have hardly any chance of being accepted; only one out of 48 proposals is accepted. There is a significant difference[6] between the percentage of accepted law proposals of the government in 1997 and 1998. In 1997, 55% of the government proposals were accepted, while in 1998 this percentage increased to 94%.

[5] Some law proposals are excluded from this right; mainly proposals in the field of finances. The rationale for this exception is that otherwise necessary, but unpopular financial reforms could be frustrated.

[6] I do not have a valid explanation for this difference. It illustrates, however, that it is far from certain that law reforms proposed by the Government actually are accepted by Parliament.

If a law proposal is accepted by Parliament, the King (Queen) signs the law as well as the competent Minister (§22 of the Constitution). This has to be done within 30 days after acceptance by Parliament.

Many laws in Denmark have the character of a Framework Act. The more detailed content is described in the Executive Regulations (*Bekendgørelser*). Danish Courts have the power to declare an Act of Parliament unconstitutional, but in general, the Danish legal system accepts the supremacy of Parliament, also in regard to the interpretation of the Constitution (Langsted et al., 1998, p. 30).

It is possible that a law reform has only a temporarily status. After three years the law reform is evaluated and possibly revised. After that period the law reform may acquire a permanent status. An example is the so-called *Rockerlov*. Because of the feud (1996-1997) between the Outlaw Biker Clubs Hells Angels and Bandidos a law reform was accepted by Parliament (15 October 1996), which gave the authorities the possibility to forbid Outlaw Bikers to come together at certain places. After three years *Rockerloven* got a permanent status.

3. Crime Prevention and Crime Risk Assessment in Denmark

Traditional crime prevention is well rooted in the Danish society. In 1971, the National Council for Crime Prevention (*Det Kriminalpræventive Råd*) was established. The Council includes representatives of many societal organizations: Legal System (Police and Public Prosecution Service), Schools, Social- and Leisure-Time Institutions, Universities and Commercial Businesses. About forty private and public organizations are represented in the Council. One of the most remarkable initiatives of the Council is the so-called SSP cooperation (Schools, Social work and Police). On a local level the SSP-organization tries to prevent the youth from participating in criminal activities.

The Council makes a distinction between – what they call – objective and subjective crime prevention. The goal of objective crime prevention is to avoid that persons or property are violated, for instance by technical measures (situational crime prevention). With subjective crime prevention potential offenders are in focus. This may be done at a general, specific or individual level (community and individual crime prevention).

As stated in the introduction of this project "traditional crime prevention strategies do not seem to fit accurately into crime areas which are characte-

rized through economic rationality, the rational actor and illegal profits." The National Council for Crime Prevention does not focus on these types of crimes. In Denmark, these crimes are labelled as Serious Economic Crimes and Denmark has a relatively long tradition for tackling this kind of crime. In 1973, the Regional Public Prosecution Service for Serious Economic Crime (*Statsadvokaten for særlig Økonomisk Kriminalitet; SØK*) was founded as "a natural result of the debate on the so-called *Bagmandsrapport*.[7] The type of cases investigated and prosecuted by this unit are those in which "there is reason to assume that the offence is of significant proportion, is associated with organized crime, is conducted in a particular fashion, or is in another way of a special qualifying character." (Kruize, 2000, p. 4). SØK consists of three investigation teams and an information and analytical section. The information and analytical section collects, registers, analyses and exchanges information of Serious Economic Crimes, like VAT-Fraud, Stock-Market Fraud and cases of EU-Fraud. SØK is – often in cooperation with Tax and Custom Services – an important player in preventing and investigating Serious Economic Crimes. Also, in the legislative process concerning Serious Economic Crimes, for example, the Law of Preventive Measures Against Money Laundering (*Lov om forebyggende foranstaltninger mod hvidvaskning af penge*) of 1993, SØK plays a key role.

In Denmark, there are no formal procedures to assure a Crime Risk Assessment. As mentioned in the previous paragraph there is however a tradition in Denmark to use external experts in the legislative process as members of a Special or Standing Committee. Hence, in a sense there is a sort of natural setting for risk assessment in the framework of the legislative process. However, external experts are not always involved in the legislative process. As stated before, it is up to the Ministry to decide whether a Committee will be installed.

Another point of concern is mentioned by Seppo Leppä. He states: "The potential crime risks are not, as a rule, given serious consideration, unless a clearly defined feature of criminal behaviour is known to intersect with legally acceptable activities. This is particularly true of reform work primarily involving experts outside the sphere of crime prevention and criminal justice, but also to some degree within the crime prevention and criminal justice community." (Leppä, 1999, p. 7).

[7] The term *bagmand* may be translated to backer or financier.

4. Case Study: Economic and Data Crime

To illustrate how legislation is evaluated and revised in practice, the work of a Special Committee will be discussed in detail. It concerns a Committee installed by the Ministry of Justice and focuses on Economic and Data Crime. The Committee was installed in October 1997. The Chairman of the Committee is a Judge. The Committee consists of twenty members (including the Chairman) and a secretarial support of three. The members are appointed by the Ministry and work at Universities (three members), several Ministries (seven members), Public Prosecution Service (one member) and several Professional Organizations, including Advocates, Judges, Chiefs of Police and Revisers (eight members).

The Ministry has formulated nine questions. Some of which are descriptive, while others are evaluative of nature. The questions are listed below:

1. The Committee has to describe the development of Economic Crime patterns and modern technology.
2. In regard to this crime pattern, Property Crime Sections of Penal Law have to be evaluated, as well as the level of punishment, because Economic Crime has to be re-evaluated and compared to other types of crime.
3. The Committee has to evaluate the Special Laws; the need for changes in Tax- and Excise legislation to prevent Economic Crime, as well as legislation related to Companies, Money Laundering and Finances. International initiatives, among these EU-regulations, have to be taken into consideration.
4. The Committee has to consider the periods of limitation for certain criminal activities.
5. Other questions that might be taken into consideration are the role of Accountants, the cooperation of Judges in Court Sessions and research in the field of prevention and repression of Economic Crime.
6. The Committee has to evaluate Penal Law and the Administration of Justice Act to assure up-to-date provisions for Data Crime. For instance, provisions for False Declarations, Forgery and Industrial Espionage.
7. The Committee has to estimate the crime risks Information Society may facilitate.

8. The Committee has to consider changes in the Administration of Justice Act concerning the regulations of information secrecy in the light of new forms of telecommunication.
9. The Committee has to estimate how resources can be used best in the fight against Economic Crime.

The Committee decided to create six Working Groups to deal with the questions of the Ministry: (1) Developments in Legislation and Crime, (2) Penal Law, (3) Special Laws, (4) Advisors, (5) Hearing and (6) Data Crime. The Committee further decided to report their considerations in a White Paper as soon as a question is answered. Some questions have to be discussed in several Working Groups.

A selection was made for this case study. The results of Developments in Legislation and Crime (Working Group 1) and Accessory after the Fact (Working Group 2) will be discussed in detail.

4.1. Developments in Legislation and Crime

In the report, significant changes of legislation in the field of Economic Crime are described and evaluated. In total, 26 law changes are (briefly) discussed an evaluated. Some law reforms were a direct result of criminal cases in Denmark – like cases of Bankruptcy and Data Crime – while other reforms were the result of EU-directives, such as the Money Laundering Act and Stock Market reforms. The Committee states that "the very important question of which preventive effect the different regulations have had, is impossible to estimate". The Committee underscores the impact of the multidisciplinary approach in fighting Economic Crime. The Commission suggests a more extended coordination and exchange of information between the Public Services (Police, Prosecution, Customs and Tax-authorities) to benefit a maximum effect of legislation.

In regard to developments in Economic and Data Crime, the Committee concluded that the crime pattern is constantly changing and that these types of crime have become more international and complex. It is, according to the Committee, however difficult to predict what the next step will be. The Committee advises, among other things, risk assessments and research on the effects of elaborating law restrictions.

4.2. Accessory after the Fact

The White Paper describes the Sections of Penal Law in regard to Accessory (after the Fact), but also mentions the relevant Sections of Special

Laws; stocktaking of the existing Sections and a study of Accessory after the Fact provisions in other countries, namely Sweden, Norway, France, Germany and England as well as international regulations.

It would be too complicated to explain the considerations of the Committee in detail, because that presumes in-depth knowledge of Danish legislation. To give an impression of the discussion in the Committee some aspects will be highlighted.

The Committee agrees that there is no need for a General Section of Accessory after the Fact, instead of the existing separate Sections. There is also no need for integration of Accessory before and after the Fact. The Committee stresses, however, an extension of Sections to all forms of profit earned by the criminal activity of others.

The Committee has not reached a consensus on all issues. The question whether Gross Negligence should be included in all Sections of Accessory after the Fact has split the Committee. The Majority favours no changes in the existing Sections at this point; in some Sections only Intentional Accessory is criminalized. A minority supports the idea of including Gross Negligence in all Sections on Accessory after the Fact. One member representing the minority view, argues that if this is not the case, Gross Negligence should be abolished from the other Sections as well, for reasons of consistency.

Also regarding the question of the maximum penalty for Accessory after the Fact the Committee has not reached a consensus. The majority favours a maximum of six years imprisonment, while a minority argues for four years imprisonment.

In the White Paper a law reform of Accessory after the Fact is presented. The text represents the opinion of the Committee. At points where the Committee did not reach a consensus the text represents the view of the majority, but the minority standpoint is presented as alternative. It is up to Parliament to make the final decision.

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England and Wales

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Contents

Introduction

When concerned citizens demand action against a new threat, one of the first moves of government is to propose legislation. The almost automatic impulse to legislate is probably a characteristic of all national governments, but is certainly true for the UK. It is fuelled by the increasing attention paid to the manifestos of the political parties, which are essentially a list of proposed legislation, and by the political focus on the Queen's Speech, in which the Queen, at the beginning of every new session of Parliament, reads out a speech composed by the government, stating the list of bills to be introduced in the coming session. That list is seen as a comment on the political power of different ministers, as to who has won the battle for scarce legislative time to have their bill in the session. The result is that political prestige and governmental prowess are inextricably intertwined with legislation. Other means of governmental action, such as the granting of administrative permissions, regulation using secondary legislation, the awarding of finance, using the media to persuade the populace, or influence in filling major positions, are of course also used to fulfil governmental aims, but are subordinate to legislation, both symbolically and substantively, in terms of the amount of civil servant and parliamentary time and effort.

The subject of this paper is the extent to which crime prevention risk assessment is operative in the production of legislation in England and Wales. Given the growing importance of crime - or, rather, law and order - to government and to politics in the UK in this new century, it seems rather strange that, in fact, crime prevention risk assessment is not a formal, published stage in the UK in the process of creating all this new legislation. Indeed, the crime inducing potential of new legislation is a topic seldom raised in public, though its possible crime reduction potential may certainly be trumpeted during its passage through Parliament and into law. In this paper, I shall explore the ways in which crime reduction or crime induction are touched upon in the legislative process and in recent legislation. Because legislation is so bound up with politics and with national social and cultural contexts (as well as supra-national and local ones), it will be important to set this discussion in the context of the changes in ideas about crime and crime reduction and in ideas on the ability of the state to influence crime in the UK over the last 20 years or so.

It is not possible to conduct a discussion on legislation and crime in the context of the UK as a whole. Though the Home Office[1] is the department of government with the UK wide mandate on crime, its role as a UK wide body is very small, effectively being confined to discussions on transnational criminal structures and policies. Most of its work is confined to England and Wales. Scotland has always had a separate criminal jurisdiction and criminal justice system, until recently serviced by the Scottish Office. With Scottish devolution in 1999, all criminal legislative functions and criminal justice/crime reduction policy have moved to the Scottish Parliament and Scottish Executive. Northern Ireland has also been a separate jurisdiction, with its own, different criminal justice system, though crime and criminal justice matters are not yet devolved to the Northern Ireland Assembly, but are mediated by the Northern Ireland Office and the Westminster Parliament[2]. Legislation on social, educational and health matters, all of which may affect crime, is already devolved in both Scotland and Northern Ireland. Moreover, the crime profiles of Scotland and Northern Ireland are both different from each other and from that for England and Wales[3]. In this essay, therefore, I shall be concentrating upon England and Wales[4], with only brief mention of Scotland and Northern Ireland.

There is a serious lack of research on the process of legislation affecting crime in England and Wales and indeed on the details of the legislative process in general. Though the Home Office has produced a considerable volume of research on crime prevention, and could be said to have pioneered situational crime prevention, under the leadership of Ron Clarke as head of research and statistics, it has not engaged with the details of the

[1] The Home Office is responsible for policy on crime, crime reduction, policing and crime prevention legislation for England and Wales, as well as prisons, probation, immigration and other interior ministry functions.

[2] The Review of Criminal Justice in Northern Ireland (2000) has proposed that all criminal policy and justice matters should be devolved to the Assembly. The UK government has indicated that it is willing to move to devolution of these exempted and reserved matters as soon as practicable (Mandelson 2000).

[3] Northern Ireland, despite the Troubles, has had a much lower crime rate than England and Wales over at least the last 50 years, both as measured by official criminal statistics and, more recently, as measured by crime surveys (Review of Criminal Justice in Northern Ireland, ch. 2). Scotland has a slightly different crime profile, with less property crime in the last decade or so, and has also tended to have lower crime figures (Scottish Office 1999; del Frate et al. 1993).

[4] Though Wales has a devolved parliament, crime and criminal justice matters are not devolved and so the Home Office is the department for both England and Wales.

legislative process, nor, at least publicly, with the criminogenic potential of other departments' legislation. Nor has much attention been paid to the effectiveness of different kinds of criminal legislation and their effects on the volume of crime. For this essay, therefore, I shall be trying to draw together material from a considerable number of different areas, each with a separate literature. They include:

- the process of creating legislation and the spurs to producing particular recent pieces of legislation, which will enable us to consider how far processes of considering crime risks currently exist or could be inserted
- the changing environment on dealing with crime, and in particular, the move from criminal justice and penal remedies to crime reduction and evidence-based policy
- the extent to which state action, and in particular, legislation, are seen to impact and could impact on crime and crime reduction, including the influence of national, supra-national and local factors
- the potential effectiveness of substantive criminal legislation
- the development of specific pieces of recent legislation seeking to prohibit conduct by using the criminal law
- the growing use of regulatory legislation to govern the activities of companies and specific groups in the population (such as young people or sex offenders)
- the development of monitoring mechanisms to alert either government or citizens to specific crime risks
- the development of a crime reductive strategy, based at local authority level, to bring risk of crime and crime reduction strategies to the forefront of social policy.

As far as I am aware, this is the first time that an attempt has been made in the UK to survey the overall field of legislation in relation to risks and crime reduction. We shall start with the process of creating legislation and the points at which crime risks could be considered.

Creating law

The process of considering new legislation

As a crude distinction, legislation in the UK can occur in at least two different ways. In the first, the need for legislation follows a long process of

development of policy and draft legislation in the government department concerned. Generally, criminal legislation in England and Wales will be formulated within the Home Office, but regulatory legislation, which, in the UK, involves criminal sanctions, will be the responsibility of the department for that activity. Hence controlling health and safety and pollution is the responsibility of the Department of the Environment, Transport and the Regions, whereas controlling the activities of directors of companies is the responsibility of the Department of Trade and Industry. Some matters, such as drugs and violence in the workplace, have inter-departmental committees, reflecting the multi-faceted nature of the problem.

The issue will be debated within the department with lead responsibility, with papers drafted and redrafted. A 'green paper' discussing the issues, may well be published for consultation with outsiders, followed by a 'white paper' which presages immediate legislation and which will be published at the same time as, or shortly before, a draft bill. The bill will have been announced in the Queen's Speech for that parliamentary session and its passage through parliament, both the Commons and the Lords, must be completed within that session, or it will fall. In both Houses of Parliament, amendments to the bill can be put, both by the government (to answer criticisms and ensure the passage of the bill, or to fill out more sketchily drafted areas, or reflecting new issues) and by others. The final Act of Parliament (legislation) which receives the Royal Assent can look rather different from the initial bill.

In this mode of formulating legislative proposals, discussion within government departments about possible future legislation can itself be a long affair. Downes and Morgan (1997) have documented the process of formulating legislation on criminal justice issues in the post-war period. They show how, in the 1980s, previous reliance on officially organised advice from standing committees, Royal Commissions and the like, was replaced by greater reliance on penal pressure groups, more critical of government policy and more prepared to carry on the debate publicly in the media, as well as privately with civil servants and ministers. Pressure groups include NACRO, the Howard League and the Penal Reform Trust, all generic criminal justice groups concentrating on penal policy, though NACRO has always had an interest in crime prevention. They also include the practitioner sectional groups, such as the Police Federation, the Association of Chief Police Officers, the Prison Officers' Association and the Magistrates' Association. The pressure groups provide feedback to government through

'furnishing early warnings of probable trouble, in canvassing feasible reforms, and in heightening the legitimacy of the governmental process itself. In a complex society, pressure-group and interest-group activities are the major avenues for active citizen participation in democratic decision-making.' (Downes and Morgan 1997, p. 115). Pressure groups also fitted the 'ideological predispositions of the Thatcher administrations to accord client-based and consumerist agencies a better hearing, albeit at the expense of local government (which still harboured socialist residues) and the trade unions' (pp. 115-6). Greater reliance on these external inputs was also reinforced by the effects of the Conservative government's transformation of the civil service, whereby stability in internal organisation, permitting the leisurely production of policy papers, was fissured through the move to contract out many functions to outside bodies and to create 'Next Steps' criminal justice and crime reduction agencies with operational independence from the remaining policy-making departments (Rock 1995)[5].

At each stage, from private departmental discussions and soundings, through ministerial decisions on green and white papers and bills, to debate in parliament, there is the opportunity for people to raise issues about crime risks and criminogenic potential[6]. However, there is currently no formal point at which such issues are raised and discussed publicly. Nor is there any requirement to raise them, whether in legislation or by convention. Conversations with people in the Home Office indicate, however, that the Directorate of Research, Development and Statistics, through its Director, might well submit a paper on the crime potential of legislation and any research evidence on those specific issues, for any potential Home Office bill. The extent to which the views in such a paper prevail in subsequent ministerial decisions on the bill will depend on many factors, however, including the extent of the evidence, the persuasiveness of the author and his

[5] Paul Rock has been one of the few British authors to examine the process of creating legislation in depth, though most of his work has concentrated on victims issues (Rock 1986; 1990). It is interesting that none of these careful analyses document any process of crime risk assessment during the passage of legislation. Indeed, the key actors in formulating the legislation (innovators within the civil service, drafters of papers, committee members, representatives of powerful outside criminal justice groups) would tend not to possess, nor necessarily to value, the relevant economic, statistical, research or scientific skills.

[6] Though, as Downes and Morgan (1997) comment, there is remarkably little discussion in Parliament on criminal justice or crime prevention issues.

or her power within the Home Office hierarchy, and the political and other considerations attached to the bill. These papers are not published.

Why is there no active and public debate on the potential crime risks of legislation and on crime reduction risk management during the process of creating legislation? If we follow Downes and Morgan's (1997) analysis, then one clear reason is the lack, until recently, of appropriate official bodies or pressure groups to fan the debate. The groups mentioned by Downes and Morgan are the traditional criminal justice pressure groups. Of these, only NACRO has a major interest in crime prevention and it, like Crime Concern[7], concentrates on action in local areas and national programmes funding such action, not on legislation. Similarly, there is, as yet, no criminal justice professional group centrally concerned with crime risk management, with only the police having a major interest in this area until very recently. The police have tended to work on a local basis on crime reduction schemes and have traditionally not commented on general crime reduction issues, though this is changing. Local authorities, as Downes and Morgan note, were not favoured as contributors to governmental discussion on legislation under the Conservative regimes of the 1980s and early 1990s. Local authority groupings, such as the Association of Metropolitan Authorities and the Association of County Councils, were active in discussing and debating crime prevention and community safety in the 1980s, particularly in relation to drugs problems. However, they found greater moment in moving to a Europe-wide basis for discussion, with the formation of the European Forum of cities (which has always had an active crime reduction agenda), than in pursuing discussion in a hostile UK environment. In the 1980s and 1990s, risk management, as a discipline, was safely corralled within business groupings, such as insurers, financial institutions and the security directors of major companies. The Home Office had few contacts with the commercial world and remains relatively uninterested in commercial crime prevention, as opposed to the crime risks faced by individuals and households[8]. The explanation for the failure to develop public

[7] Crime Concern is a charity created by government to provide advice for local areas and professionals and generally to co-ordinate the development of best practice on crime prevention. It could not be said to take a critical stance on government policy.

[8] The lack of interest in commercial crime risks, and hence the lack of contact with the commercial security world, is indicated by the very late introduction in 1994 of a commercial crime survey, providing the first baseline data from which crime risks could be considered (Mirrlees-Black and Ross 1995; see also Shapland 1995). The

debate on the criminogenic potential of legislation may be simply that there were no major bodies with the ability and interest to undertake such a debate.

The second way in which a bill can arise, however, is a far more hasty and less considered affair. As we shall see below, events can occur which ministers feel demand an instant response and instant legislation. Clearly, the amplification of the events into moral panics (Cohen 1972) and perceptions of increased seriousness of the deviance itself depends upon their media treatment. Whether the event obtains such treatment depends upon its newsworthiness and upon the subsequent iterating and reverberating discourse between government, media and police (Hall et al. 1978; Ericson et al. 1989). Yet even the most newsworthy and hyped criminal event may not lead to immediate legislation. Downes and Morgan (1997) suggest that, in addition, the event needs to have been seen to discredit institutions or agencies which are seen as under government control - or at least discredit their potential to take action, so that their credibility and effectiveness are at stake.

Recent examples include the savaging of young people by 'pit bulls', leading to the (seriously flawed in operation) Dangerous Dogs Act 1991[9], and, secondly, the massacre of schoolchildren at Dunblane by Thomas Hamilton in 1996, leading to major gun control measures, including the outlawing of handguns, in the Firearms (Amendment) Act 1997. Downes and Morgan (1997) comment that 'For all their pretensions, both parliamentary and extra-parliamentary groupings can be utterly outpaced by events which explode in such a way that unusual responses are called for by "public opinion" - a phenomenon for which media attention is often taken to be the proxy' (p. 121). When this occurs, there is simply no time to undertake crime risk analysis, though the media debate itself can have created the idea that the legislation is necessary to curb an 'obvious' crime risk. Whether the legislation may increase other crime risks or interact problematically with other crime reduction measures will only, however, become clear on implementation.

British Crime Survey covering individual and household risks started in 1982 (Hough and Mayhew 1983).

[9] Its problems in operation, including those seizing dogs thought to be dangerous being left in limbo (with the dog) if a court order for destruction could not be made because, for example, the owner did not appear in court, required an amending act, the Dangerous Dogs (Amendment) Act 1997, shortly thereafter and illustrates the danger of rushing into legislation without considering the practicalities of operation of the legislation.

Another way in which 'immediate' legislation may arise is when a minister himself or herself has an idea which is put in an official speech and which then drives through to legislation, with little possibility of influence by any consideration of crime risks (or even practicality, on occasions). We have to remember that legislation is at base a political event, with political considerations being sometimes the dominant ones. As crime has become an ever more important political issue in England and Wales, so has criminal legislation. Governments feel they are judged not just on their law and order record, but also on their law and order rhetoric.

We can see that there are in fact several points at which discussion of crime risks could be placed within the process of creation of legislation in England and Wales - provided that that particular piece of legislation is occurring through the normal, 'slow' route. Perhaps the most effective would be during the shaping of potential legislation through departmental consultation processes, when external views are invited. It would be necessary, however, for consultation papers ('green' papers or more informal consultation) specifically to address the question of crime risks. Moreover, such questions would need to be included not only in legislation stemming from the Home Office, but also in regulatory legislation deriving from other departments.

From criminal justice to crime reduction, ideology and evidence-based policy

Is a focus on crime risk assessment likely to occur during the next few years in England and Wales? Several authors have charted changes in governmental and societal crime policy over the last 20 years (for example, Garland 1990; 1996; Garland and Sparks 2000; Jefferson and Shapland 1994; Shapland and Sparks 1999). Their messages are similar. The increases in recorded, 'official' crime rates since the 1960s, and especially in the late 1980s, underpinned by crime surveys showing increases in victimisation and fear of crime, have rendered crime a more normal and common experience of everyday life. Many aspects of social life and social policy have increasingly been described in terms of crime and disorder. The normality of crime has made talk about crime an everyday discourse and has persuaded the population to take more crime preventive precautions themselves, rather than castigating the government for its failure to prevent crime and for the increasing restrictions on their lives caused by security precautions. This transfer of responsibility for crime prevention has been

channelled and foreseen by government itself, as it acknowledges the limitations on the state's power and the inefficacy of traditional criminal justice responses in reducing crime. It has been spurred by a general move towards a more consumerist ethic in public policy, in which citizens are not to be seen solely as the subjects of action by state or experts, but as active consumers with views which must not be ignored. The corollary of citizens having views on crime policy to which politicians must listen, is that they are also now seen as having responsibilities for preventing crime themselves. State agencies do not attempt to promise to reduce crime themselves or by their own actions: the rhetoric is one of partnership and of active citizenry, in which all are to join together in order to combat crime. At base, the calculation seems to be that if crime is seen as a result of citizen inactivity, then citizens will find it difficult to blame government (or the police) for crime.

At the same time, theories of crime causation and images of the criminal have undergone related changes. As Garland (1996) indicates, the 1900's image of the offender as 'different' - as mentally disordered or born bad - gave way to the mid-century's welfare state image of the offender as a social misfit, badly socialised and in need of assistance. In the 1980s and 1990s, the offender, according to rational choice theory, instead became seen as an opportunistic consumer, picking desirable goods according to rational decisions: someone acting with the same ends in mind as everyone else, though using illegal means to get there. Garland has called these the 'new criminologies of everyday life' (p. 450). To affect this new, illegal consumer, situational crime prevention should be used to redesign the living environment and hence the cost-benefit equations consumers would use, so that the illegal options are seen as having fewer benefits and higher costs. However, situational crime prevention is not the sole influence on crime reduction strategies in England and Wales. A reluctance to move from earlier social control theories and an appreciation of the socially destructive consequences of ghettoisation, exclusion and fortress societies has combined situational techniques with community development measures, cognitive measures to address offending behaviour and early years preventive programmes.

The seemingly inexorable move in the last 20 years towards a dominant ideology of crime reduction in criminal policy has, however, been accompanied by several apparently incompatible elements. Garland (1996) indicates how deterrence and general punitiveness (what the French would call

'repression') have been rekindled in an increasingly ideological response to crime - ideological in that the initiatives (punitive rhetoric, legislative increases in sentence lengths, the 'prison works' view, increased prison building programmes, longer sentences for young recidivist offenders and the creation of a category of 'persistent young offenders' for which courts have special powers) do not accord with criminological research findings on what would be expected to reduce crime. He calls this ideological punitiveness a 'symbolic denial' of the predicament that the government has found itself in: that it needs to withdraw from any claim to be the primary, effective provider of security and crime control, because it has realised that it cannot significantly reduce crime, but that it would be politically disastrous to be seen to be withdrawing. Hence government has taken refuge in 'tough talk'.

Another apparently contradictory element is the tension between the need for crime reductive action to be local to be effective and the strong centralist tendencies of recent UK crime policy. Jefferson and Shapland (1994) counterpoint the distancing move towards privatisation in criminal justice delivery and in crime reduction, with the more centralised management of agencies (through the creation of national guidelines in criminal justice, national agencies replacing locally controlled ones, and the abolition of local autonomy, as well as the adoption of more tightly controlled financial budgets and reporting requirements). These trends have continued in the 1990s and into the new century. Crime policy is currently certainly not 'let a thousand flowers bloom' according to the details of local crime profiles, but a managed set of programmes in which the extent of permitted local variation is judged centrally, according to what is accepted in tendered bids for government funds.

We can now look at the development of crime prevention in this context. Crawford (1997; 1998) has documented the changing policies in respect of crime prevention in England and Wales. He describes the 'dramatic growth, in the last two decades, of crime prevention and community safety as terms around which policy initiatives, practices and intellectual debates cluster' as a 'notable feature of crime control at the end of the millennium. It constitutes what one leading British criminologist described as a "major shift in paradigm" (Tuck 1998)' (Crawford 1998, p. 5).

Crime prevention was of course not absent from official discourse on crime earlier in the last century. Crime prevention has always been a major aim of policing, featuring in the original mandate given by Robert Peel to

the new police in London and enshrined in the Metropolitan Police Act 1829. However, actual crime prevention activity within policing tended to be marginalised in favour of crime fighting (investigation and prosecution using the traditional criminal justice system). Crime prevention was thought to be being accomplished through the deterrent effect of the mainstream criminal justice system.

In the 1950s and 1960s, however, police and Home Office interest in crime prevention as an activity in its own right began to appear, with the formation of the National Crime Prevention Centre at Stafford in 1963, the creation of specialist police crime prevention officers to advise householders and commercial premises on protection against crime, and the formation of crime prevention panels by the police at local authority level to create networks within communities to foster support for crime prevention. Specialist crime prevention officers were soon to be followed by specialist police architectural liaison officers, whose job was to scrutinise planning applications submitted to the local planning authorities for any criminogenic aspects.

At central government level, specific policy was beginning to be developed in the early 1980s on how to address preventing crime. The Gladstone report (1980) set out the method to be adopted, including a thorough analysis of the crime problem, the identification of measures that would make it more difficult for these offences to be committed, the assessment of the likely practicality of those measures and the selection of the most promising measures and their incorporation into an action plan. This model, as Crawford (1998) comments, has been followed ever since. It implicitly focuses attention on situational crime prevention measures, because the analysis emphasises 'hot spots' and situations in which the offence occurs (rather than victim or offender characteristics), and because it has tended to be used with local geographical areas, following initial experiments with regeneration of declining local authority housing areas, such as the Priority Estates Project. The central government initiatives following this model, such as the Five Towns and Safer Cities programmes, emphasised creating action plans to combat local crime problems. Activity and obvious signs of implementation, rather than reflection on outcomes, was the key sign of a successful project. The need for careful implementation and evaluation of outcomes only became dominant in central government thinking rather later, following criticism of the early initiatives as achieving much apparent action, but few clear results in terms of reducing crime levels.

Early initiatives, both locally and centrally funded, were dominated by the police. The central Crime Prevention Unit in the Home Office, set up in 1983, was the driving force behind development of government policy on crime prevention and largely consulted with the police. It also, with the Home Office Research and Planning Unit, pushed forward experiments and evaluations of situational measures. It was becoming very obvious, however, that the police could not implement crime prevention measures alone, mainly because many of the elements of local action plans involved such elements as changes to the design of the built environment, street lighting, or projects with schools or housing developments - all the province of the local authority. In 1984, a major milestone was the issuing of an inter-departmental circular (no. 8/1984) which stated that 'since some of the factors affecting crime lie outside the control or direct influence of the police, crime prevention cannot be left to them alone. Every individual citizen and all those agencies whose policies and practices can influence the extent of crime should make their contribution. Preventing crime is a task for the whole community.' Interestingly, however, given the context of this paper, there was no mention of the responsibility of government to consider the crime prevention implications of its own legislative programme in this task of preventing crime.

By the early 1980s, therefore, the site for actual crime prevention activity had been firmly placed at the local level. Action should follow the results of local crime audits and be developed in such a way that it would be effective given local conditions. This was cemented by the burgeoning number of local initiatives and the (much smaller) number of evaluations of crime prevention initiatives, all of which hammered home the message that much crime was local, with locally based offenders, and only responded to initiatives which were seen as relevant by local people (or else nothing happened at all) and which manipulated the local environment. It is hardly surprising that this trend developed. The things about which local people complained were nuisances such as the activities of local youth, rubbish, abandoned cars, vandalism, noise and loose dogs (Shapland and Vagg 1988; Morgan 1987). Crime que such only figured in higher crime, urban areas, where the crimes that focused residents' and business people's attention were the bulk crimes of burglary, theft from cars and damage. All of these tend to be committed by local, often young offenders (Shapland and Vagg 1988[10]).

[10] The early work of Shapland and Vagg showing the J-shaped distribution of distance to offend for bulk crime such as burglary and theft from cars has been confirmed by

The central government role to support this local action was one of funding a series of programmes, in which local consortia of agencies could bid to a central tender specification for funds to employ local development officers and to undertake initiatives, though any action within the remit of statutory agencies normally had to be undertaken within their own budget. The result was a series of short-term projects, many of which were not then taken up into the budgets and priorities of their constituent agencies, because they did not reflect the key preoccupations of those agencies with their statutory mandate. Inter-agency action, almost by definition, will never be at the centre of individual agencies' concerns and funding lines, because no one agency has the responsibility to deliver it. The content of these programmes reflected central government concerns stemming from the major rise in bulk crime in the late 1980s shown by the British Crime Survey. They focused on household burglary and theft from cars, though some attention was also paid to domestic violence.

During the 1980s and early 1990s, under the Conservative administrations of Thatcher and Major, this local model of crime prevention was developed and funded, with the Home Office circular 44/1990 again reinforcing the message of 8/1984 that the main approach needed to be a partnership one. There was, however, no structural arrangement to facilitate these partnerships. For each programme and initiative, the executive group of chief officers of relevant agencies at local level had to be formed anew[11]. The Morgan report of 1991 proposed a new statutory framework at local level, in which local authorities would acquire a statutory responsibility for crime prevention and be jointly responsible with the police for carrying out regular crime audits and developing a crime action plan for the local authority area. This was to be accompanied by central co-ordination, an inter-ministerial committee and an independent standing conference to provide advice. Had the Morgan model been implemented in all its respects, it is quite possible that attention might then have been paid to the crime reductive potential of government legislation. However, giving this prominence to local authorities at local and regional level cut completely across

more recent and detailed ongoing analyses in South Yorkshire by Andrew Costello (University of Sheffield, UK). See Wiles and Costello (2000), which concludes that 'the vast majority of offender movements are relatively short' (p. v).

[11] Though the process of preparing so many funding bids for central moneys meant that the same key local officials kept on meeting each other, so that the end of a meeting on, say, vandalism might be followed by key informal talks on the proposed budget for domestic violence information packs.

the Conservative government's view that local government should be reduced dramatically and much of it privatised or its duties given to individual schools and community bodies. The Morgan report was not endorsed by government, though central crime prevention funding and activity continued, with very considerable funding for CCTV city-centre installations.

The manifesto for the new Labour government which swept to power in 1997 included, however, the firm commitment to rescue the Morgan report from obscurity and to implement its recommendations. The Crime and Disorder Act 1998 introduced a statutory duty on local authorities and the police to develop, co-ordinate and promote local community safety partnerships. They have to undertake local crime audits, to consult and involve other local agencies (including probation, health, education, the Crown Prosecution Service and youth services), and to produce and publish a 'community safety strategy', on which local consultation must occur. However, the central structural mechanisms which Morgan recommended were not implemented in the clear way he suggested. The links between local activity and central government bodies are far from clear[12].

The initial round of audits and strategies produced by partnerships in 1999 has now been reviewed as a research exercise, as far as possible, by the Home Office (Phillips et al. 2000). Of the documents which the Home Office managed to acquire from local areas, there are clearly major differences between audits produced by different local areas, with some focusing solely on crime and disorder issues and others including community safety issues such as road safety. Most audits still concentrated on police data, because of incompatibility between police and other data sources. Partnerships prioritised between two and 18 crime types for action, with most selecting between seven and nine. Those most likely to be prioritised were domestic violence, household burglary, drug-related crime or drug misuse, vehicle crime and crime committed by young people. About a half included specific outcome targets for crime reduction, with strategies emphasising educational means and awareness-raising, enforcement, situational measures, victim support and offender rehabilitation/drug treatment. There were clearly problems, however, in engaging with voluntary sector and community organisations and with businesses, and in developing longer-term strategies. Though there is obviously considerable variance, local strategies

[12] For example, there is no requirement that a copy of locally produced audits or strategies should be sent to any central government department, so it is very difficult to obtain an overview of how the local partnerships are interpreting their new mandates.

seem still to be concentrating on the kinds of locally based offences often committed by young people.

The central government role currently is primarily to provide advice and some training for local activity. There is detailed guidance on how to carry out a crime audit and ideas on possible crime prevention strategies (Home Office 1999), which emphasise social and community crime prevention activity as well as situational crime prevention. The Home Office Research and Planning Unit has pulled together research findings on 'what works' in prevention terms (Nuttall 1998), largely influenced by the earlier American exercise (Sherman et al. 1996). There is also a major, centrally funded Crime Reduction Programme, which is spending some £250 million over three years to test what would be the most effective interventions in the context of England and Wales in relation to household burglary, targeted policing, corrections work with offenders, domestic violence, early intervention and sentencing options. It is clear from this that the central government idea of crime reduction, once linked primarily to situational crime prevention programmes, has now been broadened to encompass both social crime prevention programmes, such as early years parenting, and traditional criminal justice system responses.

The crime reduction emphasis permeates other areas of criminal justice policy as well. Though deterrent and harsh sentencing views remain prominent, as we saw above, youth justice sentencing options have been reformed to include the replacement of formal cautions by the police with a system of reprimands and final warnings, where final warnings will include work with offenders to address offending behaviour. Action plan orders and reparation orders are new sentences, brought in nation-wide in 2000, both of which have crime reduction aims and are intended to reduce reoffending (through targeted action on offending behaviour, and through working for victims or the community to show the consequences of offending). A parenting order is being introduced, whereby the courts can order the parents or guardian of a young person who offends to attend parental training to control the young person's offending behaviour. The youth justice system, at least, has been given as its main task preventing reoffending.

Two other government aims also combine to accelerate the prominence of crime reduction. One is the perceived need for social policy to be 'joined-up', in that state interventions with individuals should be coordinated, so that one intervention is not nullified by another. This has ob-

vious ramifications in crime prevention, where social, education, health, employment and crime policies need to be aligned in their effects on individual offenders, on communities and on potential victims. The second is the government's insistence on 'evidence-based policy'. One effect of evidence-based policy is to accentuate the need for creation of good outcome measures and evaluation of initiatives, something not initially typical of British crime prevention. A second is that it is producing an extraordinary number of targets which government departments are being required not only to set, but also to meet. An early result has been the production of the first published Strategic Plan and Business Plan for the criminal justice system as a whole (CJS 1999). Aim A is 'to reduce crime and the fear of crime and their social and economic costs'. For this, the targets include 'a reduction in the growth of crime relative to its long-run rate by 31 March 2002', the level of disorder to be reduced by 31 March 2002, a 30% reduction in the level of vehicle crime within 5 years, and so forth (p. 6). Crime reduction, and hence crime prevention, are clearly central to present government criminal policy.

Though clearly much of this reduction is designed to be undertaken through local activity, supported by central government, as we have seen, it would be incorrect to characterise government as entirely inactive at national level. Home Office ministers have intervened to encourage business to design cars with greater security precautions, even to 'name and shame' the worst manufacturers by publishing annual 'league tables' of car makes which are stolen more often. The Home Office and the Department of Trade and Industry are active in the field of computer security and the Home Office has actively sponsored research into new technological crime threats such as 'e-crime' and the use of the Internet for criminal activities. The Department of Trade and Industry has extended its lead role in predicting the implications of scientific and technological advances to their implications for crime prevention (Foresight 2000), which recommends dedicated funding to focus science and technology attention on crime reduction and the need to establish a strategy in relation to e-crime.

The necessity for central action in these fields illustrates the deficiencies in a purely local site for crime reduction activity. Although most crime, numerically, is committed by local criminals, some crime is now placeless - in that it does not require any particular geographical connection between offender and victim. Internet-mediated crime is difficult to address on a local crime reduction plan. Even where crime does not require any long journey to

offend, taking action to prevent it may well require co-ordination at a regional, national or international level. Cars are designed for a global market. Much manufacturing is similarly for national or international markets. Retailing and service industries are typically organised on a regional basis, with security directors at regional or national level. Shop design cannot often be changed by local managers, without higher approval. All these organisational features of business organisation create the need for local plans to have their counterpart at regional and national level (see Shapland 1995). Unfortunately, these structural connections are currently not well developed. This mirrors the relative disregard of crime against business in crime reduction policy in England and Wales, compared to that against individuals or households. Eventually, an evidence-based policy would suggest the need to start targeting business-situated crime, especially given the cost of crime in the business sector and hence its contribution to the crime opportunity pool. The cost of crime to the retailing sector was estimated at £780 million in 1994, with that to the manufacturing sector being £275 million, although the costs in the domestic sector were far higher (Mirrlees-Black and Ross 1995). Though crime reductive action is being taken by criminal justice agencies and by local government, and though criminal justice is increasingly connected to social and employment policy, there is little connection with industrial and commercial policy and action.

Perhaps the major 'black hole' in this landscape of increasing attention being paid to crime reduction in England and Wales is a failure to consider the criminogenic or crime reductive potential of government legislation itself - the subject of this paper. Though criminal justice has been subsumed into crime reduction, there is no equivalent slant for criminal legislation. It is almost as though in the move from central state responsibility for action against crime towards locally based, partnership responsibility, the state has lost its capacity to introspect on its own activity.

The role of legislation and the role of the state

We need to explore in more detail the move from state responsibility and state action to a more pluralist responsibility, because it affects our ability to predict the effect of legislation on crime. Bottoms and Wiles (1995; 1997) have proposed that, in this period of late modernity, the state has become 'hollowed out'. By this they mean that, as economic activity has become both trans-national and also very local, the ability of the nation state to control crime-relevant activity has decreased. It can neither affect substantially transnational capital and business, nor intervene very helpfully in

the activities of local communities. Hence they would see crime reductive power as being devolved upwards to transnational bodies such as the European Community, or downwards to the kinds of local partnerships we were discussing above.

This seems to leave legislation in rather a limbo. Although, as we shall see, much regulatory legislation is already being conceived and developed at supra-national levels, criminal legislation is still very much a product of the nation state. It is this criminal legislation - legislation which criminalises or increases penalties - to which governments typically turn when confronted by a distressed or irate citizenry. Though clearly nation states are no longer the powerful monoliths they were of old, they still see themselves as having tools to use in relation to crime. I would argue that the effects of the hollowing of the state have been, not so much to shift power absolutely, as to separate the location of the levers of declamatory and implementatory power. Though clearly, the effectiveness of legislation (its implementatory power) depends upon a far greater multiplicity of bodies at all levels than it did when state criminal justice was the main response to crime, it is still the state legislature which keeps its hold on the ability to declare what should be said to be criminal and how seriously it should be regarded (declamatory power). Though, given the importance of supra-national bodies and the global technological and marketing economy, norm creation may have become more supra-national, and though norm enforcement takes place at many levels, norm production is still a resolutely national affair and legislation reflects national preoccupations in criminal activity. The locus of declaring something to be criminal - what I shall term 'criminal legislation' is still at national level. Its potential for crime reduction or augmentation needs, hence, to be considered there.

What I shall term 'regulatory legislation', however, seems to have rather different loci in terms of norm production to criminal legislation. Regulatory legislation is legislation which aims to increase the regulation of particular forms of conduct and so decrease the incidence or cost of undesired future behaviour, often through reporting of incidents, inspectorates and licensing of more dangerous forms of activity. In England and Wales, the penalties for not undertaking the particular regulatory activity indicated by the legislation are normally criminal penalties[13]. The locus of norm produc-

[13] England and Wales has no system of administrative law similar to that in continental European countries. Regulatory legislation depends upon criminal penalties and the criminal justice system for its ultimate deterrents.

tion of regulatory activity is currently often supra-national. Why this different pattern of development? A greater amount of economic activity has been trans-national for far longer than has criminal activity. Regulatory legislation designed to combat the effects of unrestrained commercialism has similarly developed along trans-national lines. This includes health and safety legislation, environmental regulation, combating money laundering and, increasingly, food safety matters. Though the directives created by the European Community or other supra-national bodies then need to be transformed into national legislation to have effect, national distinctions in these areas are increasingly being ironed out, at least in substantive terms. Enforcement, however, still retains discretionary elements, which show national cultural patterns.

John Braithwaite (2000) has argued that crime control itself needs to develop greater regulatory tools. He has also described the move from a more unitary, Keynsian state to one fragmented into public, semi-public and private parts, where market competition is the key ideology and states attempt to control at a distance. He sees the key tools for this control as being regulatory (i.e. their purpose is to make the future safer, not to punish the past) and its mentality increasingly one of managing risks. The move in England and Wales to crime audits and crime strategies would fit this theory, but it is not clear that we have yet developed forms of regulatory legislation which have the potential to control crime. The current regulatory tools in, for example, the health and safety arena, include those of:

- reporting of incidents (of serious accidents under the RIDDOR scheme) to a central body able to investigate reports (the Health and Safety Executive);
- regulation of environments (such as workplaces or premises), enforced through an inspectorate (the same Health and Safety Executive);
- the ability to prosecute and demand penalties from offenders (companies) for breaches shown up through reports of incidents or inspection of environments;
- potentially serious financial penalties for offenders because victims (employees who have been injured) can sue in the civil courts to claim compensation.

We do not yet have similar tools in the traditional criminal areas of street crime, burglary and theft. The difficulty may be that health and safety

regulatory tools depend upon the employment relationship for their force. In other words, they are effective because employers and owners of premises have been held to have a duty towards their employees and those using premises. Hence companies can be required to report, to take precautions and to pay compensation.

Would similar duties be held to exist in relation to other potentially criminal situations? There are some moves in this direction. Banks are now responsible for exposing the origins of money deposited in them and solicitors and other professionals for reporting the origins of their fees from clients (to combat money laundering). Owners of premises are responsible for their maintenance and safety, even if they are being used illegally and in ways that the owner would certainly not agree with. So, for example, burglars can sue if injured by falling through fragile, unmarked roofs or by the brick they threw to break a shop window bouncing back from polycarbonate used to prevent their entry.

It is difficult, however, to envisage an equivalent bond between potential offenders and potential victims in relation to burglary, theft or assault. For regulatory legislation to be used for general crime control, the obligations and duties within society would have to be redefined. Crime control could not place regulatory obligations on individual potential offenders, as potential offenders, because each could as well become a victim of another individual in the same situation. It would be equivalent to placing an obligation on all citizens to be law-abiding - but that already exists as criminal law, and seems particularly ineffective in preventing crime. Using regulatory legislation as general crime control would, I suspect, involve putting obligations on intermediate bodies, such as local authorities or communities, both actively to prevent crime and also to be financially responsible for its occurrence (i.e. sources of compensation or penalties). There may be local communities strong enough and stable enough to bear such a burden - but the increasingly fissured and temporary nature of late modern society would argue against this as a major tool. It may be that regulatory legislation could only be used as a crime reductive device in arenas where there are clear legal bonds already existing between the parties.

The move from the modernist nation state to a late modern, pluralist, fissured, transient set of groupings at different levels hence has considerable implications for the effectiveness of different crime reductive measures and different kinds of legislation. It similarly affects the ability to predict the effects of introducing particular crime control measures, as well as states'

ability to control crime. Introducing and improving crime audits can tell one more about crime risks, but not necessarily how those risks will be affected by any particular measure. Launching a crime control measure and ensuring it hits its target is difficult enough when its enforcement was to be undertaken by a single, supposedly well understood body like the police, or the courts. It is far more difficult when it depends upon partnerships of agencies with varying degrees of resources and willingness to participate, and different types of bonds between them.

Is legislation used? Is legislation intended to be used?

If we return to consider legislation specifically as an example of a crime control measure, then creating a process of crime risk assessment for proposed legislation needs to have several strands. One is to consider on which crime risks the legislation might impact and in what ways. I have discussed some of the complications in doing this above. Were this to be achieved, however, it would only provide what one might call the ideal case. However, legislation may not be implemented or used in relevant situations. We need to consider the likely extent of implementation and the potential effectiveness of legislation, as well as its ideal impact.

The implementation and effectiveness of legislation has not received much research attention in England and Wales, except as part of a historical case study (for example, what the effects of the Poor Law were in the nineteenth century). There is certainly no routine examination of the use or abuse of substantive criminal legislation after it is enacted and what effects it has had. This is quite different from the position in relation to criminal justice legislation, where statistics are regularly gathered and published in relation to the offences and offenders on which new sentences have been used (the annual *Criminal Statistics*, published by the Home Office). Similar exercises are undertaken in relation to a number of types of regulatory legislation (for example, the number of polluting incidents and licences issued etc.).

In 1990, the Dutch Ministry of Justice published its five year plan called 'Law in motion' (Ministerie van Justitie 1990). Its thrust was that the replacement in the Netherlands of a society divided along denominational lines to a modern consumer oriented welfare state radically altered the position of the law. Because law was increasingly being seen by both individuals and government as an instrument rather than a normative framework, and because government, despite successfully placing preventive re-

sponsibilities on municipalities, still could not meet the demands for care mediated by law, the effectiveness of the law was declining. 'As a result of this situation, the law is in danger of gradually losing its capacity to create order and security. The intrinsic value of law is diminishing. More and more legal rules are being introduced, but their average effectiveness is declining. Indeed there would seem to be an insidious process of legal inflation.' (p. 30).

The plan concluded that the basis for justice policy should be that creating legislation imposing criminal penalties or involving criminal justice agencies should not be free of obligation to the departments introducing them. The quality of legislation should be improved, with lead responsibility for ensuring quality lying within the Department of Justice. More attention should be paid to the implementation and enforcement of law, with new laws being examined to see if they have objectives which are clearly formulated and can be met, and every new bill being accompanied by a plan of implementation and examination of whether the sanctions proposed are workable and the least necessary to secure compliance. This implies, it was said, that the Ministry of Justice should be involved at an early stage in the drawing up of new legislation by other departments.

The 1990 Dutch plan is a rational, risk management approach to the formulation of new legislation. It is the first I have seen which puts the emphasis in new legislation on its consequences and its enforceability, rather than the statement made by the enactment of the legislation itself. English and Welsh legislation does not have such an emphasis on implementation and the effects on enforceability, though it does contain an analysis of the potential cost or saving to the public purse if the proposals were to be implemented. An emphasis on clear objectives, however, works only when legislation is formulated in the first of the two ways outlined at the beginning of this paper - with careful consideration. It is far more difficult if the legislation is introduced in rapid response to a moral panic - when the statement, rather than the effects, are the key element. This latter form of legislation could be thought of as symbolic legislation. It states norms; it is not clear whether it is meant to be used if they are breached.

So, when we consider the crime risks of legislation and the extent to which crime risk analysis is carried out, we need to distinguish between several different types of legislation, including substantive criminal law intended to be effective and whose penalties will be used, legislation which is really only making a statement (hopefully a deterrent one), and regula-

tory legislation which aims to prevent, rather than to punish. Before considering whether crime risk analysis of legislation is likely to be introduced in England and Wales, it is worth summarising some recent legislative programmes to see how far each of these types of legislation are being used and developed and so which kinds of crime risk analysis we might be needing to undertake.

Crime prevention in legislation

We can look at Acts of Parliament which received the Royal Assent in the year 1999 to see how prevalent these different kinds of legislation are[14]. For 1999, the following legislation relating to criminal offences or criminal justice was passed:

substantive criminal legislation (criminalises or increases penalties)

- Football (Offences and Disorder) Act 1999 - introduces international football banning orders, bans indecent or racialist chanting, with criminal penalties (prison or fines)

regulatory legislation

- Breeding and Sale of Dogs (Welfare) Act 1999 - licensing dog breeders, with criminal penalties, including up to 3 months prison, for unlicensed breeding
- Company and Business Names (Chamber of Commerce, Etc.) Act 1999 - protecting the name 'chamber of commerce' and equivalent Welsh term, with no specific penalties for misuse
- Disability Rights Commission Act 1999 - establishes a commission to promote equal opportunities, undertake formal investigations of possible breaches and issue 'non-discrimination notices', with powers to apply to the civil courts for injunctions in case of non-compliance
- Food Standards Act 1999 - sets up the Food Standards Agency, with power to undertake observations and to monitor enforcement, with criminal offences if entry is obstructed to premises or information provided is deliberately false or withheld

[14] The text of all Acts of Parliament recently enacted can be found on the website of the Stationery Office: http://www.hmso.gov.uk/.

- Immigration and Asylum Act 1999 - changes the immigration rules and provisions for removal of those unlawfully in the UK, with provisions for carriers (airlines, ship companies etc.) to provide information on passengers and for registrars to report suspicious marriages
- Local Government Act 1999 - local authorities to obtain services using best value criteria (previously compulsory competitive tendering), with the requirement to consult those affected, performance indicators and provision for inspections by the Audit Commission
- Pollution Prevention and Control Act 1999 - implementing EC Directive 96/61/EC to create integrated pollution prevention, extending existing pollution inspections and licences, with criminal offences in breach
- Protection of Children Act 1999 - setting up national registers of those who should not be working with children due to their criminal convictions for sexual offences etc. and requiring relevant employers to consult the lists and not to employ people on them. This is a good example, in the traditional crime area, of a new type of regulatory control, i.e. collecting information centrally and then requiring those responsible for particular environments to reduce crime risks by accessing this information, in this case through checking potential employees
- Road Traffic (Vehicle Testing) Act 1999 - amending and extending provisions relating to testing of vehicles for roadworthiness, with inspectors of premises which are licensed to do so etc.

Criminal justice legislation (changes to the criminal justice system)

- Access to Justice Act 1999 - sets up the Legal Services Commission to provide or fund legally aided services, provided for a Criminal Defence Service with salaried lawyers and a Community Legal Service to increase legal advice availability
- Criminal Cases Review (Insanity) Act 1999 - changes the definition of insanity as a defence in criminal cases
- Youth Justice and Criminal Evidence Act 1999 - introduces referral orders as a new disposal for young offenders, creates new provisions for vulnerable witnesses at court, restricts sexual history questioning of complainants in sexual assault cases, restricts cross-examination by the accused, changes tests for competence of witnesses etc.

The Acts passed in 1999 and not listed above are the Adoption (Intercountry Aspects) Act 1999, (implementing the Convention on Protection of

Children and Co-operation in Respect of Intercountry Adoption 1993); the Commonwealth Development Corporation Act 1999 (setting up the corporation); the Contracts (Rights of Third Parties) Act 1999 (changing privity of contract to allow contracts to be enforced by third parties); the Employment Relations Act 1999 (on trade unions, parental leave, the minimum wage, unfair dismissal); the European Parliamentary Elections Act 1999 (changing the electoral system for MEPs); the Greater London Authority Act 1999 (sets up the Greater London Assembly and the Mayor for London); the Health Act 1999 (changing the structures for primary health care provided by the state); the House of Lords Act 1999 (changing the composition of the House and abolishing hereditary peers); the Road Traffic (NHS Charges) Act 1999 (recouping compensation paid for road traffic accidents where medical treatment was provided by the state); the Trustee Delegation Act 1999 (changing the possibility of delegation of trustees); the Water Industry Act 1999 (changing the basis on which water charges are made, re water meters etc.); the Welfare Reform and Pensions Act 1999 (introducing new forms of pensions, pensions following divorce etc.); and the finance acts (Appropriation Act 1999, Consolidated Fund Act 1999, Consolidated Fund (No. 2) Act 1999; Finance Act 1999; Rating (Valuation) Act 1999; Social Security Contributions (Transfer of Functions, Etc.) Act 1999; Tax Credits Act 1999).

Hence, in 1999, of the total of 32 pieces of legislation affecting England and Wales, there was one piece of substantive criminal legislation, as many as nine Acts increasing regulation in different ways, and three Acts making substantial changes to the criminal justice system - a total of 13 Acts involving new criminalisation, increased criminal justice effectiveness or increased regulation. Many of the other pieces of legislation were standard or technical financial measures. In 2000, of a total of 41 pieces of legislation, a similar analysis shows four created new criminal offences or increased penalties, 12 were regulatory legislation, five changed the criminal justice system and 20 were not related to crime or criminal justice.

The analyses show the prominence of legislation relating to crime in recent England and Wales legislative programmes. It also indicates the extent of increasing regulation. Braithwaite's (2000) view that we are seeing the growth of the regulatory state, trying to act at a distance, whilst still controlling activity, seems to have some force. The interesting thing about this increased regulation, however, is that almost all of it was introduced by departments other than the Home Office, whilst ultimately depending for its

effectiveness on criminal justice activity. The Dutch in 1990 concluded that this tended to be a recipe for increased citizen perceptions of ineffectiveness, as police and courts failed to cope with the increased demands being made on them. It would seem to be sensible to try to make some estimate of the likelihood of breach of regulations before introducing the legislation - to see whether the legislation will be able to be used. This, of course, would be a crime risk assessment.

Do these trends facilitate a move towards crime risk analysis of legislation?

As I commented at the beginning of this paper, governments have limited tools with which to be seen to combat a significant crime risk. Legislation - criminal legislation which criminalises or increases penalties - has been seen by them as their major weapon. Government is now beginning to explore other legislative responses to citizens' demands or panics. Many of these responses have stemmed from conventional regulatory areas, such as health and safety, pollution and food safety. They include greater regulation, removal of targets, central monitoring of risks by new agencies given statutory responsibilities to inspect, prosecute and/or publicly report their findings, and requiring reporting of incidents or potential risks by companies or individuals. They also include giving consumers information about risks, in order to pass the responsibility for choosing potential victimisation onto them. Whilst these responses are being developed, government still has to respond to media cries for action. I suspect that punitiveness will always be the response if the action has to be immediate - but the development of a crime reductive and risk frame of mind may come to supersede prolonged punitiveness and ultimately criminogenic increasing incarceration.

In terms of the likelihood of the development of a crime risk approach to legislation, we can see that the general trend of UK policy from its previous policies stressing criminal justice approaches to offenders, towards its current aims of crime reductive approaches to offending and victimisation, would facilitate the development of such a trend. The stress on evidence-based policy and practice is an additional spur. Regulatory legislative approaches to dealing with crime risks are becoming much more common.

However, the acceptance of the inability of government to deliver effective crime management on its own, and the consequent development of inter-agency and partnership approaches, have complicated pictures of crime

causation. No longer can a simple programme be seen as impacting on its own on a single group of offenders or type of target. Its effectiveness will depend upon crime-directed action by all those in contact with those potential offenders and victims, as well as the action being taken at neighbourhood, local authority and national level. Similarly, doing a risk analysis in relation to one piece of government legislation would need to take into account the thrust of other governmental and local programmes on that area.

Developing formal crime reduction risk assessments for proposed legislation would be a complicated task. If we are becoming a risk-driven society, however, not developing such assessments might well eventually attract as much oppobrium from citizens as not taking action on moral panics does today. The immediate target of that angst would be national governments, because it is they who are the immediately identifiable production sites for legislation. However, given that regulatory legislation often stems from supra-national sources and that crime risk audits are, at least in England and Wales, primarily locally produced, crime risk assessment of legislation will need to have both supra-national and local elements as well.

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Finland

SEPPO LEPPÄ

Contents

1. The structure of the Finnish legislative process

Finland is a democratic state built upon the principle of the rule of law. Article 2 of the Constitution Act expresses the principles of the structure of society in the following way: "The sovereign power in Finland rests with the people, represented by their delegates assembled in the Parliament. Legislative power shall be exercised by the Parliament in conjunction with the President of the Republic." The Parliament is not merely a legislative body, but it is not the sole legislative body, either.

In general, the initiative for matters to be considered by the Parliament is taken either by the Government, or by one or more Members of the Parliament. Legislative bills, as a rule, are introduced in the Parliament as Government Bills. But also a Member of Parliament may bring a matter before the Parliament in session, for example by introducing a legislative motion, containing a draft Act of Parliament or a draft Amendment Act. In practice almost all new laws in Finland, however, originate from Government proposals. Only very rarely does a parliamentary motion lead to the emergence of a new law.

The President of the Republic takes part in the legislative process, first by virtue of his right of initiative, *i.e.* his power to propose that a new law should be enacted, or an existing statute amended or annulled. It is the President who decides upon the introduction of Government Bills to the Parliament. But the cooperation of the President is also needed at the other end of the legislative process. Before a bill adopted by the Parliament becomes an act, the assent and the signature of the President are needed. He or she cannot make any amendments to the bill, but must either give or refuse assent. The President is considered to have refused his or her assent if he or she has not endorsed the bill within three months of the date when the bill was submitted to him or her. But although the President has refused his or her signature, a bill may become law if, after a new election, the Parliament passes the bill without changes by a majority of the votes cast. In such a case the President must sign the bill.

Within the limits of what in Finland is labelled 'economic legislation', i.e. what might be called the day-by-day work of administration, as opposed to the major matters decided upon by the legislature, the President is not restrained by the Parliament. He has the right to issue statutory orders (or decrees) upon (i) matters previously regulated by administrative provisions, and (ii) orders concerning the execution of legal enactments, (iii) the ad-

ministration of state property, and (iv) the organization and functions of the public services and public institutions. An order may obviously not contain any provisions which entail an amendment of legislation.

The Council of State, *i.e.* the Cabinet, is a multi-member body of a collegiate nature. The members in meeting decide collectively and under collective responsibility. If different opinions are expressed, the matter is settled by vote. The concept 'Council of State' is also used to denote a body or unit larger than the meeting of Ministers. Before matters are brought before the President for decision, they are prepared in the Ministries. The Council of State has the task of carrying out the decisions of the President. But in addition it has competence in its own right to announce statutory provisions. The powers of the Council of State, however, do not extend beyond the limits of governmental and administrative business, that is to say beyond the executive field, except in so far as it has, in special cases and by express authorization, the right to issue statutory provisions which concern a specific matter or which regulate specific legal relations. In order to distinguish these statutory provisions from presidential statutory orders, they might be termed statutory instruments. In contrast to the general powers of the President to issue statutory provisions concerning certain matters, the Council of State needs special authorization to declare a statutory instrument.

As regards ordinary statutes, or Acts of Parliament, the Courts of Law, let alone administrative authorities, are not, according to the dominating opinion, empowered to review their constitutionality. This opinion is deeply rooted in the evolution of the constitution, and it is hardly to be expected that the Courts will extend their jurisdiction to assuming the right of passing judgements on the constitutionality of legislative acts.

What has been written above about the structure of the Finnish legislative process gives to the reader a description how a legal instrument formally comes into existence[1]. At the same time the reader ought to know also something about the more practical aspects of the Finnish law drafting procedure.

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[1] The description is based, *inter alia*, on the article "The System of Government" by professor Veli Merikoski in Uotila, Jaakko (ed.), "The Finnish Legal System". Helsinki, 1985, pp. 25 - 40, and on the article "Law Production in Finland; Strategic Considerations" by Professor Matti Wiberg in Wiberg, M. (ed.), "Rationality in Institutions". Turun yliopiston julkaisuja, Sarja B, Humaniora, Tom 206. Turku, 1994, pp.219 - 226, respectively.

In respect of the drafting of legislation (whether laws, statutory orders, statutory instruments, or decisions of ministries) the main responsibility in general lies with the ministries. Each ministry is responsible for the drafting of legislation concerning the matters that rest with that ministry. The Ministry of Justice has the competence in general legislative matters not resting with any particular ministry. The organization of legislative drafting in the ministries is carried out in different ways. The Ministry of Justice, for example, has a law drafting department with a rather large personnel. Other ministries employ civil servants whose main activity is drafting although this may be one task among their other administrative tasks. Larger drafting projects may be piloted by either a working group or a committee, although during recent years committees have been established only for the drafting of important legislative projects.

A legislative project may be initiated in many ways. The initiative may come from a ministry, or from an interest group outside the ministry. Very often legislative initiatives are included in the Parliament's or the President's express opinion. Other sources of initiatives often are the Government programme, decisions-in-principle of the Council of State, the expressions of opinion by the Parliamentary Ombudsman, the Chancellor of Justice and the State Auditors, as well as various public authorities. Initiatives may also originate in the social debate and among citizens, when deficiencies are found and felt. All legislative initiatives are given serious consideration by the ministries.

Once a legislative initiative has been adopted, an evaluation on the need for the launching of a legislative project has to be made and the furtherance of the drafting has to be planned. At this stage the drafting body and its composition has to be determined and an assignment given to it. The aim in case drafting is done in a working group or in a committee is to reach a unanimous proposal which is advantageous when it comes to the completion of the project. Compromise is, on the other hand, necessary if unanimity can not be reached, and this might sometimes mean that the original goals are not achieved and in that case relevant alternatives may remain hidden. Sometimes a differing opinion can, however, be useful in the further preparation of a reform.

Circulation of a proposal for comment is an intrinsic phase of the law drafting process. The normal procedure is for the ministry in charge to request for written statements on the draft proposal. In recent years the tendency has, however, been towards more and more oral hearings, because of

time constraints. A summary of the statements, expressing the attitudes towards the reform and detailed comments, is then drawn up. After the circulation, an evaluation of the case is conducted at the ministry. The project may even be stopped completely if a majority of those presenting statements are opposed to a reform. It may also be possible for the project to be adjusted and finalized according to the statements given on the matter. The further drafting, during which all comments that have been made in the case are considered, is mainly worked out by officials.

The final proposal is then presented for approval to the Council of State's general meeting by the ministry in charge of the drafting, after which it is submitted to the Parliament for further processing. After an act has been passed in the Parliament and approved by the President it enters into force. New legislation is not, however, as a rule, perfect therefore, while its effects are monitored attention is paid to whether the goals of the reform are realized as intended or not. The effects of the reform on costs also have to be observed. The responsibility for the monitoring of new legislation falls on the ministry in question[2].

In 1996, a decision-in-principle was taken by the Council of State on the Programme to Improve Law Drafting, in which the drafters of legislation were given, *inter alia*, directives about how to structure a draft. The main items to be considered should include: (i) a sufficient factual basis regarding the issue in question, including international developments and legislation in other countries, (ii) the identification of alternative regulatory and other mechanisms available in the context of a particular law drafting effort, (iii) the assessment and forecast of the effects of the legislative instrument, and (iv) subsequent study and evaluation of the impact of the measure. In terms of the assessment issue the following components are particularly mentioned: (a) economic and financial impacts, (b) implications on organizations and manpower, (c) environmental impacts, and (d) consequences for various groups of citizens. It is stressed as of utmost importance to carefully analyse especially the economic and financial im-

[2] As main sources for the above description the following have been used Niemivuo, Matti, "Kansallinen lainvalmistelu (Finnish National Legislative Drafting)". Kauppakaari OYJ: Helsinki, 1998; Wiberg (see note 2 *supra*, pp. 231 - 232); and Valtiovarainministeriö, hallinnon kehittämisosasto (Ministry of Finance, public management department), "Säädösvalmistelu ministeriöissä; yhteenveto ministeriöiden säädösvalmistelua koskevista raporteista (Drafting of statutes at the ministries; summary of the reports concerning the drafting of statutes at the ministries)". Helsinki, 1996.

pacts[3]. Assessing the risk of crime is not, on the other hand, mentioned as a separate subcategory, although as a general rule it is expected that all significant impacts are to be assessed and presented notwithstanding whether they are listed as separate components or not. Thus, at least in principle the assessment of crime risks in the course of a law drafting procedure might be a potentially recognized feature also in Finland.

2. Policy intentions with respect to the need of crime risk assessment in Finland

During the last couple of years, the idea of crime risk assessment has spread among the well-informed circles in the field of crime prevention and control in Finland. One of the focal points in this respect has been the National Crime Prevention Council, the staff members of which have learned about the concept at their regular meetings with their colleagues from the other Scandinavian countries, the Netherlands and the United Kingdom. Sweden, in particular, has been ahead of Finland in implementing the crime risk assessment aspect in its structure of legislative process (see, e.g., Decree on committees/SFS no. 1998:1474, e.g. para. 15 : "In case proposals of a committee report will have an impact (...), on crime and crime prevention, the consequences thereof must be stated in the report", and also para. 16 in which it is stated that "the Government will announce in the mandate of the committee more in detail what types of assessments must be presented in the committee report").

In Finland no guidelines or directives in this respect exist so far. Moreover, according to a competent government officer at the Finnish Ministry of Justice, the situation is complicated by fact that at least four various interpretations have been attributed to the concept[4]. She outlines them as follows:

(i) Crime risks may be taken into account in the context of law drafting by the construction of legally binding practices that prevent criminality, for example by the creation of a public register on prohibitions of engagement in business as well as a system of delivery

[3] See "Valtioneuvoston lainvalmistelun kehittämisohjelma; Valtioneuvoston periaatepäätös". Oikeusministeriö, lainvalmisteluosaston julkaisu (Ministry of Justice, publication of law drafting department) no. 3/1996, pp. 16 - 17 in particular.

[4] Personal written communication to the author of this text from Ms. Marja Wallin, Legislative Counsellor, Ministry of Justice, 16 February 2000.

of information in one's official capacity to the keeper of the Trade Register;

(ii) Crime risks may be prevented by providing law enforcement authorities with tools to investigate offences, for example with provisions that authorize them to receive confidential information from another government authority or to surrender confidential information to another authority; certain authorities are also obliged by law to report to police about observed misappropriations (cf., e.g., Laki verotustietojen julkisuudesta ja salassapidosta [Act on publicity and confidentiality of taxation information], 1346/1999);

(iii) Crime risks may be taken into account in such a way that they are assessed as a part of the impact assessment of the legal draft; the aim of the drafter is thus to make an attempt to prevent the occurrence of offences of a known type;

(iv) Crime risks are, as a rule, taken into account either by including penal provisions in the substantive act or by a referral to the criminal code as regards the punishability of the offence.

No clearcut decision exists as to which one or which ones of the four options should be favoured in Finland in this respect, and, consequently, the term 'crime risk assessment' is not very often found anywhere in the Finnish documents and in the Finnish discussion. On the other hand, the wider concept 'mainstreaming the crime prevention perspective', encompassing also the assessment angle is sometimes used. The meanings of these expressions are, as a matter of fact, more or less synonymous, the basic idea being that authorities in different administrative sectors should develop strategies for crime risk assessment in their own law reform activities. The newness of the idea to assess crime risks should, accordingly, be contrasted with the fairly common use of other types of assessment procedures in law drafting. Today, for example, the main-streaming of economic and environmental considerations, respectively, in decision-making is considered more or less self-evident[5][6]. The assessment of crime risks, on the other

[5] About the obligation to assess both the economic and environmental impacts of a measure when preparing legislativa drafts, see note 4 *supra*, p. 7

[6] However, although consideration of the economic and financial effects of new legislation has been received fairly well in Finland, the assessment of environmental impact has, as a matter of fact, become evident quite recently. When Ervasti and Tala analyzed all the 1994 Government bills in this respect they found out that over one half of

hand, is not, as yet, equally valued as an initial basic issue to be observed by law drafters, notwithstanding the notion that crime occurs because the effects that public decisions have on crime are not taken into account except in the case of decisions that directly affect the criminal justice system and the activity of criminal justice practitioners.

At the same time, the current infrastructure of the Finnish law drafting system would seem to make it easily realizable to incorporate the assessment of crime risks as a subcategory of economic considerations in this field. It is obvious that not all types of crime risks can be conceived to bring in economic consequences in their wake, but all the same, calculations amounting to estimates of crime costs are presented all the time as background information for decision making in the field of crime prevention and criminal justice. Similar calculations ought to be possible always when a legal instrument to be drafted is considered to touch upon the potential for profit making - legally or illegally. This holds particularly true of all categories of organized crime.

Accordingly, my aim in the next four chapters is to explore more in detail what is the emphasis of the practical proposals and presentation of ideas in this field in Finland.

3. About concrete steps already taken to tie up crime risk assessment to the Finnish legislative process as an inherent part of the drafting procedure

In the national crime prevention programme approved by the Council of State, on March 4, 1999, It is stressed that "all committees and other preparatory bodies should be required, when proposing reforms (even if these do not directly affect criminal policy) to assess the impact of the reforms on crime. If such an assessment is not made, the reason for not doing so should be mentioned. The goal is to make planners and decision-makers

them were assessed from the point of view of the public economy (but, on the other hand, the economic impact on households, commerce or the economy in general was very rarely assessed), while only about one-tenth of the bills during that year contained a reference to environmental effects, the most probable explanation being that "apparently it had not been possible in the drafting of the bill to recognize or assess its environmental effects" (Ervasti, K. & Tala, J., "The Drafting of Legislation and an Assessment of Its Impact in Finland". Ministry of Finance, Public Management Department & National Research Institute of Legal Policy: Helsinki, 1997, pp. 32 & 35 in particular).

also realize that other direct criminal policy reforms may have a significant impact on crime, and to encourage them to assess the impact of the reforms from this point of view. In this way, an attempt should be made to mainstream crime prevention into public decision-making"[7].

To take an example, the recent Land Use and Construction Act[8] has established the institution of a safe living and operating environment as general goals of planning. Safety has also been as one of the articulated requirements for the contents of general plans and zoning plans. Standards on planning and constructing a safe living environment is one way to render more specific the aspects that should be taken into consideration. Such standards are being currently drafted by the European Committee on Standards. In the year 2001, the Committee intended to publish four standards on crime prevention through regional planning and construction. After the standards have been finalized, the national implementation, for example in the form of obligatory provisions on construction, will be initiated[9].

4. The focus in Finland is on ordinary crime, not on organized crime

It must, however, be kept in mind that in Finland so far the issue of crime risk assessment has been deliberated at a fairly general level. Further, it must also be observed that the main driving force in the country in this field at the moment, the national crime prevention programme is focused on all types of offences. The main focus, accordingly, is thus on crimes producing unsafety and on crimes that the citizens may be confronted with in their everyday life. In this respect, also the Council of State strategy for the prevention of economic crime, 1999 to 2001, and the projects concerning violence against women, respectively, are particularly mentioned[10].

Likewise, as already stated, the programme makes it clear that the planning of communities and the environment can influence crime and safety. This is particularly true of the zoning of urban areas, since zoning sets the external framework for land use and the interaction of the people using the

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[7] "Turvallisuustalkoot; kansallinen rikoksentorjuntaohjelma". Oikeusministeriö, yleisen osaston julkaisuja 2/1999. Helsinki, 1999, p. 13 (boldface in the original text). On the English language version of the programme, see note 19 *infra*.

[8] See Statute Book of Finland 132/1999, para. 5.

[9] Cf. note. 8 *supra*, p. 15.

[10] Cf. note 8 *supra*, pp. I - II.

land. Zoning also affects individual buildings and their yards and parking spaces, as well as public spaces such as streets, markets and parks. The planning of traffic routes and other traffic environment affects traffic-related crime and traffic accidents. It may further be noticed that community spirit that is fostered by supportive social networks has a calming influence on feelings of insecurity and on crime in urban cultures that emphasize individuality. Consequently, land use and zoning might be envisaged as an instrument of investing in the conditions for viable local communities and pleasant as well as safe residential communities.

It is safe to emphasize, on the other hand, that in Finland very little has been said about crime risk assessment as a preventive instrument in the context of organized crime. Even in the Council of State strategy for the prevention of economic crime, 1999 to 2001, approved on 22 October 1998, and already mentioned on the previous page, it is possible to find only indirect references to the risks posed by organized crime. Perhaps not surprisingly, at the same time one of the main points of the strategy is, *inter alia*, to strive for the minimizing of opportunities to commit offences. Three objectives are envisaged in this respect: (i) the ability and willingness of the administrative and law enforcement authorities to prevent economic crime and activities within the parallel economy in the course of their daily work, (ii) the introduction of legal provisions, by means of law drafting and bills, to eliminate economic crime and activities within the parallel economy, and (iii) the maintenance of an efficient enough control structure, including a sufficient cooperation among competent authorities[11]. A few case examples with the potential of national or transnational organized crime risk connotations are listed in the strategy paper. One of them is the risk minimization of the ownership of transferable securities by foreign interests and of the nominee registration of book-entry securities. Another one relates to the ascertainment of the reliability of the tenderer in the context of public procurement of commodities and services. The third one concerns the transparency as regards the recipients of public subsidies. Lastly, it is proposed that an extensive study on the ways and means to prevent labour offences and environmental offences is to be conducted.

Another document dealing with the risks of economic misappropriations, albeit on a much more practical level, and not directly looking at the issue from the organized crime angle, is a memorandum produced a few years

[11] The Council of State strategy for the prevention of economic crime, approved 22 October 1998, item 5.5.

ago at the Finnish Ministry of Trade and Industry[12]. The author analyses the risks associated with the subsidies to enterprises granted by the Ministry and proposes measures to prevent subsidy crimes and misappropriations. He is able to prove, on one hand, that the number of offences in proportion to the total of all subsidies to enterprises granted by the Min- istry is insignificant. Since the potential for offences in this category, on the other hand, seems to be on the increase, the author urges the decision-makers at the ministerial level to approve the already existing draft guidelines for anticipative preventive measures, and to control that the rules are observed as an inherent phase of the granting procedure. This is also what has taken place since 1995[13].

Also a couple of statements in the field of taxation legislation can be interpreted as anticipative expressions in this respect. Thus, in recent legislation it is stipulated that information in the preliminary tax withholding register concerning the beneficiaries entered in that register is publicly available, and the same holds true of persons, enterprises and associations, in terms of the date they have been entered into the value added tax register[14]. This is supposed to prevent abuse due to the fact that only persons and bodies attending to their prepayments of taxes stay registered. Defaulters are removed from the register, and, for example, initiators of public bidding may eliminate tenderers with previous tax defaulting by cross-checking the register. Tax administration may also on its own initiative and without risking confidentiality forward, for example, to prosecution authorities and to authorities responsible for the pretrial investigation taxation information relevant to the pretrial investigation, prosecution and court hearings of tax

[12] Kalliokoski, T., "Kauppa- ja teollisuusministeriön tukijärjestelmä, sen kautta myönnettyjen tukien riskikartoitus ja toimenpiteet avustusrikosten ja väärinkäytösten ehkäisemiseksi (The system of public subsidies of the Ministry of Trade and Industry, a risk assessment of the subsidies granted by it, and the measures to prevent subsidy crimes and misappropriations)". Kauppa- ja teollisuusministeriön monisteita (Ministry of Trade and Industry, internal memorandum) 12/1995. The subsidies studied by the author are of a purely national character - no European Community subsidies, for example, were included (at the time the study was conducted Finland was not a member state of the EC).

[13] We have to bear in mind, though, that since 1995, both the scope and the control of these type of subsidies have been altered due to the fact that since 1 January 1995, Finland is a member state of the European Union.

[14] Law concerning the publicity and maintenance of confidentiality of taxation information, No. 1346/1999, para. 9.

and accounting offences on the condition that the information is destroyed when not needed any more[15].

5. The future perspective

As already pointed out, the national crime prevention programme recommends a wide acceptance of the practice of assessing the impact of reforms on crime[16]. It seems, however, somewhat optimistic to assume that this recommendation would be given serious consideration in the context of law drafting immediately or in the near future. A working group at the Finnish Ministry of Justice with the task of upgrading the law drafting guidelines currently in force and which were supposed to make public its proposal by the end of April 2000, is not going to include the crime risk assessment angle in the text of the revised guidelines[17].

As indicated by the recent law reforms as regards anticipative efforts in respect of taxation and other economic offences, however, a more indirect approach seems more probable. That approach seems to be the one of incremental policy; a step-by-step course to introduce minor law reforms in this respect in various relevant fields of law enforcement, thus allowing a wider freedom of action to competent control authorities. Announcing, for example, publicly the enhanced cooperation and exchange of information between the police, on one side, and the taxation authorities, the customs agencies, and also the agencies granting various kinds of public subsidies and benefits, on the other hand, will signal to potential perpetrators that they should revise their own risk assessments.

6. Relevant literature

Not very many relevant works have been written in Finland on crime risk assessment, on the whole, and even less in the languages of English, French and German. Besides the English language version of the national crime prevention programme[18], which has been referred to repeatedly above, an-

[15] See note 15 supra, para. 18.
[16] See note 8 *supra*, p. 8.
[17] See note 5, *supra*.
[18] "Working together for a safe society: The national crime prevention programme". Ministry of Justice/The National Council for Crime Prevention: Helsinki, 2000. There is also a Swedish language version of the document: "Trygga tillsammans; Ett

other text written in that language should be mentioned in this context. It is the article "Improving the quality of law drafting in Finland" by *Tala, J., Korhonen, J. & Ervasti, K,* in **The Columbia Journal of European Law,** vol 4, no. 3, Summer 1998, pp. 629 - 646. In it they write: "When examining the effects of a law - whether beforehand, during the drafting process, or afterwards, in connection with the evaluation - it is important to stress the holistic and systematic nature of the analysis" (p. 634). They point out that almost without exception, individual laws seem to have side effects in addition to the intended effects on their appointed target groups. According to them, some of the effects are unforeseen, and continue that "by definition one could not expect a drafter of legislation to recognize 'unforeseen effects' and report them" (p. 635). The authors analyze the frequency of two categories of impact assessment in the proposed legislation in Finland, namely the assessment of economic impact and the assessment of environmental impact[19]. Assessment of crime risks is not mentioned. They conclude that "the implementation of law and other public programs has been studied quite extensively in many countries, albeit to only a limited degree in Finland" (p. 644). Their proposal is "the establishment of a high standard legislative drafting culture in the government (...). The culture of legislative drafting encompasses at least the procedures and methods of the planning of new regulations, values that steer the drafting work and standards concerning the content and quality of the law drafting" (p. 645).

In addition, the following reports dealing with the issue in hand should be mentioned:

- *Lehtola, M. & Paksula, K.,* "Talousrikosten tilannetorjunta (Situational crime prevention and economic crime)" (with summary in English). **Oikeuspoliittisen tutkimuslaitoksen julkaisuja 142** (National Research Institute of Legal Policy, Publication no. 142). Helsinki, 1997.

The study assesses the actions of the authorities in relation to the different types of economic crime and from the point of view of cooperation between the authorities and the general requirements of legislation. So far, the authors claim, there has been almost no research on whether situational crime prevention measures can be applied to economic crime. The primary motive for this type of crime is generally economic benefit, and the meth-

nationellt brottsförebyggande program". Justitieministeriet, allmänna avdelningens publikationer 4/1999.

[19] Cf. note 7 *supra.*

ods of committing the crime are often planned and rational. The authors note that economic crime serves as a measure of the credibility of the legal system. Consequently, they would like to find measures that could reduce the opportunity for that kind of crime. The possibilities of preventive measures tailored to the rational choice perspective, the routine activities approach, and the increase of risk are examined. The study data shows that efforts to prevent economic crime have typically lacked a sense of overall responsibility, and suffered from a piecemeal approach. The main conclusion is that economic crime could be prevented more effectively by applying a situational crime prevention strategy in a deliberate and planned manner, for example by increasing the transparency of business activity, by decreasing the opportunity for crime, and by taking a more wide-ranging approach to control, with measures that are softer than the traditional measures used in criminal law. Although the role of organized crime is not considered as a separate category in the analysis, several of the ideas presented might be conceived to make life more difficult for the offenders in this category of crime. The authors propose, *inter alia*, that the investigation of economic crime should be concentrated in the hands of a new authority, one of the tasks of which would be to assess the impact of legislation under preparation from the point of view of the prevention of economic crime.

- *Laitinen, A.*, "The problems of controlling organizational crime", in *Alvesalo, A. & Laitinen, A.*, "Perspectives on economic crime". **University of Turku, publications of the Faculty of Law, Criminal Law and Judicial Procedure**, ser. A:20. Turku, 1994, pp. 44 - 66.

In the article, Professor Laitinen examines, *inter alia*, the problems of controlling organizational crime - *nota bene*, not organized crime[20]. His analysis results in listing a couple of obstacles that make the development of effective controls over organizational crime problematic. First he looks at the ideological obstacles and claims that "it is not so easy to envisage organizational/corporate offences as conventional crimes", since "organizations are strong and they are able to resist the powers and controls of the state". He further points out that the state is dependent on enterprises and organisations, and therefore their reactions must be taken into account. Second,

[20] By organizational crime, Professor Laitinen understands "a form of criminality which is possible only in connection with an organization. It is a form of criminality which is bound up with the operations of the structures of society" (cf. Alvesalo & Laitinen, p. 7).

he mentions the legal obstacles and continues that "political decision makers are exercising some kind of symbolic legal policy", the root cause of which is "the stability of principles and definitions created a long time ago. In those days the main problems were individual offenders, individual behaviour and relationships between individuals. That is why the legislation itself is a problem. It does not very easily touch collective actions, and organizational crime cannot be proved by using individual arguments". He also presents a few structural features which weaken opportunities to control organizational crime: (a) compared to individual offences it is difficult to uncover and investigate organizational crime, (b) often it is difficult to define who will be prosecuted, since usually the cases are wide and multidimensional, (c) like any defendant, corporate offenders are reluctant to cooperate with the prosecutor, and (d) often bar to prosecution by lapse of time as regards offences in this category. In conclusion he declares that adoption of the principle of reversed burden of proof should be considered, since "it is difficult to find unambiguous evidence to prove illegal organizational activity", as he quite correctly comments. In his text Laitinen does not bring into the open the concept of crime risk assessment, but the remedies and obstacles to them discussed by him could, *mutatis mutandis*, be interpreted, all the same, to mean the encapsulation of the idea of risk assessment, but also of the problems associated with such an approach.

The main points of some studies in Finnish that discuss the matter more marginally should also be presented:

- *Laitinen, A. & Virta, E.*, "Talousrikokset; teoria ja käytäntö (Economic crime; theory and praxis)". **Poliisiammattikorkeakoulun oppikirjat (textbooks of the Finnish Police College)**, 2/1998. Oy Edita Ab: Helsinki, 1998.

Authors of the report which take up issues somewhat similar to the ones dealt with in the book "Talousrikosten tilannetorjunta (Situational crime prevention and economic crime)" referred to above, study by means of a mail questionnaire, *inter alia*, views in terms of prevention of persons responsible for investigating offences of this type in Finland[21]. Three broad categories of attitudes concerning preventive efforts emerge. 40 % of the respondents are of the opinion that the society should invest in prevention

[21] The distribution of the 434 respondents to the mail questionnaire was as follows: police officers 44 %, prosecutors 19 %, judges 8%, execution officers 14 %, taxation officers 10 %, and attorneys 5 %.

by emphasizing additional punishment and control. Another 40 % would like to invest in enhanced information dissemination and in educative measures as instruments for prevention in this field. An additional 20 % find an increase in internal and external cooperation among competent law enforcement authorities preferable. The respondents were also required to assess the threat posed by economic crime in the future. The assessments are quite pessimistic: two respondents out of three forebode that crimes in this category will increase and only 4 % estimate that there might be a decrease. Globalization, complicated and computerized procedures in the realm of economic life, and the Common Market/European Union integration are given as arguments for the increase.

- *Hakman, M.*, "Sata konkurssia; verotarkastuksiin ja asiantuntijahaastatteluihin perustuva tutkimus konkursseihin liittyvistä rikoksista (One hundred bankruptcies; a study of criminality connected with bankruptcy situations)". **Oikeuspoliittisen tutkimuslaitoksen julkaisuja 121** (National Research Institute of Legal Policy, Publication no. 121). Helsinki, 1993.

The aim of the study was to provide an overall picture of average bankruptcies. One hundred randomly sampled bankruptcy applications were scrutinized. The analysis of the material indicates that minor breaches of the relevant legislation are rather the rule than exception. Systematic and aggravated crimes are, however, exceptional. In about 10 % of the cases analyzed it was observed that the goal of the business operations from the beginning had been a systematic speculation at the expense of creditors. After bankruptcy these speculative business operations are often continued in another disguise. In a few advanced cases the construction was that of incorporating companies at several levels, utilizing intermediaries in the context of the assignments of assets, and sales and purchases of profit and loss statements. The already well-known fact that creditors are more interested in covering their losses than in bringing the matter to court and in making the perpetrator stop with the operations is also reinforced here. Consequently, the zeal of creditors to report offences is, obviously, minimal. An additional factor making the prevention and control efforts of the law enforcement system in this field less efficient, according to the author, is that the system often seems to have a very limited view of its own powers and possibilities.

France

ANNE KLETZLEN

Contents

Within the frame of the Falcone Project, the Max Planck Institute for Foreign and International Criminal Law, coordinating a comparative study, wishes to make available theories, research and information on the way how crime risk assessment can be integrated into the legislative process.

Within the process of creating new criminal legislation, crime risk assessment seems to constitute an adequate instrument in the prevention of organised crime. It allows an insight into the possibilities of creating by legislation conditions that favour the development of certain forms of crime, especially white-collar crimes. Thus, the prohibition of narcotics has favoured the emerging of an illegal drug market. Furthermore, the prevention of organised or white-collar[1] crime can hardly be conducted from the traditional criminological approaches (individual, situational and social) since this delinquency is characterized by economic reasoning, rational actors and illegal profits.

Such an approach supposes that the prevention of crime is part of the national legislators' tasks. Still, in France, an absence of questioning on crime prevention seems to mark the legislative process[2]. In criminal matters, new legislation often comes up under the pressure of events: evasion of a prisoner, or the involvement of political personalities in affairs of corruption[3]. In that way, the preparation of criminal legislation is regularly characterised by an absence of reflection on its consequences and on the necessary means to put it into action[4]. In a general way, criminal laws tend to suppress certain forms of behaviour and not to prevent them. Prevention is finally realised by the double function of criminal laws: by penalising certain behaviour, the legislator intends to prevent their commitment. This is notably the case in traffic offences where the public authorities hope, by means

[1] Cf. Quéloz, 1999, who shows that there is no reason to distinguish organised crime and white-collar crime.

[2] Cf. Enguéléguélé, 1998 ; Delmas-Marty, 1985.

[3] This is illustrated among other examples by the project of the commission des Lois of the Assemblée Nationale to restrain the delay of the prescription of the offence of abuse of social goods following the accusation of the mayor of Lyon, former minister. This project, which was given up, tended, by modifying the jurisdictional regime of this offence, to protect political personalities implied in affairs of corruption. In France, the latter is most often persecuted by means of the offence of abuse of social goods and of concealing this offence.

[4] For example, the institution of specialised jurisdiction in matters of economy and finance in 1975, was not followed by the creation of further offices of judges or a training of judges in this field. This facility was thus not applied because of a lack of means.

of a severe criminal regulation, to direct the drivers' behaviour facing the dangers of traffic. Prevention thus goes with repression.

In such a context, the crime risk is not the subject of any foregoing assessment. As we will see, it is dealt preferably with *a posteriori*, notably by policies of prevention realised by the controlling agents.

But, in parallel, with concern about the effectiveness of public action, the public authorities have instituted mechanisms of public policy assessment, and, as a minimal means, laws. This preoccupation was followed by a movement of rationalisation of the production of regulations. It brought along the introduction of a procedure of foregoing law assessment, the impact study. This procedure, planned as an aid to public decision-making, aims at anticipating the economic, social and judicial effects of the regulations in view. Although not specific to criminal law, and, as a consequence, not relevant to the question of crime prevention, it could be a means to install risk assessment.

This is what we are going to emphasise after having presented the way how the crime risk is handled in France and the still marginal character of law assessment. We must remember that the works and research existing on the latter practically do not effect criminal law, but civil and administrative law. Furthermore, the fields of crime we will mention, on the whole, are completely different from organised crime.

1. The handling of the crime risk and the prevention of white-collar crime

The concept of *organised crime* does not exist in French law. The legislator penalises certain specific forms of organised crime, such as corruption, money-laundering and tax fraud.

Within these three sectors, the controlling institutions, outside of law, realize a policy either of risk anticipation , such as in the field of corruption, or of partnership with those companies and bodies concerned, such as in the field of tax fraud and money laundering.

1.1. The management of the crime risk

A legal definition of **organised crime** does not exist in French penal law. This is covered by the commission of an offence determined by the aggravating circumstance of a *bande organisée*. Thus, for example, drug trafficking committed in an organised gang does receive a criminal qualifica-

tion. An organised gang is broadly characterised as a group or an understanding formed to commit a breach of law (art. 132-71 of the code pénal). Such a notion is similar to the qualification of *association de malfaiteurs* (incriminated by Art. 450-1 to 3 of the code pénal). The latter offence seems to constitute an insufficient arm with which to fight organised crime[5]. This could be the reason for the recent draft bill intending to introduce the *bande organisée* in economic and financial matters.

The law of January 29th, 1993 on the financing of political parties and the law of May 13th, 1996 instituting a general offence of money laundering aim at capital gained from the activities of *criminal organisations* (law de 1993) and of *organised crime* (law de 1996). A circular from the ministry of justice dated March 1995, provides a rather vague definition: the notion of organised crime covers criminal or delinquent actions which are the deeds of structured groups, most often acting on an international level, whose aim is to search for considerable profits before entering the legal circuits.

At a time when the worlds of money and of politics penetrate the sphere of the courts, manuals on the prevention of criminal risk in the fields of economics and finance have been published to be used by those professionals concerned. These manuals, edited by legal practitioners, aim at preserving these professionals against eventual penal prosecution. From this perspective, they present an overview of the different offences and following sanctions and the means to be used to limit the crime risk[6]. Considering the latter subject, large companies do not hesitate to recruit former judicial officers[7].

The development of the crime risk can generate changes in the behaviour of both the controlling agents and of companies concerned with white-collar crimes. Researchers and practitioners have recently underlined their interest to start research on the subject[8]. In the same way, the controlling agencies put into action a policy of anticipating the risk of corruption as well as a policy of partnership with those institutions and companies concerned with tax fraud and money laundering.

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[5] Savona, 1996.

[6] E.g. Antona, Colin, Lenglart ., 1997 et Auby, Moraud, 1998.

[7] Séminaire européen du GIP sur *la délinquance économique et financière comme criminalité organisée. Actions nationales et internationales,* Paris, 25 et 26 novembre 1999 (not published).

[8] Conclusions du séminaire européen du GIP sur *la délinquance économique et financière comme criminalité organisée. Actions nationales et internationales,* Paris, 25 et 26 novembre 1999 (not published).

1.2. The policies of anticipation and of partnership

Administrative structures are charged more specifically with the prevention of certain aspects of economic and financial delinquency. Their mission is to coordinate, analyse and technically assist the investigating services concerned.

1.2.1. The policy of anticipating the corruption risk

The *service central de prévention de la corruption* (SCPC) was created in 1993, within the Ministry of Justice. Directed by a judicial officer, it is composed of civil servants from different fields of administration, including customs and the police. It centralizes the information necessary to the detection and prevention of breaches of law, provides advice for the administrative authorities in matters of prevention, and, should the occasion occur, assists the judicial authorities in the case of penal prosecution. This service has developed a policy of anticipating the risk of corruption: it consists, to prevent any corrupting action, of "*reading the law, in a way, from the point of view of someone who could exploit its potential weaknesses. Repairing the vulnerabilities, examining the way how the text can be turned is a form of anticipatory management*"[9].

By the description and anticipation of the risk, such a policy tends to develop schemes of the modes of operation of corruption. These are stressed in various fields of action: international commerce, decentralisation, lobbying, public markets etc. The elaboration of these schemes requires a method of analysis inspired by hearing frames and numerous procedures, referring to different branches of law (commercial, fiscal, concurrence...). The anticipation of the risk also needs to take the means to face it and equip the civil servants with adequate instruments[10]. An annual report of activity of the *service central de prévention de la corruption* is addressed to the prime minister and to the Garde des Sceaux. It constitutes a decision aid.

This policy of anticipation seems specific to the field of corruption. At least, it is known only in this sector.

1.2.2. The policies of partnership in matters of tax fraud and money laundering

The policies of partnership do not appear in the same form when aiming at the prevention of fiscal delinquency and money laundering.

[9] Giovacchini, 1999, 99.
[10] Giovacchini, 1999, 95-96..

In fiscal matters, there is a partnership between the customs administration and private companies to help them " improve their comprehension of customs mechanisms and their information on the most advantageous procedures in the payment of duty. The aim of this partnership is two-fold: to make the actions of the customs officers more profitable (by greater efficiency of administrating agents working preventively) and to help the private companies to autonomously handle their tax records permitting them to reduce their industrial and financial costs and to enlarge their gains in productivity". The administration so uses persuasion and means that are not coercive[11].

Another form of partnership has been set up to control money laundering. A specialised service was instituted in 1990, at the heart of the administration of the Treasury : TRACFIN (traitement du renseignements et des actions contre les circuits financiers). The service receives declarations of suspicions of sums issued from drug traffickers and criminal organisations from banks, financial and real estate intermediates, the notary's offices and likewise. The declaration of suspicions is not automatic: the financial and real estate bodies themselves judge the suspect or fraudulent character of money transactions. A draft bill intends to make these be reported automatically by its local origins.

So as not to be implicated in affairs of money laundering, large banks have instituted anti – money laundering departments. And, public service companies have adopted codes of conduct.

Until today, the research done so far in the field of organised crime, reports on the effective national regulations which they replace within the European context and compare them to their equivalents in other European countries. Just one empirical study on the use of the means of confiscation in the battle against money laundering has been realised[12]. It dealt with the assessment of the effectiveness of these sanctions in the field of money laundering. The study did not touch upon the problem of law assessment.

2. Law assessment, a practice still marginal

The topic of assessment is a subject for literature and research; they concentrate mainly on public policies. The assessment of laws, especially criminal laws, is still a practice only marginally used. For the legislator

[11] Belloubet-Frier, Timsit, 1993, 637.
[12] Godefroy, Kletzlen, 2000.

promulgates either experimental laws, or – and this is often the case in "responses" to delinquency – pays attention to earlier experiences.

2.1. From public policy assessment to law assessment

The redefinition of the role of the State[13], has since then centred on the attentions and needs of the administrated, and has generated questioning on the efficiency and effectiveness of public action. This problematic nature, of asking questions about the situation of the State and its relationship to society,[14] has generated a need to assess public policies. The renewal of public action is its main goal.

2.1.1. Public policy assessment

It is in the frame of State Reform that the first examples of public policy assessment realised by the executive power came up. Created in the late 1980s, they attempt to help in public decision-making and accompany the policies of those days : politique du RMI (revenu minimum d'insertion), politique de la ville ...

A decree of January 22, 1990, instituted assessment as the " new repertoire of action of the French administration" [15]. It was to find out "if the judicial, administrative or financial means put into action, produced the effects expected from this policy and achieved the goals assigned to it"[16].

From this perspective, three instances are directed at the commissariat général concerned. The inter-ministerial committee of assessment, presided by the Prime Minister, is charged with coordinating governmental assessment policy. The national fund of assessment development permits the financing of assessment projects to be realised. The scientific committee of assessment, whose members are nominated by the President of the Republic, gives advice on the projects and assessments realised. Assessment is thus effectuated at the initiative of the executive power.

The assessment of public policies practiced within the last few years is an assessment *ex post,* that is, an analysis of the realisation and the effects of public policies. Until today, the thirteen assessments carried out have mainly concentrated on local and employment policies. It seems that in criminal matters, only the policy of road security was subject of an assess-

[13] Cf. the document *Réflexion préparatoire à la réforme de l'Etat,* 1996.
[14] Conseil scientifique de l'évaluation, 1992, 18.
[15] Muller, 1998, 122.
[16] Muller, 1998, 122.

ment by the Cour des Comptes in 1992. Meanwhile, these assessments hardly reflect on the political decisions made. In fact, the timely distance between budgetary execution and assessment – on average two years- is an obstacle to the integration of the conclusions of the latter into the decision-making process[17]. Based on this fact, assessment fulfils only an informative function.

This is the final outcome of the researches presented by the instances of assessment themselves. The scientific council of assessment, in different reports, underlines the plurality and heterogeneity of practices. It also insists on the importance of methods and procedures rigorously followed[18]. This is why the scientific council has edited a *petit guide de l'évaluation des politiques publiques* in which it defines the rules of method of general application [19].

It is undoubtedly for the diversity of practices and methods of evaluation that the commissariat général concerned lanced in 1993, a call for offers titled *Evaluer l'évaluation.* The researchers who answered to it, Lascoumes and Setbon, both political scientists, centred their reflection on the research *"of what was understood as " methods" in earlier assessments "*, and worked out *"the role they played in the process and its impact on the results gained"*[20]. Afterwards, they worked out models of the assessments produced [21].

The question of methods is not the only preoccupation of the researchers. Some underline the uncertain status of assessment in France[22]. All, on the other hand, agree on the plurality of assumptions connected to that notion. One can, following Rangeon, define it simply as *"a methodical way aiming at measuring the results of an activity with view to improving its efficiency"* [23]. All show equally the diversity of its goals[24]: helping with decision-making, strengthening respectively assuring the legitimacy of public action, participating in the rehabilitation of politics[25]. Sometimes the insufficient character of assessment with respect to certain aims is enlightened, notably

[17] ENA, 1999, 970 ; Conseil économique et social, 1991, 38.
[18] E.g. Conseil supérieur de l'évaluation, 1992.
[19] Conseil supérieur de l'évaluation, 1996.
[20] Lascoumes, 1998, 23 et Lascoumes, Setbon, 1996.
[21] Lascoumes, Setbon, 1996.
[22] Cf. e.g. Duran, 1999.
[23] Rangeon, 1993.
[24] Kessler, 1998, Duran, 1999.
[25] On the latter point, Duran, 1993.

those who help in decision-making and the efficiency of public action[26]. This observation can be explained by the fact that the assessments practised so far are assigned to *normative instruments used to frame and diffuse* public policies [27]. And, since all politics integrate a normative dimension, this one must also be the object of an assessment with adequate tools [28].

2.1.2. Evaluation of laws

Preoccupations different from those which preside in the evaluation of public policies speak in favour of law assessment. Actually, the transformation of the role of State has generated a re-composition of the functions of legal rules.

Today, acts and decrees tend less to normalise behaviours than to reorient social changes or social practices. As Jeammaud and Serverin remind us, this is notably illustrated by the Act on the RMI (revenu minimum d'insertion) destined to reduce social exclusion and eradicate the great poverty[29]. This instrumentalisation of law has brought with it the need to assess legal rules, to know their effects. This need was further strengthened by the practice of experimental laws which, as we will see later, bring about an example of assessment, as well as by the phenomenon of legislative inflation. The identification of the latter by both public authorities and lawyers [30] has given rise to a movement of rationalisation of the legislative production.

It is from this perspective that the parliamentary offices of assessment were created. From 1983 on, Parliament instituted, inspired by the American *Office of technology assessment*, an office of assessment of scientific and technological choices. This body, composed of eight députés and eight senators and assisted by experts, was appointed to inform the nation's representatives of the treatment of problems in the field of science and technology. After a difficult start, the office of assessment of scientific and technological choices has delivered numerous reports, notably in the field on environment and bioethics. But the influence of these reports on the production of legislation is very indirect [31].

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[26] E.g. Duran, Monnier, 1992, Loiseau, 1996, Duran, 1999.
[27] Lascoumes, 1990.
[28] Jeammaud, Serverin, 1992.
[29] Jeammaud, Serverin, 1992, 264.
[30] Notamment Carbonnier, 1994 et 1996.
[31] Braud, 1996, 9.

This is the reason why the senators reacted with greatest scepticism on the institution of two new parliamentary assessment offices, one for public policies, the other for legislation, by two acts of June 14, 1996[32]. Both are composed of member s of parliament who can commission researchers and experts with studies. The first of these bodies is meant to offer an independent budgetary expertise to the députés and senators. The second's function is to analyse the adequateness of legislation to the situations it rules. It also has a mission to simplify legislation. The latter has a prolonging effect on the work of the superior commission of codification, which cannot codify but does *droit constant* [33]. It might seem that for instance, these offices whose right of initiative is borne by the députés and senators had only *"produced but two obscure reports nobody has ever heard about"* [34]. The reports of evaluation are only transmitted to those who have commanded them.

The question of assessment of legislation preoccupies sociologists and lawyers. The first are interested in the relationships between the legislation and the social practices and behaviours. Jeammaud and Serverin furthermore show that the assessment of legislation against social practices brings limits[35]. The second ones, on the other hand, deal with, for example, the relation of the effects produced by the legislation and the respect of certain legal principles. For the latter, legislative assessment consists, following Bergel's definition, of an methodical analysis of the effects observed or foreseeable of legal rules[36]. To precise the goals of the latter, it would be convenient to develop a methodology of assessment of legislation, notably with a view to the state of the law in France[37]. The works of these lawyers of civil or public law follow the line of the thesis of Mader, a Swiss lawyer[38].

Legislative assessment here fits into "a frame different to the one presiding the analysis of public policy, but one of a discipline which aims at the rationalisation of legislation, legistics" [39]. This is the science of legisla-

[32] Cf. Braud, 1996 ; Maury, 1998.
[33] Braud, 1996, 10.
[34] Rouban, 1998, 115.
[35] Jeammaud et Serverin, 1992.
[36] Bergel, 1995..
[37] Bergel, 1995.
[38] Mader, 1985.
[39] Morand, 1998, 88.

tion[40]. Morand, whose works reveal a legal problem, distinguishes formal legistics from material legistics. The first refers to the technique of law-making. The second centres on the optimisation of the effects produced by legislation, its efficiency. It suggests a structuring of the legislative process into different phases: definition of the aims of the legislator, retrospective analysis of the earlier situation, prospective analysis, a catalogue of measures to take in order to achieve the aims determined before, definition of a process of realisation and institution of mechanisms of assessment [41]. Material legistics are in an embryonic state, especially in France, where the lawyers are, by education, made sensitive only to the problems of the execution of legislation[42]. Still, it is constituted step by step by inter-disciplinary reflections of lawyers who are interested in public management, legislative and public policy assessment.

Following Mader, assessment *ex ante* or, to use his expression, *prospective assessment,* is dependant on techniques such as simulation, games, practical tests or the recourse to experimental legislation[43]. In France, the practice of the latter is developing. Its progress still seems more than marginal in criminal law. For, in that field, the public authorities, or more precisely the Ministry of Justice, often legalise practices realised before in a given legal frame.

Legislative assessment becomes thus more concrete by "trial legislation" and "trials before legislation"[44].

2.2. Experimental laws and legalised practices

The law, voted on by the Representatives of the Nation, incarnates the general will. The law rests on a postulate of generality, of stability, of immortality. "*Incarnation of truth, of reason, of justice, the law appears as an incontestable and holy act, whose reasons cannot be doubted ; it could not be put to the test of reality*" [45]. This mysticism of law is fully opposed to the principle of experimentation. For this transforms the legislative process into an empirical phenomenon resting on an experimental policy. From that moment, the law is open to further questioning, which is a source of legal

[40] Cf. the collective work *La science de la législation,* 1988.
[41] Morand, 1995 et 1999.
[42] Morand, 1999.
[43] Mader, 1985, 46.
[44] Delmas-Marty, 1986.
[45] Chevallier, 1993, 122.

insecurity[46]. These remarks explain the rather modest development of experimental laws.

2.2.1. Experimental laws

The practice of a *"sociological legislation"*[47], has been widespread for a long time. Planned as a provisory mode of direction of behaviour and as a process of learning, experimental laws provide opportunities to assessment a few years after their realisation. This assessment, scheduled within the law at a determined date, may bring about legislative modifications.

This is illustrated by the law of January 17th, 1975, authorizing abortion under certain conditions, notably within deadlines. The law was object of a balance of application after a testing period of five years. It was then finally adopted in 1979. By authorising the voluntary interruption of pregnancy, the legislator intended to prevent the practice of secret abortions, a source of mortality for women. Then, the application of the text showed that there was neither an explosion nor a diminution of the number of abortions. But those abortions carried out after the legal deadlines still stayed high. The public powers thus failed to prevent this practice. For this reason, the department of health planned to prolong the legal deadline of voluntary interruption of pregnancy and initiated information campaigns about contraception at High Schools.

The larger part of experimental laws are completely foreign to the sphere of criminal law: one can quote among the most recent the Auroux laws of 1982, on industrial law, the law of December 1st, 1988 instituting the *revenu minimum d'insertion* (RMI= minimum introductory income), and the law of 1992, on bioethics.

It seems that the recourse to experimental laws is effectuated in politically sensitive domains such as abortion and bioethics, or when they are potential sources of social conflicts, as is the case in industrial law and social law. As Chevallier says, the *"time of experimentation aims at reducing the uncertainty how to obtain the consensus still lacking"* [48]. The assessment permits us to remedy the dysfunctions observed in the realisation and to technically adapt the institutions concerned[49].

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[46] Bergel, 1994.
[47] Jeammaud, Serverin, 1992, 264.
[48] Chevallier, 1994, 1091.
[49] Chevallier, 1994, 1091.

The assessment of the texts is effectuated by either the government or specific instances.

The assessment of the law decriminalising abortion and of the Auroux law on the right of expression of employees at work was realised by the government: it draws up, based on the information delivered by the interested departments, a balance of application of the texts at the time of the adoption of new laws[50].

The mechanisms of assessment of the RMI are, following all authors, the most institutionalised ones. Since an inter-department delegation is charged with the supervision of the application of the text and the formulation of suggestions with a view to the improvement of the functioning of the system and to allow for all researches and studies it is considered useful. Furthermore, a national commission of assessment relative to the RMI, composed of personalities chosen for their competence in the social sector, was created to appreciate the effects of the application of the law. Having carried out surveys, it has drawn up a complete balance on the application of the law and made reform suggestions. The latter was then included into the law of July 29th, 1992.

The assessment work "seems of particular importance with respect to its reach and ambitions: the objective was, at the same time, to institute a system of information delivering both quantitative and qualitative data not processed before, and to institute elements of appreciation permitting assess to the pertinence of the objectives of the law, and, in any case, to rectify and precise its forms." [51].

Meanwhile, as Chevallier observes, this mechanism of assessment is specific and disconnected from the general mechanisms of assessment instituted in January 1990 – which tends to relegate the latter to the general function of a study, apart from any effect on the specific legislative process[52].

2.2.2. Legalised practices

Certain laws generalise experiences made earlier in local application. This practice is old and anchored to legislative customs. The sanctions –or, more exactly, the "responses" to the breaches of law –seem to constitute a field much in favour of the experimentation of certain formulas.

[50] Chevallier, 1993, 132.
[51] Chevallier, 1993, 132.
[52] Chevallier, 1993, 132.

The field of road circulation provides a number of illustrations. Thus, at the beginning of the 20th century, after the commission for the revocation of the driving licence, the institution of the revocation of the driving licence, charged with sanctioning the non-compliance with the rules of road traffic, followed experiences made earlier by the Prefecture of Paris[53]. In the same way, in the 1990s, a law instituted courses sensitising on road security to give drivers the opportunity to re-obtain some of the points subtracted from their driving licences. There as well, these courses existed before their institution by the law. The department of Justice had created them as an alternative sanction for small traffic offences[54].

The experimentation of certain practices is not specifically linked to road traffic, it is found as well in other areas.

The law of 1970, prohibiting the use of narcotics has added the principle of the withdrawal treatment to the mechanisms of the treatment of drug addicts. The curative element of the law had already been tested in the Paris region[55].

The delay with the testing adopted in 1958, was preceded by experiences made from 1951, at four courts settled in different regions. In the same way, the institution of the TIG (travail d'intérêt général= work of general interest) by the law of June 10th 1983, went through an analogous process. Delmas-Marty underlines, with respect to these two cases "*that a legal frame existing before (the principle from which follows that it is up to the public prosecutor's office to have the condemnations executed, the task of the tribunal is to impose punishments) allows testing of a new measure whose large directing lines are already fixed, most often by reference to comparison of law (...)*" [56]. One can, in the same sense, mention other "responses" to urban delinquency empirically tested at the initiative of diverse prosecutors, then conceptualised by the department of Justice at the beginning of the 1990s : corresponding to practicality, mediation and real-time treatment. Criminal mediation and reparation was adopted by the code of criminal procedure in 1993[57].

A study deals with the assessment of the law from 1983, instituting the TIG. Its author, Cimamonti, reminds us that this measure has been, since

[53] Cf. Kletzlen, 1993.
[54] Robert, 1996.
[55] Cf. La loi n°70-1320 du 31 décembre 1970 sur la lutte contre la toxicomanie (auteur anonyme), *La semaine juridique*, 14-7-71.
[56] Delmas-Marty, 1986, 257.
[57] Cf. Robert, 1996, 80.

1982, in parts subject to "experimentation in the form of pilot experiences conducted from the legal frame existing in the field of certain courts of high instance"[58]. And, even though this is not an experimental law, that is, a law promulgated for a restricted period of time, a note from the director of the penitentiary administration of the ministry of justice, the Chancellery, considers that the realisation of the TIG implies the adoption of specific measures of assessment. The objective is to appreciate the real impact of the TIG and the means necessary to its development. To this end, the realisation of the TIG must be the object of an annual assessment by the Chancellery. Furthermore, the latter has commissioned several reports and studies on the subject. This assessing research was carried out by researchers including those from the department of Justice[59]. But this legislative assessment *ex post,* carried out notably within the frame of operations of the celebration of the 10th anniversary of the TIG, has not been integrated into the frame of public policy evaluation instituted in the 1990s. It does not associate with Parliament. Following Cimamonti, it seems that this assessment shows up rather as an enterprise of communication of the department of Justice than as an assessment in the strict sense of the word. Since assessment practised in this question does not aim at modifying the institution of the TIG: this is made clear by the fact that assessment was only started when the new code pénal was voted upon (1992). It will come into force at the moment of the ten year celebration of the TIG. What is more, it seems that the will to reform the latter is hardly shared by the legal professionals[60].

These same practitioners, supported in this respect by members of parliaments and énarques have favoured the adoption of a preceding law assessment procedure, the impact study, in order to remedy the multiplication of regulations and to facilitate the readability of the law [61].

[58] Cimamonti, 1994, 1284.

[59] Notably by researchers of the CESDIP : Cf. Barré M.D., Tournier P., Lecomte B.: *Le travail d'intérêt général : analyse statistique des pratiques,* Etudes et données pénales, Paris, CESDIP, n° 50, 1986 and of the service of communication, of studies and international relations of the penitentiary administration of the Chancellery: Cf. Cirba L., *Le TIG : peine et société. Etude documentaire,* Paris, Ministère de la Justice, et Kensey A., *Le TIG. la mesure d'une peine,* Paris, Ministère de la Justice.

[60] Cimamonti, 1994.

[61] Cf. Bignon, Sauvadet, 1995 ; ENA, 1999.

3. The introduction of impact studies into the legislative process

Fitting into the frame of law rationalisation was decided by the public authorities some years ago, thus the practice of impact studies originates from administrative law. It prolongs as well, somehow and in a different register, the practice of foregoing research.

3.1. Research preceding impact studies

Since the 1960s, the promulgation of laws is often preceded by earlier research aiming at assessing the effects of the measures favoured. This is what Carbonnier calls *pre-legislative sociology*. This practice had been experimented in the field of family law : the reform of marriage in 1965, reforms of succession, of filiation in 1972, of divorce in 1975[62], recently of adoption. It was also used with respect to the laws on bioethics, whose conception was preceded by surveys and several colloquia on the subject[63].

The technique of preceding research seems well-anchored to the process of the production of laws considering the family. In criminal law, its use is more rare, or at least, less known. To a certain degree, it was experimented onduring the project of the creation of a second degree jurisdiction in criminal matters. Actually, the services of the department of justice realised an impact study on the reform project; they carried out intensive surveys in the courts of appeal in order to ascertain the position of the judges on the question[64].

The public authorities also recourse to preceding simulations. This consists of a fictitious legal experimentation preceding the adoption of the law[65]. It is to "*measure the predictable effect of a legislation, either by recourse to indicators in numbers, as in matters of taxes, or by reports on the behaviour in question*" . The first of these preceding assessments was notably used in the field of taxes[66]. The second seems to have accompanied the adoption of the obligatory wearing of seat belts in the 1970s.

It is still so, as says Chevallier, that such techniques have largely developed in France, up to a point that "*simulation has become some sort of*

[62] Carbonnier, 1994 ; Cf. aussi Commaille, 1994.
[63] Cf. Memmi, 1989.
[64] Cf. débats parlementaires, A.N., 2° séance du 21 janvier 1997, p. 256 et suiv.
[65] Chevallier, 1993, 120.
[66] Chevallier, 1993, 120.

obligatory exercise" in the field of tax legislation[67]. And still, the tools of simulation are contestable, notably because they are not based on economic reasoning[68]. What is more, the adaptation of these models to reality is never perfect[69].

The impact study is a procedure imported from administrative law .

3.2. The impact study, an established technique of administrative law

The impact study was first established in environmental law, then in transportation law.

3.2.1. The impact study, an established technique of environmental law

Inspired by a model installed in the United States in 1969, the law of July 10th 1976, on the protection of nature, introduces the technique of the impact study[70]. It is a study preceding the realisation of public or private facilities susceptibly pre-assessable with respect to their effects on the environment [71]. The law makes them obligatory for all works, installations and facilities that have an important influence on the environment, either because of their specific nature, or because some of their characteristics exceed a certain technical base or financial cost. For more modest installations and works, the law organises a simplified procedure: the impact notice. Since then, almost 5000 impact studies have been realised annually, two thirds for private bodies, one third for bodies of the State or of local collectives[72].

The impact study constitutes a procedure of social and scientific survey[73]. It actually includes a detailed study of the site as a whole, the modifications the realisation of the project is to bring about, the measures to reduce or compensate the negative consequences for the environment as well as an estimation of the corresponding costs. Its realisation is the task of the master of the works. It is made public, and, if necessary, included into public survey.

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[67] Chevallier, 1993, 120 ; On simulation, cf. Laubadère, 1979.
[68] in Kessler, 1998.
[69] Bergel, 1995.
[70] Braconnier, 1998, 819 ; Lascoumes, 1994, 108.
[71] Definition given by le *dictionnaire de l'aménagement du territoire et du développement local,* Paris, La maison du dictionnaire, 1997.
[72] Lascoumes, 1994, 108.
[73] Lascoumes, 1994, 108.

It is thus a scientific expertise which supports the decisions of installation in order to reconcile the different interests concerned[74].

The procedure was actualised on March 5th, 1993. The field of application of the impact study has been notably enlarged to sports equipment and commercial centres. Its contents is strengthened in matters of cultural heritage and public security. It gives the department of environment the right to take its own initiative and freeze all procedure of authorisation for 30 days. The increase in the minimum demands of an impact study has increased from 6 million French franc to 12 million French franc[75].

As Lascoumes observes, "ecology has promoted procedures of decision-making, such as the impact study and the public survey, in which the experts' opinions win against the democratic confrontation of interests. The impact studies are carried out by the local and regional services of the industry. They consist of an assessment of the probability of risks, a calculation of costs and of alternative technologies. They often show that the choices of the adversary are neither rational nor justified from the scientific point of view" [76].

Ecology is not the only field of application of the impact study. The procedure has been further integrated into the process of decision-making in transportation law.

3.2.2. A priori assessment in matters of transport

In matters of transport, the law does not use the term of impact study, but speaks of *a priori* assessment. This has the same aim as the impact study: to trigger the decision and public debate.

The law of September 30th, 1982, on the orientation of internal transports puts up the principle of systematic *a priori* and *a posteriori* assessment for projects of infrastructure of important transports (canals, railway and road infrastructure, etc.) . The financial base is fixed at 500 million francs. A decree of application of this law further defines that *a priori* assessment must be realised at least six months before the decision is made, and the balance between two and five years after the opening of the infrastructures. A service of the department of transports, the economic and statistical observatory of transports, proceeds with these assessments[77].

[74] Lascoumes, 1994, 108.
[75] Lascoumes, 1994, 108.
[76] Lascoumes, 1994, p. 301.
[77] Conseil scientifique de l'évaluation, 1992, 117.

A priori assessments give rise to important studies, no doubt because of the irreversible character of the construction of transport. They are realised on the basis of essentially technical and economic criteria: economic cost of the project, fitting of the project into existing infrastructures, impact of the infrastructure on the geographical zone concerned, impact in the field of energy and regional planning of urban and rural areas etc. [78]

The *a priori* assessment record is integrated into the record which is subject to public surveys. It is brought to public attention, likewise, the balance of application. In practice, the latter is hardly ever realised and, if it is drawn up, "*it is often reduced to an observation of traffic evolution and economic profitability*" [79].

Thought as a help in decision-making, the impact study has become an instrument of law rationalisation.

3.3. The impact study, an instrument of law rationalisation

To control legislative inflation, the government decided to equip, since 1995, draft bills and decrees of Conseil d'Etat[80], and from 1998 on, draft decrees with impact studies[81]. The impact study thus does not draft bills, most of the decrees, decisions and circulars.

The impact study is a document annexed to a draft bill, distinct from the exposition of motives, containing a precise analysis of advantages expected and multiple effects of the texts [82]. Its introduction into the legislative process is part of an evolution common to numerous countries, since in 1995, an advice of the OECD urged the states to system the recourse to analyses of the impact of regulations.

3.3.1. The objectives of the impact study

This study is to examine a priori the texts in consideration " about society and the economy at short, middle and long term". It "notably deals with

[78] Conseil scientifique de l'évaluation, 1992, 118.

[79] Conseil scientifique de l'évaluation, 1992, 120 et 118.

[80] There are two sorts of decrees : the decrees of Conseil d'Etat which are acts of ruling adopted after having been transferred to the Conseil d'Etat for further advice and simple decrees promulgated by one or several ministers. The elaboration of the latter does not necessitate any impact study. Still, the prime minister favours the generalisation of the procedure for simple decrees, ordinances, projects of international accords or acts of community (Braconnier, 1998, 828).

[81] Circulaire du 26 janvier 1998.

[82] Circulaire du 21 novembre 1995 et ENA, 1999, 1007.

assessing the positive and negative consequences of the texts for individuals and legal entities and to draw from it the improvements expected in terms of social well-being" [83]. It should also analyse the macro- economic and micro-economic effects of the dispositions in view as well as their budgetary consequences.

To achieve this, the circular of November 21st, 1995, introducing the impact study into the legislative process defines seven categories[84] including the category of advantages expected from the adoption of a text. From this perspective, a prior assessment of the state of law and legal practices must show that " *the objectives in view cannot be achieved in any other way than by enacting new legal norms* " [85]. It must point out that "*the reform in consideration contributes to the clarification and simplification of applicable rules and, so, to an improvement of public security*" or that it is necessary to introduce an increase of complexity into legal decision-making [86].

Furthermore, the creation of new criminal sanctions must be justified. It is also advisable to prove that "the effectiveness of the new rules cannot be obtained by other means, such as the enforcement of pecuniary responsibility, civil, disciplinary or administrative sanctions or stimulating measures. The amount of the maximum sanction scheduled by the text must be justified by references to comparable infractions designated by the code penal"[87].

The impact study is object of a paper annexed to the exposition of motives of the draft bills and to the reports presenting the decrees of the Conseil d'Etat. It is realised before the editing of the texts and accompanies them all through their procedure of adoption. Their absence brings about the adjournment of the examination of the text by the instances associated to its elaboration (departments, Conseil d'Etat, Parliament etc.). Still, the circular of November 21st 1995, clearly points out that it is possible to realise "*a simplified impact study in case of emergency*".

The impact paper containing a cost-advantages balance sheet and an enclosure of supervision and assessment of the putting into action of the draft

[83] Circulaire du 26 janvier 1998.

[84] These categories are : expected advantages, impact on employment, impact on other general interests, financial consequences, impact in terms of administrative formalities on enterprises and individuals, consequences in terms of complexity of the legal situation, indirect and involuntary consequences.

[85] Circulaire du 21 novembre 1995.

[86] Circulaire du 21 novembre 1995.

[87] Circulaire du 21 novembre 1995.

bill or decree of Conseil d'Etat is realised by the central services of the departments developing the text. These services must "*use the whole of internal resources of their administration in terms of legal, administrative and budgetary expertise*". They also must cooperate with their "*service of inspection, control, investigation and assessment*". Furthermore, "*the association of local services in action, most of then charged with the realisation of texts constitutes an urgent necessity*" [88].

The impact study must "point out how the principal addressees of the suggested measures have been associated (by realising, for example, qualitative surveys, even including small samples)" [89].

3.3.2. The reach of the impact study

The practice of impact studies is not systematically applied. It seems that in criminal matters, only the draft bill reforming the jury court has been accompanied by a very precise and developed impact study. The whole of the jurisdiction was taken into consideration. The aim was to assess the means necessary to the realisation of such a reform[90].

The impact study was experimented for a year, from January 1st till December 31st, 1996. In spite of a rather negative balance formulated by the Conseil d'Etat in its 1998 public report[91], the Jospin government has decided to make it a permanent institution, to improve and complete it.

Most of the time, the studies prepared rapidly and somewhat delayed can be read as a paraphrase of the exposition of motives of the text in question[92]. Furthermore, they are realised by the offices of the department developing the draft bill or decree of Conseil d'Etat: They respond to a concern of legitimacy rather than a prospective assessment of the measures in view. This is why they do not contain a critical analysis and, for the same reason, do not suggest any alternative solutions. Their political character gives rise to contests. Therefore, the députés could question the assessment of the jury court reform project [93]. Parliament is thus free to contest the contents of impact studies [94].

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[88] Circulaire du 26 janvier 1998.
[89] Circulaire du 26 janvier 1998.
[90] Cf. A.N., débats parlementaires, 2° séance du 21 janvier 1997, p. 256 et suiv.
[91] Conseil d'Etat, 1999.
[92] Conseil d'Etat, rapport public, 1996.
[93] A.N., débats parlementaires, *J.O.*, 21 janvier 1997 ; Braconnier, 1998, 830.
[94] Braconnier, 1998, 830.

The counter-expertises effectuated came from the direction of budget of the department of finance. They integrated a budgetary and financial view[95] . One finds there the conclusions made by Lascoumes in the field on environment: "*the experts make up their assessment, not within the terms of their scientific competence, but starting from the categories and needs of their partners, making the expression of counter-powers and counter-expertise extremely difficult*" [96] .

For all these reasons, the practice of impact studies has not produced the effects expected : helping with decision-making by informing the executive and legislative powers about the effects and consequences of the draft bills and decrees of Conseil d'Etat[97].

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The impact study has not yet been fully integrated into legislative customs. Still, the Members of Parliament, the legal professionals and the government favour its use. Researchers recommend it not to be applied systematically, as it is a very heavy procedure. Many would prefer them to be realised by instances outside the departments developing the draft bills and decrees.

The Ministry of Justice proceeds while preparing draft bills by a systematic reflection on alternative tools and attempts to institute an impact study[98].

This could very well bring about a crime risk assessment, as at present it must contain an anticipatory analysis of the different effects of the laws, including the legal ones. But the department of Justice does not monopolize criminal law production anymore. It thus does not completely control risk assessment procedures. For this reason, it would be preferable to continue legalising procedures empirically tested. It is a means for the Chancellery to conserve legislative impulses.

Crime risk assessment within the legislative process would also constitute a means of rationalising law. It can thus not be separated from problems in terms of depenalisation, since a small proportion of incriminations –notably the abuse of social goods and the concealing of this offence- is used to deal with affairs of white collar crimes [99].

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[95] ENA, 1999, 984.

[96] Lascoumes, 1994, 308.

[97] Cf. les rapports annuels du Conseil d'Etat, notably the 1998 report.

[98] Conclusions du séminaire européen du GIP sur *la délinquance économique et financière comme criminalité organisée. Actions nationales et internationales,* Paris, 25 et 26 novembre 1999 (not published).

[99] Séminaire européen du GIP sur *la délinquance économique et financière comme cri-*

The reflection about alternative tools, in matters of organised crime, shows up in the concern of the public authorities to promulgate sanctions adapted to this form of delinquency. Therefore, the stress put on confiscation and seizure, is often presented as decisive measures in the fight against organised crime. Their legislative confirmation shows a shift of targets of criminal sanctions. These measures effect the fortune and not the persons unlike most other sanctions (imprisonment, fines, suspension of rights, different prohibitions). So the question on the status of the criminal sanction arises.

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Germany

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Contents

1. Introduction

Considering the present practice of the legislation in Germany and the perspective of criminal abuse risks, risk assessment within the legislative process is a relatively new question. This finding may at first be surprising, the theory of legislation being an established scientific discipline since the early 1980s, itself even being divided into different areas. Surely its practical realisation is still somewhat at a beginning stage. And as far as law effects assessment models have been developed and are being tested, this happens mainly with respect to different purposes, namely with deregulation and cost reduction. They are thus part of a more general, important change of function of modern states[1]. This development is precisely characterised by the expression "from the subsidy state to the regulation state" (*Schulze-Fielitz*[2]); this also implies very clearly that legislation itself, with respect to its aims, is for sure in a process of change, but will not inevitably be reduced with respect to its quantity.

The (former) concentration of law effects assessment on the aims of a *lean government* does not mean that the approaches already being practised could not be made usable to new aims of crime prevention. On the contrary: facing the immense costs of crime and the finiteness of (financial) resources available also in the area of criminal prosecution, the new awareness of costbenefit-calculation questions strongly the achievement of the legislative and thus social goals by the search of counter-productively – that is, not sufficiently crime preventing or possibly even crime promoting – working regulations. Such an approach seems more attractive, the higher the (estimated) damage[3] particular areas of delinquency turn out. This makes especially organised crime – including aggravated white collar crime – a most attractive starting point for risk assessment.

The following essay will present the current approaches of German so-called *Gesetzesfolgenabschätzung*[4] [i.e., law effects assessment]. Basing on

[1] Compare *Schulze-Fielitz* 2000, pp. 301 et seq. and, from an international perspective, *Braithwaite* 2000.

[2] Loc. cit., p. 305 (with further references).

[3] The *Bundeskriminalamt (BKA)* [Federal Bureau of Investigations] estimates the damage caused by organised crime in Germany only in the known area to amount to more than 1,8 Bio DM; see *BKA*, Lagebild Organisierte Kriminalität [i.e., the annual report on organised crime] 1999, www.bka.de/lageberichte/ok/1999kf/index.html. About the empirically questionable basis of such estimations, see *Albrecht* 1998, pp. 15 et seq.

[4] See below, Pt. 4.

that, possible approaches for a *criminological* risk assessment – a term still uncommon – will be discussed[5]. Meanwhile, we will put up the thesis that organised crime as rational crime that specialises in the consequent use of the opportunities offered by the regulatory setting – including those opportunities and evasions not intended by the legislative – could be suitable for criminological risk assessment. What is more, especially with regard to the restricted scope of prevention and repression strategies in the field of organised crime, the institution of a 'pre-preventive' screening of the legal frame for organised crime activities as an extra, possibly promising component to the present tools available in the fight of organised crime will be discussed[6].

2. Relevant fields of regulation

To begin with, the relevant fields for such an approach must be identified. At a closer look, the question of the effects of relevant regulations has two dimensions. This considers at first

- the control of the *intended effects of law.*

The main question in this area is if and how a certain legislative aim can be reached at all. The whole frame of preventive and repressive regulation including the relevant provisions of criminal law are to be included at this level[7]. Evaluation is in so far the search for possible gaps that make an exact application of the regulations more difficult or even prevent it. A recent example of this – certainly taking into consideration the aspect of European harmonisation – is the 'package of intervention' especially conceived for the more targeted fight of organised crime, consisting of money laundering control, tracing, seizure and confiscation of profits (not only in the framework of criminal law)[8/9].

[5] See below, Pt. 5.
[6] See below, Pt. 3.
[7] See already *Schreiber* 1983.
[8] Compare: (1.) Joint Action of 03/12/1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA), Official Journal L 333 of 09/12/1998, pp. 1-3; (2.) Framework Decision of 26/06/2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (001/500/JHA), Official Journal L 182 of 05/07/2001, pp. 1-2.
[9] See also *Kilchling* 2000 (with further references).

This area is not to be the main aspect of the following discussion. The prime focus is to be on the second field, that is:

- the *non-intended effects* of certain rules or complexes of regulation.

The central point of interest of research is in so far the search and analysis of possible opportunities of evasion or even abuse of rules of any kind. Here lies thus the main field of application of risk assessment. This considers prevention in the widest sense, that is, with less respect to criminal regulation, but to all branches of law.

Even though the first area is not in the centre of attention here, it is never to be fully ignored in risk analysis. For it is especially the interaction between different branches of regulation or even law that is to be taken into consideration. The more complex and differentiated a set of provisions is, the more complicated the system of possible interactions[10]. And the flood of legislation is still rising. 612 draft bills were actually realised during the 10th session period of the German *Bundestag* [i.e., the National Parliament], and the number rose to 895 during the 12th period of session[11]. By 01/07/1997, the number of effective national laws rose to 2,059 laws and further 3,004 decrees with an estimated 85,000 individual paragraphs[12]. The whole legislation of the 16 Federal States has yet to be added. Here, the colourful expression of the 'dynamisation' of legislative sources of error[13] has already been used.

2.1. Risk bearing areas

Which areas of regulation are most in danger of possible abuse by organised crime respectively aggravated white collar crime? In principle, not only primary, but also secondary law, thus the whole spectrum of sub-legal norms[14] and standards must be subject to risk assessment[15]. In all areas mentioned, the analysis must aim at discovering 'legislative structures' of opportunity. Here, especially the following situations can be differentiated:

[10] This has already been pointed out by *Schreiber* 1983, p. 37.
[11] *Rupprecht* 1997, p. 70.
[12] *Wagner* 1999, p. 481 (with further information on the quantity of E.U. legislation).
[13] *Diederichsen*, ZG 1996, p. 374, quoted after *Grimm/Brocker* 1999, p. 60.
[14] *Schulze-Fielitz* 2000, p. 312 points out that a sociology of sub-legal legislative procedures is still missing to a large extent.
[15] Inter alia *Brocker* 1999, p. 35.

- *direct opportunities*, as provided especially in rules, in the whole area of offers, subsidies, services and invitations to bid[16];
- *indirect opportunities* through prohibition, deliberate shortage, creation of hurdles of entry, etc.; as a classical and often quoted example, the example of the drug markets should be mentioned[17];
- another area of *indirect opportunities* are potentials of abuse resulting from a totally different context of regulation: the so-called unification-crimes[18] and the forthcoming introduction of the Euro cash money[19] are examples of that type;
- *legal grey areas* belong to the interface between direct and indirect opportunities, as e.g., to be found when differentiating between fraudulent acquisition of subsidies on the one hand and skilful, only just legal exploitation of legal gaps, uncertainties etc., on the other hand[20];
- as other considerable areas are unexpected *side effects* of laws or measures, for example, by insufficient density of monitoring (fiscal law) or deliberate reduction of control in certain areas (e.g., the border cut-backs between the Schengen-states);
- a special form of unexpected side effects are *counter-productive effects* resulting from badly conceived controlling strategies[21];
- finally, possible *moving effects* play an important role, as they are thought to exist in the field of money laundering, where illegal activities are thought to be directed from the official/legal to the para-banking area or other professions not yet underlying the compulsory registration of suspicions of money laundering legislation[22].

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[16] About the situation of subsidies in detail see below Pt. 2.2.1.

[17] The economic damage of heroine prohibition for Germany was estimated to amount to at least 13,8 billion DM by 1992; compare *Hartwig/Pies* 1999, p. 188.

[18] See below Pt. 2.2.2.

[19] See below Pt. 2.2.4.

[20] Especially in the case of white-collar crimes the borders between criminality and business-mindedness are less visible than elsewhere; see *Heinz* 1999b, p. 703.

[21] In the discussion on the introduction of the money laundering legislation, there were considerations about waiting periods in cases of suspect transactions as they would be desirable for investigative reasons would make evident the official suspicions at a too early date and thus considerably endanger the investigations.

[22] See the Directive 2001/97/EC of the European Parliament and the Council of 04/12/2001 amending Council Directive 91/308/EEC on prevention of the use of the

2.2. Some concrete examples

Four examples from very different areas of crime – two of them very recent ones – will illustrate the full reach of the problem, but also of the possible application potential of a preventive risk assessment.

2.2.1. Allocation of subsidies

An area especially prone to abuse is the varied field of subsidy allocation[23]. The subsidy as a one-sided and often only insufficiently controlled – controllable (?) – contribution is apparently especially appealing to abuse. Sometimes even the opinion is voiced that any subsidy is bearing fraud in itself[24]. Already within the application procedure, the attempt is made to institute precautionary measures against manipulation in order to prevent abuse as far as possible[25].

At the same time, this is affecting the definition of abuse. Abuse in the sense of the German definition (art. 264 *StGB*) is especially the case, when considering the economic aims of a deal an obviously inappropriate, 'artificial' way is chosen without there being any objective reason for the choice of this unusual way[26]. An example of this often described, are the cases of circle deals (so-called "roundabouts"): a good is only meant to be, within the course of – sometimes several – small changes, exported, re-imported and sometimes exported again in order to obtain import respectively export subsidies. Such phenomena could only be covered by criminal law through a shift forward of penal liability was shifted far into the preparatory stage of the fraudulent deal[27].

In Germany, federal subsidies only increased, from 1997 till 2000, from 41,3 billion DM to 45,2 billion DM[28]. In view of these numbers, criticism had been voiced that the federal ministries were unable to assess the

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financial system for the purpose of money laundering, which expanded the scope of application on lawyers, notaries, tax consultants and accountants.

[23] Still, the term of subsidy is not uniformly defined. Depending on the context and (political) interests it is interpreted in the wider or narrower sense. In the context presented it used in the widest sense and includes any kind of one-sided government grants.

[24] *Tiedemann*, LK, 10th edition, § 264 margin no. (mno.) 1.

[25] See about precautionary measures against manipulations in public commissioning *Schaller* 2001.

[26] *Tiedemann*, loc. cit. mno. 92.

[27] With further examples, see e.g. *Jobski*, www.lpb.bwue/publikat/grenzlos/subvent.htm .

[28] BT-Drucks. 14/1500, p. 5.

reaching of goals, economics and effectiveness of these subsidies. Especially the methodical bases for later performance reviews are lacking. This is why in 1996, the *Bundesrechnungshof* (i.e., the National Audit Office) explicitly urged to develop criteria of effectiveness and efficiency and to institute procedures of performance reviews already at the very beginning of a measure[29].

This view is in principle shared by the federal government. First attempts being discernible in the 15th subsidies report 1995[30], the 17th subsidies report 1999[31], pointed out explicitly that all federal subsidies are regularly to be checked with a view to their necessity as well as their efficiency. Facing the larger public discussion about the abuse of public services, the report on performance review had been considerably extended. And subsequently, an extra point "reaching of aims" for every single measure was introduced[32]. In practice, however, the check is most often not more than a comparison of the planned numbers and the actual spendings; sometimes some additional information about the numbers of applications respectively, applicants and supported persons next to a short political assessment are provided. Deeper analysis going further than mere description is not carried out. Such an effects control, as the subsidies report points out tersely, "is very difficult"[33]. Any information about abuse is completely missing. Still, the report has been mutually agreed upon by the responsible parliamentary committee[34].

Several research projects about the "logistics of organised crime"[35] have shown, with view to fraudulent acquisition of subsidies– especially such to the disadvantage of the E.U. – and tax fraud in all fields of crime considered, the central importance of the prevailing arrangements of the subsidies and fiscal norms. The criminal misuse is thus based, among others, on the regulation of duties and claims to pay off the public authorities[36]. For it is

[29] *Bundesrechnungshof*, Planung und Erfolgskontrolle bei Subventionen des Bundes, www.bundesrechnungshof.de/ergebnis1998/b14.html.
[30] BT-Drucks. 13/2230.
[31] BT-Drucks. 14/1500.
[32] Anlage 1 zum 17. Subventionsbericht, BT-Drucks. 14/1500, pp. 51 et seq.
[33] BT-Drucks. 14/1500, p. 35.
[34] Final recommendation of the parliamentary commettee for budgetary matters of 28/10/1999, BT-Drucks. 14/2010.
[35] LOOK I, LOOK II, LOOK III; see *Sieber* 1997 (with further references); basically already *Sieber/Bögel* 1993.
[36] See *Sieber*, loc. cit., pp. 256 et seq.

the legal regulation itself that, on the one hand, makes criminal opportunities come up at first, while on the other hand, new opportunities create new incentives for illegal profits. Furthermore, the E.U.'s subsidies policy had not been accompanied by the institution of appropriate controlling mechanism at the beginning[37]. *Sieber* thus suggests that a draw back of subsidies in general is the most promising solution[38].

This would of course show little effect. Today already prognostics say that within the course of the forthcoming enlargement of the E.U., which will make necessary further extensive subsidies and support programmes, new opportunities of abuse will be created[39].

2.2.2. Crime during German unification

The example of so-called unification crimes shows that scenarios as the one mentioned above are quite realistic[40]. In order to prevent the total collapse of the economy in the territory of the former GDR, the possibility to exchange the valueless currencies of the countries of the former *Council for Mutual Economic Assistance (RGW)* into 'hard' DM an artificial currency, the so-called "transfer rouble", was created. This procedure which was planned as a supporting measure in favour of the exports from the GDR opened the way to enormous profits from transaction at the edge of or beyond legality. The damage is estimated to amount to at least several billions of DM[41].

Unification crime in the narrower sense is a typical example of transformation crime, which has profited from a non-congruence between already (or partly) modernised legal frames on the one hand and overcome administrative bodies on the other, which either have not been restructured yet or at least stick to old routines[42]. Another supporting factor was a much lower

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[37] *Albrecht* 1998, pp. 19 et seq.

[38] *Sieber*, loc. cit.

[39] See *Kohl* 1998, p. 39.

[40] About the challenges of the German reunification for the legislation *Karpen* 1992; more in detail about the appearances of unification crime *Schmidt* 1991, *Hillgärtner* 1995; a short overview on terminology and the different appearances is available at www.white-collar-crime.de.

[41] Depending on the sources the estimations are between ca. 1.5 to 8 billion DM (*Fischer* 1996, 46f.) up to 50 billion DM (*Schmidt* 1993; similar figures are provided at www.white-collar-crime.de).

[42] About the peculiarities of white collar delinquency during the phase of restructuring caused by the reunification *Hey* 2000, put it into a nutshell as "*Wendedurcheinander*" [i.e., confusion of system change].

risk of discovery, resulting from a not (yet) fully functioning criminal prosecution. This is of special importance, as a large part of white collar crimes are so-called control crimes[43].

Only in 1992, was the *Zentrale Ermittlungsstelle Regierungs- und Vereinigungskriminalität (ZERV)* [i.e., Central Investigation Unit for Governmental and Unification Crime] established as a body specially designed to prosecute these crimes; it was only fully equipped to work in 1994[44]. In our context, the interesting question is of course, if this criminal behaviour was foreseeable or controllable. *Fischer*[45] at least is sceptical. And a look at the working statistics of the *ZERV* seems to confirm this impression. In 1997, some 20,000 investigation procedures were carried out, of which 16,000 have been finished so far, resulting to only 392 indictments and more than 15,000 cases dismissed. Only 124 of the indictments mentioned refer to white-collar crimes related to unification, and just eight cases were charged as *transfer rouble fraud*[46].

2.2.3. Fraud and corruption in the health care system

Certain parallels to the different forms of fraudulent acquisition of subsidies and public invitations to tender can also be found in the different fields of crime in the health care system including medical and pharmaceutical research.

Especially in the field of this type of research, the existence of considerable potentials of corruption caused by its particularly high financial dependence on external funding can be assumed, which may result from overlapping interests between the research institutions on the one and financial backers and clients on the other hand, the latter ones being quite often (large) industrial companies which have their own commercial exploitation interests. *Lüderssen*, for example, has assessed this situation as distinctly critical with respect to this[47]. Typical for the problems in this area is on the one hand, that the research requirements in the medical sector can by no means be sufficiently covered by public funds; the share of external funds is meanwhile even considerably higher than the public support. Facing that background, quite understandable endeavours to clear up legal bar-

[43] In detail *Heinz* 1999b.
[44] *Jankowiak* 1998; see as well BT-Drucks. 12/3549.
[45] *Fischer* 1996, pp. 338 et seq.
[46] All figures taken from *Jankowiak* 1998, p. 119.
[47] *Lüderssen* 1997, pp. 322 et seq..

riers for external funding are in full action[48]. As a consequence, this brings about a new need for additional, detailed rules. It is rather questionable, if the grey zone between the – generally legitimate – attempts of private sponsors to pursue their own commercial aims and interests by allocation and support of research assignments on the one hand, and the borderline to the acceptance of benefits relevant in the perspective of criminal law on the other hand can be cleared.

A totally different case which lately came to public attention refers to invoicing frauds in doctors' practices. As a news agency reports, in 2000 only 15,230 cases of fraud were detected in the Federal State of Rhineland-Palatinate alone, which is more than in the whole Federal Republic in 1999. In Bavaria, the number had increased fivefold, in Baden-Württemberg there had been a rise of 760%[49]. A member of the board of the health insurance schemes believes that he can see structures of organised crime in some areas[50], which was promoted by, inter alia, a lack of transparency within the accounting system. Presumably fraud is also supported by the stricter public budgeting in the area of private doctors' practices. This makes it evident that on the whole, stricter principles of allocation and more defined legal standards of regulation can increase the potential of abuse.

2.2.4. Introduction of Euro cash money

A quite recent example refers to the introduction of Euro cash money. Although the direct profit incentives in this context are estimated to be lower than in unification crime, where, because of the artificial offset value of the transfer roubles and the graded exchange rates, further incentive factors play a role. Nevertheless, experts have expected a considerable rise in 'classical' forms of crime, especially counterfeit money crime, property offences, but also – and this is especially interesting, in regard of organised crime – in money laundering activities[51]. Thus, a project team of Federal and State Polices, under the leadership of the *Bundeskriminalamt*, has

[48] Compare the report of the Federal Government on the support of external funding in the area of basic research, BT-Drucks. 10/225. See, for further references, *Lüderssen*, loc. cit.

[49] *Handelsblatt* of 06/05/2001.

[50] *Kiefer*, www.rundschau-online.de/politik/1669553.html.

[51] See, for more details, *Stübert* 1999.

worked out a strategic crime analysis entitled "crime and criminogenic factors in the frame of the introduction of the Euro"[52].

Experts assume a significant rise in criminal opportunities especially during the period of time when two currencies are valid[53]. But also for the run-up phase more money laundering activities can be supposed. Here, larger cash transactions could often be plausibilised by fiscal „camouflage arguments' (black money); this danger is potent in Germany, where tax fraud is no suitable prior offence to money laundering in the sense of art. 261 of the German Criminal Code (*StGB*) and corresponding suspicions are not covered by the obligation of the banks to inform the authorities following art. 11 s.1 of the Money Laundering Act (*GwG*). Furthermore, especially voices from Switzerland suppose, that in the run-up phase of the so-called *Big Bang* a rise in pre-laundering activities in the EEU member states is probable[54].

In view of these predictions, it seems even more surprising that when introducing the so-called "modified deadline system"[55] the legislature attaches great importance to the cost burden of economy and consumers connected to the parallel circulation of two legal currencies, but, as regards the criminal law, concentrates on the protection of the DM currency still in circulation. Any kind of risk assessment concerning the risk of money laundering is total missing in the law.

At the same time, it is the foreign currency business which is said to be extremely susceptible to money laundering activities, especially with the occasional customers about whom the individual banks do not have any concrete knowledge. Therefore, following an announcement of the *Bundesaufsichtsamt für das Kreditwesen (BAKred)* [i.e., the Federal Banking Supervisory Office] from 30/03/1998, all banks are to identify and record their customers in the foreign currency business from a transaction amount of DM 5,000,- (this is not the case, when the buying and selling of foreign currencies is processed via home accounts of customers). Besides, the gen-

[52] Methodical and organisational aspects are discussed by *Arm* 1999, qualitative results by *Kubica* 1999.

[53] Compare *Stübert* 1999, p. 239.

[54] Empfehlungen der schweizerischen Meldestelle für Geldwäscherei (*MROS*) [recommendations issued by the Swiss Money Laundering Control Authority]: Kriminogene Faktoren im Zusammenhang mit der Euro-Einführung mit Bezug auf die Schweiz – Empfehlungen für die Prävention (October 1999).

[55] Drittes Euro-Einführungsgesetz [3rd Euro Introducing Act], cited in BR-Drucks. 453/99 of 13/08/1999.

eral threshold value of DM 30,000,- stays unaffected, also during the period of introduction of the Euro Cash money[56]. Considerations to temporarily lower this limit – corresponding to the present rules for the foreign currency business – to DM 5,000,- were not further pursued. Decisive for this was, among other factors, that no consensus between the other EEU member states was found in this question[57]. The Federal Banking Supervisory Office, however, points out that persons, who are not regular customers of the bank in question are – following internal rules – registered anyway[58]. It still seems rather questionable, in how far the normal circumspection and attention can be maintained under the circumstances of the predicted scenarios of people.

Co-ordination difficulties also seem to exist in the field of the prevention of conventional crime, especially of counterfeiting. Complains from the side of the police were voiced, that even the police experts for counterfeit money were only admitted to see original bills two weeks before the date of introduction. Appropriate prevention could impossibly be carried out in such a small period of time[59].

3. Risk Assessment in the context of prevention

3.1. conventional approaches of prevention

At first, the conventional approaches of prevention are to be presented and checked for starting points for risk assessment in advance, also and especially in the field of organised crime. Crime prevention is in general, defined as the whole of state and private efforts to prevent crimes.[60]

The prevailing German model of structures[61], systematizing the tasks of crime prevention, differentiates between primary, secondary and tertiary prevention:

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[56] According to the Money Laundering Act *(GwG)* a bank must identify the person in action when accepting or emitting cash money, bonds or precious metals worth DM 30,000 or more (art 2 s. 1 *GwG*).

[57] See www.bundesbank.de/lzb-nrw/de/serviceinfo/eurobar/faq.htm.

[58] *Handelsblatt* of 10/11/1998.

[59] See www.spiegel.de/spiegel/0,1518,47188,00.html

[60] *Kube* 1999, p. 71.

[61] In detail *Kube* 1987, pp. 9-147; *Kube* 1999, pp. 72 et seq.; *Kaiser* 1996, pp. 249 et seq. Also *Schily* refers only to the traditional approach of prevention in his programmatic speech about the security strategies at the threshold to the 21st century. Ap-

- *Primary* prevention is to touch delinquency at its root and ideally eliminate the deeper reasons of criminal schemes of behaviour.

- *Secondary* prevention is to, regarding the perpetrator, keep persons currently in danger or ready to commit a crime by changing the structure of the opportunity of perpetration or active support of conformist behaviour. The potential victim is to be immunised against its own vulnerability.

- *Tertiary* prevention finally, aims at fighting repeated offences by preventing the committing of further crimes.

This model of structures is criticised in several aspects. *Kaiser*[62] e.g., complains that the model is too much centred around areas of prevention advancing the administration of penal justice and thus considering penal justice itself, including possible alternatives and continuingly effective and accompanying services, only incomplete and inefficient. It is also noticeable that the described model seems to fully ignore legislation on the side of the reasons. *Kube* himself has, of course, basically recognized the problem of anticipatory risk prevention within the 1980s and settled it on the secondary level at the creation and elimination of commission opportunities[63]. He thus quotes that market-oriented controlling instruments combined with state regulation- and control measures could be used to a-priori-containment of criminogenic opportunities[64]. One would thus stimulate the avoidance of such opportunities. The model is made clear by the example of the environmental tax. Still, a problem could be that if the costs are overestimated, illegal refuse disposal in the way of the so-called sandwich-procedure is not to be ruled out[65].

Unfortunately, this approach to the avoidance of criminogenic structures has not been further developed in the sense of an anticipatory risk prevention. It is still somewhat questionable, in how far the settling of risk assessment within the structure model – and here on the secondary level – seems sensible at all. The model sketched above namely refers only to

proaches of risk assessment within the legislative procedure are not included in the presented strategies of prevention. Similarly, from the perspective of a member of Parliament, *Meyer* 1998.

[62] *Kaiser* 1996, pp. 249 et seq.

[63] *Kube* 1988, pp. 53 et seq.

[64] *Kube* 1987, p. 181; *Kube* 1988, p. 54.

[65] *Kube* 1987, p. 181.

criminal law in the *strict sense* respectively the right of intervention in the wider sense. The systematic appliance of anticipatory risk prevention is not included here.

In contrast to the model of structures there is another model not yet containing anticipatory risk prevention, but which seems expandable with respect to this. It is the model favoured by *Kaiser* inter alia, the functional model of *pre-*, *inter-* and *postvention*[66]. The different strategies of crime control can be considered better in general, as also activities in the form of justice can be included into the whole context.

3.2. Risk assessment as prevention in advance

The example of organised crime is now to show how risk assessment can be made usable for organised crime prevention and how it can be integrated into the model of pre-, inter- and postvention. Naturally, also the conventional strategies, especially the technical and situational strategies, play an important role in the prevention of organised crime[67]. But as long as there are demand and commission opportunities, these can only partly be successful. In addition, moving effects will surely show up. It suggests that structures of opportunity be reduced as on the side of 'legal offers', namely in the sense of *legislative prevention in advance* (see graph 1). It is thus a control of opportunities preset to prevention in the traditional sense[68].

The use of legislative prevention in advance (*'pre-prevention'*) could be helpful especially in cases of transnational organised crime. As the traditional approaches and programmes of prevention are locally, regionally or nationally restricted[69], they can hardly handle transnational crime. Legislative pre-prevention could however help reduce and ideally prevent incentives to allow international organisations to take action in certain legal spheres. Risk assessment could be used as a specific instrument of such legislative prevention in advance.

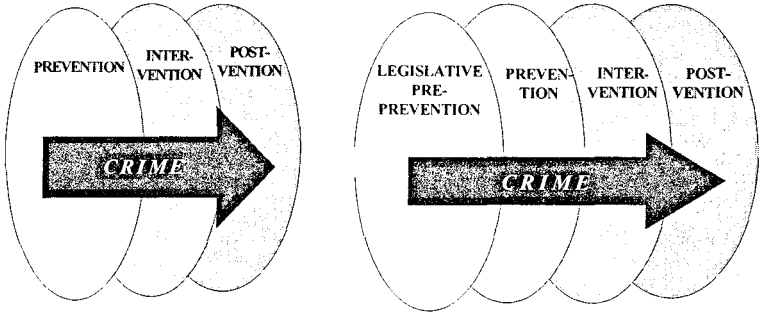
[66] *Kaiser* 1996, pp. 249 et seq.

[67] As an illustrative example, the urban crime scene in metropolitan Berlin is shown by *Saberschinsky* 1997.

[68] The appearance of further moving effects can of course not be denied.

[69] See, for more details, *Heinz* 1999a.

Graph 1: Introduction of risk assessment as 'legislative pre-prevention' into the traditional model trias



conventional model[70] modified model

4. Risk Assessment and legislation in Germany

Not only the interest of criminology, criminal law and the practice of criminal law, but also of legal sociology has long been centred around the application of law – namely as a burden to the genetic aspect of the creation of law[71]. Also in the area of effectiveness research, especially in implementation and evaluation research, questions of the effects and application of existing positive law – by ignoring or neglecting the preceding process of the creation of law, are dominating[72].

4.1. Principles of legislation in Germany

The possibilities and the legal and institutional framework of an effective risk assessment can not be discussed without an introductory look at the principles of the process of legislation in Germany[73]. Corresponding to the structure of Germany as a federation, the legislative competence is distrib-

[70] Source of the traditional model: *Kaiser* 1996, p. 251.
[71] *Schulze-Fielitz* 2000, p. 295.
[72] *Schulze-Fielitz* 2000, p. 298.
[73] See, for more details, *Ossenbühl* 1988; a short overview over the stages of the legislative procedure is provided by *Karpen* 1999, p. 436.

uted in a complicated way between the Federation and the Federal States (*Länder*). According to art. 70 *Grundgesetz (GG)* [i.e., the German Constitution] there is a basic presumption of competence in favour of the States[74]; the Federation is in so far *authorized to legislate*, as this is explicitly mentioned in the Constitution (so-called principle of enumeration[75]). Neverlethess, in practice, the main emphasis of legislative lies at Federal level[76].

The Constitution differentiates between different *kinds of legislation*: The exclusive legislation of the Federation (art. 71 *GG*), the concurring legislation of the Federation and the States (art. 72, 74 *GG*) and the frame legislation of the Federation (art. 75 *GG*):

- In the area covered by the exclusive legislation, the States are excluded from legislative action; they are only allowed to issue laws in exceptional cases when explicitly authorized by federal laws[77].

- Matters of concurring legislation are to be settled by the States only in cases when the Federation has not made use of its right to legislate in this particular fields[78].

- Also in the area of frame legislation, the States are allowed to legislate only as long and in so far as the Federation has not legislated yet. Still, the Federation does not possess full legislative competence in this case. Its regulations must build up a frame which is to and needs to be filled by State legislation[79].

Following art. 76 Abs. 1 *GG*, the federal government as a body, a further to be defined group of members of the *Bundestag* (the group must at least have the same numerical strength as a parliamentary party[80]) and the *Bundesrat* [i.e., the Assembly of the States, a kind of second chamber], have the *right to initiate* legislation.

A considerable part of parliamentary work is prepared and completed in the *specialized committees*[81], composed with informed members of parlia-

[74] Compare, e.g., *Maunz/Zippelius* 1994, p. 310; *Katz* 1992, § 20 II mno. 424.
[75] *Katz*, loc. cit., mno. 424.
[76] Art. 73-75 *GG*; *Maunz/Zippelius*, loc. cit., p. 310.
[77] *Maunz/Zippelius*, loc. cit., p. 310.
[78] *Rengeling* 1990, § 100 D I mno. 112.
[79] *Katz*, loc. cit., mno. 427; *Rengeling* 1990, § 100 E I mno. 253.
[80] See art. 76 and 10 *GeschOBT*; *Katz* 1992, § 20 III 1 mno. 432.
[81] Compare *Ossenbühl* 1988, § 63 D II mno. 36.

ment. They thus execute a supervisory function towards the government. The Constitution provides explicit rules on the committee for foreign affairs and the committee of defence (art. 45a s. 1 and 2 *GG*). The further spezialized committees are regulated in the rules of procedure of the *Bundestag*[82].

The so-called *intercession committee* will be of high practical importance as soon as the political majorities in *Bundestag* and *Bundesrat* diverge[83]. The intercession committee is a joint institution of *Bundestag* and *Bundesrat*[84]; its constitution and procedure are set by its own rules of procedure. Accordingly, it consists of an equal number of members of *Bundestag* and *Bundesrat* (art. 1 of the rules of procedure for the intercession committee: 11 members from each of the two parliamentary bodies). The task of the intercession committee is the search for compromises in legislative divergences of opinion between *Bundesrat* and *Bundestag*[85]. The committee is to work out a proposal of settlement to a disputed draft bill, that has to be adopted by both bodies.

Another characteristic of the federal structure of Germany lies within the distribution of the executive power following art. 30 and 83 et seq. *GG* (execution of legislation). Accordingly, the Federal States are presumed competent also in the field of administration[86]. Following art. 83 *GG*, the enforcement of the federal laws is the general task of the States. The Federation possesses only the administrative competences explicitly assigned to it. This means that the Federation, even though possessing legislative competence and being able to issue a certain federal law, *cannot guarantee an integrated enforcement of the laws* because of the privilege of administration assigned to the States. This situation undoubtedly constitutes a factor of insecurity always to be considered in prognoses within the frame of law effects assessment.

[82] See the chapter on the formation of committees, art. 54 et seq. *GeschOBT*.

[83] This situation often occurs. Currently, the majority of the social democratic and green parties in the *Bundestag* is facing since mid 2000 a strategic majority of union-led *Länder* in the *Bundesrat*.

[84] Art. 77 s. 2,1 *GG*; *Ossenbühl* 1988, § 63 F I mno. 51.

[85] More in detail *Ossenbühl* 1988, § 63 F II mno. 54.

[86] Compare *Katz* 1992, § 21 II 2 mno. 454.

4.2. Previous approaches of law effects assessment

4.2.1. Development

Already in the 1970s, the idea of methodical improvement of legislation came up. The law-preparing administrations gave the first impetus, announcing the need of a problem- and method-oriented training to improve legal provisions and the anticipation of their effects[87]. This led to research initiatives aiming at elaborating methods (inter alia of checklists, cost-and-effects analyses). In 1975, the results obtained were critically tested and assessed in a joint model seminar conducted by the Federation and the States for the first time. This gave impetus to a research project of the *Speyer Post-Graduate School of Administrative Sciences* designed to test draft bills and to advance legislation methodology[88]. A first practical test dealt with the development and enforcement of an expert draft of a *Jugendhilfegesetz* (i.e., a youth welfare law)[89]. Further experiments with draft bills dealing with a variety of subjects followed[90]. On the basis of these tests, the necessity and benefit of the improvement of traditional legislation techniques was made clear and the attempt was made to further optimise the processes of legislation through testing and monitoring procedures[91]. The terminology and methodology of this type of law effects as-

[87] *Böhret* 1994, pp. 497 er seq.; *Böhret* 1997, p. 5; further information by *Konzendorf* is provided at www.itas.fzk.de/tadn002/konz002a.htm.

[88] The research introduced and carried out by *Carl Böhret* was not the only one to deal with the improvement of the theory of legislation. The research on the theory of legislation has taken an upward trend since the beginning of the 1970s. See *Karpen* 1986 with further references on pp. 12-13. The great interest into the subject of legislative theory and the closely linked law effects research was illustrated by the edition of an anthology on legislative theory (*Schreckenberger* 1985), presenting different approaches to the topic from a historical, theoretical and political basis and discussing the problems of application in the political and administrative practice. *Strempel* 1998, pp. 89-91, furthermore outlines the historical development of law effects research since the end of the 1960s.

[89] See, for more details, *Böhret/Hugger* 1980a; compare also *Böhret* 1992, pp. 197 et seq.

[90] So e.g., an administrative simulation dealing with a state law (law on fire safety and disaster control, 1981) and a three-level simulation about regulatory provisions for a federal law (administrative chapter of a law on environmental impact assessment, 1990). See *Böhret* 1992, pp. 197 et seq.

[91] Compare inter alia *Böhret/Hugger* 1980b; *Hugger* 1983.

sessment[92] was developed in analogy[93] to the so-called objective technology impact assessment[94].

Moreover, both the Federation as well as several States[95] developed and introduced binding checklists which had to the be adapted during legislation[96]. The best-known is the so-called "Blue Checklist" for federal legislation, issued by the Government on December 11th, 1984, in order to improve the preparation of laws[97]; it was also adopted by several States[98]. The checklist was translated into several languages, varied and recommended by the OECD[99]. The checklist however had hardly any practical consequences in the practice on the federal level in Germany. The attempt to integrate it into the revised *"Gemeinsame Geschäftsordnung (GGO II)"* [i.e., the common rules of procedure between the federal ministries] by way of amendment failed. The basic revision of the *GGO II* in 2000, made the checklist completely superfluous[100].

On July 18th, 1995, the Federal Government appointed an advisory expert group "lean state" as an independent, external committee[101]. One of the tasks of the expert commission was to assess the necessity of a qualified

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[92] The generic German term is *Gesetzesfolgenabschätzung (GFA)*.

[93] Numerous experiences were made in the field of technology impact assessment (TA) with the preparation, presentation and assessment of future developments. According to *Brocker* 1999, p. 38, such development scenarios for the law effects assessment are to be connected with regulation alternatives in order to find out different problematic fields. About TA as model methodology for law effects assessment also *Strempel* 1998, p. 91; *Wagner* 1999, p. 482; *Böhret* 1997, pp. 8 (footnote 2) and 12.

[94] About TA in general *Paschen/Gresser/Conrad* 1978; with special focus on the national system of TA in Germany pp. 26-35.

[95] So e.g, the State of Schleswig-Holstein instituted a so-called "Yellow Checklist" in 1996; GVBl. 1998, p. 34.

[96] Compare *Karpen* 1999, pp. 408 et seq.

[97] GMBl 1990, pp. 42-45. On 20/12/1989, this was amended by the "Guideline of the Federal Government on the Shape, Order and Review of Adminstrative Provisions in the Federal Legislation", GMBl. 1990, pp. 38-41.

[98] A working group instituted by the state parliaments in October 1996, which was to deal with law effects assessment from the parliamentary perspective pointed out that the intensity to which the federal as well as the state legislatures deal with las effects assessment considerably differed. See *Brocker* 1999, p. 36.

[99] *Zypries/Peters* 2000, pp. 324 et seq.; compare also *Karpen* 1999, p. 409.

[100] *Wagner* 1999, p. 483.

[101] See, for more details, *Meyer-Teschendorf/Hofman* 1997, pp. 271 et seq.; see also *Wagner* 1999, p. 483; *Brocker* 1999, p. 38; *Strempel* 1999, pp. et seq.; *Strempel* complained about the composition of the committee doubting its independence due to the lack of representatives of the opposition, political and social scientists.

system of control of the needs and possible alternatives within the legislative process. After a thorough examination, the committee favoured the implementation of a stringent catalogue of check points for the legislature. The recommendations include inter alia an anticipatory necessity control for each piece of legislation, a consequent law effects assessment – which was, however, too much centred around the *cost* side – more transparency in the process of necessity control and the institution of an institutionalised norm examination agency. The suggestions of the expert advisory panel were realised in part, in particular through the integration of the "Blue Checklist" into the *GGO*.

On December 1st, 1999, an administrative reform package of the federal government, named "Modern State – Modern Administration" was put on the way[102]. One of the explicit areas of reform is the chapter on the reach of a "higher effectiveness and acceptance of law"; the leading project under this chapter is the elaboration of a "handbook on law effects assessment"[103] in order to reach a better implementation of the methodology of law effects assessment into the political-administrative system[104]. Another area of reform is formulated in the chapter "the Federation as a partner", dealing, among other issues, with the fundamental revision of the *GGO*[105]. The *New GGO* that came into force on September 1st, 2000, now provides an explicit obligation of the legislature to carry out a law effects assessment and to make its results available in the explanatory materials to the draft bills[106]. On the one hand, figures on the financial consequences of a law must be provided, on the other hand, a concrete period of time must be set after which a review evaluating the achievement of the expected effects as well as possible side-effects has to be conducted. The new handbook and the explanatory "manual to law effects assessment" are to give a hand in this.

The development indicates that commissions and research institutions, on both federal and state level, are dealing with the further development and practical application of effectiveness research within the legislation

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[102] *"Moderner Staat – Moderne Verwaltung"*; for detailed and updated information about the program see www.staat-modern.de.

[103] The manual was prepared in co-operation of the Federal Ministry of Home Affairs, the Home Office of Baden-Württemberg, the Speyer *Post-Graduate School of Administrative Sciences* and the Speyer *Research Institute for Public Administration.*

[104] *Konzendorf*, www.itas.fzk.de/tadn002/konz00a.htm.

[105] See *Zypries/Peters* 2000.

[106] §§ 43 and 44 *GGO*. See also: BBB-Informationen (2000), pp. 2-5; www.staat-modern.de/presse/info/pm131200.htm.

procedure[107]. The law effects assessment is thus definitely "in demand"[108]. There is also agreement upon the importance of its institutionalisation, as *Böhret* pointed out: "Only what is institutionalised actually exists"[109]. The way how such an institutionalisation of law testing and law effects assessment is to be carried out has been frequently discussed[110]. The advisory expert group "lean state" suggested the institution of a norm examination agency residing under the Federal Chancellor's Office[111]; until today such an agency was not implemented. Set in motion by the new programme "Modern State – Modern Administration" the first step towards an interministerial institutionalisation was made[112]. The success of this model remains to be seen. On the basis of seven selected legislative procedures, in particular in the area of data protection, allocation by tenders and taxation of enterprises, the methods and concepts worked out in the handbook are to be reviewed within a year[113].

4.2.2. objectives

According to *Strempel* law effects assessment multidimensionally covers and assesses with the help of interdisciplinary research approaches, the necessity of a rule, its effectiveness and consequences beyond its operative effects in the narrower sense[114]. The conventional objectives of law effects assessment at the same time are[115]:

- Cost reduction and deregulation,
- Improvement of exactitude and reaching of goals of the measure – increase of the degree of effectiveness of laws,
- Avoidance of negative side effects,
- Compatibility of laws with the constitution,

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[107] *Brocker* 1999, p. 38.
[108] As pointed out by *Konzendorf*, www.itas.fzk.de/tadn/tadn002/konz00a.htm.
[109] *Böhret* 1994, p. 496.
[110] Compare *Böhret* 1994, pp. 496 et seq.; *Wagner* 1999, pp. 485 et seq.; *Strempel* 1998, pp. 91 et seq.; *Meyer-Teschendorf/Hofmann* 1997, p. 272; *Brocker* 1999, pp. 39-40, *Strempel* 1999, pp. 632-637.
[111] This was criticised from various sides, so e.g., by *Brocker* 1999, pp. 39 et seq.
[112] § 44 *GGO* provides principles of allocation of responsibilities.
[113] www.staat-modern.de/presse/info/pm131200.htm.
[114] *Strempel* 1998, p. 91.
[115] Compare *Böhret/Hugger* 1980a, p. 16; *Wagner* 1999, p. 482; *Konzendorf* 1999, pp. 107-108; www.staat-modern.de/presse/info/pm131200.htm.

- Consumer-friendliness and feasibility of application,
- Efficiency (optimal ratio of effected results to expenditure and costs).

The law effects assessment is thus to improve the *quality* of norms.[116] When looking at the list of goals, it stands out that crime prevention is *not* counted as such. *Böhret and Hugger*[117] say of course, that the performance of a simulation could be suitable to find out "norm avoidance strategies". It stays, however, questionable if unwanted effects in the sense of criminal behaviour are meant, or if the authors were thinking of aspects of administrative practicability when referring to the norm avoidance strategies. Our impression during the expert interviews was that there were no reflections specifically aiming at abuse in the sense of crime preventive risk assessment. A substantial reason for this is probably to be found in the administrative law background of the scientists in charge of the development of the conventional law effects assessment.

Nonetheless, one should think about transferring the idea of norm avoidance strategies to cases of abuse in order to make law effects assessment usable for criminological risk assessment as well (further see point 5).

4.2.3.methods

The development of a *methodical* range of measures to check norms and their necessity started – as pointed out in paragraph 4.2.1. – already in the late 1970s, and has been further refined since then[118]. Science and practice now agree on three modules of law effects assessment (LEA), which can be carried out individually – and ideally as well in combination[119]. The different stages of legislation and the various corresponding demands on effects assessment have played a central role in the creation of the modules[120]:

- *Prospective* LEA is to be classified as *ex-ante* procedure of effects assessment on the basis of alternatives of regulation.
- *Accompanying* LEA go for an *ex-ante* procedure on the basis of a law-form draft.

[116] *Grimm* 2000, p. 88.
[117] *Böhret/Hugger* 1980a, p. 25.
[118] See, for more details *Grimm* 2000, p. 88.
[119] *Böhret* 2000b, p. 553.
[120] *Böhret/Konzendorf* 2000, p. 9.

- *Retrospective* LEA means an *ex-post* procedure on the basis of a legal provision in force.

Each module consists of a stage of conception, of concretisation and of application (see graph 2)[121].

Graph 2: Modules of law effects assessment (LEA) and its features[122]

Prospective LEA	Ex-ante evaluation and assessment of effects of alternative regulations	Checking of alternative regulations by means of effects assessment and scenarios, analyses of remaining risks	Which alternative regulation can promise the best achievement of goal? Which effects are to be expected where, for whom and when?	Choice of an optimal alternative of regulation, including the possibility of non-regulation
Accompanying LEA	Analysis of formulated legal provisions, test and control of drafts or selected parts	Test and control methods (e.g. cost/benefit analysis, practical test, simulation, implementation analysis)	Are the drafts suitable for the field of regulation as well as for the norm addressees? Are burdens and relieves to be improved?	Confirmation, completion and/or improvement of drafts or selected parts
Retrospective LEA	Ex-post evaluation of regulation in force (reliability control)	Evaluation procedure, methods of empirical social research	Were the intended goals of regulation reached? Is an amendment necessary?	Degree of effectiveness (e.g., concerning acceptance of the norm, goal achievement, identification of necessary modifications

[121] See, for more details, *Böhret/Konzendorf* 2000, pp. 15-18, pp. 23-25, pp. 29-33. Compare also *Konzendorf*, www.itas.fzk.de/deu/tadn/tadn002/konz00a.htm.

[122] See *Böhret* 1997, p. 9; *Böhret/Konzendorf* 2000, p. 10; *Konzendorf*, www.itas.fzk.de/deu/tadn/tadn002/konz00a.htm; *Böhret* 2000a, pp. 134 et seq.; *Strempel* 1999, p. 632, designs a similar model, evading the original terminology of law effects assessment, replaced by the term "law effects research" [in the German original: *"Rechtswirkungsforschung" (RWF)*].

During the 1980s, the accompanying law effects assessment especially stood in the focus of research and practice[123], the prospective and retrospective LEA (the so-called *law controlling*) has been in the centre of attention only within the last few years. The prospective LEA was first applied to a real legislation procedure in 1997, i.e., to the *"Landeswaldgesetz"* [State Forest Act] of Rhineland-Palatinate[124]. Also the third module – the retrospective LEA – is continually increasing in importance[125]. More and more often, the explicit duty to ex-post evaluation of implemented legal provisions is anchored in laws[126].

4.3. Problems and open questions

As has already been pointed out, law effects assessment in its present form intends to "optimise law" by less and better laws. Hereby, the assessment mainly refers to *single* laws or norms. Because of the differentiation of law into a welter of legal provisions completing or counterbalancing each other, instances and instruments of regulation, great attention is to be paid to the interaction of different norms, from European legislation to federal and state legislation, including all kinds of secondary legal norms such as, e.g., legal norm concretisation by statutes or administrative rules, and also private legislation[127]. In such a complex setting simple ideas of causality of effects of individual parliamentary laws (must) fail[128]. Possible 'sources of error' thus are not only the *legislature* itself, but also the *executive instances*, the *addressees* and the *norm interpreters*.

Without any doubt, the problems of law effects assessment result also from the complexity of the subject. Namely in view to a prospective LEA, there are doubts if it could at all be carried out with a chance of success in the majority of the cases[129]. The variety of potential factors affecting every

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[123] *Böhret* 2000a, pp. 134-136; *Konzendorf* 1999, p. 111.

[124] *Konzendorf* 1999, pp. 111 et seq.

[125] See, for concrete examples of the realisation of law controlling and its importance, *Böhret* 2000b, pp. 555 et seq.

[126] One prominent example is the recently amended so-called *G-10-Act*, restricting the privacy of correspondance, postal secrecy and secrecy of telecommunications as guaranteed by art. 10 *GG*. The government will have to report to Parliament after a period of two years, *Handelsblatt* of 11/05/01.

[127] About interactions see the introductory remarks before Pt. 2.1.

[128] *Schulze-Fielitz* 2000, p. 308.

[129] See, for a more detailed discussion of this problem, *Schmidt-Eichstaedt* 1998, pp. 322 et seq.; *Schmidt-Eichstaedt* 1999, pp. 617 et seq.

individual case, starting from the layers of competence up to the behaviour of the addressees can be the reason for a possible failing. It seems hardly possible to predict and concretely take into consideration all sorts of undesired effects such as, e.g. shortcomings of implementation, enforcement deficits, suspension effects, behaviour of addressees and norm interpreters.

These problems are seen as well by the creators of the prospective law effects assessment. *Böhret*[130] acknowledges that the LEA is subject to the general limits of prognostics in theory as in methods. Still, he reaffirms that the LEA in all three modules can be improved only by further practical tests and und refers to already obtained progress in insight and methodical experience.

Criticism of the developed testing criteria of the law effects assessment is also voiced by *Blankenburg*[131]. He points out that the effects research is based upon the assumption that its results could be objectively evaluated and used as a basis for better decisions. Regarding ex-post analysis, he finds further fault with the fact that different answers can be given to the question, what is meant as "effectiveness" being the original subject of the analysis[132]. Aware of this problem of selective perception the supporters of the law effects research want to find the solution in a more transparent procedure[133].

Also, from a purely practical point of view several critical aspects of law effects research are susceptible. So, for example, the fact that a detailed effects assessment is not yet a routinely part of the lawmaking process. Also, the formal anchoring of the law effects assessment in the amended *GGO* will not bring about any considerable change in this aspect[134]. An obstacle not to be underestimated might also be the high costs and expenditure on personnel arising from every assessment procedure to be carried out[135]. The determination of the complex data of effectiveness necessary for prospec-

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[130] *Böhret* 2000a, p. 155.

[131] See, for more details, *Blankenburg* 1986, pp. 109 et seq.

[132] *Blankenburg* 1986, p. 112; for a critical consideration of ex-post checks, examination and assessment of measures and programmes, see *König* in Schreckenberger (ed.) 1986, pp. 99 et seq.

[133] *Böhret* 2000a, p. 155.

[134] The new procedure anchored in the *GGO* is to be tested in a probationary year on seven legislative procedures.

[135] Compare *Schmidt-Eichstaedt* 1998, p. 323; *Lübbe-Wolff* 1999, voices concerning this aspect, that the financial restrictiveness as well as the compulsion to select resulting from the factual limits of empirical exploration is an especially distinctive problem.

tive risk anticipation as well as the later effects monitoring require capacities available, until now only to an insufficient degree[136]. Even its supporters probably doubt if it is sensible and suitable – and practicable at all – to routinely integrate a law effects assessment into every drafting procedure. They admit that it would have to concern fairly important draft bills, whose legal implementation is expected to cause some burdens and relieves[137].

Also the already shortly mentioned[138] problem of the institutionalisation of the law effects assessment is to be explained at this place. Who shall how, at what time and to what degree be involved inthe assessment procedure? The legislature itself regularly works and decides under time pressure and following political purposes and/or financial criteria. The most promising for a quick parliamentary treatment therefore are draft bills with the explanatory note attached "alternatives: none, costs: none"[139]. The standards of rationality in legislation are generally overestimated[140]. This is, of course, not only a question of standards. A problem with a *constitutional dimension* even stands in the background[141]: Which role can and must parliaments play[142]? Should there be an independent institute for law effects research, which – following more or less the example of the auditing offices – would have the advantage of greater impartiality and independence in law monitoring compared to a legislative or executive self-control[143]?

In principle, Parliament is the highest, independent and autonomous deciding body. According to this democratic – and, therefore, constitutional – principle, legislation is a right of the parliament, not a duty[144]. The law-making procedure designated by the constitution (see above Pt. 4.1.) is conceived as decision making, not as contentious proceedings. In this procedure, *political decisions* are made, not objective decisions well-considered and reasoned[145]. This parliamentary responsibility for the laws

[136] The assessment of *Schmidt* 1986, p. 10 has not outdated.
[137] *Böhret* 2000a, p. 155.
[138] See above Pt. 4.2.1.
[139] *Wassermann* 1999, p. 1376.
[140] *Schulze-Fielitz* 2000, p. 299.
[141] The constitutional lines of conflict between executive and legislative are discussed in detail by *Grimm* 2000.
[142] See, for more details, *Brocker* 1999, pp. 39 et seq.; *Grimm/Brocker* 2000, pp. 61 et seq.
[143] As for example *Strempel* 1998, 92f.
[144] *Klenner* 1992, p. 278.
[145] See also *Gusy* 1985, pp. 296 et seq.: "Those who are responsible for political compromise cannot collect factual information or to balance prognosis models. [...] De-

does not end with their enactment[146]. The Federal Constitutional Court [*Bundesverfassungsgericht*] has established a lasting obligation to observation, which under certain circumstances can develop into an obligation to remedy shortcomings and deficits[147]. Effective ex-post monitoring by the parliaments can and is taken into consideration to an increasing degree already within the legislative process itself, in a way that e.g., reporting obligations of the government about the practical probation are integrated into the laws themselves. This 'model of reporting obligations' can be very well intensified to law controlling[148]. However, in spite of what was last said, it is still true that "the legislator does not owe anything but the law; it is not subject to any (constitutional) optimisation obligations nor to an obligation to substantiate for its measures"[149].

From constitutional perspective, this almost inevitably constitutes strained relations between the specifically expertise-oriented law effects control and the politically determined (final) decision of the legislatore. This tension became obvious already at the example of Rhineland-Palatinate, where in the course of the already mentioned law effects assessment project to the State Forest Act[150] it had come to protests of professional associations and lobbies. These were excluded from participation for the reason that associations' interests had not been considered in the prospective effects assessment in order not to distort the specialist results[151]. It seems therefore at least questionable, if draft bills assessed only with view on specialist expertise are actually more open to compromise than draft bills conventionally realised[152] or if the acceptance of, not least of all, the members of parliament as the last responsible holders of legislative competence would not be reduced, because of them being exposed to a considerably higher pressure from the lobbies[153] of the views excluded from the

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cisionmaking of the democratic majority follows the rule of compromise, *not* the *objectively* corect." (italics not in the original). The importance of the perspective of compromise is stressed as well by *Schulze-Fielitz* 2000, p. 297

[146] *Grimm/Brocker* 1999, p. 62.

[147] *Gusy* 1985, pp. 292 et seq. with numerous references from the jurisdiction of the Federal Constitutional Court.

[148] *Grimm/Brocker* 1999, p. 64.

[149] *Gusy* 1985, p. 298.

[150] See above Pt. 4.2.3.

[151] Compare *Der Tagesspiegel* of 24/07/1999.

[152] In this sense *Rupprecht* 1997, p. 71.

[153] *Wassermann* 1999, p. 1377 criticises that considerations concerning interests of coalition partners, party wings and clients often dominate objective decision criteria.

process of realisation. Furthermore, the political dimension of legislation could disappear on a long term basis – problems now and then being discussed as the danger of the replacement of democratic legislation by technocratics[154].

Until now, the parliamentary committees – in any case, the information obtained from our enquiries – mainly deal with ex-post assessments, as for example, when the necessity of further amendments is to be discussed. In comparison, the systematic ex-ante monitoring, as far as it is practiced yet, is concentrated in the executive area almost without exception[155].

The question of its *institutional linkage* still remains. In the Federation as well as in most Federal States, the monitoring is carried out mainly within the specific ministries; only in Baden-Württemberg, Bavaria, Lower Saxony and Saxony, are there inter-ministerial bodies[156]. But, basing on our interviews, we had the impression that at least on a federal level, the capacities created so far[157/158] seem to be not used to the desired extent[159] because of obviously existing personal interests of the different departments[160]. This experience speaks for the institution of a inter-ministerial, central assessment body, which – as the so-called cross-section task[161] – could e.g., be established at the Chancellery; an "organised crime" department independent from the Ministry of Justice and the Ministry of Home Affairs already resides there, which could also take on the job of co-ordinating a *criminological* risk assessment specialised on organised crime risks.

The next question would then of course be, if this department should be confronted with a separate cross-section committee as a parliamentary equivalent or if the assessment should be the task of each parliamentary committee[162].

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[154] See *Karpen* 1994, p. 57.

[155] See, for similar conclusions *Grimm/Brocker* 1999, p. 61.

[156] *Grimm/Brocker*, loc. cit.

[157] The Ministry of Justice established a department for crime prevention which only sporadically gets involved with other ministries' draft bill preparation.

[158] Parallel structures exist also with regard to the so-called so-called *Rechtstatsachenforschung* [law facts research]; both the Ministry of Justice and the Ministry of Home Affairs together with the Federal Bureau of Investigations have such a department; compare *Rupprecht* 1997, pp. 73 et seq.; *Strempel* 1998, pp. 91 et seq.

[159] *Wassermann* 1999, p. 1377 comes to a similar assessment.

[160] Because of their setting of tasks the Ministry of Home Affairs and the Ministry of Justice have a classical tense relationship.

[161] *Grimm/Brocker* 1999, p. 64.

[162] Compare *Grimm/Brocker* 1999, pp. 64 et seq.

All previous considerations of course, refer only to draft bills of the federal government[163]. It is still totally unclear, how draft bills brought in by the legislature itself (i.e., from the midst of the *Bundestag*) or from the *Bundesrat* should be treated with respect to prospective resk assessment[164].

5. Perspectives for a criminological risk assessment

In all the variants of risk assessment it is still open if a crime-preventive risk assessment, integrated into the 'conventional' law effects assessment, could at all be effectively used. Instead, one might consider creating an extra instrument for anticipating risk assessment in the field of crime prevention, which could be removed from the conventional LEA and follow a modified methodology. One could, to clearly differentiate, speak of *criminological risk assessment*. How such a specified instrument could exactly look like, will be discussed now.

5.1. Differences to conventional law effects assessment

The example of the former so-called "Blue Checklist" and the comparable checklists of the States illustrates very well, the different aims and qualitative requirements of a criminological risk assessment. For crime prognosis can hardly by done by ticking off checklists. This becomes even clearer in comparison to technology impact assessment – in which law effects assessment has its roots[165] – with its largely objectifiable problems of regulation often going back to laws of nature.

This may not only require different qualitative criteria of evaluation as compared to the conventional law effects assessment, at least in some points. It can even in parts impede or at least relativise its general aims. Especially, the basic aims of cost reduction and reduction of density of control (deregulation) may, looking at prevention-centred crime opportunity considerations appear much more controversial.

Even the experimental prospective law effects assessment to the witness protection law[166] – an important legal instrument, in particular in the context of organised crime – had totally ignored aspects of possible abuse as

[163] Only in so far the common rules of procedure are binding (compare § 1 *GGO*).
[164] *Wassermann* 1999, p. 1377.
[165] See above Pt. 4.2.1.
[166] *Brocker* 1997; summarizing *Böhret* 1997.

they had appeared, e.g., in Italian *"pentiti"*-legislation[167]. The Italian example shows of course, that problems also often arise unexpectedly and are thus inevitably just not foreseeable.

5.2. Approaches in terms of content

Upon which substantive approaches could specific instruments for criminological risk assessment be based? The following considerations seem very likely especially referring to the prevention of organised crime:

- Conventional profiles of perpetrators are not so suitable because of the special perpetrators structure in organised crime;
- Victim-related approaches of prevention are of minor importance as well because of the victimless character of many fields of delinquency of organised crime;
- Situational approaches can however be made usable in parts; this is the case especially for the cost/benefits perspective, which is of special importance when considering organised crime as *"rational crime"*[168].

Dismantling the common definitions of organised crime[169] of the components of violence respectively the criminal commission, what stays as dominating characteristics are the business-like or commercial structures, economic profit orientation and – above all – maximisation of profits[170]. Maximisation of profits is the highest commandment that is only made possible with economic rationality. Also, criminal business are subject to the laws of business management[171]. Notably, the European organised crime can definitely be characterised as capital-oriented criminality[172]; and the examination of the perpetrator- and group structures in the frame of the LOOK projects already mentioned, has been able to show that in the field of E.U. fraud the "classical", unorganised lone offender does not play a great role[173]. The central hypothesis of the LOOK research team, according to which the dominant working method of organised groups of criminals in

[167] Compare *Ruga Riva* 2000.
[168] See *Albrecht* 1998, pp. 15 et seq.
[169] See, e.g., *Sieber* 1997, p. 235 (with further references).
[170] *Albrecht*, loc. cit., p. 7.
[171] *Hetzer* 1999, p. 248.
[172] See *Krevert* 1998, p. 21.
[173] *Sieber* 1997, p. 256.

principle corresponds to the working method of legally working business undertakings, however modified in some special features typical for the illegal market, finds more and more confirmation. *Meyer*[174] refers to this as "perfect corporate structures".

In the area of organised crime, economic *rational choice theories*[175] thus offer a promising starting point also for further development of risk assessment. One might even dare to say that potential risks of abuse by organised crime can probably be predicted on the basis of rationality assessments[176] more easily, respectively more exactly than the risks of conventional delinquency which depends from the multi-layered individual factors influencing the individual perpetrator[177] – who could also act irrationally[178].

There are of course, deficits as well in criminological research in view of the methodical entry of the phenomenon of organised crime. Individual careers and individual forms of crime, around which also crime prevention conventionally centred, dominated the research interest for a long time; at the same time, the interest in examining the phenomenon of organisation, professionalisation and rationalisation was missing[179].

The *further development of such approaches* concerning the methodical differentiation especially considering criminological risk assessment is, of course, still in a state of flux[180]. It is only certain that real experiments in criminal law are to a large extent impossible. Experimental laws restricting certain rules or prohibitions to a certain experimental period of time are, at first, quite thinkable. Still, the institution of control groups to whom these laws would not apply is not feasible[181]. Risk assessment will thus have – at

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[174] *Meyer* 1998, p. 656.

[175] Compare, for the economic approaches of rationality, *Schumann* 1999, p. 613; more in detail *Smettan* 1992, pp. 30 et seq. (with further references).

[176] *Kaiser* 1999, pp. 189 et seq. (with further references) comes to a similar assessment of the *rational choice* approaches regarding the special perpetrator structure in the field of environmental (criminal) law.

[177] The criminal variant of human weakness can thus lead to the 'overfulfillment' of a norm through abusive utilisation. Especially in public services (e.g. social welfare or unemployment benefit) such an abuse is quite often perceptible; see *Schmidt-Eichstaedt* 1998, p. 324.

[178] According to *Karpen* 1999, p. 422, the tension of effectiveness and law is largely characterised by the fact that man do not calculably submit to the law.

[179] See, for considerations about the traditional, individual-centred analysis, *Albrecht*, loc cit., p. 17.

[180] *Grimm/Brocker* 1999, p. 66.

[181] *Schreiber* 1983, p. 37; more detailed about experiments in the field of crime prevention *Schumann* 1999.

least in the foreseeable future – an at best summary, intuitive character. Furthermore, the already described increase in complexity in the existing norm structure[182] will make the anyway restricted meaningfulness of social prognoses appear even more problematic. A realistic risk assessment will surely not be able to restrict itself to transfer isolated insights the "quarry" of effects research on individual laws in force doubtlessly holds, to totally different laws or constellations of regulation. What is more, socioscientific insights can only be gained in a longer process of research and discussion and can not be generated without further ado by means of research on request. In so far and taking into consideration the state and the possibilities of effects research, only trend statements are possible. There is also the fact that effects research gets its bearings mainly by *individual* contents of regulation of laws and norms and the extent of its implementation[183].

Further, possible *displacement and moving effects* (now and then appearing as so-called escalating displacement and moving effects) must be integrated into a sensible prognosis. Such effects can be proved in various fields of delinquency, e.g., with a view to technological prevention[184] – effects, which sometimes, can even considerably increase the risk for potential victims. Further to be considered, is the phenomenon of the dynamic effect, the dulling of law over time[185] as well as the technological development[186]; certain reductions of effectiveness are susceptible, e.g., in the area of asset confiscation in the USA[187] or the United Kingdom[188].

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[182] See as well *Schulze-Fielitz* 2000, pp. 308 et seq.

[183] See, for more details, *Schulze-Fielitz* 2000, pp. 310 et seq.

[184] *Albrecht* 1986, p. 66, refers to the concrete example of a possible escalation of a bank robbery to hostage taking or money courier robbery.

[185] See *Schumann* 1999, p. 614.

[186] *Kaiser* 1999, 146 supposes that because of the fast technological development in *electronic banking*, a growing technical and thus factual uncontrollability of the monetary flows, and considers that in front of that background, the concept of money laundering might be worn out in the near future. On the whole, *cyber-crime will gain importance*, as pointed out by *Rederer* 2000.

[187] While the values of confiscated assets in the customs area numbered, between 1988 and 1990, altogether more than 1 billion US-$ annually each, only 500 billion was reached in the years from 1992 to 1994. The confiscation rate of the drug police took a similar development: while the overall value of all objects and assets numbered still ca. 875 million US-$ in 1992, the sum was at only 650 million in 1994; compare *Kilchling* 1997, p. 627 (with further references).

[188] On the basis of the DTOA, significantly stricter rules were implemented in 1994, the sum of decreed *confiscation orders* rose to 25,4 Mio. £; in 1995, the number declined to 18,3 Mio., continuing further down in the following years (1996: 10,5 mil-

Counterproductive mechanisms or long-term effects are well worth mentioning before the background of the enterprise approach. As in the area of E.U. subsidies fraud by organised crime, it is susceptible that because of the meanwhile more detailed and 'resistantly-to-abuse' planned norms, the criminal abuse now requires a degree of organisation which cannot be covered by normal perpetrators (nor groups of perpetrators). Furthermore, the assumption is quite plausible that the 'preventive refit' on the offering side requires such a high logistical and financial expenditure that fraud is not at all profitable but on a very large scale – this as well would be an unwanted support of especially dangerous structures of organised crime. It is, by the way, reasoned that the higher expenditure generally increased, as in the legal area, the price level for illegal services to the highest enforceable on the market, which led to a considerable further increase of (procurement) crime. What is more: in the end, there will be a concentration of the 'best' and most dangerous criminal groups[189].

We can conlude by stating that at the present methodical stage, at best, increased risk potentials are identifiable and/or predictable. Abuse is, finally, surely not foreseeable[190]. Therefore, especially in this field, a merely anticipative risk assessment alone seems insufficient, but should regularly be combined with an ex-post-evaluation as a second component.

In view of the variety of norms and the complex interactions, a criminological risk assessment on *E.U. level* should prove even more difficult than on a national level. An E.U. controlling, at least in the prospective field, will not be centrally practicable in the foreseeable future. Thinkable instead seems a corresponding definition of its goals, also by E.U. law.

6. Conclusion and Outlook

On the whole, the model of a criminological risk assessment seems a promising methodical approach to add a useful component to the instruments available in the fight against organised crime. As presented in this essay, there are various – and also theoretical – points of departure for this. The final point is to bring legislation "back from the office desk to real-

lion; 1997: 5,6 million); figures taken from *Home Office*, Criminal Statistics for England and Wales 1997, table 7.22.

[189] See, for similar conclusions, e.g. *Hund* 1996; *Sieber* 1997.

[190] *Schmidt-Eichstaedt* 1999, p. 623.

ity"[191]. Legislation without giving any motives[192] is sometimes unavoidable, but this should become an exception, especially in criminal law.

One must be aware that efforts in the science of legislation must always reach its limits, as in the theory of science, it is impossible to come to a point of total rationality. It seems right, as *Karpen* points out so well, that "a science of legislation, reflecting also its actual and normative limits, is the task of the future"[193]. The idea of a kind of certificate equipping laws with a *«crime proof»* stamp, does not seem realistic in the foreseeable future. "There is no such thing as perfect law [...]; improvement and perfection of law can only consist of improving the degree to which its aims and purposes are reached" (*Schmidt-Eichstaedt*[194]).

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[191] *Schumann* 1999, p. 503.
[192] This kind of *ad hoc* legislation exists in different forms; see *Rupprecht* 1997, pp. 71 et seq.
[193] *Karpen* 1986, p. 32.
[194] *Schmidt-Eichstädt* 1999, p. 624.

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Greece

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The* manipulation of public opinion by means of such arguments as escalating criminality, especially in connection with foreigners, organised crime and terrorist activities, has led to an increased fear of crime in Greece, and in other European countries alike. As a consequence, criminal policy is gradually becoming security policy;[1] as a rule, an intensification of penal codes can be observed in most countries. This intensification, which is also closely related to an increase in criminality rates as well as the ineffectiveness of existing preventive measures, has been expected to lead eventually to a strengthening of the security in society.[2]

In most of the member states of the European Union various strategies have been adopted, which introduce, among other provisions, preventive measures against such expanding forms of criminality. Such measures are imposed either directly, by means of various agreements[3] which establish a cooperation among the states, or indirectly, by pretence that the national criminal policies – including the legislation – aim primarily at the prevention, especially of organised criminality. In addition, the international character of organised criminality hinders the task of the criminal persecution authorities, which operate within the national boundaries.[4] One must also take into consideration that organised criminality is a flexible phenomenon, in view of the fact that it follows the developments in national and international markets, it assumes diverse disguises and, more often than not, it remains unreported by the victims, since they are discouraged by the publicity and the annoyance of the investigative procedure.[5]

Within this framework and in compliance with the interests of the European Union, Greece sought to adapt its penal code to the respective directives. This adaptation concerned all possible areas, extending from security at work to the fight against terrorism. Following the enactment of the respective laws, in particular of penal nature, there emerged new noteworthy issues, which triggered an interesting discussion within both the public and the scientific community. This entails a new risk, of political character, which needs to be anticipated in the preparation of the respective bills. Even on the part of the government, the adoption of such guidelines that may lead to the restraint or deprivation of fundamental rights was met with reservation in several instances.

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* Translated by T. Serassis.

[1] *Hassemer* 2000, p. 249.

[2] Cf. *Jehle & Kirchner* 2000, p. 159.

[3] Cf. *Pilgram* 2000, p. 9.

[4] Cf. *Klughardt* 1984, p. 83.

[5] *Hassemer* 2000, p. 254.

Since the endeavour to reduce criminality by means of more severe sanctions has been proven ineffective in contemporary criminal policies, in terms of both general and special prevention,[6] other mechanisms are now sought, mainly in the legislative procedure, in order to anticipate in advance the risk of the enacted laws and thus repress organised criminality more effectively than in the past.

In Greece, there is no indication that the social conditions or prevailing social problems are of primary concern in the legislative procedure. It appears that legislation is mostly motivated by political and economic interests. In addition, the priorities in legislation are determined by practical issues, such as the capacity of the legislative body at a given time or the resources required for the enforcement of the law, especially funds, which are usually not available.[7]

According to the Greek Constitution of 1975, which is distinguished for its democratic and liberal character, the introduction of laws is the privilege of the Parliament and the Government. The Ministers of the Government can introduce bills for discussion, while Members of the Parliament can propose bills, as well as amendments. In any case, these need to be accompanied by a justification report stating the rationale, the purpose and the goals of the proposed legislation. In case the bill entails a public expense, a report by the Treasury, determining the overall cost, is also necessary.

Bills introduced to the Parliament are submitted for assessment and revision to the respective standing committee, which subsequently prepares an official report and forwards the bill and the accompanying documents to the Assembly. The parliamentary procedure of discussion and voting provides for three phases: in principle, by article, and in toto. The voted law is enacted after its ratification by the President of the Republic, according to the provisions of the Constitution.

The same procedure is of course followed in the case of penal legislation. As "penal legislation" is considered every legislative regulation that provides for new penal sanctions. In almost every law passed by the Greek Parliament – concerning traffic, commerce, transportation, immigrants – some penal sanction is included as the ultima ratio, in case of violation of its provisions.[8] This is a clear indication that there exist no alternative forms of social control to restrain deviance effectively.

[6] *Heinz* 2000, p. 131.
[7] See also *Eisenberg* 1979, p. 138.
[8] *Manoledakis* 1989, p. 14.

Every criminalisation of behaviour that intensifies in time[9] results in an increase of the number of persons that are subjected to the mechanisms of social control. It is also questionable whether the perpetrators can be deterred, before the commitment of the act, by the penal sanction. Anyhow, the number of such cases cannot be statistically determined.[10]

If one accepts that prevention, as the goal of a legal norm, can be understood only as precaution against the future behaviour of the offender or other potential offenders in a given society,[11] it appears as a utopia, as far as the Greek society is concerned. It seems very difficult to determine the content and conditions of the functions of prevention independently from a specific society, in terms of its distinct economic, social and political realities. In addition, a measure of prevention cannot fulfil its function, as long as it is not assessed in terms of its social effectiveness.[12] Towards this end, ideas and data from Sociology of Law could also be useful to the legislative procedure.[13]

With regard to the available means, Greek criminal policy appears to be relatively ineffective. This is true both for negative general prevention, i.e. the deterrence of potential offenders, and for positive general prevention, i.e. the attempt to maintain and strengthen the belief in law and the trust in legal order.[14]

Greece's involvement with crime prevention policies is recent and limited. Preventive measures in Greece are not planned on a long-term basis. This is mainly due to lack of political will as well as limited financial resources for the criminal justice system in general, and for the agencies of crime prevention and long-term crime control strategies, in particular.[15] On the one hand, very little is invested in the criminal justice system, and on the other hand, research is limited to serious forms of criminality and is usually followed by hasty legislative process, aiming at immediate, short-

[9] Regarding the legislative work, some forms of behaviour have indeed been decriminalized, like adultery and abortion, but others – the majority – have on the contrary been penalised in a more systematic and severe way, such as the protection of the environment, computer crime, hooliganism and sport violence, money laundering, drugs trafficking and anti-terror legislation. Cf. also *Courakis* 1993, p.76.

[10] *Manoledakis* 1989, p. 10.

[11] See, among others, *Tsatsos* 1989, p. 142 ff.

[12] *Tsatsos* 1989, p. 142 ff.

[13] Cf. *Chaidou* 1984, 781 ff.

[14] *Kürzinger* 1996, p. 320.

[15] See also *Spinellis* 1997, p. 291.

term results with the lowest possible cost. Repressive solutions are always preferred to preventive ones. Characteristic examples of this tendency can be found in traffic, immigration and drug laws.

In the field of traffic, legislation is becoming stricter. Because of the absence of proper information about the risks of drinking and driving or dangerous driving (high-speeding, defective vehicles or security measures), it is attempted – rather ineffectively – to deal with problems associated with driving and traffic by means of strict penal regulation. The same reaction can be observed in the case of illegal immigration. Missing integration measures and strategies lead to such repressive solutions as forced deportation or imprisonment of illegally dwelling foreigners. As far as drug policies are concerned, the constantly stern Greek legislation has led to the opposite effects.

When it comes to the prevention of new forms of criminality, which enter into the social, economic and educational policies of the state, one can observe radical measures adopted by the respective Minister in cooperation with the Minister of Justice. Accordingly, as a rule repression supersedes prevention. Preventive measures are not easily observed by the citizens, they take a long time and require a high cost. Repressive measures, in contrast, are immediate, visible and more easily accepted by the citizens; this phenomenon has been particularly evident in the last years, when fear of crime has escalated, due to organised crime and the increase of foreigners and their criminality, in comparison to other criminal manifestations. For these reasons, in Greece the risk factor is hardly ever assessed in the preparation of laws.

Only in exceptional cases can one observe in the legislative procedure specific propositions or measures aiming at a preventive effect of the law. This is true both for the preparation of laws and for the parliamentary discussion. Such hesitant indications of risk assessment or consideration of the preventive effect of laws are becoming more occurrent in the case of organised criminality.

Organised criminality, which constitutes an international phenomenon, has become in the last decades, a subject of scholarly and political discussion for Greece as well. The mere involvement of well-organised bands and their professionalism are not adequate to describe a criminal case as an "organised criminal act".[16] If one takes into consideration that organised criminality has few individual victims who would be interested in an in-

[16] See also *Hassemer* 2000, p. 252.

vestigation and that it probably organises before anything else its own opacity, preventive prognosis becomes very problematic.[17]

The fields of activity of organised crime concentrate on criminal areas that guarantee high profits and at the same time the risk of detection is minimised, due to the fact that there are no immediate individual victims or any existing victims willing to report the incident and give evidence for the penal prosecution. The prevailing forms of organised criminal activity in Greece include illegal trafficking of drugs and weapons, terrorist acts, hold-ups, "protection" and extortion in nightlife, money laundering, transportation of illegal immigrants, mainly from Asia or Balkan and other East-European countries, prostitution and procuring, organised auto theft, often followed by extortion, smuggling of ancient or antique objects.[18]

In the respective literature, organised crime is defined as the criminal enterprise that is operated either in an illegal manner or with illegal means, irrespective of the legality of its nature.[19] Organised crime, at least in theory, is not associated with economic crime, to the extent that the former takes place within illegal markets, while the latter constitutes an aberration within the normal functioning of legal markets. What is also decisive in terms of the gravity of organised criminality is not the qualitative but rather the quantitative changes in criminal activity. The elements of organised crime include the constitution of a criminal organisation (of professional character but not necessarily hierarchically structured), the activities of such an organization within an illegal market (where prohibitions or impeding restrictions exist), and the means and nature of activities on the part of the organization in order to force itself into the illegal market (including offences against life or freedom and bodily injuries). Transnational criminal organisations, which now control, in an extremely profitable way, illegal markets such as drug-trafficking, transportation of immigrants, prostitution and nightlife, weapon-trafficking and smuggling of counterfeit or other illegal (such as tax-exempt) products, are in a position to expand their assets much faster in comparison to large corporations or international financial institutions.[20]

In the prevention of organised criminality, the principle of expediency is partly applied and new methods of investigation are developed. Such

[17] *Hassemer* 2000, p. 281.
[18] See also *Courakis* 1993, p. 72 ff. Cf. *Kern* 1993, p. 6.
[19] See, among others, *Spinellis* 1985, p. 108 ff.
[20] *UNO* 1996, p. 8.

measures include, among others, the surveillance of suspects, the penetration of illegal organisations by secret agents, the removal of confidentiality in telecommunications and the electronic process of data.[21]

As far as organised crime in Greece is concerned, in the last years there has been an increase in armed robberies; cases of protection and control in nightlife have also multiplied. Another phenomenon that has expanded is the laundering of proceeds from criminal activities in Greek banks as well as the Athens Stock Exchange. Drug and weapon trafficking are also illegal activities that follow the international trends. Since the 1980s, drug trafficking from Turkey to Greece and from there to the rest of Europe has steadily increased.[22]

In the case of organised criminality, such preventive measures as, for example, harsh penalties have no effect as regards general prevention.[23] For this reason, among others, a Council for the Prevention of Criminality was established in 1987. Because of various organisational problems only recently did it assemble and assume duties; but still it engages only in certain forms of criminality, such as pharmacy burglaries or theft of bags, and not in the overall crime problem.[24]

Drug-related criminality is regarded as one of the most important forms of organised crime, which justifies national and international reinforcement of internal security.[25] In Greece, drugs are considered a serious social problem and drug use a criminal behaviour calling for either treatment (therapeutic approach) or imprisonment (repressive approach). The two approaches are often combined both in legislation and court decisions. As far as drug trafficking is concerned, the problem focuses more on transportation (towards West-European countries) than domestic consumption.[26] As regards the assessment of effectiveness of laws, until today criminal policy resorted, mostly unsuccessfully, to intensified penal repression, as the only means of prevention, especially in the field of drug trafficking. An interministerial committee, established in 1990-1 to deal with the drug problem, did not introduce anything novel. Similar attempts appeared in Greece in the field of football hooliganism in 1986-9.[27]

[21] *Livos* 1998, p. 1039.
[22] *Courakis* 1993, p. 72 ff.
[23] See also *Spinellis* 1985, p. 112.
[24] For more details see *Spinellis* 1997, p. 292 ff.
[25] See, among others, *Hassemer* 2000, p. 235.
[26] *Katsios* 1998, p. 265.
[27] See *Courakis* 1993, p. 77.

Within the framework of this repressive policy, the Minister of Justice went so far as to express publicly the opinion that the death penalty would be the most appropriate sanction for drug traffickers; a statement that reflected the majority of public opinion. This view, which has been prevailing since recent years, as a result of a drug panic, largely due to mass media agitation, is rather absurd, since, on the one hand, the death penalty was abolished legally in 1993 and in practice right after the restoration of democracy in 1974[28] and, on the other hand, it is hardly feasible to trace, arrest and convict a major trafficker. In Greece, since 1954, the persistent strengthening of drug-related legislation resulted in a raise rather than a drop in the criminality rates of drug trafficking, dealing and use.[29] This is yet another proof of the fact that stricter sanctions have no effect in the case of serious forms of criminality.[30]

The same criticism, which is expressed for drug-related criminality, applies also to traffic-related criminality. In every respective law, prevention is based on a system of sanctions that is becoming stricter. In spite of contrary expectations, violations of traffic law increase steadily. In certain cases, however, it could be claimed that the preventive effect of regulation was successful. One example is drinking and driving: such procedures such as the removal of the driver's licence and of the car plates, in case of excessive alcohol consumption (irrespective of an accident), which were introduced as preventive measures, have contributed to a reduction of accidents attributed to drinking and driving.

More important appears to be the steps taken in the legislative procedure concerning terrorism and organised crime. For several decades it was accepted[31] that terrorist activities had an additional dimension, namely their political character, which differentiated them from organised crime. Today in Greece, it is considered to be part of organised criminality, i.e. a form of criminality that is difficult to investigate, since it usually has few individual victims and it organises its opacity.[32] In the case of terrorist organisations, illegal activities constitute the means for the achievement of their goal; offences against life and personal freedom, robberies, money laundering and weapon trafficking are some characteristic examples.

[28] See , among others, *Courakis* 1997, p. 220; *Margaritis & Paraksevopoulos* 1984, p. 58.
[29] Cf. *Chaidou* 1995, p. 67.
[30] See also *Paraskevopoulos* 1997, p. 49.
[31] See, among others, *Spinellis* 1985, p 110 ff.
[32] See also *Hassemer* 2000, p. 281.

"17th November", which has been active since 1975 without any of its members having been arrested until today, is the major terrorist organisation, with political, legal and economic figures (such as officials, judges, politicians, high-rank officers) as its main targets.[33] In order to combat this new form of criminal activity in Greece, in 1978 the conservative government introduced the first antiterrorist legislation (L. 774), which, however, was repealed five years later by the succeeding socialist government. In 1990, a new law (L. 1916, "Protection of the society from organised crime") came into force, in which several new forms of criminal activity were described: The establishment of or participation in criminal organisations or groups for the purpose of the commitment of criminal acts (either felonies or misdemeanours); the commitment of such acts by persons who have established or are members of such organisations; aggravating forms of terrorist acts by means of accomplices, the "technical" facilitation, moral or ideological support and the cover-up of such acts.[34] It is noteworthy that, already in the first article of the new law, the term "organised crime" replaced the term "terrorism" that was used in the former law (L. 774 of 1978).

In the parliamentary debate on the fight against terrorism in Greece and particularly during the discussion of the new legislation (L. 1916 of 1990), it was proposed, in the framework of criminal prevention and risk assessment, that in the future the proclamations of terrorist organisations should not be publicised through the press. Thus the positions of the terrorists would not be brought to public notice and they would eventually be led to isolation. A code of ethics on the part of the press would facilitate the implementation of this regulation.[35] The proposition, however, was rejected by the majority of the Members of the Parliament.[36] Three years later, the law was ruled unconstitutional by the Supreme Court (Council of the State) and was abolished,[37] on the grounds that its general preventive provisions offended the fundamental human rights and liberties.[38] Among those provisions, the most problematic were the extended time limit for flagrant offences, the sanctioning of negligent cover-up in cases of suspicion of participation in terrorist activities, surveillance of telecommunications and

[33] See *Courakis* 1993, p. 72.
[34] See *Belantis* 1998, p. 45
[35] See, among others, *Tsoulos* 1996, p. 105.
[36] See also *Belantis* 1998, p. 287.
[37] *Tsoulos* 1996, p. 107.
[38] *Dimopoulos* 1998, p. 313.

mail, as well as the composition of the court, the members of which were chosen by lot only three days before the trial. In addition, the rationale of the law was disposed towards the logic of "white cells".[39]

In October 1992, a new debate on terrorism took place in the Greek parliament,[40] but only in January 1995, did a Presidential Decree trigger off a new debate on organized crime in Greece. A council, comprising six experts, six police officials and a public prosecutor, was set up, with the duty to coordinate the research and planning for tackling organised crime. The result was a new law – five years after the abolition of the previous one – on the "Prevention of and fight against the legalisation of proceeds from criminal activities" (L. 2331 of 1995). This legislation was to include every action that aimed at legalising the proceeds from any form of illegal activity, an intention explicitly proclaimed in the draft and the accompanying report.[41]

In the meantime, even scholarly debate abandoned the political element of organised crime, especially since Greece had to adapt to the political guidelines of the European Union. A working group (comprising judges, university professors and lawyers) on the fight against organised crime was established by ministerial decree in March 1998, with the duty to study and implement the guidelines of the action plan for the fight against organised crime of the European Union, as well as coordinate this action at a national and international level. Another committee for the preparation of a new antiterrorist law was established in October 2000, with the Secretary General of the Ministry of Justice, a former Supreme Court judge, as its chairman. The ascertainment that the various laws on terrorism and organised crime in Greece had no preventive effect[42] led to the decision to revise the respective articles of the penal code. Several university professors, who had refused to participate in this revision committee, expressed the opinion that the existing legal framework for the fight against such forms of criminality was adequate and that its enforcement was problematic. The same stand was taken by leaders of the Opposition and other politicians, as well as by chairmen of scientific and professional associations, such as the Athens

[39] *Bossi* 1996, p. 158.

[40] See *Tsoulos* 1996, p. 105. Several years later, Prime Minister Costas Simitis, commenting upon the anti-terrorist legislation of the conservative government of Costas Mitsotakis (1990-3), argued that it had no effect on the fight against the terrorist organization "17 November". (*Eleftherotypia*, 24 January 2001)

[41] *Katsios* 1998, p. 278.

[42] Cf. *Belantis* 1998, p. 80.

Bar, and by the majority of the press. According to their view, the priority should be the reorganisation and effectiveness of Greek police, rather than the passing of a new law.[43]

If one takes into consideration that penal law has lost its traditional functions in society as well as the trust on the part of the citizens,[44] the reservations about the appropriateness of new regulations in penal law and penal procedure are quite justified. The most serious argument against this decision is that such amendments would inevitably lead to restrictions and violations of the rights of citizens and in particular of the accused.[45] This would constitute a slap at the guarantees of the rule of law.

This phenomenon can also be ascertained in the legislation of other countries, where, in the context of modern penal law, we witness the implementation of such measures, for example the widening of the limits of penalties, use of new methods – usually of dubious legality – in investigation and interrogation, introduction of the "King's evidence" as well as new, unlimited sanctions against the property. In no case, however, should the end justify the means.[46]

According to the most recent law (L. 2928 of 27 June 2001, "Protection of citizens against criminal acts of criminal organisations"), terrorism is included in the organised economic criminality, on the basis that terrorists (exactly like the Mafia) influence public opinion as well as certain decision-making centres. In addition, they employ methods of the general organised crime – such as bank robberies – that aim at providing the necessary funds. Among the points of debate in the new law are the electronic surveillance, the conduct of the trials, and the protection of witnesses who are going to testify against suspects of terrorist acts.

Among other provisions, in the new law, prison sentences of 10 years minimum are provided for. Former terrorists and members of criminal organisations, who repent their criminal career and are willing to cooperate with the authorities for the disruption of these organisations, can remain unpunished, after a substantiated court decision. This is not applied if they have committed homicide or some other crime involving serious bodily injuries; in such cases they are punished with reduced sentence. A most

[43] See, for example, the views expressed by Anna Benaki, MP for the Opposition and professor of penal law at the University of Athens, in the influential newspaper *To Vima* (18 June 2000).

[44] See on this *Frehsee* 1999, p. 16 ff.

[45] Cf. *Dimitratos* 1999, p. 304 ff.

[46] *Hassemer* 1992, S. 380.

problematic issue is the participation of undercover police in illegal organisations and their uncontrollable, as well as immunity from punishment, and activities.

In the case of suspects of terrorist acts and organised crime it is allowed to test the genetic material (DNA) in order to determine the identity, a regulation that violates every limit of legality.[47] In some cases, confidentiality of bank and taxation transactions, as well as of communications is violated, with permission from court authorities. Lay judges are excluded from the composition of the courts trying such cases, which is considered a step towards the abolition of mixed courts for serious offences.

Until now, preparatory acts leading to the formation of a criminal organisation remained unpunished, while with the new legislation they are considered punishable; in this way even intention is punished, a direct violation of democratic legal doctrines. The enhancement of surveillance methods is yet another indication that the new law threatens the rights not only of the suspects, but also of every member of specific groups of citizens, so that the "usual suspects" can be arrested more easily.[48] Penal law is thus becoming a political instrument and the judiciary is being replaced by the police. Thought is becoming a target of penal law and we are being led to extremities.[49]

International pressures, especially from the United States but also from the European Union, have led to an escalation of the discussion about and occupation with terrorism in Greece. The situation was aggravated after the terrorist attacks in the United States last September, as well as by the fact that Athens is hosting the 2004 Olympic games. This event has many effects upon the demand for more intense surveillance: a climate of panic and fear of crime is apparent, which enables both the intensification of internal controls and the interference of foreign agencies – particularly the F.B.I. – in the operations of the Greek police and the judiciary. The issue of internal security, especially in view of the circumstances, is gradually leading to

[47] The suspect can of course request a DNA analysis in order to prove his / her innocence.

[48] According to Prof. Yannis Vavouras, Rector of Panteion University, the goal of the new law is ultimately not the fight against terrorism, but the restriction of the fundamental rights of citizens. (*Eleftherotypia*, 6 March 2001).

[49] For example, the possession of explosive materials – even for simple, a small camping gas container – can be punished by mere suspicion that it can be used to hurt persons or property.

new measures, which are problematic in terms of both their legality and their effect on democratic principles.

From the perspective of criminal policy, the aim is constantly to tackle the escalating criminality with the production of deterrent laws, at a low cost and with immediate, visible results. However, both theory and research in Greece have established that such a procedure takes into account only one aspect of prevention and the public is hardly deterred by severe sanctions. It is indicative that more than half of the prisoners interviewed during a research project admitted that they would have committed the offence even if the penalty provided for was twice as high.[50] For this reason, it is often endeavoured to reduce the risk of an enacted law afterwards, by means of special preventive measures. This is accomplished mainly through alternative sanctioning strategies, which are considered as positive by the public. For example, petty criminality and tax evasion are not sanctioned with penal, but rather with administrative or civil law measures; prison sentences up to three years can be redeemed; those who have not the means to pay their fine or other monetary penalty can offer instead community service and thus avoid ending up in prison.[51] Such alternative sanctions, which serve to bypass imprisonment, are common practice in most European countries.[52] There is no doubt that criminal policy appears as a conservative field and constitutes a suitable issue for political debate and strategies.[53]

Legislators often fail to acknowledge the legal reality. Since the citizens are the recipients of various (both national and international) legislative regulations,[54] great caution should be exercised in the formation of criminal policy. As regards organised criminality, the quest for the causes that generate and facilitate the phenomenon should be of utmost priority. A more liberal drug and immigration policy could possibly be the means towards a more rational policy, together with other similar measures. Even if such an endeavour fails to be accomplished,[55] a reduction of criminality by means of alternative general and special preventive measures can be considered.

[50] *Spinellis* 1982, p. 382 ff. and 397.
[51] *Courakis* 1993, p. 77 ff.
[52] *Jehle & Kirchner* 2000, p. 159.
[53] *Hassemer* 2000, p. 249.
[54] Cf. *Andenaes* 1974, p. 118.
[55] Such proposals are usually treated as unrealistic, especially within the framework of the international guidelines, which Greece, as a member of the European Union, has to follow.

Within this context, it might not be advisable to establish risk assessment as an obligatory element of the legislative procedure in Greece, especially if one takes into consideration the current situation and the (in)effectiveness of existing preventive measures.

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Italy

ROBERTO ACQUAROLI

Contents

1. Introduction: the law-making process in Italy

The Italian legislative process does not assess the criminal risk attendant upon a new law prior to its introduction. Assessments, whenever made, are ex post, based on the knowledge of criminal behaviour in specific economic or administrative sectors. The many-headed expressions of crime in connection with the law on public tenders is an example of this, as also the capacity to adapt to or circumvent laws that are introduced on a case by case basis to counter unlawful behaviour. [1]

The absence of prior assessment during the passage of the bill is due to the consolidated procedures followed in preparing bills. In general, legislative bills totally fail to make any empirical or criminological analysis of the law's impact upon society.

Most bills are prepared by the competent offices of the single ministries, which are normally staffed by public employees and magistrates seconded from judicial offices. When more complex bills must be drafted, covering entire legislative sectors – for example corporate crime – special committees are formed, made up of judges, university professors and lawyers.

However, neither in this case is any account taken of empirical and criminological analysis. Instead, the cultural and policy stance adopted concerns the need to adapt the law to new emergencies or new social requirements, or to update the organisation of sectors of the state or economy according to the dictates of social protection or welfare.[2]

Consequently, the legislative product is the result of positions expressed by individual members in committees or in ministerial legislative offices or of policy guidelines laid down by the government or sectors of the public opinion.

The upshot is the multiplication of laws in the most disparate sectors; which is matched by the multiplication of hypothetical fact situations to which the law attaches a penal sanction.

A recent survey found that these hypothetical fact situations in special legislation amounted to more than 5,000. The level of law enforcement in the face of such a plurality of situations is, on the contrary, quite limited[3]. An observation made on the drafting of penal law, which we subscribe to

[1] COLOMBO, *Ed., Il sistema degli appalti*, Milano 1985.

[2] Cfr., for example, PALIERO, *Minima non curat praetor*, Padua 1985, p. 3-178.

[3] Research MURST "*La riforma del diritto penale complementare*", in publishing phase.

and would extend to the law en bloc, depicts the legislator "as the slave of the needs of the moment, who submits to the pressures of lobbies and other groups and regularly bows to emergency procedures and the symbolic abuse typical of penal law"[4]

In the past decade the harmonisation of domestic law with community directives has produced another set of circumstances in which no attention is given to the possible effects of the new hypothetical situations in terms of the encouragement of crime. Instead the legislator's attention is wholly given over to "adapting" the system to community law.

2. The evaluation of penal risk in Italian law

It cannot, therefore, be asserted that any form of preventive assessment of penal risk is associated with the introduction of a new law.

Instead, there are ex post assessment methods mainly aimed at controlling or preventing organised crime, especially as regards the public administration and the economy.

The explosion of serious forms of economic – political and organised crime forced the legislator to introduce regulatory and preventive mechanisms that, albeit downstream of Parliament's acts, enable control functions, crime-growth assessment and crime prevention functions to be carried out.

However, we cannot speak of a systematic choice on the part of the legislator but rather of the need to come to terms with emergency situations by fielding a multitude of instruments, often in an uncoordinated way. Such instruments are institutional, normative, "contractual" as well as procedural and substantial.[5]

As concerns the institutional aspect the most important instrument is, without doubt, the parliamentary committee of enquiry on the mafia, with investigative and proactive powers also as regards Parliament and the government.

In legislative terms, the need for preventive and monitoring operations on criminal activity is principally aimed at public procurement contracts and calls for a number of means. On the one hand, there is new general

[4] PALAZZO, *Scienza penale e produzione legislative: paradossi e contraddizioni di un rapporto problematico*, RIDPP 1997, p. 715.

[5] For example, MOCCIA, *La perenne emergenza, Naples 1996; Moccia, edited by, Criminalità organizzata e risposte ordinamentali*, Naples 1999.

legislative framework within which an authority has been set up to monitor public works, and on the other, a series of powers given to prefects (decentralised government bodies, operating at provincial level) to make controls and investigations in the fight against the mafia designed to prevent the infiltration of organised crime in public works.

The initiatives promoted by institutional bodies such as CNEL (the national committee on the economy and work) and CIPE (Interministerial committee for economic planning) and represented by the socio-economic observatory and the protocols of legality constitute an attempt to develop actions to repress organised crime at a local level, and involve not only the institutions (Prefectures, Municipalities, Police) but also business associations and trade unions.

The fight against crime is the framework in which the complex legislative provisions for alleviating punishments operate as concerns criminal turncoats, and which has recently undergone radical reform.

3. The paradox of recent criminal legislation: increase of criminal risk as criminal policy strategy

Not merely, as we have said, are there no preventative institutional evaluation mechanisms; on the contrary, the legislator in recent years has systematically followed a risk increase method of thinking[6], identified as an object of political exchange and means of obtaining from the author of the crime "useful" services for reasons often external to the protection of that which is put in danger from the said crime: proposing impunity for the author, the legislator "directs" the conduct of the author following the crime up to reaching to those ends, desired by the legislator.[7] To this way of thinking, corresponds the frequently adopted recourse, by the legislator, to the so-called "condoni"[8](*remissions* or *pardons*), that anticipate the extinction of the crime following the payment of a sum of money. Here it is clear that the interest of the State, is that of using the "criminal threat" as an "alternative" instrument in ensuring fiscal earnings, when confronted

[6] SGUBBI, *Il reato come rischio sociale*, Bologna 1990, p.7 s.

[7] CORTE COSTITUZIONALE sent. n. 369/1988.

[8] Cfr., in matters of social security, d.l. 483/83; in matters fiscal d.l. n. 69/1989 and d.l. 83/91. On the theme, DI MARTINO, *La sequenza infranta. Profili di dissociazione tra reato e pena, Milan, 1998; Padovani, Il traffico delle indulgenze- "premio" e "corrispettivo" nella dinamica della punibilità*, RIDPP, 1986, 398 ss.

with the absolute impossibility of combating the phenomenon of tax evasion. These "condoni" are proposed as remedies to a phenomenon of "mass-illegality", in front of which, the efficiency of the criminal social control system is almost invalid.[9] It is in this sense, that we may state, that criminal intervention and fiscal intervention are categories which can be interchanged.[10]

4. The criminal risk prevention in the work place

Apparently, this is ascribable in the same frame of thought, the recent legislation concerning the extinction of the transgression regarding safety in the work place[11].

Also in this case, this transgression is usually extinguished out of court, following the payment of a cash settlement.

To view it well, however, there are some substantial differences: above all, the "mending" of the entrepreneur's ways of working is not included in cooperation in the trial, and never in the simple payment of the sum: the subject, in fact, must, before being allowed the cash settlement, from which the extinction of the crime derives, have eliminated the source of danger for the safety of the workers.

This therefore deals with a mechanism, that is suitable to limiting criminal risk, represented by lesion to the damage of the employees, that have come about by violating precautionary law. Such a mechanism is not automatic: it foresees the intervention of a "supervising organ", which, from the start, reveals the existence of a dangerous situation, contrary to law; therefore, it dictates the "prescriptions" that the entrepreneur must adopt for its elimination; finally, it verifies that such prescriptions have been properly executed. Only at this point, will the author be admitted to pay; with the consequent archiving of the criminal proceeding against him.

In this model, the evaluation of criminal risk is a constituent element of the process of ascertaining transgression.

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[9] PADOVANI, op. cit., p. 425.

[10] SGUBBI, op. cit., p. 35.

[11] D. Lgs. 758/1994. On the theme, PADOVANI, *Nuovo apparato sanzionatorio in materia di lavoro*, in DPP, 1995, 506; FIDELBO-PACINI, *Le innovazioni secondo le direttive della legge delega,* in DPP, 1995, 523 s.

5. The supervisory authority for public works

In the 1990s, serious and widespread forms of economic and political criminality emerged and became the subject matter of a series of important judicial enquiries. To deal with the phenomena, generally known as "Tangentopoli" (kickback city) the Italian legislator, also spurred on by the need to fall in step with community procedures, made radical changes to the law on tender procedures for public contracts.

The principal result was the institution of a supervisory authority for public works (law 109/94), which, in order to prevent crime, monitors the sector for premonitory elements of unlawful conduct (systematic irregularities in public tenders, unjustified price increases, excessive delays in completing public works).

Formally, the authority is independent of the public administration and can control, inspect and apply sanctions.

Its primary activity is to make systematic checks on the manner in which public contract and tender procedures are conducted. When irregularities are discovered, the competent regulatory bodies are informed but also the courts, if such irregularities appear to contravene penal law. It also has powers to bring serious cases of non- or incorrect observance of the law on public works before the government and Parliament and to make proposals for amendments to public tender procedures.

6. The Parliamentary committee of enquiry into the mafia

As mentioned earlier, this committee is the most important means for the preventive assessment of penal risk as regards organised crime.

The committee, made up of parliamentarians, is set up by law and lasts for the entire legislature.

Among its tasks it can:

- verify the implementation of the law designed to fight the mafia;
- ascertain the appropriateness of the law by proposing bills and administrative measures to make the action of the state and regional and local authorities more effective and coordinated. Similarly, it works to ensure the adequacy of arrangements for the prevention of crime and judicial assistance and cooperation;
- ascertain and evaluate the nature and features of changes and alterations in the mafia and all its related activities;

- report to Parliament at the conclusion of its work or whenever it deems it necessary; and in any case at least once a year.

It is worth pointing out that the committee of enquiry has the same powers as the judiciary. But at the same time it can avail itself of the help of experts in social and economic fields. Thus it can overcome the shortcomings mentioned above concerning the lack of any sociological and criminological input in order to make a more realistic effect of the consequences of proposed new laws.

This advantage is exhibited by the manner in which the committee has organised itself to deal with organised crime. The same importance is given to preventive systems and administrative regulation as is given to systems of penal repression.

7. The monitoring work of the antimafia committee

The committee is also an important channel of information and control on the effectiveness of the law on mafia-type crime, in addition to its strictly judicial activities.[12]

Its investigations into how preventive measures against money laundering actually operate is a good example of this function. The committee has dedicated much work to two critical matters as concerns preventive action: the trend in reports on suspicious activity (Article 3, law 197/ 1991) and the setting up of a register of bank accounts and deposits.

The committee has compiled statistics that indicate the effectiveness of banking law on bank deposits to combat – when correctly applied - the illegal financial system. Such statistics are a valuable and real insight into suspicious financial movements and transactions as well as being an empirical study on how preventive and prohibitive measures are applied in practice. They bring to light shortcomings in the manner in which the law is applied, and report them to Parliament: "Parliament and the government must be informed – the committee stated in its final report for 2000 – that apart from an undue emphasis on some formal mistakes in transactions ... the application of the sanctions provided under law 197/91 by the Treasury is altogether unsatisfactory in terms of the quality of the results obtained. The situation calls for specific actions designed to determine and assess methodologies and results.

[12] The following considerations from the *"Relazione conclusiva della Commissione d'inchiesta sul fenomeno della mafia"*, Rome, 2001, p.51 ss.

Further proof of its monitoring and control functions on the danger of mafia infiltration into the economy is the attention it gives to relations between the banking system and suspicious operations related to the 'ndrangheta. It concluded that the banking system had exhibited a "very low level of cooperation on measures for the prevention of money laundering revealing a bureaucratic under-estimation of the financial aspects of the knowledge and action needed for such preventive action".

It cannot be sustained, therefore, that no assessment of the preventive efficacy of a law against organised crime takes place at an institutional level. However, certain problems remain which are, in part, due to the absence of juridical constraints on the legislator, who is not obliged to transform the proposals and indications of the committee of enquiry into law and is in part the result of the political conditioning to which the committee is subject, given its nature as a parliamentary body, that by impairing the objectivity and the scientific rigour of the enquiries, undermines its effectiveness.

8. The role of the prefects in preventing organised crime from infiltrating the economy, especially as regards the sector of public contracts

After the closure of the "Office of the High Anti-mafia Commissioner", the Ministry of the Interior assigned powers to the prefects, [the territorial representative of the ministry (d.m 23.12. 1992)], as a means to prevent mafia companies or organisations infiltrating the field of public contracts.

In order to acquit the tasks assigned to them the prefects have:

- fact-finding and investigative powers applicable to the public administration and public bodies. For investigative purposes they have the power to ask the responsible organs of the state to perform mandatory controls and executive measures to allow them to peruse documents in cases of misfeasance and malfeasance by offices of the public administration.
- the power to require companies to provide organisational, financial and technical information on their activities as well as any other indication useful for establishing who their real owners are;
- the power to ask contracting public bodies for documents on tender procedure and contracts;
- the power to ask banks and other credit institutions for data and information on the documents in their hands.

The practical implementation of these powers – according to the findings of the antimafia committee – has had contradictory results.

If, on the one hand, the results obtained from these powers appear positive it is also apparent, on the other, that the specialised powers and structures available are inadequate to monitor what are often complex operations.

9. CNEL's socio – economic observatory on crime

Alongside those "classical" forms for monitoring and assessing organised crime, referring to the parliamentary committees and the controlling function of the decentralised public administration, mention must be made of "integrated" initiatives among institutional subjects and collective associations (primarily, trade unions and business associations) which have produced instruments of coordination for preventive action.

Among these there is the socio-economic observatory on crime run by CNEL, the National Council for the Economy and Labour.

The observatory has gone about the socio-economic analysis of crime by pursuing certain lines of investigation: monitoring the principal phenomena of the illegal economy and problems related to them (money laundering, money-lending, contracts, agricultural fraud); studying the crisis of legality in institutional and territorial contexts (civil justice); the observance of self-imposed forms of legal conduct (codes of professional behaviour); factors to adapt preventive action to legality.

Further to this kind of monitoring, CNEL has drawn up proposals for legislative action on usury, extortion and the use of confiscated and seized property.

In the framework of this research, an interesting experiment was conducted using an original assessment model of penal risk that involved the analysis of social dynamics and administrative procedures. The model highlights the weaknesses of the present legislation on organised crime thanks to which organised crime can penetrate the economic and business fabric.

10. The "protocols of legality"

Another recent experiment designed to prevent the infiltration of the mafia into the economy and public contracts and their subsequent contagion, is the "protocol of legality".

Public legislation has recently introduced the so-called "territorial agreement" designed to promote social development and job creation in distressed areas, mainly in the South of Italy. The measure envisages private and public investments, the former being encouraged by important economic incentives. Alongside these "territorial agreements" the legislator has postulated special "protocols of legality" designed to reinforce the security of productive activities and providing controls aimed at preventing and repressing unlawful activities in the labour market, the control of investments and in public and private tenders.

The actual constitution of these protocols is not dictated by law but left to the capacity of public institutions and business and labour organisations, within the territory, to introduce a form of stable coordination.

Thus the municipality and prefecture of Catania, under the auspices of the protocol of legality adopted, have created a coordination group comprising the mayor, the prefect, the heads of the various police forces operating in the territory and representatives of labour unions and business organisations.

The protocols serve a number of purposes and cover a series of operations ranging from the constant surveillance of public contracts to the monitoring of all the executive phases of such contracts.

Furthermore, coordinated action among such bodies entails that there should be a commitment to highly localised territorial controls in whose framework the police can undertake a focused surveillance on building sites and industrial premises in order to extirpate extortion attempts or any other form of unlawful or disturbing activity.

In some cases direct involvement by companies is envisaged in the control and prevention of acts of violence and sabotage that are typical of the intimidatory influence of mafia associations. Under some protocols there is the obligation to use private security guards and adopt simple safeguards to improve the potential for preventing forms of violence and intimidation, whose objective is to instil fear among workers and entrepreneurs. For example, it is foreseen that lighting systems will be introduced in non-working hours in areas subject to surveillance.

As concerns the repression of usury, which is another favourite instrument in the hands of organised crime to control local economies, the signatories of the protocols will, in some cases, work to identify appropriate guarantees to facilitate access to credit by companies experiencing economic difficulties.

The foregoing experiences of the observatory and the protocols of legality are to be seen as experiments in a new culture of crime prevention that makes use of different channels with respect to the classical means of the penal system. Commencing from the direct involvement of private and public subjects in the territory these forms aim at directly opposing the presence of the mafia and at making the legislative measures on crime prevention and economic and social development more effective. And it is by means of such measures that the state has lately been trying to attack the sub-stratum of economic poverty and the culture of illegality in which the mafia grows and prospers.

But in the fight against organised crime, prevention strategies make use of special instruments of a substantial and procedural nature; the former to uncover "suspect" wealth and the second to gather information on persons belonging to mafia associations or criminal associations in general, when they refer to the multitude of hypothetical situations of criminal association existing in Italian law. The latter strategy applies a contractual form of co-operation between the state and a criminal who turn state's (or Queen's) evidence.

11. The legislation on criminals who turn state's evidence as a means of fighting organised crime

With the advent on the law on turncoats (decree law 15.1.1991 No. 8, amended by law 13.2.2001 No. 45) the "contractual" nature of the benefits provided by the law on the protection of turncoats was established. This approach is embodied in the last legislative measure, which is above all, concerned to remedy some distortions that gradually emerged in the first ten years of the law's life. In brief, on some occasions an ambiguity in the behaviour of some these turncoats has emerged, when, for example, they occasionally exploited the status recognised them by law, to discredit judicial enquiries and individual persons according to directives received by mafia organisations or to obtain financial benefits or even some freedom of action to continue unlawful activities.

Despite these drawbacks, which led to the recent reform of the law, these legislative benefits appear, at least in numerical terms, to be working. Between 1991 and 1999 about 2,200 protection programme proposals have been advanced for criminals turning state's evidence.[13]

[13] Source: Ministry of the Interior, in Guida al Dir., 2001, 11,69.

The law in question operates along three lines. 1. the turncoat obtains significant reductions in his sentence; 2 he is obliged to disclose illegally acquired wealth to demonstrate that he has given up organised crime; 3. he is prevented from making "pre-arranged" declarations with the judicial authority.

11.1 Legislation to reward cooperation as an instrument in the fight against organised crime

The law on favourable sentencing plays an important role in repressing organised crime.[14]

With respect to traditional forms used to attenuate sentences by the penal code, based on balancing reductions in, or the exclusion of, the sentence against the interests at stake, and without any use being made of the evidence provided by a co-operator of the police to incriminate other persons associated in the crime, a fundamental change took place in the 1970s as part of the measures against terrorist organisations.

The decree law 625/1975 was the first measure to provide specific occasions for reductions in the sentences of persons who disassociated themselves from terrorism and collaborated in the judicial enquiries.[15]

The introduction of such a norm, later extended to other hypothetical fact situations sanctioned by penal law, obviously aroused criticism about its constitutionality.

Penal jurisprudence was largely opposed to the norm and challenged its functionality with respect to general prevention as also its diversity with respect to the concept of the function of the sentence, as set forth in Article 27 of the Constitution. However, the greatest criticism was reserved to the inquisitorial nature of the norm, based on a logic of reciprocal advantage.[16]

The opposition and the reservations have, moreover, increases as such instruments to reward cooperation have been extended to other forms of organised crime.

Alongside the foregoing criticisms of principle, there are those that concern the basically different reasons for the decision to turn state's evidence as between persons accused of terrorism and those of organised crime, with

[14] INSOLERA, *Diritto penale e criminalità organizzata*, Bologna 1996, 131 ss.

[15] Cfr., BERNASCONI, *La collaborazione processuale*, Milan, 1995, p. 79 ss.

[16] PADOVANI, *Il traffico delle indulgenze*. 420 s.; MUSCO, *La premialità nel diritto penale*, in AA.VV., *La legislazione premiale*, Milan, 1987, 121; FLORA, *Il ravvedimento del concorrente*, Padova, 1984, 163 s.

the associated risk of distorting the objectives of the new norm.[17] And this circumstance has, in fact, been shown to take place in the fight against mafia-type organised crime and has led, as we shall see, to the reform of the institution.

Thus the contradiction grew between the benefits obtained, on the one hand, and the constitutional functions of the sentence and the principle of equality, on the other. The question of equality concerned the so-called "pawns" or rank and file operatives of criminal organisations, who were handicapped by not having much to offer for purposes of cooperation.[18]

However, the argument advanced mainly by the investigating magistrates and based on the excellent results in the fight against terrorism, that the system of favourable sentences had a disaggregating effect on criminal organisations, was hard to contest.[19]

11.2 Legislation rewarding cooperation in the fight against the mafia: the present law on "turncoats"

At the beginning of the 1990s, a contractual form of reduction in sentencing was introduced as an instrument in the fight against organised crime. The innovations were clearly modelled upon American measures.[20]

The experience of these first ten years of the law brought to light some highly negative effects. Reservations in particular were raised about the manner in which the norms were managed by the judicial authority, which was sometimes accused of not evaluating the declarations of turncoats in an objective fashion. Similarly, the strategy of infiltration put into practice by the mafia through the use of false turncoats or false accusation based on real facts was viewed with alarm. Again the tendency of the judiciary and the police to turn criminals into co-operators of the police despite the very limited value of the information they provided was strongly criticised. And lastly, the conflict between the judiciary and the political system increased as the judiciary investigated areas that parliamentary immunity and political logic had traditionally viewed as off-limits. [21]

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[17] CASELLI-INGROIA, *Normativa premiale e strumenti di protezione per i collaboratori della giustizia tra inerzia legislativa e soluzioni di emergenza*, a cura di Grevi, Milan, 1993, 199 ss.

[18] MOCCIA, *entry "Ordine pubblico"*, in Enc. Giur., XXII, Rom, 1995, 122 s.

[19] INSOLERA, cit., 133.

[20] GIORDANO-TINEBRA, Il regime di protezione, in DPP, 2001,5,561.

[21] GIORDANO-TINEBRA, cit., 561.

These developments were the background to the recent reform. "The new law is inspired by more rigorous criteria as concerns the qualifications of those wishing to obtain the benefits and the protection it affords and the transparency of the mechanisms that regulate the whole institution; as such these criteria are in line with the objective of modifying the most criticised aspects of the law in force" [22]

While there are some who consider that the new law can in some manner harm the effectiveness of the fight against the mafia, there are also others who emphasise the need for fixed rules to avoid the recurrence of abuses and questionable attitudes on the part of the judicial authority and the police.

The present legal arrangements, moreover, have harmonised the institution of the law rewarding cooperation as it applies to the two areas of criminality in which it was, at different times, previously used: terrorism and mafia.

11.3 The requisites for being eligible to protection measures

Cooperative conduct in order to obtain the benefits provided by the law, goes beyond making declarations in court as it requires a more general – and perhaps generic – cooperative conduct. "With this notion, the law refers to the provision of information, such as news and data, interpretations and expertise advice that the subject can offer outside penal proceedings and which, while devoid of immediate judicial use, can nevertheless give rise to lines of investigation...By means of this notion, which may involve confidential reports, an important new field is opened up that the standardization of investigative procedures traditionally precludes. It is supposed, for example, that information on the habits of a fugitive can be acquired".[23]

The characteristics of cooperative conduct as concerns the eligibility for special protection measures are set forth in subsection 3 of Article 9. Intrinsically trustworthy declarations also include those that present novel characteristics or comprehensiveness or other important elements are held to be valuable as regards not only enquiries on single proceedings but more generally on the complex process of investigation into criminal organisations – that is, its structural features, its arms, explosives or property, its internal

[22] *Report on Law* n. 45/2001.
[23] GIORDANO-TINEBRA, cit., 562.

and international relationships or mafia or terrorist/ subversive organisations, the objectives and operating procedures of such organisations.[24]

To determinate what constitutes a situation of danger for co-operators with the police, as a result of providing the foregoing declarations and information, account must also be taken of the intimidatory capacity of the criminal groups (to which such information refers), within the local social environment in which the subject lives.

It should also be remembered that the protection measures extend to the family members of turncoats and also, but only in specific circumstances, to persons outside the nuclear family who find themselves in danger as a result of the declarations made.

11.4 The protection programme

The protection programme, as an application of the so-called special measures for turncoats, has a twin objective. It aims to create a "new life" for the turncoat and it aims at completely uprooting him from the context in which he lives and at recreating another economic and social context. It includes the so-called special measures that comprise a series of arrangements to guarantee the subject's safety to be implemented whenever somebody's life is endangered on account of his declarations. Additional specific measures may also be taken that range from the transfer of the turncoat to protected areas to economic help, the issue of a new identity and his social reintegration.

The recent amendments to law 45/1991 reinforce the structure of the protection programme – and the special measures – and transform it into an authentic contract between the state and the turncoat. Article 5 sets out the latter's obligations which include the observation of the security and cooperative rules provided in the protection measures, cooperating with interrogations and investigative actions ordered by the judicial authorities, the non-release of declarations to nobody except the judicial authorities, the police or his defending lawyer on the proceedings with which he has agreed to cooperate, no meetings with persons associated with the crime in question, the disclosure of goods owned and handing over to the state all monies accrued by the preceding unlawful activities.

[24] ROBERTI, *Nella netta distinzione tra premio e tutela di un contributo al superamento delle distorsioni, in Guida al dir.*, 2001,11, p. 46.

11.5 Forms of cooperation and the results of the "rewards"

The "minutes detailing the contents of the cooperation" must contain all the information in the possession of the turncoat useful for the reconstruction of the facts on which he is being interrogated as well as other serious facts and matters of social alarm with which he is acquainted as also the information necessary for identifying and capturing the authors of the crimes.

These declarations must be completed within 180 days from the decision to cooperate otherwise any declarations made after this period will be deemed unfit to be used. In addition, respect for this term is a necessary premise for benefiting from the special protection measures. However, respect for the foregoing term will, above all, be the determining factor in the application of attenuating circumstances to subjects for the crimes committed and for the application of penitentiary benefits such as release on parole, release for good behaviour and house-arrest.

11.6. The "witness for the prosecution"

Law 45/2001 introduces the notion of witness for the prosecution alongside the figure of the "co-operator with the police". This notion, according to the first interpretations, refers to a person who makes declarations in the course of penal proceedings involving the subject matter to which the law on turncoats refers, on facts committed by third persons and thus not only extraneous to the penal proceedings in which they were made but also to related proceedings.[25]

The measures of protection provided for these witnesses comprise protection measures in the narrow sense of the term and measures of economic assistance. The former also include access to the protection programme, as specified above for turncoats. The others refer to the provision of a contribution aimed at maintaining a standard of living not inferior to that obtained before the commencement of the protection programme in addition to the capitalisation of assistance costs as an alternative to their provision over time. A sum of money to compensate for lack of earnings may also be provided following the curtailment of the witness's and other family members' gainful employment as a result of the declarations made. The law stipulates the duration for which these measures can be provided and also

[25] GIORDANO, *Testimoni, più snella la raccolta delle deposizioni, in Guida al Dir.*, 24.3.2001, 11, p.62.

their termination, regardless of the stage reached by the penal proceedings, whenever the risk for which they have been applied ceases to exist.

12. Conclusions

It seems questionable, when viewing such an irregular picture, that is made up of multiple protection and criminal policy needs, to be able to give an unambiguous answer to the question, relative to the need or otherwise of introducing a criminal risk evalution system, placed in the processing of the law.

If on one hand, in fact, this would lead to a rationalising of the criminal system, limiting the multiplying crime effect, which characterized the legislator activity, on the other it seems to be questionable to identify theoretical models of a general nature; the risk is that of creating a mechanism that carries out a check of an exclusively formal character, leaving at that point the effectively evaluation moment of the crime-producing, induced by its introduction, to the concrete application of the law.

It appears more realistic, instead, to think of monitoring mechanisms of those applicative effects of the law, in relation to sectors of economic and public administration activities, that are more exposed to the risk of infiltration by economic criminality or by organized criminality.

The Netherlands

CYRILLE FIJNAUT

Contents

1. Introduction

In accordance with the questionnaire devised for this study, we shall start by briefly outlining the current legislative procedure in the Netherlands. The role that crime risk assessment plays within this procedure will then be examined, in that the possibilities of reducing the risk that laws themselves encourage people to commit serious - organized - crime will be assessed. Lastly, we shall discuss to what extent academic research has explored these possibilities.

For a clear understanding of this text, it is worth noting that this report is based on a study of the available literature as well as on conversations with several officials from the Dutch Ministry of Justice who have a key role in bringing legislation into effect in the Netherlands.

2. The formal legislative procedure in the Netherlands

In the Netherlands laws can come into effect by being introduced either by one or more members of the government or by one or more members of the Lower House. The first alternative is much more common than the second.

2.1. Laws introduced by the government

Bills that originate from one or more members of the government may have a long and very varied previous history (Boon, Brouwer and Schilder, 1996). Sometimes they have their origins in political debates, within and/or outside Parliament, while at other times they are based on recommendations by official committees - either parliamentary committees of inquiry or royal commissions. Whatever the route, at some stage one or more ministries - usually on the initiative of one or more ministers - start preparing a bill. Depending on the subject matter of the bill, several departments have an important part to play in this process, namely the relevant policy departments of the Ministry/Ministries concerned as well as their special legislative departments. In order to ensure the uniformity and quality of the legislation, the officials involved have to draft the bills in accordance with the *Aanwijzingen voor de regelgeving* [Instructions for rules and regulations], which were first published by the Prime Minister in 1992 and have since been revised twice - most recently in 1998. These *Aanwijzingen* contain legal and technical rules of thumb as well as more policy-based recommendations, for example that no firm promises should be made and that

a decision should not be made to proceed with a regulation until it has been established whether it can be properly enforced. By virtue of these *Aanwijzingen* the Ministry of Justice bears ultimate responsibility for the constitutional and administrative quality of the legislation (no. 254).

Once the ministry-level preparatory work has been completed, the bill is discussed in the Cabinet. If the bill is accepted - in the amended form or otherwise - it is sent to the Queen's secretariat (in her capacity as Head of State). From there the bill is sent to the Council of State (of which the Queen is the President) for advice. This body chiefly pays attention to the legal quality of the bill and generally does not concern itself with its political merit. Its *Rapport* [Report] is sent directly to the relevant Minister(s), who, in turn, must respond to it with a *Nader Rapport* [more detailed Report] to the Queen. The bill is then presented to the Lower House, together with a *Memorie van Toelichting* [Explanatory Memorandum], under the responsibility of one or more Ministers.

The presidium of the Lower House consigns the bill to a standing - general or special - parliamentary committee. On the basis of its deliberations, this committee draws up a *Verslag* [Report], to which the government has to respond by means of a *Memorie van Antwoord* [Memorandum of Reply]. This Memorandum sometimes prompts the committee to draw up a *Nader Verslag* [more detailed Report]. Committees are otherwise at liberty to speak to the Minister(s) concerned to exchange views on the bill or to invite individuals and organisations to make known their views orally or in writing. Once the committee stage has been completed, the next item on the agenda is the plenary debate of the bill. The debate initially covers general matters before moving on to discuss individual articles of the bill. Members of Parliament have the right to submit amendments at this stage, just as the government itself is allowed to amend the bill by means of a *Nota van Wijziging* [ministerial Memorandum of Amendment]. Amendment of a bill in a way that is unacceptable to the government may of course lead to its formal withdrawal. In practice, however, this does not happen very often.

Once a bill has been debated in the Lower House, it is sent to the Upper House. The President of the Upper House passes the bill to one of the committees for discussion. Like the committees in the Lower House, this committee will deliberate alone or in consultation with the relevant Minister(s) or interested parties or organisations. The outcome of its deliberations is once again set down in a *Verslag* [Report]. The bill is then debated in the Upper House in plenary session. An important difference here compared

with the debate in the Lower House is that the Upper House has no right of amendment. It can only accept or reject a bill.

Once the Queen and the Minister(s) responsible have signed the Act, it is published in the *Staatsblad* [Bulletin of Acts, Orders and Decrees]. Unless the Act decrees otherwise, it comes into force on the first day of the second calendar month following its date of publication.

2.2. Laws introduced by the Lower House

Each member of the Lower House has the right to introduce legislation and can bring a bill before the Lower House. Broadly speaking, a bill introduced in this way goes through the same procedures as a bill that is introduced by the government. There are, however, a few significant differences, stemming directly from the fact that the bill has a different origin.

The first difference is that the bill is debated in the Lower House and only then does the government consider it.

Secondly, the Council of State issues its report to the Lower House rather than to the government.

And thirdly, the parties introducing the bill assume the role that the government has in the alternative route: they write the *Memorie van Toelichting* [Explanatory Memorandum], they defend the bill in the plenary session and they decide on the amendments submitted.

3. The role of crime risk assessment in the legislative procedure

By and large it can be said that crime risk assessment does not play a major and/or clear-cut part in the legislative procedure in the Netherlands, either formally or *de facto*. In order to highlight what part it does play in this context, we shall first examine the general quality policy for legislation and law enforcement that was outlined by the former Minister of Justice Hirsch Ballin in the early 1990s. Secondly, we shall indicate to what extent the instruments currently used within the legislative procedure to assess the quality of legislation are evidence of interest in crime risk assessment. And thirdly, we shall discuss the extent to which the policy that is actively pursued to combat serious crime - organized or otherwise - takes account of crime risk assessment when laws are being brought into effect.

3.1. The policy of the Minister of Justice Hirsch Ballin with regard to the quality of legislation

Over the past few decades in the Netherlands there has been a great deal of interest in how laws are brought into effect and also how they are enforced, particularly as regards the problems associated with enforcing the law and the intended or unintended consequences of enforcement. In the early 1990s, however, on the initiative of the then Minister of Justice Hirsch Ballin, a real policy on the quality of legislation was introduced by means of two important policy documents.

The first policy document - *Zicht op wetgeving* [Spotlight on legislation] (March 1991) - tackled the question of how the quality of legislation could be improved generally and what part the various actors - ministries, temporary committees, Council of State and Parliament - might play in this process. One important point here is that this policy document paid a great deal of attention to the effectiveness and expediency of legislation, and also to its practicability and enforceability, but devoted less space to the possibilities of introducing measures to prevent crime, wherever possible, at the stage when a bill is being drafted. The policy document also explicitly emphasized that the Legislation Department of the Ministry of Justice should play a key part in promoting the quality of legislation. On the one hand by furthering its own expertise in this area, and on the other hand by giving support - in the form of information, training and ad hoc advice - to the legislative departments of the other ministries.

Some of the ideas put forward in this first policy document have since been put into practice. For example, a quality policy section has gradually been set up within the Legislation Department. To promote the quality of legislation this Department publishes a series of handbooks entitled *Gereedschap voor de wetgevingspraktijk* [Tools for legislative practice]. The *Aanwijzingen voor de regelgeving* [Instructions for rules and regulations] mentioned earlier are also published as part of this series. Another publication provides answers to *101 Praktijkvragen over de implementatie van EG-besluiten* [101 practical questions about the implementation of EC Decisions]. As mentioned earlier, these handbooks deal with legal and technical issues as well as more policy-based issues.

The second policy document - entitled *Met vaste hand* [With a firm hand] (March 1991) - is concerned with improving the quality of law enforcement; it therefore complements the first policy document to some extent. This policy document not only points out the problems (and their

causes) in law enforcement, but also puts forward a proposal to strengthen the role of the Minister of Justice in eliminating these causes and problems. Basically, the proposal entailed setting up a Law Enforcement Inspectorate with the task of analyzing and evaluating the practice of law enforcement in consultation with other departments of the Ministry of Justice, other ministries, the Public Prosecutions Department and the police. More specifically, this new Inspectorate would have to work closely with the Legislation Department in the area of assessing bills, particularly as regards their future implementation and enforcement. One of the aspects that should always be considered in this context is to prevent regulations being violated, for example, by taking preventive measures and by organising supervision and investigation in certain ways.

This policy document did not remain on the shelf either. Shortly after it was published, the Law Enforcement Inspectorate became a reality and was installed on the same floor in the Ministry of Justice as the Legislation Department. Since then it has concerned itself with the enforcement of all possible laws by the numerous special investigation departments within the Dutch ministries. In recent years this Inspectorate has also developed an instrument for legislators that can be used to predict which problems will occur in law enforcement. This instrument has rather an unusual name: it is called the *Tafel van Elf* [Table of Eleven].

3.2. The development of instruments to assess *ex ante* the quality of legislation

As mentioned earlier, both the Legislation Department and the Law Enforcement Inspectorate have been making efforts in recent years to develop instruments to pre-assess the quality of legislation, including its practicability and enforceability. To what extent, however, do these instruments take into account something like crime risk assessment?

The general *Aanwijzingen voor de regelgeving* [Instructions for rules and regulations] mention various aspects to do with the practicability and enforceability of legislation which legislation officials have to consider when drafting bills; however, there is no explicit reference to an assessment of the risks that the intended legislation itself might encourage people to commit crime or to the possibility of minimizing those risks. Naturally, this does not mean that those risks are not taken into account in practice, but it is evident that the Legislation Department of the Ministry of Justice does not give explicit priority to this aspect when drafting legislation. This does

not of course prove that other ministries do not consider these risks when working on new legislation. On the contrary, in fact. The *Wetgevingstoets* [Legislation Test] carried out by the Ministry of Social Affairs and Employment, for example, devotes a great deal of attention to these risks. Some of the points that have to be borne in mind when drafting legislation include the following: does the proposed legislation contain any elements that are susceptible to abuse? What interest do target groups have in complying with this legislation? What support is there for complying with this legislation? What do implementing and enforcing bodies think of the proposed legislation and what are the practical problems that will be encountered during implementation and enforcement? How these regulations are applied in practice is of course another question.

The *Tafel van Elf* [Table of Eleven] is an instrument that was developed between 1993 and 1995, by the Law Enforcement Inspectorate and the Sanders Institute of Rotterdam's Erasmus University. Its purpose is to assess the extent of compliance with legislation by means of a coherent set of relevant factors. These factors are divided into 11 dimensions, which, in turn, are grouped into three categories: dimensions of spontaneous compliance with legislation (knowledge of rules - familiarity with rules, clarity of rules -, costs and benefits of compliance or infringement, degree of acceptance, law-abiding practices and informal control), dimensions of control (informal opportunity to report, opportunity to control, opportunity to detect, selectiveness) and dimensions of sanction (opportunity for sanctions and seriousness of sanctions). It goes without saying that, by applying various methods - estimates by experts, surveys of those sections of the population most concerned, delphi method-type discussions with members of the police force and inspectorates -, this Table can be used not only to predict compliance with legislation, but also to evaluate compliance with legislation subsequently (Ruimschotel, Van Reenen, Klaasen, 1996). With an eye to the former function, the *Tafel van Elf* has been converted into a checklist for the legislator. This checklist does not explicitly mention crime risk assessment. But with concepts such as the "target group's adherence to standards" and "informal control", questions are raised that implicitly allude to the assessment of such a risk, for example, the question of whether the target group respects the government, or whether informal or other control structures exist.

This checklist has since demonstrated its practical worth. It has been incorporated into legislation tests used by several ministries to carry out an *ex*

ante evaluation of their legislation, and is also actively used in assessing specific bills in a wide range of fields, for example, legislation concerning traffic and foreign nationals. Another important point is that research was carried out recently into the validity of the methods that can be used to assess compliance with legislation (Law Enforcement Inspectorate, s.d.). This revealed that it is best to use a combination of methods, in particular sessions with experts, surveys of target groups and random physical checks by responsible officials. Lastly, we should mention a recent study that explored the possibility of determining the susceptibility of legislation to fraud in a structural manner. With a view to developing a range of instruments to measure that susceptibility as accurately as possible, two specific cases were analyzed in depth: regulations regarding waste processing in the construction industry and regulations concerning the container transport of hazardous materials by road. This analysis has led to a method being devised, which can serve as an instrument for carrying out analyses to determine fraud risks. Further experiments will be required, however, to test the practicability of the method (Bouwman, 1999).

3.3. A closer examination of the potential role of crime risk assessment

The foregoing confirms in no uncertain terms that in the Netherlands *ex ante* assessment of legislation is increasingly being incorporated into the ordinary legislative process. It should be noted, however, that this development up until now has been analysed on the basis of documents issued by the policy departments of the Ministry of Justice that are most directly involved. And this raises the question of whether it is also evident in policy documents of other ministries that are closely involved in certain legislative processes. To answer this question, we shall first examine to what extent there is evidence of crime risk assessment in a number of important documents concerning efforts to combat serious fraud or crime of a financial-economic nature. The choice of these policy documents was prompted not only by the questionnaire that forms the basis of this report, but also by the fact that containment of this form of crime has been the focus of political attention in the Netherlands since the early 1980s. Secondly, we shall investigate to what extent, at the time when legislation is being drafted, specific attention is devoted to the possibility of curtailing the risk that certain regulations might facilitate organized crime – in so far as it is possible to distinguish this form of crime from serious financial-economic crime.

3.3.1. In the context of the prevention of financial-economic crime

The first evidence of an interest in combating financial-economic fraud was the creation and subsequent reports of an interministerial steering group (1979-1985), which had the task of preventing abuse and improper use in the area of taxation, social security and subsidies (known as the ISMO committee). One of the many conclusions of this important committee was directly concerned with the necessity of pre-assessing – more frequently than had been the case in the past – the quality of legislation with regard to aspects such as the risk of abuse, the cost of enforcement, the limits on the use of controls and sanctions, etc. Its 1985 final report was therefore one of the important building blocks for the policy of Minister Hirsch Ballin that was discussed earlier. Another important point is that since the publication of the ISMO committee's final report the Lower House and the government have regularly exchanged views, by means of detailed policy documents, on the problem of fraud in the Netherlands. These policy documents may well be an appropriate source from which to start investigating to what extent crime risk assessment is taken into account when drafting legislation to contain this problem.

In a detailed policy document dated 19 December 1997 about the integrity of the financial sector numerous measures were discussed to preserve and encourage this integrity. In the area of legislation, attention is focused, for example, on new legislation to tackle malafide exchange offices and on new legislation that should make it possible for the Minister of Finance to have access to confidential police records to check the reliability of important individuals in financial institutions. But it goes further than simply discussing legislative initiatives that are intended to make criminal or administrative action against offenders or criminal organisations more effective. In some legislative projects allusions are made to the risks that regulations may be abused for criminal purposes and to the measures that should be implemented to prevent this as far as possible. The proposals to adapt European and Dutch legislation to commodity futures trading in order to prevent fraudulent practices are a good example of this.

The *Voortgangsrapportage fraudebestrijding 1997* [1997 Fraud Prevention Progress Report] of 30 January 1998 points out that six coordination groups have been set up within the Dutch tax department to pre-assess the practicability and enforceability of new legislation to prevent fraud. The report also states that the tax department regularly consults external experts for the same purpose. In the context of legislation relating to social security

the report claims that it is becoming common practice to assess certain bills beforehand to check how practicable and enforceable they are. However, the report has nothing to say about the way in which this assessment is carried out in practice and contains no information about what is happening in this area in other sectors of legislation.

The *Voortgangsrapportage financieel-economische criminaliteit 1997-1998* [1997-1998 Progress Report Financial-Economic Crime], which was presented to the Lower House on 21 June 1999, lists a whole series of fraud prevention measures, such as legislation to prevent the forgery of travel documents and legislation concerning compulsory identification. With regard to assessing the risks of non-compliance with legislation, specific reference is made to a social security project: the Ministry of Social Affairs and Employment will carry out an analysis of specific laws to identify aspects that are susceptible to fraud and minimize the risk of fraud by adapting legislation. Other ministries are also said to have plans to systematically check (or have already done so) any legislation that comes within their remit to see how susceptible to fraud it might be. Exactly how they have done this or intend to do this is not indicated, however.

It can therefore be deduced from these documents that preventive assessment of legislation with a view to combating fraud is in fact becoming widely accepted. They do not, however, provide much in the way of information about how this assessment is actually carried out. What part does the *Tafel van Elf* really play here? Which methods are used in practice to assess the susceptibility of new legislation to fraud on the basis of this checklist? Merely the deployment of government officials and occasionally of external experts? Or are more complex and more empirical methods also used? To answer these questions it is apparent that other – more internal – sources will have to be tapped, for example, interviews with legislation officials in the various ministries and analyses of the minutes of their coordination meetings. This kind of time-consuming exercise lies outside the scope of this study, however.

3.3.2. In the context of prevention of organized crime

Financial-economic crime can be particularly serious crime – think, for example, of large-scale VAT scams and environmental crime – and, to some extent depending on the definitions used, can certainly coincide with organized crime in a number of cases. In the Netherlands, however, the legislator usually deals with these two categories of crime separately. The

term "organized crime" appears rarely, if at all, in the aforementioned reports on fraud and fraud prevention. This situation may be an indirect consequence of two things: firstly of the fact that organized crime as such was not discussed in the ISMO committee, and secondly of the fact that many administrative, judicial and police authorities were of the view until the early 1990s that organized crime could only be combated using repressive methods.

This view began to change as a result of a conference that was held in The Hague in October 1990 on the theme of organized crime and the efforts made to combat it in New York and the Netherlands (Fijnaut and Jacobs, 1991). Members of the New York State Organized Crime Task Force reported to the conference on the attempts by the New York city council to drive mafioso companies out of the construction industry by systematically excluding them from the tendering procedure. The Action Plan against organized crime that was presented by the Dutch Ministers of the Interior and Justice in 1992 expanded on this idea; the intention was to examine the licence and exemption application procedure, public works and public procurement contracts and seek ways to prevent the authorities – even unintentionally and inadvertently – getting into bed with criminal organisations.

This culminated in a limited study by the Vrije Universiteit [Free University] Amsterdam into a number of policy areas. The results were published in 1994 under the arresting title *Gewapend bestuursrecht* [Armed administrative law] (Struiksma and Michiels, 1994). The general conclusion was that it is certainly possible to block organized crime in legal sectors of the economy in this way, provided that sufficient statutory provisions are created to give administrative authorities access to police and judicial databases and to grant them the power to refuse permits to individuals and/or companies or to exclude them from tendering, etc., on the basis of information obtained from such databases. Following on naturally from this conclusion, work has proceeded in the past few years on drafting a bill to promote integrity assessments by the public administration (BIBOB) concerning decisions or public procurement contracts. The bill was presented to the Lower House on 11 November 1999. Since the objective of this all in all complex and to a certain extent controversial bill lies outside the scope of this study, it would be inappropriate to discuss it here. It should be mentioned, however, that various projects are under way in Amsterdam that are wholly based on the principle underlying this bill. One

project is focusing on the construction industry in the city, while another is concerned with the reorganization of economic activities in the city centre (Bestuursdienst Stadhuis Amsterdam, 1998).

The question of whether there are also examples of legislative projects in which a specific attempt is made to estimate the risks that organized crime will use or abuse the regulations contained in that legislation must be answered, generally speaking, in the negative. According to the literature and according to my informants, such examples are rare. One of the few examples known is the reform of the *Wet op de kansspelen* [Betting and Gaming Act] during the 1980s and 1990s (Van 't Veer, Moerland and Fijnaut, 1993). While the number of legal games available was being increased, measures were implemented as part of this reform to make it as difficult as possible to organize games of chance illegally. It should not, however, be ruled out that when the various ministries are assessing the susceptibility of legislation to fraud, there is in fact a growing tendency to consider the risks of serious - organized - crime. To find out whether this is actually the case, a fairly in-depth study is required, as suggested earlier. However, it should not be forgotten that the term "organized crime" does not occur once in the assessment instruments developed by the Ministry of Justice.

4. Academic research into the role of crime risk assessment in the legislative procedure

Apart from the highly policy-oriented studies mentioned earlier in connection with the development of the *Tafel van Elf*, there has been no academic research in the past few decades on the subject of crime risk assessment during the process of bringing legislation into effect. Most of the research on the quality of legislation that has been conducted or is under way concerns the implementation and enforcement of legislation. For example, in the 1980s, there were a number of important studies of legislation in the area of taxation and social security (Berghuis, Van Duyne and Essers, 1985; Verheul, 1989). More recently there has been research on the implementation and enforcement of legislation in the fields of agriculture and the environment and also food safety (Wiering, 1999; Oosterwijk, 1999; Lugt, 1999).

5. Conclusion

The quality of legislation, in particular its practicability and enforceability, is an important issue in the Netherlands. The policy pursued in this area

and the instruments used to assess its quality beforehand – preventively – form in themselves an appropriate framework for applying the concept of crime risk assessment when drafting bills. The extent to which this form of risk analysis is systematically used to prevent forms of serious crime, whether organized or not, cannot be determined at present, however. The fact that it is actually used within the context of legislation on taxation and on social security is beyond dispute. There is scarcely any interest in crime risk assessment in academic research, however. Wrongly so, one might add, since it is certainly as interesting and important a subject as the enforcement of existing legislation.

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Spain

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Contents

1. Introduction

At the moment there is in Spain, no specific rule or procedure that foresees risk assessment for the newly enacted laws. Being this the starting point, it must also be said that a certain activity of risk assessment does indeed exist, and that step by step, the conditions of introducing it in a more formal and systematic way are being established. That means, that as soon as a political decision in this sense arrives, the pre-conditions for a prompt performance may be guaranteed.

2. State of the question of the legislating technique

This statement is based on the development of the matters related to the legislative technique during these last fifteen years. During these years a growing debate can be reported, with the participation of both theorists and those in charge of the ruling procedures, that has lately led to new legal provisions on the matter. This does not mean that previously there had been no legislative technique activity at all, nor that the theorists did not work on it[1]. It means only, that there is a point of inflection in the way of handling this matter, in the importance given to it and in the depth and broadness of the debate.

Taking this fact into account, three stages have had to be distinguished in the last twenty five years of interest on the technique of legislating:

a) The first one begins with the promulgation of the constitution in 1978, and the opening of a new age of the Spanish political life that demanded a new policy of openness and transparency, after forty years of dictatorship. In this context, article 88 of the constitution came into force. But although this problem was considered important enough to be included in the new constitution, the parliamentary practice has since, paid not much attention to it.

b) The second one is determined by the fact of Spain joining the European Union, and the subsequent mechanism of internalisation of its rules into the Spanish legal system, which opened the interest of the theorist on the possible dysfunctions and wrong introduction of the new rules that were totally "alien" rules to the Spanish system.

[1] In this sense, see LÓPEZ-MEDEL BÁSCONES, *La elaboración...*, p. 185.

c) The third one consists of the above-mentioned generalisation of the interest[2] on the improvement of the legislative technique caused by the rise of complexity of the legal system, and as a reflection of the increasing international interest on the matter.

This last and most significant change of tendency has its origin, as in most of the countries of our cultural area, in the need to count on rules clear and understandable enough to allow its correct and fair use in the context of expansive complexity of the Law that presses our legal systems. Nevertheless, this moment has arrived in Spain, with a little delay when compared to these other countries, and it has probably been introduced by the reflection of the comparatists on constitutional Law. The Spanish theorists agreed by fixing the first impulse of the new phase in the creation of the group GRETEL (*Grupo de estudios técnica legislativa*, that is, Group for the studies on legislative techique) and the book "*La forma de las leyes. 10 estudios de técnica legislativa*". After that, there were many congresses and debates and many books have been published[3] on the matter, in which both theorists and practicians have been involved, exchanging efforts and conclusions. The fact that also the public servants responsible for these activities have taken part in them has also brought new legal rules on the matter, that will be mentioned further on in this report.

An important point of the discussion that is relevant to the risk assessment and crime prevention has been what has to be understood under *legislative technique*, that is, the extent and contents of this term. There are two main streams of opinion. On the one hand, those who give this notion a more restrictive meaning and include only *formal questions*, beginning from the language correction to the systematization of the texts. The most important exponent of this opinion is CODERCH and his group GRETEL. The second opinion was started by SÁINZ MORENO. Under *legislative technique* he also includes correction of the *contents* of the law, and not only in its form. He includes therefore, matters concerning the feasibility and the effectiveness of the legal provisions[4].

[2] TUDELA ARANDA, *La legitimación...*, p. 85.

[3] It is easy to check it by taking a look on the literature enclosed at the end of this report.

[4] See. SÁINZ MORENO, *Técnica...*, specialy p. 44 and ff. The same opinion is shown by MARTÍN REBOLLO, *La técnica legislativa...*, p. 75; CORONA FERRERO, *En torno...*, p. 51; MARTÍN REBOLLO, *La técnica legislativa*, p. 73 ff.; TUDELA ARANDA, *La legitimación...*, p. 89.

It is easy to see that the risk assessment and crime prevention test can only be taken into consideration under this second meaning , because it includes this matter as a dysfunction of the feasibility and effectiveness of the legal provision that turns the rule into a bad quality rule.

All this shows that the driving force of the recent interest on the quality of the legislating process and its circumstances is alien to criminological considerations at a general level, and that neither the legislating offices nor the theorists have expressly claimed for a risk assessment and crime prevention testing activity of the newly enacted laws.

3. Spanish legislation

Dealing with preventive research on criminal risks generated by legal rules, the first thing to be examined is the process of drafting of laws and other legal rules, that is, the preparatory stage of the legislative process. For the study of this phase in Spain it is necessary to take into account two realities: on the one hand, the multiplicity of parliaments existing in Spain, and on the other, the fact that there are two different systems that rule the legislating initiative.

In Spain, there are 17 *Comunidades Autónomas*, which are territories with their own parliament, government and Public Administration. Although there is a federal Law regulating the civil services, every *Comunidad autónoma* has within its own *Estatuto* (territorial constitution) specific rules for its parliament, government and civil services. Subsequently, every parliament developed its own *Estatuto* in different ways. This situation makes it difficult to talk about ***a*** legislating procedure in Spain, because there are many, and every one of them develops to a different extent the legislative initiative and its procedure and requirements. Despite this situation, it is possible to find a certain uniformity among them[5].

A. The Constitution of 1978

Nevertheless, all these parliaments are subject to the constitution, naturally common to all of them, in which the basic principles of the legislative pro-

[5] Especially if we take into account that the "non historical" *Comunidades autónomas* have adopted a kind of model-law very similar to the federal law. On the contrary, the "historical" ones have tried to get back their traditions and peculiarities in order to preserve them.

cedure are foreseen[6]. The Spanish constitution, as most of the other constitutions of countries with a parliamentary democracy in our historical and cultural area, confers the legislative initiative on various individuals (art. 87) and then, provides a different procedure to each of them. On the preparatory phase of the drafting of the rule, the constitution foresees a specific provision only for the cases in which the Government takes the initiative, which is the most frequent situation: in 90% of the cases[7]. That means that the other individuals who have this power do not have to fulfil this requirement. This difference in requirements exists in nearly all the occidental democracies, and it is also based on the great amount of information available to the government through ministries and its offices, that the parliament does not have. This supplementary information means also that the government is obliged to use it in the drafting of the bill in order to improve its quality. If the other individuals, having the legislative initiative according to the constitution, had to fulfil these requirements, their real capacity of taking the legislative initiative would be considerably diminished.

Art. 88 CE provides that bills (*proyecto de ley*) will be approved by the Council of Ministers, which will then submit them to the lower chamber enclosing a *Motivation* (*Exposición de motivos*) and the necessary *Backgrounds* (*Antecedentes*) in order to enable its assessment. The *Motivation* of the bills is already traditional in Spain, and it must always be enclosed with the bills sent to the parliament. It consists of a short analysis of the previous situation on the matter, followed by an explanation of the necessity of the new legal rules and of the form that they have adopted. This Motivation has to be published together with the new ruling.

The requirement of enclosing the *Backgrounds* is, on the contrary, totally new in Spain, and it is probably the first time that a constitution has laid it down [8]. The backgrounds consist on the information, studies and documents in which the bill and its motivation are based: that is, its premises. This information should not just be just a group of documents, but elaborated information.

The fact that these steps of the legislating procedures are foreseen in the constitution show how important they appeared at the time of its drafting.

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[6] In art. 81 f., in the title III of chapter II.

[7] See ABAJO QUINTANA, *Directrices...*, p. 129.

[8] The Greek constitution is the only other one that provides the duty of enclosing a motivation, but not the backgrounds. See SÁINZ MORENO, p. 23; ALZAGA, p. 567; CORONA FERRERO, in CORONA FERRERO..., p. 49.

There were two reasons for this choice; on the one hand, a historical-political reason, and on the other hand, a functional one. In the first place, after a forty year long dictatorship they wanted to build a much more transparent system in order to allow an easier control of the drafting procedures of the government. In second place, they wanted to provide the members of parliament with adequate and enough information to allow them an assessment of the bills on which they have to vote.

However, the importance at the beginning, that was given to this matter disappeared already during the approval of the text of the bill in both chambers of the parliament. Actually, the first wording of article 88, as approved by both chambers, provided the development of the concept and requirements for the *Backgrounds* in a Law and also the possibility for the members of parliament to ask for any specific background they might have needed. Both provisions were left out in the final wording of the article, and it is not formally possible to know why because the sessions of the special commission that decided it were not recorded.

Certainly, one of the suppressed requirements may be just a repetition on another constitutional prevision that may be used by the chambers in order to collect any information from the government offices that may be useful to their right of taking the legislating initiative. In accordance to article 109, the chambers and their commissions have the right to ask for any information and collaboration they may need from the government, its offices and any authorities of the federal State and of the *Comunidades autónomas*. It is a general possibility that does not have to be necessarily used, except in the cases we are dealing with, and in fact, it belongs to the chapter of the relationship between the government and the parliament. But, that does not mean that it may not be also used in this sense. A similar rule exists in many other constitutions, and likewise, in these countries, it is normally only used to establish parliamentary inquiry commissions, which means not using many of the possibilities that this provision allows.

The decreasing importance given to the matter reflected in the final wording of the article has been confirmed by the parliamentary practice, and reality shows that normally the enclosed documents are not that many, and above all, not enough[9]. It is also true that there are no complaints of the chambers in this sense, and it seems that the matter has no special importance; in fact, there is only one decision of the Constitutional court on the

[9] In this sense, see SANTAMARÍA, p. 1270, and CORONA FERRERO in CORONA FERRERO,..., p. 54.

matter, and it does not seem to give very much importance to the issue[10]. Also, the theorists have not paid much importance to this requirement.

The constitution has, nevertheless, other provisions on the matter. According to art. 97 of the constitution, the government holds the direction of the administrative rule-making in the Federal Public Administration, and art. 152.1 gives the same powers to the governments of the *Comunidades autónomas*.

B. Legislative development

After the explanation of the constitutional rules related to the legislating technique, that show the importance given to the quality of the law by the constitutional legislator, the law developing the constitution must also be taken into consideration, at least in a summary way.

But before doing that, it is necessary to mention that it is the Spanish tradition that the bodies in charge of writing the laws are the Ministries, as in Germany, and, similar to the English tradition, where there is a special and unique body in charge of it[11].

There is also no procedure of elaboration of legal provisions, and the ministries may organise their activity as they wish, although it is frequently done through the creation of an *ad hoc* committee whose members are civil servants of the same Ministry or independent experts[12].

The regulations on the drafting of bills and other legal rules, and in general, also of administrative rule-making are to be found especially in articles 129 and f. of the LPA [13], and in articles 68 and 69 of the LRJPA[14] . These provisions describe different procedures, depending on who promotes the initiative. To begin with the procedure it is always necessary to lay down an "initiation order" that may be a simple provision ordering the necessary researches and studies in order to prepare the drafting, when a text already exists because it came from outside of the office. This provision has to submit the text to the necessary steps and formalities in order to

[10] STC 108/1986 of the 29th July 1986. See, in this sense, CORONA FERRERO, in CORONA FERRERO..., p. 54.

[11] Real Decreto 1891/1996.

[12] GARCÍA-ESCUDERO MÁRQUEZ, *La inciativa...*, p. 86 y p. 91.

[13] Act on administrative procedures: Ley de 17 de julio de 1958 de Procedimiento Administrativo.

[14] Act on the statute of the public administrations and administrative procedures: Ley 30/1992 , de 26 de noviembre de 1992 de régimen jurídico de las Administraciones públicas y de procedimiento administrativo común).

assure that it is "legal, correct and appropriate" (**art. 129 LPA**). Only two of the formalities mentioned in this article are interesting to our subject:

a) The report of the *Secretaría General Técnica*, which is the technical office of every Ministry, in charge of the specialised expert advice on the subject of the office or Ministry. Originally, it was born as the legislating office of the ministries[15]. This report is always compulsory, except when it is the same *Secretaría General Técnica* who started the procedures, in which case this same draft is supposed to be already done following his expertise.

b) In case it is required by the Law, and anytime the Minister might find it adequate, the draft should be submitted to report of other consultative bodies.

Article 82 LRJPA distinguishes between optional and compulsory reports. The first ones are the normal cases. Among the second ones, two have to be mentioned:

a) the report of the *Consejo de Estado*, compulsory for legal bodies having the rank of "Law" or those that although being merely orders, develop the provisions of a "Law". This consultative body is the highest general consultative body of the Federal State, and has equivalent bodies in every *Comunidad Autónoma*. Its members are normally lawyers and other high general advisers, and their main duty is to give advice to the parliament. This report must always be shown first, that is, it has to be the last report before the draft is sent to the parliament.

b) Other reports foreseen by the Law, normally *ad hoc* specialised bodies: *Junta de defensa nacional* (defence), *Consejo interterritorial de la salud* (health), etc.

Finally, and related to these requirements, the office that has started the procedure has to keep all the reports, advice and information that may be of any interest, should information about its drafting procedure be required in the future, or to help to its interpretation (art. 129.2). But there is another purpose for keeping all this material that the article does not mention, that perhaps is the only real duty of the Administration: to give the members of parliament the information required by article 88 of the constitution. In fact, these documents are not binding for the interpretation of the provisions of the Law, that may also be interpreted in a different way.

[15] RUBIO LLORENTE, El procedimiento ..., p. 87.

C. Official specific rules, check lists and guidelines on legislation technique

As the legislation on the matter has been described, we will now deal with the practical consequences of the debate of these last years on the quality of the laws in Spain. As result of this atmosphere, in 1988, Council of Ministers of the central government considered the need to draft some guidelines on the form and structure of the drafts[16].

The first of its fruits was the "*cuestionario de evaluación que deberá acompañarse a los proyectos normativos que se elevan al Consejo de Ministros*"[17], which is a check list test, in the direction of the German "Checklisten" that go together with the drafts that reach the Council of Ministers, and that have to be answered by the office responsible for the wording of the draft. There are more or less 20 questions that ABAJO QUINTANA[18] distributes in three main questions:

a) the need of enacting a new law

b) juridical and institutional impact

c) social and economic impact of the draft: that is, the feasibility and effectiveness of the legal provision[19], both from the economical and the social point of view, including the possible acceptation or refusal of it by the social agents. It is, in this point, where considerations on the criminological impact of the enacting of the draft are possible. It is true that the check list does not expressly ask the question of the crime prevention, and consequently, this control is not made automatically, but the wording of the question may suggest it. Nevertheless, the fact that a check list already exists, and that in it, one of its questions might suggest this test to the office in charge of answering, means that only a minor political step has to be taken in order to include the risk assessment and the crime prevention by enacting new laws.

The central government of Spain has enacted other laws that search for the correction of the legislating technique, but they are focused in more formal

[16] ABAJO QUINTANA, *Directrices...*, p. 130.

[17] Agreement of the counsel of Ministries: Acuerdo del Consejo de Ministros of the 29th of January, 1990.

[18] ABAJO QUINTANA, *Directrices...*, p.131 f.; LÓPEZ JALLE, *La elaboración...*, p. 184, prefers a different classification of only seven questions.

[19] In this sense, see also SÁINZ MORENO, *Técnica...*, p. 45; MARTÍN REBOLLO, *La técnica legislativa...*, 78

aspects, such as language, and are called the "guidelines on the form and structure of the Drafts"[20].

But, the major effort on enacting rules in this sense comes from some of the territorial governments. The pioneer was the Catalan government in collaboration with the group GRETEL, with the law nr. 13/1989[21], that includes general provisions on the way of elaborating legal rules. They have also published a practical check list with all the steps that have to be approved of before enacting a law[22].

Also, the Basc Country[23] and Cantabria[24] have been particularly active in the organisation of congresses on legislating technique and afterwards enacted a law on the matter.

4. Real practice of these procedures in relation to the criminal risk assessment by drafting legal rules

Up to now, I have summarised the basic rules that the Public Administration must follow in the drafting process, showing which are the compulsory controls to which the drafts have to be submitted before they are approved as such. The first significant conclusion, is that in Spain, there is no specific rule that obliges a previous control or assessment of criminal risks of legal rules during the drafting procedures.

Therefore, this control is not carried out in all the legal provisions, but of course, it is done in the drafting procedures of the Ministry of Justice. In this field the task of assessing the risks arising by a legal rule has to be carried out by the experts in charge of all the reports mentioned in the Law, and among them especially the *Secretaría General Técnica* of the Ministry of Justice, which generally includes it in its report. In addition to this and according to article 129 LPA it is also necessary to carry out all the studies

[20] Enacted by the agreement of the Council of Ministers (Acuerdo del Consejo de Ministros), of the 18th October 1991 (BOE 18 november, nr. 276) and the one of the 26th of July 1996". An exhaustive comment on them is given by ABAJO QUINTANA, *Directrices...*, p. 132 y ff.

[21] Llei de organització, procediment i regim jurídic de l'administració de la Generalitat de Catalunya.

[22] GENERALITAT DE CATALUNYA, Tècnica normativa: el procediment...

[23] The congress celebrated in 1988, as a result the book „La calidad de las leyes" and afterwards the government enacted the „Directrices para la elaboración de los proyectos de ley, decretos, órdenes y resoluciones„ of the 23rd of March 1993, published in the BOPV of the 19th April 1993, which are also guidelines on this matter.

[24] The congress of 1993 was followed by the book „La técnica legislativa a debate".

and researches that assure the quality of the draft, which in Criminal Law provisions include this kind of report, and it is a fact that they are carried out, although in a very "elastic" way. How deep and specific this report is cannot easily be said, because it varies from one to another, but there are many reports which deal with this matter. The Ministry of Justice usually asks for a report on drafts to the Police authorities, the "Consejo General del Poder Judicial", which is the top organisation of the judges, the General Attorney, and from many other organisations, such as the General Bar Association and Law Faculties etc. Also the political parties, including the government party, have their own specialised advisors, normally university professors. But all these reports are not compulsory, and because of this they are different from draft to draft and depend on many factors, including the will of every government, to follow its own methods.

On the other hand, the Ministry of Justice has as special office, the "comisión general de codificación" whose purpose is to give technical and language advice in the drafting of new laws. But, in reality, this office advices only in the creation or modification of the criminal code or of the criminal procedural code.[25]

Due to the complexity that criminality has achieved in the last years it would be desirable to carry out the criminal risk assessment in a more systematical way, and not in such a changeable way. One of the possibilities would be the creation of an *ad hoc* consultative body according to article 82 LRJPA, but the tendency is to adopt the method of the check lists. The first one would need time and money to create it, but would allow specialist advice on the matter. The second one is quicker, but runs the risk that this examination would not taken seriously. In this case, the civil servants in charge of it would need special training in order to assure good results. The matter has been discussed very much, and among the theorists all the proposals have been suggested.

5. Prevention of organised crime by drafting legal rules

The preventive criminal risks assessment receives special treatment in matters related with organised crime. Due to the increasing attention that this subject has lately achieved in Spain[26], the Spanish authorities have

[25] GARCÍA-ESCUDERO, *La inciativa...*, p. 86 f.

[26] PIFARRÉ DE MONER, *La criminalità organizzata in Spagna*, in MILITELLO/PAOLI/ARNOLD, *Il crimine organizzato come fenomeno trasnazionale*, Freiburg, 2000. P. 123 ss.

been specially active in combating it from all the possible perspectives, creating new offices and carrying out several programs that involve different offices and ministries at all levels.

Already in 1985, the Government approved the National Antidrugs Plan, which deals with all kind of problems relating to drugs. The plan creates also a permanent interministerial committee that meets once a month and that coordinates the work done by the Public Administrations in this field from a multi-disciplinary point of view. One of the most important tasks developed by this commission is a permanent risk assessment on all kinds of legal rules in preparation in their ministries, which among others are Ministries of Health, Justice, Education, Industry or Defence, in which the rules have been analysed from all these points of views. To mention one specific example, the discipline orders of the soldiers during the military service received advice from experts in psychology, chemistry, criminology and many other fields not only to avoid drug consumption and drug trafficking, but also to avoid that the soldiers begin with drug consumption or trafficking during their military service.

During these years, the commission was able to establish that the economical issues related to the matter – money laundring, etc, – are too complex for such a commission, and has suggested the creation of a similar commission on economic organised crime. Although the commission has not been created, similar bodies and offices created by the national anti-drug plan have been created for the economical organised crime. Two of them were very important these last years: on the one hand, the special "public attorney on corruption related to economic crime", normally called the anti-corruption attorney, although he deals with economic organised crime, and on the other hand, the UDYCO, a section of the police forces specialised on organised crime. The UDYCO has created an efficient system of collection and elaboration of information: exactly the kind of information needed for following criminal risks assessment.

These two offices are extremely important in the task of organised crime prevention. With the information provided by the UDYCO and the anti-corruption attorney office, this last one gives important advice on the prevention of organised crime, during the drafting process of many legal rules that are not only criminal Law rules, but also administrative or economical rules.

6. Conclusions

1. There is no rule or standard procedure in Spain for the drafting of new rules, neither by the central government nor from the territorial ones, that specifically foresees that a previous test on crime prevention is to be done by enacting new laws.
2. There are a certain number of tests or check lists in some of the 18 governments of the country, in which to a bigger or smaller extent, the public offices or committees responsible for the draft are asked about the legal and social effects and dysfunctions that the draft might arise. This method has an increasing grade of acceptation among the civil servants and the theorists, because, it is argued, makes it easier not to forget the main aspects that contribute to the quality of the law.
3. The mere existence of this check lists means that is would be very easy:
   a) to generalise it to all the territorial governments of the country.
   b) To include the specific question on risk assessment and crime prevention by enacting new laws.
4. There exists a certain *de facto* test on crime prevention, but this is not organised through check lists. On the contrary, it is carried out by some public offices and ad hoc expert committees, such as the called Anti-drug committee or the UDYCO, especially in everything related to organised crime. These activities have achieved a high grade of results.
5. In the Spanish case it would be a pity if these good results are swept away by a check list test that is carried out by unspecialised civil servants, and my personal proposal would point to a procedure that puts together both the expertise of these traditional bodies (because it works!) and the new check list methods.

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Sweden

LARS EMANUELSSON KORSELL

Contents

"Doubt consumes the power to act, they say.
But is it then better to act without considering
and contemplating the consequences of the act."
August Strindberg (1886)

1. The importance of advance consideration

When new legislation is introduced, there is always a risk that the regulations will be abused. This is sometimes self-evident and is often a logical consequence of modern legislation. Organised and economic crime are not uncommonly an effect of "modern" legislation. An important aspect of organised crime is that it provides the "market" with prohibited or untaxed goods and services. Economic criminality often involves the breach of onerous rules that apply to business proprietors.

If a subsidy or subvention is introduced that is only paid out in certain specific circumstances, then we can expect in advance that certain individuals or companies will attempt to abuse the regulations by making the pretence that these preconditions are fulfilled. The area of taxation is not uncommonly prone to the phenomenon of attempts to "squeeze" new regulations and to attempt to take advantage of or circumvent them (Helmers, 1956).

Sometimes the situation is more complicated. Different rule systems may interact and together create incitements to abuses at a level which could not realistically have been foreseen when the respective rule systems were introduced. A good example of this is the way the taxation system and other income-related regulation systems, such as those relating to day-care charges for children and housing benefits, make it particularly attractive to work in the black economy; not simply because incomes from this form of employment are "tax-free", but because means-tested allowances continue to be paid at the same rate as before and day-care charges, which are also income-related, do not get raised (Korsell, 1998 and 1999).

New legislation may also involve structural changes to the conditions in certain markets and industries, for example, which can impact upon criminality. The deregulation of commercial vehicles led to an increase in the number of taxis in operation and thus changed the conditions of competition. This in turn affected the incentives for unfair competition by means of breaches of tax regulations amongst other things. When value-added tax

was introduced into the hairdressing industry, the price of a visit to the hairdresser went up, which also affected competition (SOU, 1997). Unfair competition is one of several factors affecting the incentive to commit economic crimes (Alalehto, 1999).

If cigarette duties are raised sharply, it is not all that strange to find that smuggling increases and organised crime experiences an unwarranted boom (Persson, 1999). This happened in Sweden in 1998, but cigarette duty had to be lowered again once the smuggling gained momentum (Eklund, 1998).

Since January 1st 1999, the purchase of sexual services has been prohibited in Sweden, and as a consequence visible prostitution has diminished (BRÅ, 2000). Recruitment into street prostitution has also decreased. The question however is whether, as a result, it may have become more difficult to get witness statements in connection with more serious offences such as pimping, since the potential witness – the buyer of sexual services – is likely to be unwilling to reveal his own crime. If prostitution takes on concealed forms, perhaps organised crime stands to benefit?

Through awareness of the extent and structure of crime, it is not only possible to avoid the abuse of regulations but also to introduce or change regulations in order to prevent or obstruct the commission of crime. The preventive element can be introduced by way of two principle means. The first involves the introduction of regulations to reduce the opportunities for crime. This might be the express intention of the reform, or at least an important part of it. The other has to do with the construction of rules and regulatory systems in general, involving the ongoing consideration of crime preventive issues, i.e., that regulations are formulated in such a way that they cannot be abused whilst at the same time supervision is made easier. In practice it may be difficult to distinguish between these two levels.

Examples of crime preventive regulations include tax deductions or reduced taxes for private individuals that require the presentation of invoices and receipts. These can reduce the size of the black economy in certain sectors. Special controls of companies in certain industries involve the setting of various thresholds that make it more difficult to commit offences. Other control regulations can increase the risk for crime. Economic guarantees that one will be able to continue operating in a certain sector may serve to reduce the rewards of crime. Legislation can systematically be used to reduce crime by means of regulations that have a preventative effect.

Examples of the crime preventive aspects involved in the formulation of regulations include making directions simple so that they cannot be misun-

derstood and are in addition easy to enforce. Important information essential to the quality of decision making can be collected automatically from the most reliable source. There are general regulatory and enforcement techniques that can be applied in order to reduce the scope for crime and abuses (Arnell & Korsell, 1999).

However, consideration of the effects of regulation and clear preventive thinking are relevant not only when regulations are to be introduced or changed. As the Committee on Banking Law noted recently, "the risk associated with an obsolete regulatory system ...is that it can obstruct potentially effective solutions whilst at the same time it risks failing to limit the development of potentially harmful ones" (SOU, 1999). This means that assessments of regulations' effects on crime should be carried out continually in order to fill the holes that are discovered and that may continue to open up as time goes by. It is the responsibility of the enforcement agencies handling the legislation in question to bring the attention of legislators to its shortcomings. This occurs in fact quite regularly, as these agencies bring up the need for legislative changes with the state authorities.

To carry out risk assessment and consider crime preventative factors only in association with the legislative process itself is to apply a far too narrow perspective. As has already been indicated, the question of how the regulations are applied and handled in practice, for example, how control and enforcement agencies are actually going to act, is also an important one. The "law in the books" is one thing, the "law in action" quite another.[1] Even if there are no holes in the legal text, such holes may exist in the enforcement system. Legislation and enforcement apparatus are thus intimately connected and cannot be viewed distinct from one another (Arnell & Korsell, 1999). Lundberg's (1982) study of legislation in the area of health and safety at work is a good example of this. He points out that the working environments found in the real world are very different from the ideal types imagined by the legislator. Something happened between the law and the workplace.

It would realistic to see risk assessment and crime prevention as only two among many other factors that require consideration in the comprehensive evaluation that must always be carried out at the political level when

[1] This distinction, albeit veiwed from another perspective, is currently of importance within the fields of criminology and the sociology of law where conflict theory (e.g. Turk, Chambliss and Quinney) have focused on the real-world implementation of legislation.

reforms are introduced. Other factors may thus weigh heavier in this evaluation at the cost of these crime-related elements. In order for these questions to be taken into consideration, what is needed above all is an awareness of the issues involved. The questions of risk assessment and crime prevention stand or fall on the basis of this level of awareness. During the 1990s, control and crime prevention issues have received increased attention and it is therefore likely that these factors may be given more weight in the political context and in the legislative process than they have up to now.

1.1. Definitions and issues to be addressed

The questions addressed in this essay involve the ways that Swedish legislators take account of the fact that new or changed regulations can be abused through crime, particularly with regard to economic and organised crime. Are risk assessments and descriptions of consequences carried out and are crime preventive issues taken into consideration when making new laws? In addition, the essay describes how primarily economic crime can be prevented through legislation.

The areas of particular interest for economic crime do not include criminal law, but rather civil, administrative and taxation legislation. It is in these areas that we find abuses of regulations and where there is a need to make analyses of the consequences of legislation and to take crime preventive factors into consideration. It should be noted from the start that there are no specific instruments in place in Sweden for risk assessment and crime prevention which are specifically directed at economic and organised crime, even if there have been plans for the introduction of such instruments from time to time. There are however a number of more general systems in place which to some extent provide for these interests. To a large extent, this essay will therefore involve a description of general systems and will attempt to show why they are also important for carrying out risk assessments concerning economic and organised crime. The discussion that has surrounded these issues, the proposals that have been put forward and the measures that have been taken in respect of economic and organised crime are taken up primarily towards the end of the essay.

The concept of risk assessment is employed in a number of different contexts and thus with a varying content. In this essay, unless otherwise specified, risk assessment is taken to mean analysing the consequences that

legislation and proposed legislation may have for crime. In Sweden, discussions of risk have as a rule concerned themselves with other issues, as outlined in Appendix 1. Deciding what the crime prevention concept means is not as simple as it might at first appear (Sahlin, 2000). In the present context it means the immediate ability of regulations to prevent or obstruct the commission of crimes, and not the extent of the positive effect which the regulations might have in the long term. As is shown in section 8, regulations primarily concerned with economic crime can be divided into those that create an incitement to act in accordance with the law, those that make it more difficult to commit offences, those that reduce the returns from crime and those that militate against the justifications that can facilitate the commission of crime.

The focus in this study lies with the legislative process, but questions of enforcement and evaluations of systems of regulations are also addressed. It is not simply a question of considering the effects of regulations in advance of legislating, but also of how the laws then function in practice and how shortcomings are corrected afterwards.

2. General directions to committees

The most visible example of an instrument for risk assessment and crime prevention in the Swedish legislative process are the general directions to committees and inquiries that revise legislation and that they undertake an analysis of the consequences of legislation "when a proposal has significance for crime and crime preventive efforts" (Article15, Committee Ordinance [1998:1474]). These directions focus on crime in general and not purely on economic and organised crime.

The regulations contained in the Committee Ordinance have replaced the general committee directives which previously required committees to describe the consequences proposals may have for crime and crime preventive efforts (Dir. 1996). In the earlier government directives the requirements were outlined in much more detail than in the more concise text of the Ordinance. For this reason there are good grounds for presenting a few of the central themes in these earlier directives:

Crime and the fear of being exposed to crime are adjudged in the government directives to be a growing social problem. Since the mid-1940s, the number of offences notified to the police has increased by almost 500 per cent. There is agreement at the political level that anti-crime measures

and those aimed at improving feelings of security must be given a high priority. The structure of crime is, to a large extent, dependant on the structure of society. Changes in economic policy, social welfare etc., also have an effect on crime. Crime preventive efforts aim to introduce measures that reduce people's propensity to commit criminal offences and to reduce the number of situations that might lead people to commit such offences. Much crime preventive work thus takes place outside the justice system in other sectors of society. The Government therefore emphasised the importance of an increased awareness of the causes and preconditions for crime and that just about all societal changes impact upon crime in some way. Crime preventive efforts were therefore not to be regarded as an isolated issue, but rather questions about consequences for crime should be analysed and presented in all sectors of society. Committees and specific investigations were therefore instructed always to analyse and describe how proposals could be expected directly or indirectly to impact upon crime and crime preventive efforts.

The general directives should be seen as framed in the wider context of the Government's national crime prevention programme "Everybody's responsibility" (Ds, 1996). This program in fact focuses solely on traditional, everyday crimes. For many years, in the Nordic countries, crime preventive aspects of crime policy have been emphasised and the national program builds on the "importance of preventive efforts in all sectors of society" (p. 5). With regard to the question of risk assessment and crime prevention, the first of the three linchpins[2] is of special interest (p. 5):

"The Government and governmental authorities shall to a greater extent pay attention to the ways in which societal change in general and political decisions in areas other than those related solely to crime policy affect crime. Greater demands shall be placed on those who create opportunities for crime in the course of their work to prevent crime. Those affected in all sectors of society shall consider the consequences of their decisions and actions for crime to a greater extent than is the case at present."

On a superficial level, the general directives on the analysis of consequences for crime can be seen as a large step forward as regards the carrying out of risk assessments and the consideration of crime preventive is-

[2] The other two linchpins are that legislation and the work of authorities and agencies in the field of crime policy should be developed and made more effective and that measures are to be taken to support and encourage the involvement of citizens, *inter alia* in local crime prevention projects.

sues. But it is important to remember that, according to the general directives, several other questions must also be considered, namely whether proposals involve consequences for the economy, for employment and public service provision in different parts of the country, for conditions affecting the ability of small businesses to operate and compete, for equality between men and women or for the goals of integration policy (Article 15). Since so many and such complicated political issues are to be considered by the committees and inquiries, which are always under pressure for time, it is my experience that the analyses of the consequences for crime are as a rule rather rhapsodical. In the final analysis, committees have a concrete purpose and all such "secondary considerations" inevitably reduce the amount of time they have to devote to the principle task before them.

The way the committees have carried out the general directives has also been the object of a good many criticisms, from amongst others the Parliamentary Auditors (RR, 1997). The Office for Administrative Development (1998) examined a general directive concerning an unconditional examination of public sector commitments, which had been initiated in order to tighten the public purse strings. The Office for Administrative Development stated that far too many inquiries failed to follow the directive but instead suggested new or increased public sector commitments without further scrutiny.

The Justice Department recently investigated the extent to which the general directives to analyse and consider the effect of proposals on crime and crime preventive efforts have affected the work of inquiries (Ju, 2000). It was found that in 57 per cent of the inquiries, no such analysis had been carried out and that no motivation was given for this. These inquiries thus failed to fulfil the formal condition requiring a description of consequences. An analysis of the significance of proposals for crime and crime preventive efforts was adjudged to have been necessary in only 23 per cent of the committee reports. In 27 per cent of the reports, an analysis of consequences deemed to be necessary had been neglected. In those cases where analyses were presented, they were often short, not uncommonly just a few lines in length. In 70 per cent of these reports, the analyses covered less than a single side. Just over a quarter of the analyses were adjudged to be manifestly inadequate. The analyses were deemed to have become better with time, however.

In the course of their work, the committees have for many years had the support of the Committee Handbook. The new committee handbook con-

tains a section on how to make analyses of consequences *inter alia* for crime and crime preventive efforts (Ds, 2000). Included is also a comprehensive checklist based on the tenets of situational crime prevention. The new handbook will probably have the effect of increasing the number and quality of the consequence analyses that are carried out in the future.

The system of general directives has itself been the subject of criticism. The Office for Administrative Development was of the opinion that general directives should be adapted and integrated into the individual directives issued to specific inquiries and that a more selective attitude should be adopted with a greater focus on the characteristics of the specific situation. General directives were adjudged to be demoralising and counterproductive. A similar view has been presented by Gunnarsson & Lemne (1997). The Parliamentary Auditors have also suggested that the requirement for analyses of consequences be included in the specific directives to the individual committees (RR, 1997). The content of a committee's task would thereby be clarified at the same time as the need for specialist competence would be made clear from the start. The Justice Department's investigation also suggested that the individual directives to the committees should be clearer and should make express references to the centres of expertise which ought to be contacted (Ju, 2000). The suggestion is also made that the general directives should apply not only when proposals are produced, but that crime and crime preventive factors should also be considered in connection with the production of evaluations and summaries of expertise in different areas.

The general directives relating to consequence analyses are directed at committees and inquiries that produce legislative proposals. Within the legislative process, the committee system is the most important instance with regard to the analysis of the consequences of legislative proposals and the consideration of factors relating to crime prevention.

3. Committees and commissions of inquiry

The most important task of the legislative process is to analyse the shortcomings of the existing system, to evaluate new solutions and to work out new legislative proposals. It is here that risk assessments can be carried out in depth and where the best opportunities lie for the consideration of crime preventive measures. This is true of course for both traditional forms of crime and for economic and organised crime.

The Swedish legislative tradition has primarily been one where analyses and proposals for new legislation are produced *ex ante* in the context of commissions of inquiry. The roots of the Swedish committee system can be traced back over 400 years to the early 1600s when Sweden's expansion as a great power began to require new forms of government (Gunnarsson & Lemne, 1998). The major part of the work of preparing larger reforms is therefore carried out within the committee system. The task of the committees is to elicit the facts, analyse them and present proposals. The reason for this is that the Swedish Cabinet Office is quite small compared with that of other countries. The committee system has been studied and investigated on several occasions (Hesslén, 1927, Meijer, 1956, Johansson, 1992 and Helander, 1998).

The concentrated committee system is often presented as an important element in the Swedish democratic tradition, but studies indicate that similar systems are to be found in other countries and that the system is in no way unique to Sweden, as many have wished to believe (Gunnarsson & Lemne, 1998). Each year, somewhere in the region of 200-300 reports are presented to the Government. These are published in the Government's public inquiry series (SOU).

A committee is made up of a chairperson and one or more committee members. Persons with competence or expertise in a particular area and secretarial staff may assist the committee. Sometimes, rather than convene a committee, a special investigator is appointed, who like the committees is assisted by experts and a secretarial staff. On occasion a committee may be given a political constitution (a Parliamentary Committee). Usually the chairperson or special investigator works only part time with the inquiry. The secretary, who in inquiries into legislative issues is often a young court lawyer, is employed by the inquiry. Committee members and experts are drawn from different authorities and agencies. As a rule officials from the Cabinet Office are also included in the inquiry. The object is to achieve all-round competence (Ds, 2000).

Legislative proposals are not solely produced in committees, however. They may also come from interdepartmental working groups, or be produced as assignments given to government authorities or other agencies. Departmental inquiries are published in a different report series (Ds) and the work of government authorities is as a rule presented in their own report series.

Apart from the general directives concerning the presentation of descriptions of the consequences of proposed legislation, *inter alia* with regard to

crime, the extent to which risk assessments are carried out and crime preventive issues considered depends on the commitment and proficiency of those working on the proposal. It is primarily authorities and agencies in the area of crime prevention or crime control who are to ensure that these issues are addressed during an inquiry. As a rule, representatives from these authorities participate in inquiries with a direct focus on crime issues. When it comes to committees inquiring into areas a little distant from criminal justice, it is my experience that expertise on crime and crime prevention is less well represented. As has been mentioned, it is often just these areas – civil, taxation, and administrative legislation – that economic and to some extent organised crime have as their target. Whilst there is thus an opportunity to introduce crime preventive aspects into these regulatory systems, these are areas of law dealt with by the committee system into which criminological perspectives have not penetrated to any great extent.

According to the study of committee reports mentioned above, a committee member, or other person with particular expertise relating to crime was included in only 22 per cent of the inquiries that have referred to crime or crime preventive efforts (Ju, 2000). In those inquiries where such expertise was represented, such persons were primarily drawn from the police or other similar agencies. Only one out of 277 inquiries included an academic with expertise on crime and crime prevention. In only two per cent of inquiries were new studies commissioned. Scientific reports were included in 3.9 per cent of inquiries. This picture corresponds with my own experience as a committee secretary and expert in various inquiries. Amongst other things, methodological issues are much neglected in the work of the commissions of inquiry.

The committee system has on various occasions been criticised for serious shortcomings. Such criticism has focused *inter alia* on the fact that the committee system is abused when the same problem is investigated by one committee after another. Criticisms have also focused on the tightness of the time frame in which committees must work, lack of competence in investigative methodology and directives that have been too imprecise (Gunnarsson & Lemne, 1998). In addition, it has been suggested that there is a need for committee directives to be clearer and more realistically formulated (RR, 1997).

The National Audit Office recently made the following statement on the legislative process and the inquiry system (RRV, 1999:27): "It is a general problem at the level of state authority – not confined to the welfare system

– that laws are introduced and political measures taken on grounds which are often far too shaky. The preparatory work may be inadequate, proposed measures may be insufficiently precisely formulated, interference with existing legislation may have a more symbolic than real value, laws can be passed without the means being made available to enforce them etc."

According to the National Audit Office, control and enforcement issues have been assigned a subordinate significance when proposals for new reforms have been presented. "Changes have often been carried out without closer analysis of the administrative consequences " (RRV, 1999:10). Constant changes in regulatory systems make supervision and enforcement more difficult and many such systems are badly adapted to the administrative capacities of the authorities. According to the National Audit Office, demands for better supervision are first made after decisions have been taken and the problems discovered. The National Audit Office suggests however that changes in attitudes and working practices have begun to make themselves felt in different authorities within the welfare system. The National Audit Office has suggested *inter alia* that control and enforcement issues should be a standard element in the directives given by the Government to the various committees that investigate legislative reforms. Further, demands should be increased that preparatory work and the bills accompanying legislative proposals should better illuminate the administrative consequences of the proposed legislation. The National Audit Office has also suggested that the requirement for analysis of the consequences of proposed legislation should be made more stringent.

Criticism has also been directed at the fact that there is no integrated all-round control or evaluation of decisions taken by the Government and Parliament. Instead this is at best undertaken primarily by the National Audit Office and other authorities with close ties to the Departments of State.

4. The referral procedure

Even if an inquiry has failed to complete an analysis of the consequences of proposed legislation for crime, or has illuminated this question inadequately, the possibility remains to correct this in the course of the referral procedure.

Although the committee system can be found in several other countries, the comprehensive referral process of legislative proposals is unique to the Swedish inquiry system (Gunnarsson & Lemne, 1998). According to the

Swedish constitution (Instrument of Government [*regeringsformen*] Chapter 7, Article 2) "in connection with the preparation of governmental commissions...necessary information and instruction [shall] be collected from affected agencies". Associations and individuals are also given the opportunity to express their views to the extent that this is needed. Proposals are said to be sent out on referral, i.e., they are sent to agencies and other organisations such as trades unions and trade associations and these bodies then reply with their views on the proposal.

The aims of the referral system can be summarised in the following points (Eriksson et al., 1999):

- to enable the Government to see more clearly the consequences of proposals
- to inform by means of recommending rejection or approval of proposals
- to contribute to specifying what is possible to achieve politically
- to supply new standpoints and perspectives
- to provide room for independent opinions that represent the public interest
- to scrutinise the quality of those carrying out the inquiry (technique, depth, conclusions)
- to contribute to the elucidation of political positions and special interests
- to provide help to the mass media in their task of critical scrutiny
- to spread information on and around the report to a large circle via the referral bodies.

By means of the referral procedure, agencies and organisations active in the areas of crime control and crime prevention are given the possibility to scrutinise the effects of the proposal on crime and crime preventive efforts and to present their views by way of their pronouncement on the referred proposal. The referral bodies may carry out a study of their own on which to base their pronouncement. The National Council for Crime Prevention, for example, may carry out modest statistical studies before making a pronouncement on a referred proposal.

It is the Government that decides whether a report or proposal is to be sent out on referral. Sometimes views may be collected in other ways, for example, by means of a hearing. Almost 90 per cent of inquiries are sent out on referral, and such reports or proposals are referred to an average of

61 referral bodies, of which two-thirds are public sector organisations (Eriksson et al., 1999). The majority of referral bodies reply to the referrals, around eighteen per cent of referral bodies do not reply. Attrition rates are highest among private companies (56 per cent) and "other organisations" (43 per cent) and lowest among government agencies, especially in the justice sector (4 per cent), (Eriksson et al., 1999). The referral procedure involves a large number of agencies and other interested parties. For bodies with an important legislative role, the answering of referred proposals involves a significant amount of work which no doubt takes up the equivalent of at least one employee full-time per agency. Calls have therefore been made for the number of referral bodies to be reduced in order to safeguard the quality of referral pronouncements (RR, 1997).

The Parliamentary Auditors have emphasised that the referral procedure is a form of quality control and support that is not always well used. Besides the fact that a number of referral bodies are burdened with too many referrals, the time allowed before pronouncements are to be made is sometimes too short and there are departments which do not compile all the referral pronouncements they receive in connection with a proposal. There is thus, a risk that the commitment of referral bodies may waver since they cannot be sure that their views will reach the politicians responsible. The quality control carried out by the referral bodies may thus be impaired (RR, 1997). An interview survey has also emphasised the importance of making it clear to the referral bodies the specific questions to which answers are being sought, and of more effectively demarcating a suitable circle of referral bodies (Eriksson et al., 1999). Eriksson et al., summarise their assessment in the following way (p. 121):

"In summary, there seems to be a lack of both positive and negative criticism regarding method and factual content. The referral bodies, particularly the National Audit Office, have to a large extent restricted their pronouncements to brief recommendations or possibly rejections of various proposals. Alternative analyses or suggestions are completely absent from the referral pronouncements of the National Audit Office or the Office for Administrative Development. The pronouncements from the responsible branch agencies are as a rule more detailed. It is also quite usual for the pronouncements from such branch agencies to contain remarks pertaining to factual errors and the like. Sadly, though, our conclusion is that the referral procedure only fulfils its quality control role to a very limited extent."

The National Audit Office has elucidated the problems associated with independent agencies making pronouncements on referrals (RRV, 1999). In countries with ministerial rule, it is natural for the responsible minister to pay a good deal of consideration to the practical capabilities of his or her own department when changes are to be introduced. In Sweden, where the distance between the Government and the public administration is greater, "there is a risk that practical administrative questions are given only a limited place in the political consideration of these matters " (p. 28). Not even the comprehensive referral procedure is adjudged to be a guarantee for the adequate analysis of issues concerned with the practical execution of proposals.

No studies have been carried out on the extent to which referral bodies react to the absence or inadequacy of analyses of the proposals' consequences for crime. There is also a lack of data relating to the degree in which referral bodies express opinions regarding proposals' significance for crime and crime preventive efforts. My assessment is that it is in fact only authorities and agencies working in these specific areas who express such opinions and that the conclusions drawn by Eriksson et al., (1999) regarding referral pronouncements in general hold true for those directed specifically at crime and crime prevention.

5. Legislation

In questions of risk assessment and crime prevention, the parliamentary legislation itself is of secondary importance. What is central is what goes into the process prior to the legislation being passed and the way in which the regulations are then applied and followed up. As has been mentioned, the most important work takes place in committees and commissions of inquiry. Nonetheless, something should be said about the legislation itself.

The Instrument of Government (RF), contained in the constitution, regulates the Swedish system of government. It is the Swedish Parliament – the *Riksdag* - that passes laws (RF 1:4). A law may not be changed or repealed other than by law. In addition, regulations bearing on certain questions may only be communicated through law (RF, Chapter 8). Such issues include the matter of the relationship between the private individual and the state, obligations placed on the individual and other encroachments into the individual's personal or economic situation. Examples of such questions include prescriptions on crime and the judicial consequences of crime. The

Instrument of Government also regulates when the Government, following legislative authorisation, is qualified to issue directives by means of ordinances (RF 8:7).

It is the Government that presents legislative proposals to Parliament in the form of bills. The National Audit Office recently examined a sample of such bills presented in the course of two budget years by the Finance, Education, Social Service and Trade and Industry Departments (RRV, 1999). The intention was to study the way the Government handled control and enforcement issues in association with the introduction of new legislation. The questions examined included the following: To what extent do the bills elucidate the shortcomings of earlier regulations? Is there a discussion concerning the practical conditions needed for control and enforcement?

The study's findings indicate that in 94 per cent of cases the bills contain virtually no elucidation of the problems encountered with earlier regulations. In 90 per cent of cases, there is no clarification of the practical conditions required to ensure that enforcement will be able to function well. The study concludes therefore that enforcement issues are dealt with only to a very limited extent in the most important preliminary versions of new legislation, i.e., Government bills.

My own experience with legislative issues at the Taxation Office within the Finance Ministry is that risk assessments are an important aspect of the work undertaken by the Ministry in association with the preparation of new tax regulations. The interplay between new regulations and the enforcement system of the Tax Administration are also taken into consideration. The expertise of the Tax Administration is always utilised in the legislative work of the Department. This is only natural since tax legislation is a target for economic and to some extent also for organised crime.

5.1. Framework legislation

One characteristic of the legislative tradition of the last four decades has been an increase in the use of framework legislation, which involves a *de facto* delegation of legislative power from Parliament to the Government or some other executive body. The term framework legislation refers to legislation that combines an often quite vague description of goals and a comprehensive delegation of power to various agencies.

The reason for the use of this form of legislation is of course the rationalisation and increased effectiveness of the process of government.

But it also involves a deviation from the ideal model of parliamentary democracy (Esping, 1994). The use of framework legislation means that issues of risk assessment and crime prevention must often be dealt with at lower levels than in the legislative process, and at these levels resources in the form of committees and comprehensive referral procedures such as those used in the legislative context are absent. Another problem in this context is that framework legislation must be evaluated since there is always a risk that the government authorities may lose control over the practical application of such legislation (Esping, 1994). If evaluations and other controls are not undertaken, it is very difficult to know the extent to which the regulations are abused and what would be required to correct the situation.

The prescriptive right of authorities is manifested in the issuing of directives and general directions. It may therefore be of interest to examine the kind of consequence analyses found at the lower regulatory levels which exist as a result of framework legislation.

Against the backdrop of a dramatic increase in the number of administrative regulations, the Government began a regulatory reform in the mid 1980s in order to reduce and simplify the body of regulations in place (RRV, 1993). Regulations were therefore introduced (now included in the Administrative Ordinance *verksförordningen* [1995:1322]) which entailed making stricter demands on the issuing of regulations by administrative agencies primarily with regard to analyses of the consequences of regulatory proposals. In addition, such administrative bodies were, for the first time, required to follow up on the effects of executed regulations and to document this. The Administrative Ordinance applies to government authorities. The authority's director is required *inter alia* to "continuously follow up and test the operation of the authority and the consequences of those statutory directives and special resolutions which affect this operation and to take any measures that are required " (Article 7). Before an authority makes a decision on the issuing of directives or general directions, an analysis of the consequences must be carried out (Article 37). The Administrative Ordinance includes no express regulations directed at crime or at the consideration of crime preventive issues. Neither the Government in the use of its prescriptive power, nor the authorities in the use of directives and general directions are required expressly to take into consideration the significance of the regulations for crime and crime preventive efforts.

6. The discussion in Sweden regarding the carrying out of risk assessments and the prevention of organised and economic crime

The introduction of some form of instrument to improve the capacity to systematically analyse legislation, scrutinise proposed legislation and suggest changes with regard to economic and organised crime has been discussed on a number of occasions. As will be seen, suggestions have focused on the institution of a group of people with special competence in this area. Crime preventive factors have also been emphasised.

In Sweden, economic and organised crime became the focus of political attention at the beginning of the 1970s. Until the beginning of the 1980s, economic and organised crime were regarded as part of a single, largely coherent area of concern (Korsell, 2000). At the beginning of the 1980s, questions relating to organised and economic crime began to diverge in the context of political discussions, inquiries and legislation relating to these areas. The phenomenon of organised crime then became the focus of attention for the first time during the 1990s, amongst other things as a result of the debate within the EU. Specific forms of organised crime, on the other hand, such as drug trafficking have been attended to on several occasions by means of inquiries and the like.

At the end of the 1970s, the AMOB inquiry (Working Group Against Organised Crime) proposed the formation of a *central coordinating group* for organised and economic crime including representatives for the directors of the National Police Board, the State Prosecution Service, the National Tax Board and criminological research (AMOB, 1977). This would provide for long term cooperation in questions pertaining to organisation, resources and legislation. The coordinating group would employ a lawyer *inter alia* to scrutinise existing legislation and suggest changes against the background of practical experience from the field. No such group was formed. Instead a group was instituted at the middle management level which met regularly to discuss legislative needs and a number of other matters.

The AMOB inquiry also proposed that a review be made of legislation in the area of economic and organised crime, a task that was carried out by the National Council for Crime Prevention. One proposal made in the course of this work, but which was never carried out, was for the constitution of a "central body" to which agencies and individuals could present strategic

information relating to tax and currency crime. The group would then have been able to suggest legislative and other measures (Korsell, 2000).

A couple of years after the AMOB inquiry, another inquiry, this time within the National Police Board, proposed that the police should institute a strategic intelligence service which, amongst other things, would be able to provide the basis for prompt legislation (SPANEK, 1979). An intelligence service has been built up but does not appear to have any special significance for legislative questions.

A new inquiry, the Eco-Commission (*Eko-kommissionen*), emphasised the importance of crime preventive and crime obstructive measures. In addition, the point was made that legislative measures that were introduced should also work in the intended way (SOU, 1984). Several proposals were made concerning crime preventive measures, among others a requirement for trading permits in order to start up business in certain critical sectors (Korsell, 2000). The Commission wanted to see a comprehensive follow-up of ideas and proposals and for economic crime issues to be monitored at the strategic level, in order to allow for the prompt introduction of measures and legislation etc. The Commission therefore suggested the formation of a *special group* at the Cabinet Office. A further group of academics would be associated with this first group. The group described by the Commission was intended to be close to the state authority and the legislative process, but also to current research. Such a group could have had significance for the issues of risk assessment and the prevention of economic crime *inter alia* by means of legislation. The proposal was never put into practice. Instead the National Council for Crime Prevention was given the task of carrying out research into economic crime (Korsell, 2000).

Once the work of the Eco-Commission was finished, the Government presented a green paper containing a broad outline for the continued reform work (prop, 1984). This is a well-informed document that refers to many aspects of risk assessment and crime prevention (Lindgren, 1997). It is still of such interest and relevance as to deserve more attention and to be in use today (Korsell, 2000:1). Not least among the green paper's qualities was its emphasis on the necessity of considering the risks for abuse and factors affecting enforcement when planning new regulatory systems or reforms.

The paper emphasises that political issues relating to enforcement must be considered when new legislation is introduced and when existing legislation is reformed. As far as possible, laws ought to be formulated so as to prevent abuses. Legislation that is particularly liable to abuses should be

monitored. When new laws are introduced and existing laws reformed, solutions should be sought that are simple at both the legal-technical and the administrative levels. Unfortunately this document has not had too great an impact on the Swedish legislative process.

Political interest in the question of economic crime took off once again in the mid 1990s, and in 1995 the Government presented a strategy for integrated action against economic crime. This is still in effect today, although interest has waned recently following a period of comprehensive reform work (Korsell, 1999 and 2000). The strategy is very broad since the requirement was to "develop and increase effectiveness ...with regard to preventing and identifying as well as investigating and prosecuting economic crime" (Skr, 1995:1). An increased emphasis was to be placed on preventive work, however. This refers to amongst other things increasing the effectiveness of enforcement and the development of a problem-oriented approach by the agencies involved. The document refers to the fact that since the beginning of the 1990s, crime preventive efforts have been given a high priority in police work. In the area of economic crime what was required was to prevent crime by means of measures that would reduce the number of opportunities for crime, reduce the proceeds from crime or increase the risks involved.

During the 1990s, it was also emphasised that a natural element in legislative work must be to carry out a consequence analysis of whether the regulations can be circumvented and whether breaches can be discovered and prosecuted at a reasonable cost (skr, 1995).

A number of institutional solutions have been put in place which focus *inter alia* on providing the Government with information on crime and the need for legislation etc. In every county there is a *coordinating body* against economic crime.[3] Agencies that come into contact with economic crime cooperate with one another under the leadership of the County Governor. This may mean exchanging information, joint enforcement actions, establishing common priorities etc. One task regulated by statute is that each county produce an *annual situation report* on economic crime for the newly formed Economic Crime Authority[4], which collates the county reports into a *general report* which is then presented to the Government. At

[3] Ordinance (1997:899) on cooperation between authorities against economic crime.

[4] Prior to the insititution of the Economic Crime Authority, the reports were presented to the State Prosecutor.

the central level there is also a coordinating organ – the *Economic Crime Council* – where the directors of important authorities in the area of economic crime cooperate with one another. The yearly situation report is formally presented to the government by the Economic Crime Authority, but is prepared by the Economic Crime Council. In this system of reporting, new phenomena can be presented along with the need for legislative proposals, which is what takes place. The Government in turn presents an annual *communication* to Parliament on the state of affairs in the area of economic crime. Over the last few years, the Economic Crime Authority has had the task of developing a "*follow-up system*" which will provide the basis for monitoring the evolution of economic crime over time, for making decisions on measures to combat such crime and to elucidate the effects of economic crime and economic crime control.

One situation report on economic crime presented to Parliament by the Government emphasises crime preventive efforts (skr, 1999). It states that work on the part of government agencies should be systematically focused on ensuring that legislation and enforcement systems are formed in such a way that they do not invite abuses. What is being sought is some form of monitoring or the introduction of some instrument that will improve legislation and enforcement systems. One could call it a risk assessment of existing systems, which could undoubtedly be developed into regulatory changes in the future. As has been mentioned, this question is an old one with its roots in the 1970s.

Since 1996, the Government has published the annual *Joint targets and outlines for the work of authorities against economic crime* during the following year. These outlines describe in more detail the Government's strategy for combating economic crime. They emphasise that shortcomings in the regulations that facilitate crime should be noted. Among other things we find the following (Govt. communication, 1999:5):

"Economic crime can be assumed to be particularly highly affected by the formulation of legislation and by measures taken by different enforcement organs. One important precondition for a more effective combating of economic crime is, therefore, that crime preventive issues receive more attention in the legislative work and in the work of the authorities. It is the government authorities that bear the responsibility for the formulation of legislation and enforcement systems. The development of crime preventive work in this area must thus be the result of cooperation between the authorities concerned and in close contact with the Government's work re-

garding the formulation of proposals for new legislation. Among the necessary conditions for this work to be effective is the need for knowledge relating to those factors, structural or systemic, that can to a particularly large extent, be deemed to invite, or provide the opportunity for, economic crime. Legislation should be constructed so that it does not invite abuse. There should be enforcement systems that make it possible to ensure that regulations are followed where this is deemed necessary."

In addition, it is stated that the authorities shall consider one another's interests when planning and carrying out measures against economic crime. One form which is exemplified is that investigative work be carried out in the form of projects and that, where appropriate, interests such as correct taxation, collection, prosecution and other forms of enforcement are taken into consideration from the start of the project.

7. The discussion in Sweden on preventing 'fiddles'

The discussion in Sweden has not only been conducted in terms of economic crime, but also in more everyday language on the need to counter cheating and fiddles. This discussion is concerned with economic crime in a broad sense and also includes tax and benefit fiddles carried out by private individuals. These discussions have on the whole taken place independently of each other, even though the problems involved are to a large extent common to both areas. For the sake of completeness, these issues should also be presented.

According to Lindström (1996) there is one aspect of post-war social change that is often overlooked. This consists in changes in the "control apparatus" itself. At the same time as the multitude of regulations grew in line with increases in the level of state undertakings, the enforcement of laws assumed a more diffuse and softer character. Reform work focusing on the way government authorities are run, over the last decade has been symbolised and described using concepts such as decentralisation, with the focus on evaluation in terms of results and the achievement of pre-set goals (Jacobsson & Sahlin-Andersson, 1995).

Previously, the state authorities were executive. Supervision and enforcement constituted a large part of what they did and was focused on the detailed examination of figures and so forth. During the 1950s, the discussion focused on how Sweden should be modernised and rationalised. A whole new way of looking at enforcement began to crystallise. Evaluations replaced controls, rule by detail was exchanged for rule by budget, and

authorities became focused on the transmission of expertise and system analysis. The old form of control through detail became an obstacle (Lindström, 1996).

These developments have undoubtedly been for the better. The question is whether something has got lost on the way, however. The notion that regulations could be abused did not enter into the thinking of those behind the modernisation program and the age of social engineering (Korsell, 2000:1). Political decisions have often assumed members of the public to be honourable. Enforcement functions were therefore very little developed in many areas. A large enforcement apparatus would also have sent out the wrong signals, namely that something was wrong (Lindström, 1996).

This lack of enforcement may also have been a conscious strategy. The legislation was regarded as having such an educative effect that in the long term degenerate practices would diminish. In addition, politicians may perhaps have wanted to avoid challenging citizens. It is one thing to introduce regulations, it is quite another to ensure that they are followed. If enforcement practices had been developed more, it might not have been possible to carry out the changes to the regulations (Lindström, 1996).

At the beginning of the 1990s, the National Audit Office carried out a study of fiddles in the welfare system, showing that the legislators had not considered how the regulations might be abused and that the executive authorities had made no systematic attempts to develop an understanding of the abuses that were taking place (RRV, 1995). As a consequence, the regulation and enforcement systems were not improved but rather billions were paid out unnecessarily. The National Audit Office therefore presented a large number of proposals, including the institution of a coordinating group at the national level that would carry out analyses of possible fiddles. In this way it would be possible to utilise expertise on the extent and structure of benefit fraud in legislation and the enforcement system. A group of this kind might play an important role in a system devoted to risk assessment and the consideration of crime preventive issues. Such a group was never formed, however.

A further idea suggested by the National Audit Office involves the institution of a special advisory organ for implementation and budget questions in addition to the existing Legislative Council, which in accordance with the constitution scrutinises legislative proposals (RRV, 1999)[5]. Such a

[5] According to the Instrument of Government 8:18 there shall be a Legislative Council

council comprising experienced individuals with expertise on legal, economic, political science and administrative issues and with the ability to co-opt additional expertise when needed – could provide the Government with advice when regulatory changes are proposed. A group of this kind has never been constituted either.

For a long time now the Tax Administration has worked with questions relating to how tax fiddles can be reduced *inter alia* by means of improved legislation (RSV, 1983). The Tax Administration is of the opinion that "the actual formulation of the material taxation regulations and civil legislation is of great significance" (RSV, 1998:162). The question is the degree to which the regulations can be enforced. One task included in the National Tax Board's enforcement policy is the monitoring of the way the regulations function. Observations made in association with controls of the way the regulatory system functions are documented, analysed and reported.

In connection with its charting of benefit frauds, which focused on private individuals, the National Audit Office stated that "The transference system has by tradition been built up over the decades on the basis of the assumption that the recipient of benefits is honest and gives the correct information. More far-reaching checks and the calling into question of information given by claimants has been rare " (RRV, 1995:14).

In connection with a comprehensive charting of the black economy in Sweden, the National Audit Office found that working illegally was amongst other things, an effect of regulatory imperfections over a much broader field than those concerned with taxation (RRV, 1998). The Office came to the conclusion that without an awareness of this, legislators unconsciously change regulations systems that have an important indirect effect on the structure of the black economy.

The Office for Administrative Development has made a study of the benefit system and pointed to a number of strategic problems in the legislation (SOU, 1996). Among others, these include the fact that constitutional regulation takes place by means of a large number of specific laws whose coordination is technically poor. In addition powerful demands are made on external controls to counteract abuses since the benefit system lacks any drive toward internal control.

to make pronouncements on legislative proposals. The council should comprise judges from the Supreme Court and the Supreme Administrative Court.

The National Audit Office recently summarised a number of general experiences of risk assessment and control within the welfare and income tax systems (RRV, 1999). The aim was to provide a broad documentation of experiences as a basis for further measures aimed at improving these systems. The National Audit Office contends that for several decades, control issues have only received a limited amount of attention. It is only recently that the importance of controls has begun to be noted within the welfare system, where politically the tradition – unlike that in the area of taxation – has been to allow the integrity of citizens to weigh heavier than the state's control needs.

Over recent years, however, interest in governmental monitoring and controls have increased. In line with this, a number of reports have been produced by the National Audit Office and the Parliamentary Auditors that deal with issues of control and supervision. The growing interest is no accident but can be seen against the backdrop of the state of public finances and the criticism that has been directed at fiddles in the tax and benefit systems in recent years. It is possible that these developments also mirror a change in attitudes in society concerning the relationship between state and citizenry (Arnell & Korsell, 1999). The increased interest in these issues is also manifested in the parliamentary decision to carry out a comprehensive program to overhaul and strengthen the state's control function. In line with this, a large number of control-based projects have been carried out which ought to have led to a whole new way of handling control issues (Ministry of Finance, 1999).

8. Crime preventive legislation, particularly against economic crime

The final question to be answered concerns the impact that crime preventive issues have had on legislation regarding economic and organised crime. One way of providing a picture of the legislation with a crime preventive intent in these areas is to build on a theoretical model of situational crime prevention. The background is as follows.

Most criminological theories focus on the importance of personality factors for crime, even in the fields of economic and organised crime. When it comes to efforts at preventing economic and organised crime, primarily by means of regulations in the fields of civil, taxation, and administrative legislation, knowledge relating to personality factors is not particu-

larly interesting. Regulations can only affect attitudes over the long term. For legislation to prevent offences of this type, theories must be applied which focus on the opportunities for crime. It then becomes a question of reducing the opportunities for crime through legislation, but also by means of measures which do not require legislation.

According to routine activity theory, a crime requires the coincidence of three factors in time and space: a motivated offender, a victim or suitable target and the absence of capable guardians (Felson & Clarke, 1998). The theory was developed with traditional crime in mind, but if we translate it to the field of economic and organised crime, the capable guardians can be equated with various kinds of control system. Guardians might also be customers who demand a receipt. The theory can be used to prevent economic and organised crime *inter alia* through legislation. It is a case of protecting the object of the crime and creating the right conditions for control.

Rational choice theory focuses on the decision process of the offender. It starts with the assumption that the offender's motive is to increase his utility in some way (Felson & Clark, 1998). The offender has a goal in committing the offence. This theory can be deemed particularly suited to economic and organised crime where the offender often strives for a combination of maximised profit and minimised risk. We have a rational offender who "has time to consider the consequences of different courses of action and ...[who] as a rule also has the opportunity to act in different ways " (SOU, 1984:115). This theory can be used to prevent crime through legislation. If legislation obstructs certain practices or makes them less rewarding and more risky, the offender will respond to this.

Clark has produced a taxonomy of a number of techniques for reducing the opportunities for crime (Clark, 1997). These techniques are in turn divided into four principle categories: measures to make it more difficult to commit offences, to make it more risky to commit offences, to reduce the rewards of crime, and to counteract the justifications which facilitate crime. This taxonomy can also be used to advantage in order to systematise different legislative measures aimed at preventing economic and organised crime.

The taxonomy builds on rational choice theory and the measures focus on situational crime prevention. Legislative measures are also directed primarily at situational crime prevention even if they do not as a rule focus on the physical environment or objects in it. Instead, the situational environ-

ment is more often constituted of the alternatives for action available within the context of the regulatory system. I have developed the model however by means of adding an additional category to the four principle categories outlined by Clark; legislative measures that create the incitement to act correctly. The reason for this is that regulations can be formulated and reforms carried out so that it becomes economically advantageous to act in accordance with rather than in breach of the law. Regulations can also be constructed so that a certain course of action becomes interesting for one party, who thereby affects the behaviour of another party.

The role of the taxonomy is to illustrate different legislative measures that have been used primarily to prevent economic crime. In some cases, the taxonomy includes proposals presented by inquiries which were then not carried out (the various measures are explained in brief in Appendix 2).

It is worth pointing out that the taxonomy should be seen as an illustration and not an evaluation of whether the legislative measures or proposed legislation are effective in preventing crime. As with all crime prevention, there are always negative effects to be taken into account, such as crime finding other outlets when measures are introduced in a certain situation (displacement effects) or the creation of control-related harm in association with preventive measures. As was mentioned earlier, a level of expertise concerning crime is needed if preventive measures are to be successfully introduced.

The inventory presented here is not exhaustive, and the majority of examples relate to economic crime, which is the area where conditions are most suited for prevention through legislative measures. When it comes to preventing organised crime at the visible level – car thefts, prostitution, drug trafficking etc., – the greatest potential for crime prevention is likely to be found in concrete measures that do not require legislation. As regards the underlying structures of organised crime, opportunities for the use of legislation are greater since at this level there are striking similarities with economic crime. Here the issues are money laundering, for example, and counteracting the use of commercial enterprises for criminal ends, not least by means of controls.

A taxonomy could also be produced over measures to prevent economic and organised crime which are not based on legislation. This would take up practical measures and routines. Such a taxonomy is being produced in another context.

Table 1: Taxonomy of legislative measures against economic and organised crime

Legislative measures that create incitements to act correctly	**Legislative measures that make it more difficult to commit offences**	**Legislative measures that make it more risky to commit offences**	**Legislative measures to reduce the rewards of crime**	**Legislative measures to counteract the justifications that facilitate crime**
1. Benefits • The pensions system, lifetime earnings principle • Refund of alcohol duty • Lower value added tax for licensed companies	4. Start up controls • Authorisation • Test of conduct • Trading license • Disqualification from trading	8. Systems of communication • Statement of income in connection with taxation • Information exchanged between different benefit systems • Unification of bodies dispensing benefits	11. Responsibility and guarantees • Responsibility transferred from juridical to physical persons • Financial guarantees • Reclamation in bankruptcy	14. Easier sanctioning • Clear regulations • Administrative sanctions • Sanctions against acts of neglect • Assurances on basis of 'word of honour'
2. Self regulation • Tax incentives for building work • Exemption rights for living expenses	5. Thresholds • Minimum capital requirement for joint-stock company • Business tax system • Legal requirements on contractors and suppliers to public sector projects	9. Economic control • Obligatory reporting by auditors • Internal controls • Bankruptcy receivers • Reporting of money laundering	12. Secure payments • Tax rebates • Tax at source • Restrictions on payment of negative value added tax	
3. Simplicity • Simplified reporting of domestic services • Simplified tax regulations	6. Revealing existing conditions • Obligatory reporting of changed circumstances in joint-stock companies • Requirement to issue receipts • Access to register information	10. Intrusive surveillance measures • Phone taps • Hidden cameras • Bugging	13. Lower or higher taxation • Reduced tax on domestic services • Prohibition of deductions against bribery payments	
	7. Standardisation and reduced complexity • Standardised taxation assessment • Simplification of regulations			

9. Concluding discussion with proposals

9.1. General directions to committees

Criticism from a number of sources has been directed at functioning of the general directions to committees and inquiries, including *inter alia* those which are relevant in the present context, namely the instructions concerning the conducting of analyses of the consequences of proposals for crime and crime preventive efforts. One possibility is to specify clearly in each inquiry directive which consequence analyses are to be carried out. This places great demands on the competence of those initiating the inquiries of course, meaning that the departments together with others must consider the assignment carefully. A further advantage is that the kind of expertise required by the inquiry becomes clearer and the necessary contacts can be made with relevant research. As has been shown, the input from research and researchers is at present minimal within the inquiry system. The inquiry system could be vitalised if methodological issues and research were given a greater input than is the case at the moment.

By means of framework legislation, the right of decision making is delegated to the Government and lower authorities in relation to a number of issues. This means that regulations are introduced without the requirement for the carrying out of analyses of the consequences of the proposal for crime and crime preventive efforts. The general directions do not, as a rule, apply to regulations of lesser dignity than laws and the reform has thus not had its intended effect. One suggestion would be to make these general directions applicable to the introduction of regulations of all kinds and not just the proposals produced by the committee system.

The general direction reform is also incomplete in the sense that nobody has been assigned the role of monitoring that the directions are really put into practice and that the assessments made can be used in practice. Nor has any organ been given the task of formulating models for how such consequence analyses are to be conducted. The new committee handbook does contain a section describing how a consequence analysis is to be carried out, however, which will facilitate the work of the committees. These shortcomings can be remedied to a large extent by making the directives clearer and by the inquiries recruiting experts, specialists and members with criminological competence.

9.2. The referral system

The aim of the referral system is to provide the government with a clearer picture of the consequences a proposal may have if it is carried through.

This means that the referral procedure can also function as a means of introducing risk assessment and the consideration of crime preventive factors, particularly by authorities and agencies in this area. The Swedish referral procedure is an important institution which improves the quality of legislative work, but is at the same time no guarantee that failings will be discovered, particularly not in the case of economic crime which clearly acts against the system of regulations. It is also worth pointing out that authorities and organisations regularly receive many referrals requiring replies each year and there is a limit to the amount of resources that can be devoted to a detailed examination of the proposals. If a proposal does not affect the area of interest of a specific referral body to any high degree, it is my impression that no great amount of work is devoted to the pronouncement.

Another failing is that the referral bodies are not chosen with the care required if the referral system is to fulfil its institutional role. It can happen, for example, that the National Council for Crime Prevention is not referred to despite the fact that the Council's expertise is highly relevant to the proposal in question. In order to remedy this problem as much as possible, the Council monitors the referrals that are sent out and now and then replies to the authority in question with a pronouncement on its own initiative.

A hypothetical example will illustrate the problem of choosing the correct referral bodies and of carrying out risk assessments. Let us assume that a government inquiry proposes certain changes to the study benefit system. The proposal has an economic focus and interested parties naturally include authorities and organisations that monitor educational issues in one way or another. The report is sent out on referral, but typically only to the authorities and organisations mentioned. It is highly unlikely that neither the National Police Board, the State Prosecution Service or the National Council for Crime Prevention will receive the report on referral since it is not deemed to contain any aspects concerning "crime and punishment". Let us assume further that the proposal creates significant 'poverty gap' effects through dramatic reductions in levels of study benefit as income from employment increases, which creates a powerful incentive to work illegally. This situation may be deemed a reality is Sweden, and according to one study, one in four students worked illegally at some point in 1997 (RRV, 1998). This example shows that the link between the legislative proposal and the black economy was hidden and that for this reason nobody considered that referral bodies with an interest in monitoring the black economy

should also be given the opportunity to make pronouncements. Even if these authorities had received the proposal on referral, however, it is by no means certain that the link to the workings of the black economy would have been discovered since it is difficult to see how different regulatory systems interact.

The carrying out of risk assessments and consideration of crime preventive factors in complicated legislative areas requires considerable expertise. Individuals with the qualifications to meet these requirements will always be in short supply. In order to scrutinise proposals we would need a network of experts to see that issues of control and enforcement are elucidated sufficiently.

9.3. Economic and organised crime

The report system from the counties to the Government via a central authority has now been in place since the mid 1990s and it is doubtful that it has been of any great significance. My own assessment is that the value of this type of reporting is overestimated. Sometimes such reports are based on reliable facts and many observations, whilst in other cases they may rest on little more than assumptions. What is reported often amounts to a presentation of the current mood, and as an example it is often reported that the level of crime is on the increase or lies unchanged at a high level, despite the fact that crime statistics rather suggest a drop in crime since the mid-1990s, *inter alia* as a result of a dramatic reduction in the number of bankruptcies (Korsell, 1999:3). The need for new legislation is often cited, but this sometimes assumes the form of a wish list of the 'hobby-horses' of the various authorities. It is often a question of making proposals with which the government authorities are already familiar. The reports are far too rhapsodic to contribute anything of use to a well-informed Cabinet Office.

The Economic Crime Authority has also been assigned the task of instituting a 'follow-up system' to "provide a correct, accessible and up to date basis for following developments in economic crime, for making decisions on measures to counter such crime and for elucidating the effects of economic crime and economic crime control" (EBM, 1998:3). In my opinion, a number of interesting issues have been taken up in connection with this task, but there is a big question mark as to whether these issues can be adequately dealt with by means of compiling available information when the major problem is a lack of adequate data. What is actually needed is new empirical material collected through research and intelligence work. No

system can compensate for a lack of data and there is therefore a significant risk that the follow-up system will to a large degree constitute little more than a compilation of already known facts, such as statistical information on reported offences and resource deployment. A significant level of analytical resources is also needed to study the information that is already available.

What is needed instead, is a systematisation of the information coming from the intelligence services (police, customs and revenue) and the production of new data by means of research. But the Economic Crime Authority will unfortunately run into difficulties if it follows this path since the authority lacks an intelligence service. The Economic Crime Authority is constructed as a prosecution service which thus investigates and prosecutes offences that are typically discovered by other enforcement agencies.

9.4. Charting the situation in Europe

Even though the government authorities have emphasised crime preventive factors in the area of economic crime, it is still my impression that this has yet to clearly manifest itself in legislative or other measures. I feel that an exchange at the European level, of experiences of crime preventive factors against economic and organised crime in the areas of legislation and control/enforcement would be very valuable.

We could identify the social and economic factors with significance for economic and organised crime by means of a collation and summary of the research in these areas. This would thus involve identifying risk factors. In this way, a better foundation is laid for the making of risk assessments and the consideration of crime prevention.

9.5. Overhaul of existing legislation

The ideas expressed by the Government in the common objectives for authorities in the control of economic crime are interesting and invite serious discussion. In this strategic area, there are undoubtedly great gains to be made.

It is sometimes difficult to give consideration to relevant issues before the fact, however. The following example illustrates this. Sweden has high purchase duties on alcohol and tobacco, which results in home distilling, smuggling and a great deal of ferry travel. A carton of cigarettes costs ten to fifteen times more in Sweden than on the other side of the Baltic Sea.

The governmental authorities are aware of the problem, which manifested itself quite drastically in the spring of 1998:

"To begin with there was a proposal that the Postal Service be given the right to open items of international mail that might contain cigarettes; a proposal that the Legislative Council rejected on the grounds that it curtailed important rights and freedoms. Then came the spring budget proposal to reduce tax on tobacco by fourteen per cent. This constitutes a rather piquant reversal: Just a few years ago the duty on beer was reduced as a result of increasing trade in beer between Sweden and Denmark; this reduction in duty was financed then – in August 1997 – by means of a marked increase in tobacco duty. And it is this duty that is now being reduced again..." (Eklund, 1998:81).

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Appendix 1

The discussion on risk and a risk society

Takala (1995) refers to the German sociologist Beck's discussion of the desire of modern societies to control environmental risks and other risks that are the result of development or progress. Takala makes an inventory of the increased use in modern criminal legislation of linking the threat of punishment to an act, which involves the risk of injury. The tendency is towards an increased use of criminal law as a means of controlling behaviours that involve risk.

A large part of political decision making also has to do with risk management (Giddens, 1999). One important question in modern society is that of controlling the future (Giddens, 1999). Certain preventive strategies are associated with this modern thinking that makes control over the future a possibility (Sahlin, 2000). As this presentation has shown, however, the question of how regulations, which may be instituted with this intent, are to be formulated so as to avoid abuses or new risks, has been a much neglected area. This is true in the areas of both traditional crime and economic and organised crime. There are no models for making assessments in the course of the legislative process of how regulations might abused. Nor is there a systematic inventory over how regulations may be formulated to prevent crime, not least economic and organised crime. This does not mean that these questions have not been discussed in association with specific regulations or regulatory systems, and there thus exists a fragmented expertise in this area which should be brought together, evaluated and made use of.

Risk, risk assessment and risk management used to be a question primarily dealt with by technicians, statisticians and economists. There is also a tradition of studies focusing on people's experience of risks in the field of psychology. Now, although environmental and other complex forms of risks have become important items on the agenda (Gustafsson, 1997). Over the course of the last twenty years, research into the perception and communication of risk has been pursued quite intensively (Sjöberg & Ogander, 1994). In addition, the subject of risk has increasingly become a focus for social commentary and debate. A number of agencies and authorities devote themselves to risk management, among others the Defence Department and the Swedish Rescue Services Agency. Risk assessment has become an established ingredient in the life of society. A professor's chair in risk management has been instituted.

Research into risk may provide us with better instruments of control. Johannesson (1998) contends that in the course of his studies into risk assessment in the area of health and the environment, he has found reason to propose an increased use of decision theory and theories on choices of priority as an integral part of risk assessments. As a rule, decision theories include elements of problem identification, problem evaluation, the development of alternatives, and the choice of an alternative. Johannesson, Hansson, Rudén & Wingborg (1998) have studied legal and administrative systems of risk management in three areas: industrial health and safety, environmental protection and chemical control. They came to the conclusion that agencies differed significantly from one another both with regard to how they were organised, and in their working practices. The differences were not deemed to be dependent on conscious choices, but were rather the result of a lack of coordination between different political areas. One striking difference was the lower priority given to enforcing regulations by means of controls in the area of environmental control as compared with that of industrial health care. The study illustrates the way legislation and agencies have developed successively and the fundamental lack of a coordinated vision on risk assessment, resource use and control issues.

Appendix 2

Description of categories of legislative measures aimed at prevention of economic and organised crime

1. Benefits

Legislation can be formulated so that it becomes worthwhile economically to act in the way intended by the legislator. The new pensions system functions in this way, in principle, since the more years a person works, and the higher their earnings (up to a certain fairly low ceiling), the higher the pension they will receive. This makes it worthwhile declaring all income for taxation purposes since it is this income which will form the basis of the pension calculation. In Sweden, proposals have been made to give back half of the alcohol duty paid by bars and restaurants in order to encourage a correct declaration of the amount bought and sold. Another proposal is that companies adjudged according to certain criteria to be scrupulous should pay a lower level of value added tax.

2. Self regulation

In this instance, the parties' interests are made to coincide by means of the way the legislation is formulated. Reduced taxes for building work have been introduced on a number of occasions, enabling people who own their own homes to pay lower taxes if they carry out repairs. The condition is that they can produce a receipt from a tradesman paying business tax (which is evidence of the fact that the tradesman himself is responsible for the payment of taxes). For the tradesman to be given work, he will have to be prepared to give a receipt. Since the receipt is then to be presented to the tax authority, it becomes difficult not to put it through the books, which leads to the income being declared for taxation purposes. Another proposal has been for private individuals to be given 'living expense' rebates on their income tax against receipts relating to such living expenses as restaurant and hairdresser visits.

3. Simplicity

Regulations are sometimes so complex that many choose to take affairs into their own hands. There has been widespread agreement for a long time over the fact that the tax system should be simplified for those running businesses. One proposal has been to simplify the bureaucracy involved when a private person hires someone to carry out domestic services.

4. Start up controls

There are different regulatory systems to ensure that certain businesses in specific sectors are scrupulous, or that certain professions live up to specified standards. In order to get an alcohol licence in the restaurant trade, for example, there is a requirement of "desire and ability" to attend to one's responsibilities to the public good. Proprietors who have "seriously disregarded their obligations" in connection with their business interests can be banned from trading for a period of up to ten years.

5. Thresholds

General requirements that can be included in legislation may increase scrupulousness. Joint-stock companies must be capitalised in the amount of at least 100 000 SEK, for example, and companies must be registered to pay business tax, which means that those hiring the company are not required to pay tax at source on income paid out to the company. Purchases made by public sector agencies allows the possibility to make demands on contractors and exclusion from public sector projects can occur as a result of crime, tax debts etc.

6. Revealing existing conditions

Legislation can require that existing conditions be revealed that reduce the opportunities for crime. If board members are replaced in a joint-stock company, this must be registered. Authorities, companies and private individuals can be given access to different types of register information. There is a proposal that debt-collecting agencies be given access to information on certain more serious offences. There is also a proposal that business proprietors in cash industries be required to give the customer a receipt.

7. Standardisation and reduced complexity

Standardised rules reduce the room available for manipulating the regulation system. There are proposals to introduce minimum levels of taxation in certain sectors by means of a licence fee. The aim is to reduce the opportunities for tax offences. By reducing the complexity of the regulatory system, opportunities for crime are also reduced.

8. Systems of communication

One way of increasing the risk of discovery is to have regulations that are integrated or communicate with one another. If one authority were to make all subsidy payments to businesses, for example, as has been proposed,

frauds would be easier to uncover. When companies declare share profits to the tax authorities, the risk of discovery is increased for shareowners who choose not to declare their profits.

9. Economic controls

Auditors are obliged to report certain offences discovered in the course of an audit. By requiring internal controls within authorities, the risk increases that fraud and other offences will be discovered. The official receiver is called in whenever there is a bankruptcy, which reduces the opportunity of concealing crimes in a bankruptcy.

10. Intrusive surveillance measures

There are various control systems which increase the risk that offences will be uncovered. Various forms of concealed audio and visual monitoring are particularly important in the case of organised crime.

11. Responsibility and guarantees

In order to reduce the rewards from crime, it is possible to make demands on owners for the debts of juridical persons in certain instances. One proposal involves requiring certain financial guarantees before allowing a firm to start trading in certain sectors.

12. Secure payments

In order to reduce payment fiddles, rules have been introduced which involve the payment of tax as close to the income source as possible. Special rules and barriers have been discussed with regard to the paying out of negative value added tax.

13. Lower or higher taxation

In order to reduce tax avoidance in connection with domestic services, proposals have been put forward for tax reductions in these sectors. One way of fighting corruption is to prohibit tax rebates on bribery payments, even though in strict micro-economic terms such payments constitute running costs.

14. Counteract justifications

By means of legislative measures, the scope for avoiding punishment can be reduced by introducing administrative sanctions, which do not require evidence of intent. Sanctioning acts of neglect is also a way of reducing the scope for the justifications that facilitate crime.

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