

2008, volume 1, issue 5

www.erasmuslawreview.nl

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STAYING OUT OF COURT

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INTRODUCTION: STAYING OUT OF COURT

The ways court procedures can be avoided is a classical theme in socio-legal studies and criminology. The preface to a book published on that theme by the Erasmus School of Law in 1988, on the occasion of its 25th anniversary, covers the then dominant view very well: '[T]hey [people who advocate out of court settlements, *RvS*] consider the judge as an *ultimum remedium*. And that is how it often should be'.¹ Topics covered in that jubilee volume ranged from arbitration and administrative regulation to diversion and alternative dispute settlement. Now, however, it is striking to see that not only the *topics* in this issue of the *Erasmus Law Review* differ substantially from those of twenty years ago but that the *tone* is also quite different. The initial optimism and the belief that avoiding formal court procedures is essentially a good thing seem to have made way for a more sceptical attitude. Here it is questioned whether extra-legal regulations and out of court settlements actually *do* diminish the number of court procedures and whether this would be desirable. Marc Loth's argument is the most explicit, but in more implicit ways it is echoed in each of the contributions.

In many ways, this change follows the general development in socio-legal studies and criminology, which is notably influenced by the fact that we have more experience with out of court settlements and know through research how they work in practice. In the 1970s, the plea for out of court settlements often emerged from discontent about the dysfunctionality of mainly criminal law. Critics argued that there are better ways to solve conflicts, ranging from decriminalisation and diversion to informal dispute settlement.² Albeit in a very balanced way, this positive tone is maintained in Judith van Erp's contribution on reputation sanctions (also called 'naming and shaming').

¹ H.J. Snijders, C. Fijnaut, H.Th.J.F. van Maarseveen, and R. Zwitter, *Overheidsrechter gepasseerd: conflictbeslechting buiten de overheidsrechter om* (Arnhem: Gouda Quint 1988).

² L.H.C. Hulsman, 'Kriteria voor strafbaarstelling', E. André de la Porte (ed.), *Strafrecht te-recht? Over dekriminalisering en depenalisering* (Baarn: Anthos 1972), 80 and N. Christie, 'Conflict as property', (1977) 17 *British Journal of Criminology* 1.

In the early 1980s, Donald Black³ demonstrated that, next to benign reasons to stay out of court, people mostly took the law into their own hands because they perceived justice as being unavailable to them. As an example of this unavailability of law, Black referred to the settlement of conflicts that arose from an illegal transaction (e.g. a failed drugs deal). If people did not have a plausible story or perceived their opponent to be too powerful, they also often refrained from formal litigation, as is the case when law enforcement arrives too late to solve the problem or if one does not trust the prevailing legal order.⁴ The debate on private justice as such is not dealt with in this issue, but the idea that certain people have an interest in avoiding formal justice certainly is – as Judith van Erp and Nicholas Dorn demonstrate with regard to business corporations and private intelligence companies, respectively.

The real watershed in the debate was caused, however, by Stanley Cohen's seminal book *Visions of Social Control* in 1985.⁵ After analysing all the diversion programmes, non-custodial sanctions, and other out of court settlements, Cohen concluded that these initiatives had merely become 'add-ons' that had widened the net of social control and tightened the mesh so that even the smallest 'fish' were caught. As a result, the criminal justice system caseload was by no means reduced. The argument is dealt with most explicitly in this issue's contribution by Wim Huisman and Monique Koemans, which discusses various new administrative regulations that are aimed at replacing formal court procedures. However, the article also supports Marc Loth's analysis.

Another phase that can be distinguished is David Garland's⁶ assessment of the predicament that currently confronts law enforcers: they seem unable to control crime and insecurity adequately. One of the responses to this quandary is the 'responsibilisation' of other, mostly non-legal agencies. In this respect, we can point – as Huisman and Koemans do – to the enhanced importance of local authorities and civil society or – as Van Erp does – to governmental control bodies on financial fraud, food safety, compliance, and corporate governance. One consequence of these 'responsibilisation strategies' is that a large number of cases are dealt with outside of court, at least initially, since conflicts that arise from these settlements indeed often lead to new court cases.

³ D. Black, 'Crime as social control', (1983) 48 *American Sociological Review* 34.

⁴ Not everybody is in the position of the Italian Prime Minister, Silvio Berlusconi. He has regularly claimed that all the judges are against him, and in July 2008 he changed the law to create his own immunity.

⁵ S. Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity 1985).

⁶ D. Garland, *The Culture of Control* (Oxford: Oxford University Press 2001).

A next important new field in which a move away from formal law enforcement can be observed is the changing nature of policing. In their book *Policing the Risk Society*,⁷ Richard Ericson and Kevin Haggerty argue that rather than the traditional criminal investigation into individual offenders, policing today is more about crime mapping and ‘knowledge broking’. Policing is moving away from servicing the prosecution and trial of offenders and increasingly follows the rationale of intelligence. It is, moreover, no longer an issue solely for the state but also includes a growing number of private partners. According to Ericson and Haggerty, the private security sector is hired first as a provider of risk taxation and control techniques; its second task is to do the ‘dirty work’ that state agencies are not allowed to do; its third function is to do the ‘cheap work’, for which police officers are overqualified. This informal processing of data and managing risks is touched upon in Judith van Erp’s contribution and is referred to at the beginning of Nicholas Dorn’s analysis.

Dorn also addresses a possibly even more complex phenomenon: the globalisation of this new style of crime control— i.e. through intelligence and risk management — makes judicial scrutiny even harder. States that hire private military contractors, such as Blackwater, to do the ‘dirty work’ in the ‘war on terror’ have made painfully clear how difficult it is to hold these companies accountable for their acts — i.e. a fatal shooting of 17 people in Iraq. In this particular case, the employees could only have been brought to justice if Blackwater had been contracted by the Defence department and not by any other state agency.⁸ This is not just an American anomaly: private contractors who operate abroad in *Dutch* service generally also have immunity from local prosecution, whilst it is also very difficult to prosecute them according to Dutch law. The Dutch Advisory Council on International Affairs, which was asked for its advice, holds such immunity to be unacceptable and proposes that Dutch law should be applicable if the protection offered by international public law is ‘manifestly deficient’.⁹ Also in the case of Frontex, a new European, intelligence-driven hybrid between a military and a police organisation responsible for risk analyses and coordination on the level of the European Union,¹⁰ it is still unclear to whom it is accountable. We only know that the member states do *not* have ultimate

⁷ R.V. Ericson and K.D. Haggerty, *Policing the Risk Society* (Oxford: Clarendon 1997).

⁸ In October 2007, the US Congress voted for the expansion of the Military Extraterritorial Jurisdiction Act (MEJA) to become applicable also to contractors who work for other US organisations (*The Washington Post*, 5 October 2007), but as yet no contractor has been prosecuted.

⁹ AIV, *De inhuur van private militaire bedrijven: een kwestie van verantwoordelijkheid* (The Hague: Adviesraad Internationale Vraagstukken (AIV) no. 59, december 2007).

¹⁰ Established by Council Regulation (EC) No.2007/2004 of 26 October 2004.

control over Frontex. It is not easy to hold institutions, such as the World Bank, accountable if they have been criminally negligent¹¹. These are just a few examples of how the phrase ‘staying out of court’ could acquire a fundamentally different meaning; the list of global actors that cannot easily be held accountable for their acts could be expanded *in extensor*.¹²

I will conclude here with a brief overview of what is to follow in this issue of the *Erasmus Law Review*. In the first article, Marc Loth argues that, despite the increased importance of out of court settlements, there is actually no decrease in the number of court cases in the Netherlands. Moreover, Loth claims there are good reasons to insist on judicial scrutiny in many instances. In the second article, Wim Huisman and Monique Koemans examine the Dutch ‘import’ of various administrative measures of Anglo-American origin that were introduced to increase the efficacy of the fight against everyday nuisance and against organised crime. Because these measures implicitly widen the scope of criminalisable behaviour, they potentially lead to more rather than to fewer court procedures. In the third article, Judith van Erp examines the ‘naming and shaming’ of various regulatory bodies that are aimed at the prevention of mainly corporate crime. For the business community in particular, loss of reputation is far more damaging than fines or other penalties. Though these control agencies traditionally work in an informal manner, Van Erp observes a tendency towards formalisation. Nevertheless, only when there is more transparency as well can legal procedures and indeed sanctions be made redundant. In the fourth and final article, Nicholas Dorn examines the integration of public and private intelligence, and concludes that the role of the latter is best limited to informing and supporting state agencies if we still are to take the word ‘accountability’ seriously. More convergence between the two types of intelligence will leave less room for dissenting opinions and indeed for judicial scrutiny.

René van Swaaningen

¹¹ D.O. Friedrichs and J. Friedrichs ‘The World Bank and Crimes of Globalization: A Case Study’, (2002) 29 *Social Justice*, 13.

¹² P. Andreas and E. Nadelman, *Policing the Globe: Criminalization and Crime Control in International Relations* (New York: Oxford University Press 2006).

STAYING OUT OF COURT? RESERVATIONS ABOUT A SUPPOSED PRACTICE AND A POPULAR POLICY

*Marc A. Loth**

Abstract

The phrase ‘staying out of court’ raises two questions. Firstly, is there really a tendency to stay out of court? Secondly, if this tendency exists, is it a welcome development or a regrettable one? The first question is difficult to answer, as there are opposing inclinations. And since the judicial domain is a multilayered phenomenon, there is no way of telling whether the tendency is pervasive.

To gain a clearer overview of the judicial domain, it seems advisable to switch from a quantitative to a qualitative perspective, which conceptualises adjudication as part of the democratic decision-making process. We are then in the position to distinguish different kinds of increase or decline in broad or deep judgments and are also able to identify the drawbacks of a practice or a policy of staying out of court: for example, the loss of common ownership, accessibility, visibility and plurality. These findings set limits to a government policy of staying out of court, both in terms of breadth in large numbers of cases as well as in depth for exemplary and complex cases.

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1 Introduction

The phrase ‘staying out of court’ is appealing. It refers to a familiar scenario in which, according to a traditional perspective with regard to rule of law, the road to court and adjudication has always been considered the royal path to conflict resolution and to the maintenance of public order. We have discovered, however, that court intervention is potentially problematic from a social point of view. At times it not only fails to solve the social issue at stake but it even generates counterproductive results. In addition, alternative methods of resolution are available most of the time. Hence, the tide has slowly turned and the law has become unpopular. It simply provides us with the means to resolve conflicts and to maintain public order: nothing more, nothing less. There seems to be a tendency to stay away from the courts, as captured in the phrase ‘staying out of court’. The image that this presupposes is certainly familiar and attractive.

But is the image really true? Is there a social tendency to stay out of court? Do the figures support the hypothesis that there is a decline in cases being brought to and dealt with by the court? And if so, is this a welcome development? Is the intervention of the courts an evil to be avoided or an *ultimum remedium* at its best? This paper will address the following questions: (1) What are the recent developments in the judicial domain: is it in fact decreasing or are there other, contradictory, developments? (2) How should we evaluate these developments: as welcome ones or as having regrettable disadvantages? It is clear that these two questions are distinctly different: the first is empirical, the second is normative. For that reason, we will switch perspective with regard to the judicial domain. Firstly, we will address the question of the development of the judicial domain, and we will deal with increasing and decreasing tendencies (section 2). Secondly, we will switch from a quantitative to a qualitative approach (section 3). Thirdly, we will examine a few uncertainties regarding the practice and policy of staying out of court (section 4), and will provide tentative answers to the main question (section 5).

2 The judicial domain: decreasing and increasing tendencies

All this talk of a judicial domain raises the question of what we mean by the term. In the context of Dutch legal and judicial policy, it is defined as ‘the size (number of court pleadings) of the judicial system and the composition of the legal fields within the legal system’.¹ This seems clear enough.

¹ This definition is proposed in a starting document of the project ‘*Rechtspraak 2015*’, initiated by the Dutch Ministry of Justice and designed to develop scenarios on the near future of adjudication in the Netherlands. In the context of this project,

Preferably from a comparative perspective, we can and should try to imagine the judicial domain by comparing figures on the number of cases brought to court and the number of verdicts of the courts. We will then see that the resulting picture is not a homogenous one, as we can identify both decreasing and increasing tendencies. The first is described in a frequently quoted article by Marc Galanter.² Not without exaggeration, he speaks of ‘the vanishing trial’, based on the observation that the number of proceedings ending with a decision and the number of proceedings in general in the US have decreased in the last forty years.³ In his view, there is no ‘litigation explosion’ at all – as the myth would have it – but in fact a ‘trial implosion’.⁴ While almost every other form of legal activity has increased, the number of proceedings has declined, not only in comparison to the total number of cases pending at the courts but also to the population and the size of the economy.⁵ Let us examine the figures.

The *federal courts* handled almost 10 per cent fewer cases in 2002 than in 1962; the absolute number of *civil proceedings* came to 60 per cent less in 2002 than in the mid-1980s. Not only the number but also the contents of the judicial domain for civil cases changed. In 1962, proceedings in the field of contracts and liability law accounted for most of the civil proceedings (74 per cent); by 2002 this percentage had been reduced to 38 per cent. In contrast, there was an increase in proceedings for the protection of citizens’ rights: from 1 per cent of the total number of civil cases in 1962 to more than 33 per cent in 2002 (and 41 per cent if we look only at jury trials). In addition, the number of ‘prisoner petitions’ (including *habeas corpus*) increased enormously, despite a decrease as a result of regulations to limit the number of cases. Proceedings of this type amounted to 12.7 per cent of the total number of proceedings in 2002. The percentages and absolute numbers of federal criminal cases rose somewhat (from 33,110 in 1962 to 76,827 in 2002); however, the number of *criminal proceedings*

Elaine Mak and I have written a paper on the development of the judicial domain, published under the title ‘The Judicial Domain in View: figures, trends and perspectives’ (2007) 3 *Utrecht Law Review* 75.

² See Loth and Mak, above n. 1.

³ M. Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 3 *Journal of Empirical Legal Studies* at 459.

⁴ Galanter starts from the concept of a trial, which he defines as ‘a contested proceeding before a jury or court in which evidence is introduced’ (a definition that he has taken from the Administrative office, see AO Form, JS-10). Several cases can be dealt with in one trial: for example, collective claims for damages in civil liability law. It is also possible that several proceedings take place in one case, in which various aspects of the case are taken into consideration. See also M. Galanter, ‘Contract in court, or almost everything you may or may not want to know about contract litigation’ (2001) *Wisconsin Law Review* 577.

⁵ Galanter, above n. 3 at 460.

decreased by 30 per cent in the period from 1962 to 2002 (from 5,097 to 3,574). As to *insolvency cases and proceedings*, a similar development took place. The justice system for administrative cases in the US is entrusted to ‘administrative tribunals’ and to other forums that do not belong to the judicial system. The trend with regard to a decreasing number of cases, however, is also seen there.⁶ This development is not confined to federal courts. Both for civil and criminal proceedings, a similar tendency can be identified at the *state courts*, where the majority of proceedings take place. The decline in *civil cases* was substantial, both for cases that were settled by a jury trial (from 1.8 per cent of the total number of cases in 1976 to 0.6 per cent in 2002) as well as for those settled by a judge (‘bench trials’; from 34.3 per cent in 1976 to 15.2 percent in 2002). The absolute number of jury trials decreased by a third during the period of the investigation and the absolute number of bench trials declined by 6.6 per cent. As to *criminal cases*, the number of proceedings at the state courts between 1976 and 2002 declined from 8.3 to 3.3 per cent. In evaluating these figures, one must be aware that the character of the average proceedings during this period had also changed, in the sense that they had become more complex and of longer duration.

What is the reason for this ‘trial implosion’? Galanter observes a shift in ideology and in the practice of lawyers and judges involved in the proceedings.⁷ As a result of portrayals in the media, the parties have changed their strategies; consider for example the dangers involved in jury trials. The decline in the number of proceedings can be explained – in any event, for civil proceedings – by a reduced supply of cases, cases being diverted to other forums such as Alternative Dispute Resolution (ADR) and the abandoning of proceedings because of increased complexity, costs and the length of time involved. A change in ideology can also be observed on the institutional side of the judicial system. ‘Managerial judging’ aimed at arranging cases and getting rid of the caseload (Galanter speaks of a ‘turn to judges as promoters of settlement and case managers’)⁸ has grown considerably since the 1960s. Consequently, both judges and lawyers have less experience, and possibly because of this are less inclined to allow the cases presented to them to develop into proceedings. Galanter emphasises the impact that these developments can have on the role of the judicial system in American society. If the number of judgments from proceedings decreases, the legal framework for other forms of dispute settlement will decline in number and importance. Adapting is then no longer ‘bargaining in the shadow of the law’,⁹ but threatens to become a negotiation process in which legal standards are swallowed up.

⁶ *Id.* above n. 3 at 499-500.

⁷ *Id.* at 515 et seq.

⁸ *Id.* at 520.

⁹ *Id.* at 525. See also R.H. Mnookin and L. Kornhauser, ‘Bargaining in the Shadow

Now let us turn to the increasing tendencies. The question of whether something like vanishing trials exists in the Netherlands has been investigated by Klein Haarhuis and Niemeijer.¹⁰ The question is difficult to answer, since in the Netherlands there are no trials that resemble those in the US. The authors therefore understand the trial as a gradual concept: 'Judicial proceedings in the Netherlands can be characterised as more or less trial-like, depending on the degree to which they exhibit typical characteristics of an American trial'.¹¹ Their conclusions, however, diverge sharply from those of Galanter. The authors state:

In this contribution, we have demonstrated that trials are by no means vanishing in the Netherlands. Neither the number of civil judgments nor filings have revealed a downward trend. Instead, we observed a steady rise in civil cases over the years, including recent years.¹²

This steady rise is displayed by the total number of final civil judgments (from 130,000 in 1967 to 478,000 in 1999), both in summons and petitions, handled by district courts, courts of appeal or sub district courts, and both in judgments and filings (output and input). The overall rise in civil judgments seems to hold true when we differentiate among case types, such as labor cases, various types of family cases and cases related to the treatment of people with psychiatric disorders. The exceptions are divorce cases and those related to lease and real estate rent, as well as insolvencies, all of which have remained relatively constant over the past decade. The overall rise also holds true when we differentiate among the diverse ways that civil cases are disposed of: for instance, by judgment, withdrawal and settlement. The proportion of final judgments is high (about 85 per cent) and has been constant over the past several years. In the Netherlands, there is no trend towards using types of case disposition other than final judgments.

How can we explain these results? Why are trials in the Netherlands not yet disappearing? Apart from short-term explanations, such as changes in the rules of competence, the court fee and so on, some long-term explanations seem appropriate. Firstly, indicators of 'problem frequency' appear to have the largest impact on case inflow, since people's legal problems are dependent upon their socio-economic situation and their participation in society. In particular, economic variables such as unemployment have a negative effect on civil filings: the more unemployment, the fewer filings. Secondly, we must consider the indicators

of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

¹⁰ C.M Klein Haarhuis and B. Niemeijer, 'Vanishing or Increasing Trials in the Netherlands?' (2006) *Journal of Dispute Resolution* 71.

¹¹ *Id.* at 72.

¹² *Id.* at 104. Criminal proceedings are not a part of their research.

of costs of going to court, such as lawyer and court fees. These were found to have a negative impact on court filings.¹³ Interesting, of course, is why Galanter's explanation of the observed vanishing trials in the US is not valid for developments in the Netherlands. There is no diminished supply, no more diversion, no substantial decrease because of rising costs and no decrease because of the new, managerial style of judging. Apart from diminished supply, these phenomena are familiar enough in the Dutch legal system, but they somehow do not lead to a decline in proceedings. Klein Haarhuis and Niemeijer observe overlapping trends in the US and the Netherlands, but do not provide a satisfactory explanation for the observed differences. What we do see, however, is a large growth in the number of filings before the sub-district courts in the Netherlands, combined with a smaller rise in full-fledged petition procedures, which suggests a shift to less trial-like forums. Perhaps we can say that this comes closer to the findings of Galanter, so that there is, after all, some likeness between his findings for the US and those of Klein Haarhuis and Niemeijer for the Netherlands. Nevertheless, that does not alter our conclusion that the picture shown – decreasing tendencies in the US and increasing tendencies in the Netherlands – is far from homogenous.

3 The judicial domain: different approaches

I am afraid the situation remains the same when we turn our attention from figures to long-term developments. In the paper that Elaine Mak and I wrote on the judicial domain, we demarcated it from other state powers (the legislature and the administration), other legal systems (European and international), other forms of dispute settlement and counseling (ADR) and other courts (different levels, legal cooperation).¹⁴ What we found was that both increasing and decreasing tendencies can be identified in the different relations. On the one hand, there are forces to expand the judicial domain, such as the increased scope with regard to the other state powers, the extension of legislation at the international or supranational level, the jurisdiction of the judiciary in international and European law, more effective domain management, the legalisation of social relations and the growing demands of citizens. On the other hand, there are countervailing powers, resulting in a domain restriction, such as the government policy to force the judiciary into an *ultimum remedium* role, the increasing domain of international and supranational courts, the rise of alternative forms of dispute

¹³ The authors refer to B.C.J. van Velthoven, *Civiele en administratieve rechtspleging in Nederland 1951-2000* (Leiden: Leiden University Department of Economic Research Memorandum 2002).

¹⁴ *Id.* at 82-90.

settlement and a decline in the public trust in the judiciary. All these developments undeniably exist and have an impact on the judicial domain. Without a standard to measure these effects, however, there is no way of telling whether their combined result is an expansion of the judicial domain or a restriction. Because the judicial domain is a multilayered phenomenon, we simply do not know. And so we are back to square one.

What we do know, however, is that a purely quantitative approach is apparently not sufficient. We need to switch perspective to gain a clearer insight into the judicial domain. As a starting point, I would like to propose that there are two fundamentally different ways of looking at, and speaking about, the judicial domain. The first is the talk of policy makers and social scientists, who speak about the judicial domain in purely quantitative terms, just as we have done thus far. The presupposition of this discourse is that the judicial domain is a purely factual, even quantitative and therefore measurable, phenomenon. This quantitative paradigm rests on a conception of adjudication as a public service to solve social problems. In this view – which David Luban has named the ‘problem-solving conception’ – adjudication distinguishes itself from other means of dispute settlement by the use of state power to enforce the judgment.¹⁵ From there it is only a small step to the neo-liberal view of adjudication as a ‘last resort’ if all other mechanisms – which are the responsibility of individual citizens – have failed. The second discourse on adjudication is conducted by lawyers, philosophers and legal theorists. They view the judicial domain not so much as a demarcated playing field but rather as the social function that adjudication fulfills. From this standpoint, the judicial domain is a qualitative or even normative notion that cannot be adequately described without appeal to an evaluation of the social role it plays. In this view – in Luban’s terms, the ‘public-life conception’ – adjudication is nothing more or less than a complement to the democratic decision-making process in society, and therefore a necessary element in the public debate. In this communitarian perspective, adjudication has another social function beyond that of dispute settlement. In judging conflicts, the judiciary contributes to the development of public values and thus to the establishment of the political community. The freedom of citizens is not limited to their private lives but extends to their participation (i.e. self-realisation) in the community. The most important added value of adjudication is not that it licenses the use of state force but that it contributes to the development of the law in the given legal system. The intervention of the judiciary serves an altogether different social function, since in a tentative and provisional way

¹⁵ D. Luban, ‘Settlements and the Erosion of the Public Realm’ (1995) 83 *The Georgetown Law Journal* 2619.

(in the short term) it restores certainty in society as well as social peace (in the long term).¹⁶

How then do we perceive the judicial domain in the context of this qualitative paradigm? How do we conceptualise it as a social function? In short, we should highlight the influence of the judiciary in connection with the impact of its decisions. Much has been written about this influence, especially in terms of judicial activism or judicial restraint. Cass Sunstein, for example, refers to judicial restraint as judicial minimalism: making as few judgments as possible, leaving as much open as possible. The obvious advantage of minimalism is that the burden of forming a judgment is limited and the risk and impact of mistakes are kept to a minimum. Such a 'constructive use of silence' is noted when highly complex questions of principle are at stake in a lawsuit: namely, matters about which people have strong and divided opinions. In such situations, minimalist judges seek to find their way through 'incompletely theorized agreement', sometimes in an abstract form, sometimes in a judgment closely linked to the facts. They prefer not to work deductively but to seek a connection within the specific facts of the case.¹⁷ Minimalists, one could say, are contextualists.

To gain a firmer understanding of different kinds of judgments, Sunstein distinguishes between two perspectives. The first is the *breadth* of a judgment, which has to do with the consequences of a judgment for other cases. Broad judgments have precedential value, while narrow judgments have very little. The second is that of the *depth* of a judgment, which concerns the extensiveness of the reasoning on basic principles. Deep judgments offer extensive arguments on basic issues; shallow judgments rest on incompletely theorised agreement. In combination, these perspectives result in four types of judgments: (1) narrow and deep, (2) broad and deep, (3) shallow and narrow and (4) shallow and broad. It is possible to provide examples of these four categories but that is not my intention here.¹⁸ Instead, I would like to apply this classification to differentiate the diverse possible developments of the judicial domain. Thus, one can distinguish:

Domain expansion in breadth. Activist judges, who often deliver broad judgments, contribute to a domain enlargement in terms of breadth. The judge usually applies professional ethics of social engineering: namely, solving social problems by legal means. For this type of judge, responsiveness and social relevance are the driving forces. With respect to work organisation, he or she is usually a 'caseload manager', dealing effectively and efficiently with the volume of cases. This type of judge is not afraid to expand the judicial domain, if necessary at the expense of that of

¹⁶ P. Ricoeur, *The Just* (Chicago: University of Chicago Press 2000) at 127-133.

¹⁷ C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Chicago, London: Harvard University Press 1999) Chapter 1.

¹⁸ See Loth and Mak, above n. 1 at 91.

the legislature or of other judges. The result is, indeed, more social relevance of the law for society: in other words, more social problems are covered by the law.

Domain restriction in breadth. Minimalism as described by Sunstein leads to a domain restriction in terms of breadth. Minimalist judges avoid the formation of precedents, both on grounds of principle (the domain of the legislature) and on pragmatic grounds (the consequences are not foreseeable). ‘One case at a time’, as Sunstein puts it. This represents the professional ethics of the traditional judge, based on self-restriction. The policy of the judiciary as *ultimum remedium* also fits into this pattern and results in a retreat of the judiciary and, eventually, of the law itself.

Domain expansion in depth. Activist judging by delivering deep judgments results in another kind of domain expansion. One could say this type of judge does not strive for social but for legal relevance. He or she wants to deliver precedents that could serve to judge future cases. At the same time, the judge does not hold back on the issues of principle; on the contrary, he or she explicitly addresses conflicts of values or principles in an attempt to contribute to the public debate on controversial matters. Thus, the judge contributes to the way a democratic society deals with contentious issues. These are not addressed by the legislature, at least not in the first instance, but case by case by the judiciary (compare the abortion issue).

Domain restriction in depth. A minimalist judge delivering shallow judgments will lead to a domain restriction in terms of depth. In the Netherlands, under the pressure of an overwhelming caseload, the judiciary has striven for this type of domain restriction in criminal cases. Unreasoned acquittals and what are termed ‘head/tail judgments’ – in general, all kinds of standardisation – were the result of this tendency that leads, in its turn, to a domain restriction in depth. This tendency has a drawback, however, since these judgments are legally unsatisfactory and socially unconvincing. Still, it is as nonsensical to strive for tailor-made motivations in standard cases as it is to use standard formulations in highly controversial and principled cases. Every case requires its own depth.

For the individual judge, the choice between broad or narrow and deep or shallow can constitute a real dilemma. Judging a case on its own merits is safe and involves few risks in terms of both decision costs and mistake costs. Striving for breadth, on the one hand, offers opportunities for relevance and diminishes costs for future cases.¹⁹ It is the same with depth, because although it is safe to judge in a shallow manner, it contributes little to the democratic debate. Striving for deep judgments, on the other hand, can result in a genuine contribution but can also cause considerable damage,

¹⁹ See J.M. Barendrecht, *De Hoge Raad op de hei: kwaliteitsbewaking en leiding over de rechtspraak door de civiele cassatie: een analyse en denkrichtingen voor de toekomst* (Zwolle: W.E.J. Tjeenk Willink 1998) at 92-98.

both in terms of direct consequences and of trust in the judiciary. On a macro scale, the question with regard to the development of the judicial domain is both the result of the way the judiciary deals with these dilemmas as well as of the policies chosen and implemented by the judiciary itself and by the legislature and the government. It is possible to identify different scenarios but that is beyond the scope of this paper. For our purpose, it suffices to note that a practice or policy of ‘staying out of court’ has two distinct consequences for the development of the judicial domain: It leads to (1) a domain restriction in breadth, and/or to (2) a domain restriction in depth. The first concerns the social relevance of the judiciary; the second involves its contribution to the democratic debate. We will return to this later.

4 Adjudication as public good

In the previous section, we moved from a quantitative to a qualitative approach to the judicial domain. As a consequence, different kinds of considerations have come into play. Our language has changed from one of figures to one of arguments. Since the language of figures has not led to any new insights – not even into whether the judicial domain has increased or decreased – I hope this has resulted in a progressive problem shift. I think it has. The reason is that the public-life conception of adjudication provides a framework for the evaluation of a decreasing tendency in the judicial domain. In this section, I will elaborate on the public-life conception of adjudication, starting by analysing the meaning of the adjective ‘public’ in this context. I consider that ‘public’ has four meanings in this respect:²⁰

- (1) ‘Public’ in the sense of common: The judiciary and its adjudication are common, in the sense of common property. It is a public good (in the economic sense) as well as part of the body politic (in a political sense). As such, it has an ambiguous position. On the one hand, the judiciary is owned by everyone; on the other hand, it keeps its distance from everyone. The judiciary cannot serve its social purpose as an independent state organ if it identifies itself with one or more specific interests. In my opinion, this is one of the reasons that it is not appropriate to speak of citizens as customers and of the judiciary as a service provider. They are that, to be sure, but not only that.
- (2) ‘Public’ in the sense of accessible: The judiciary and its adjudication are accessible for every citizen. As the ECHR judged in the Golder case, the accessibility of the court as a constitutional right is a precondition for the

²⁰ See Loth, ‘Met openbaar gezag bekleed’ in M.A. Loth and N.J.H. Huls (eds.), *Het domein van de rechter* (Deventer: Kluwer 2004) at 46-50.

maintenance of the other constitutional rights.²¹ It is this principle that opposes the systematic exclusion of certain categories of citizens – notably the poor ones – from access to justice, as a result of the functioning of the market of legal aid.

- (3) ‘Public’ in the sense of visible, transparent: ‘Justice must not only be done, it must also be seen to be done’. The visibility of the functioning of the judiciary and adjudication is not only in the service of the demands of democratic control but also of its contribution to the public domain. The social call for accountability leads to more transparency. Alternatively, a retreat of the judiciary from the public domain may lead to less transparency and control.
- (4) ‘Public’ in the sense of a plurality of perspectives: The judiciary and its adjudication serve a plural democratic society, not only as an independent and impartial forum for the struggle between conflicting interests and values but also because the judgments in their turn contribute to the maintenance of the legal order and to the public domain in general. Adjudication is therefore to be regarded as the complement of the political decision-making process, which constitutes the difference between the public realm in both a democratic and a mass society. ‘The end of the common world’, Hannah Arendt writes, ‘has come when it is seen under only one aspect and is permitted to present itself in only one perspective’.²²

Thus, the judiciary and its adjudication are public goods, in the sense of common, accessible, visible and plural. In each of these aspects they contribute to the functioning of a democratic society. As a consequence, a retreat of the judiciary from the public domain may lead to a loss of common ownership, accessibility, visibility and plurality. An example can illustrate this risk. Chief Justice Klein of the California state Supreme Court gave a lecture in The Hague a few years ago, in which he warned about a two-tier system of justice: namely, private and public. As it happens, in California a complete industry of conflict resolution has emerged, consisting of large companies that hire former judges and sell their services to anyone who is able to pay for them. Though Klein was not an opponent of private justice or ADR, he referred to certain drawbacks relating to this development. Firstly, since only the privileged could afford private justice, access to justice was in jeopardy. There had grown, in fact, a system in which private justice was for the rich and public justice for the poor, as had existed previously in education and health care. It goes without saying that ownership is at stake here. Secondly, private justice does not take place in public court rooms but

²¹ *Golder v. United Kingdom*, ECHR (1975) Series A, no. 1; published in *Nederlandse Jurisprudentie* 1975 at 462.

²² H. Arendt, *The Human Condition* (Chicago, London: The University of Chicago Press 1958) at 58.

in private hotel rooms. As a result, visibility and transparency is seriously in danger, not only with respect to the proceedings but also to the rulings. Since the rulings are secret – only available to the parties involved – lawyers, commentators or society at large are not able to benefit from them. In certain areas of law (e.g. real estate), developments have reached a point where even the administration of private justice is hindered, since arbitrators no longer have enough precedents to use as guidelines for their decisions. As a consequence, law dries up and the public domain is seriously impoverished.²³

ADR has also become an alternative for adjudication in the Netherlands, but it has not grown to the extent that it is becoming a threat, as is apparently the situation in California. Still, one must be aware of similar effects here as well. We have pointed to certain public interests on a macro scale, which are in danger in the event of a retreat of the judiciary from the public domain. But certain individual public interests can also be in jeopardy, such as the interests of the parties involved or those of third parties. As for the parties themselves, the protection of the weaker party against the stronger one (compensation of equality) is certainly in better hands with the judiciary than with a mediator or arbitrator. Privacy can also be on the line. Although it is regularly considered to be an advantage of mediation that it takes relational and emotional aspects into account, this is not a benefit in all circumstances. The judiciary places parties at a distance from each other, thus creating space for debate and argument, leaving emotions to be dealt with privately.²⁴ The interests of third parties can be at stake as well. A settlement can shift the burden to a third party, with the effect that parties are reconciled, although at the expense of others involved. Again, public interests are better dealt with by the judiciary. This does not mean, of course, that mediation, arbitration or other forms of ADR are not profitable or a more suitable means of conflict resolution. It does indicate, however, that they do have disadvantages, both at an individual and a macro level. We should acknowledge that this is not so much a difference of degree as a difference of principle. Hence, it took a change of perspective – from a quantitative to a qualitative paradigm, and from a problem-solving to a public-life conception of adjudication – to highlight these differences. Now that we know what is at stake, we can finally evaluate the practice and policy of staying out of court.

²³ ‘Rechtsverlies’ is the phrase Jan Vranken has used for this phenomenon. See J. Vranken, ‘ADR en de gevolgen voor rechterlijke rechtsvorming; een verwaarloosde samenhang’ in E.J. Broers and B. van Klink (eds.), *De rechter als rechtsvormer* (Den Haag: Bju 2001) 241.

²⁴ Ricoeur, above n. 16 at 130.

5 Staying out of court?

The question in the title of this section can be understood in two ways: namely, as an empirical question of whether there really is a movement away from the courts and - if this tendency is the case - as a normative question of whether it is a positive development. We addressed the empirical question, and found that in the US there really is a tendency to stay out of court ('the vanishing trial', as Galanter called it) but that this inclination cannot be identified in the Netherlands. In fact, the Dutch judicial domain has increased and continues to do so. Since the judicial domain is a multilayered phenomenon, there is no way of telling whether a pervasive tendency exists. It appeared that our notion of the judicial domain was not adequate to answer the initial question. Therefore, we switched from a quantitative to a qualitative perspective, defining the judicial domain not so much as a demarcated playing field but as the social role it plays. In the background, it is more a public-life conception than a problem-solving one. We are still not able to determine whether the judicial domain has in fact decreased or increased, but we are able to differentiate between various kinds of increase or decline (i.e. in breadth or in depth), and we are also able to formulate certain disadvantages of the practice and policy of staying out of court. An ill-considered practice or policy of this nature will easily threaten individual interests (particular party interests or third party interests), and at a macro level will jeopardise the public character of adjudication, in the sense of common ownership, access to justice, visibility, transparency and plurality.

These findings set limits to a government policy of staying out of court. Let me explain this with respect to two kinds of cases that courts deal with: the large numbers of standard cases on the one hand, and the exemplary and complex cases on the other. For capacity reasons, former Dutch governments have attempted to narrow the judicial domain in favour of the administration (small traffic cases) or of the parties themselves (simple divorces). This amounts to a domain restriction in breadth, which necessarily reduces the social relevance of the judiciary and its adjudication. One can live with a certain amount of standardisation in the way these large numbers of cases are dealt with, but a price must be paid. Firstly, specific public interests are at stake, such as those of legal protection in traffic cases and in divorces. Secondly, and more generally, there is a trade-off between the desired scale of standardisation on the one hand, and the need for judicial fine-tuning in specific cases on the other. If the judiciary is forced to become a last resort, the result will be that an important source of legal norms is dried up and a correctional device vis-à-vis the legislature is lost. For exemplary and complex cases, a retreat of the judiciary would amount to a domain restriction in depth, with a host of unwanted consequences. If the judiciary no longer judges issues like abortion, euthanasia, wrongful birth or

wrongful life – arguing in depth which of the conflicting principles will prevail in the case, and why – this will not only marginalise the judiciary socially but, more important, morally as well. What is more, it will rob society of a crucial element in the political decision-making process, without which it would simply not be able to deal with such morally complicated and potentially dividing issues. The conclusion seems to be that ‘staying out of court’ as a policy has only finite viability. There seem to be only limited possibilities for restrictions of the judicial domain, both in breadth in large numbers of cases as well as in depth for exemplary and complex cases.

We began with a picture of the turning tide. Courts are no longer the royal path to conflict resolution and the maintenance of order, we were told, but at most are merely means to achieve these goals. It was posited that there seems to be a tendency to stay away from the courts – and happily so, apparently – for their intervention has all kinds of undesired consequences. However, we must conclude that this scenario is far from accurate. Firstly, we have found no conclusive evidence for an overall tendency to remain away from the courts. Though there is evidence for a decline of the juridical domain in the US (Galanter’s ‘the vanishing trial’), there is also overwhelming evidence for an expansion of the judicial domain in the Netherlands. Secondly, we have found no strong arguments that we should welcome such a development away from the courts if it were to take place. On the contrary, possibilities for a restriction of the judicial domain are limited, both in the breadth (large numbers of cases) as well as in the depth (for exemplary and complex cases). Perhaps the advice to stay out of court is not so sensible after all.

Finally, one restriction needs to be added. Our conclusions are valid at the macro level of society at large but they do not apply directly at the micro level of the individual seeking justice. She or he may have good reasons for wanting to stay out of court, just as she or he may have compelling reasons to file a claim to remedy a perceived injustice. These reasons may have to do with the duration of the expected trial, the costs involved, the alternatives available and so forth. It is simply not possible to determine whether our reservations about the policy of staying out of court have in fact resulted in people doing so. Though our doubts about both the policy and the practice are perfectly in line, it is not justified to perceive a causal link between the two. To establish such a connection would demand additional, empirical research into the decisions of the individuals seeking justice. Such research is beyond the scope of this paper. Nevertheless, on the basis of our conclusions it would seem appropriate to begin such research with the hypothesis that there can be extremely convincing reasons for individuals to decide to go to court. If this holds true, our reservations also apply at the micro level of the individual seeking justice.

ADMINISTRATIVE MEASURES IN CRIME CONTROL

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Abstract

We want to discuss several new administrative measures that were introduced into the Anglo-Saxon world and that have been copied in part in the Netherlands. One is aimed at tackling nuisance in the public domain and the other at the prevention of organised crime. These new measures have been praised by Dutch politicians as effective methods to reduce crime levels without bringing criminal law into play.

At first glance, these administrative measures indeed appear to tackle deviant behaviour without applying criminal law. However, the recent reforms can have unexpected and paradoxical consequences. This paper argues that potentially these new laws do more to criminalise everyday behaviour. This can lead to an increase in criminal cases and in the end adds an extra burden to the criminal justice system instead of lightening its load. By eroding the division between administrative law and criminal law through the introduction of certain administrative measures, one can actually increase the scope of the criminal justice system. However, these negative effects are generally ignored by Dutch policy-makers. This article explores the introduction of British and American initiatives in relation to recent developments in the Netherlands concerning anti-social behaviour and organised crime and their possible paradoxical net-widening results.

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1 Introduction

A decade ago, the British New Labour government claimed a general failure of the judicial system.¹ In England and Wales, courts were overloaded with cases, people in inner-city neighbourhoods felt unsafe, and crime rates increased each year. It was asserted that crime and behaviour closely related to crime could no longer be controlled by the state alone. As a result of this *system failure*, local authorities and civil society were given more responsibilities in order to help in the fight against crime and public insecurity. Garland identified this system failure as the ‘predicament’ with which the authorities currently have to cope.²

In addition, new administrative and civil laws were introduced: for example, the Anti-Social Behaviour Order (ASBO). One could argue that civil and administrative law – in addition to criminal law – became a tool for crime control in the UK.³

Another example of using administrative law as an instrument for crime control is found in the US. Under former prosecutor and then mayor Giuliani, New York authorities realised that applying criminal law simply resulted in members of the Mafia being put into jail but not out of business. Alongside an intensive application of criminal law, the city administration introduced administrative measures to attack the positions of power that criminal organisations had build up in several of the city’s legitimate economic sectors.

Such steps can be seen as examples of the strategy of situational crime prevention that has been popular in crime control during the last two decades.⁴ The theoretical assumption of this approach is that the level of crime is determined by the presence of facilitating situational factors: for instance, the presence of attractive targets, a low level of supervision, and a low risk of apprehension.⁵ Situational crime prevention is not aimed at altering the state of mind or motivations of criminals by issuing jail sentences or behavioural treatment. Its goal is to limit the opportunities for criminal activities or to remove incentives. Following the idea of responsabilisation,⁶ actors other than the traditional agents of criminal justice

¹ P.M. Garret, ‘Making “Anti-Social behaviour”: A Fragment on the Evolution of “ASBO politics” in Britain’ (2006) *British Journal of Social Work* 2.

² D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press 2001).

³ Scotland introduced the ASBO in 1999.

⁴ R.V.G. Clarke, *Situational Crime Prevention: Successful Case Studies* (New York: Harrow and Heston 1997).

⁵ H.G. van de Bunt and C.R.A. van der Schoot, *Prevention of Organized Crime. A Situational Approach* (Den Haag: Boom Juridische Uitgevers 2003) 20.

⁶ In short, the policy of making more people in society responsible for reducing crime.

are called upon to reduce the facilitating role of situational factors. For example, civilians are encouraged to protect their houses and valuable assets against burglary and theft, and financial institutions are pressured to prevent money laundering.

This paper focuses on administrative authorities and the measures they can take in the fight against crime. Developments in the UK and the US have quickly followed in the Netherlands. New administrative sanctions have been created here as well, such as the administrative fine, but existing measures under administrative law are also used now for a new purpose: to fight crime. We considered it of interest to examine the consequences of these developments. Accordingly, the application of administrative measures in two shifting domains of criminal policy will be discussed: nuisance in the public domain and the prevention of organised crime. These domains are particularly interesting because here several new administrative laws are being introduced and proposed, thereby copying foreign developments like the ASBO in the UK and the administrative approach to organised crime in New York.

After a short introduction of the administrative measures applied in each domain, the following questions will be discussed: Why were these measures introduced? What are the main objectives of these new policies? And what are the consequences of these new approaches, especially with regard to the crime problem and the relation of administrative law to criminal justice? Although for the Dutch cases it is too early to assess the impact of the introduction of these measures, it will be argued that certain net-widening effects can already be identified. Furthermore, administrative measures can be introduced either as an addition or as an alternative to criminal law. In the Netherlands, the latter was to a certain degree the rationale behind the *de iure* decriminalisation of prostitution and the retail selling of marihuana. This step was defined by Brants as 'regulated tolerance'.⁷ The main idea was that by regulating these activities, criminal elements in these markets could be more effectively targeted. However, this article will argue that by eroding the division between administrative and criminal law through the introduction of administrative measures, the scope of the administration of criminal justice is widened. The consequence is that these new laws potentially criminalise what can be seen as everyday behaviour.

⁷ C. Brants, 'The Fine Art of Regulated Tolerance: Prostitution in Amsterdam' (1998) 25 *Journal of Law and Society* 621.

2 Nuisance in the public domain

2.1 The UK

The new British measures tackling anti-social behaviour are a significant example for Dutch policymakers. Therefore, before we address recent developments concerning anti-social behaviour in the Netherlands, we will first discuss the situation in the UK. Although the British setting differs considerably from that in the Netherlands,⁸ this consideration will be shown to be highly relevant.

With the introduction of the ASBO⁹ by the Crime and Disorder Act 1998, the New Labour government hoped to remedy the ‘serious problem’ of the judicial system failure, as identified in the Introduction. Police and local councils were given more power to respond to all kinds of anti-social behavior.¹⁰ The then Prime minister, Tony Blair, stated that

if traditional criminal law processes in cases of antisocial behaviour continued to abide, the rights of victims would be allowed to be routinely trampled upon and would leave courts ‘fighting 21st century crime with 20th century methods’.

He claimed that the use of control orders were the best available means for protecting the public.¹¹

The primary intention of this introduction of the ASBO was to protect those people in society who are most vulnerable to the results of human disorderly behaviour: in short, to protect them from their *neighbours from hell*.¹²

The ASBOs have a minimum duration of two years, can last indefinitely, and contain prohibitions considered necessary to prevent the repetition of a person’s anti-social behaviour. In the law, the conduct is defined as ‘behavior which caused or was likely to cause alarm, harassment, or distress to one or more persons not of the same household as him or herself.’ The ASBO is a *civil* order. Restraints of certain behaviour can be

⁸ For instance, the developments concern civil law rather than administrative law as a crime fighting tool.

⁹ The ASBO has been effective from 1999 onwards and was altered in 2004, giving authorities more power. In addition, the ASBO was no longer limited to persons aged 16 or over. Sheriffs can now grant an ASBO against a child aged 12 or more.

¹⁰ S. Bright and C. Bakalis, ‘Anti-Social Behaviour: Local Authority Responsibility and the Voice of the Victim’ (2003) 62 *Cambridge Law Journal* 305.

¹¹ <<http://www.pm.gov.uk/output/Page11769.asp>>.

¹² E. Burney, *Making People Behave: Anti-Social Behaviour, Politics and Policy* (Uffculme: Willan Publishing 2005); Home office, ‘Defining and measuring anti-social behaviour’ (2004) *Home office development and practice report* <<http://www.homeoffice.gov.uk/rds/pdfs04/dpr26.pdf>> (accessed July 7, 2008).

imposed by a civil court (phase one), and breaching is a criminal offence (phase two).

The idea behind this is that in civil court a person does not have to give direct evidence against his/her neighbour, thus diminishing the fear of retaliation. Accordingly, hearsay evidence is allowed.¹³

One can go to a civil court – via, for example, the Social Landlord¹⁴ – and ask for an ASBO.¹⁵ This is an unmistakable example of a ‘responsibilisation strategy’ in which other agencies, such as Social Landlords, help in the fight against insecurity.¹⁶ Some large cities in the UK greeted the new order with enthusiasm. In the period 1999 to 2005, around 7000 ASBOs were issued.¹⁷ Greater Manchester issued 1045 ASBOs that led to its nickname *ASBO city*, while others used it more as a last resort. For example, Greater London ‘only’ issued 745 ASBOs. As Ashworth stated, the introduction and the use of the ASBO seem reasonable.¹⁸ One could even argue that the ASBO serves a noble cause: to make neighbourhoods more liveable and to fight feelings of insecurity in the public domain. However, many pitfalls can be identified.

2.1.1 Defining the crime problem

One of the first problems to manifest was the sheer endlessness of the list of things people can be forbidden to do.¹⁹ For example, boys were not allowed to use their skateboards in a particular area, or they were given an ASBO because they kicked balls against garage doors. Other ASBOs were imposed when youngsters continuously listened to loud music on the streets, or when they were verbally abusive to people in their neighbourhood. Of course, some of this kind of conduct is indeed disturbing to a number of people and it can be an enormous problem in inner-city neighbourhoods. Yet, the lack of

¹³ Bright and Bakalis, above n. 10; S. Macdonald, ‘The Nature of the Anti-Social Behaviour Order- *R (McCann and others) v. Crown Court at Manchester*’ (2003) 66 *Modern Law Review* at 630; B. van Stokkom, ‘Regulering van antisociaal gedrag. Aanpak van persistent overlastgevende jongeren in Engeland en Nederland’ (2007) 6 *Tijdschrift voor Veiligheid* at 36.

¹⁴ Registered Social Landlords (RSLs) are independent housing organisations registered with the Housing Corporation under the Housing Act 1996.

¹⁵ Burney, above n. 12; Home office, above n. 12; S. MacDonald, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO Definition of Anti-Social Behaviour’ (2006) 69 *Modern Law Review* at 183.

¹⁶ Bright and Bakalis, above n. 10.

¹⁷ Home Office, above n. 12.

¹⁸ A. Ashworth, ‘Social Control and “Anti-Social Behaviour”: The Subversion of Human Rights?’ (2004) 120 *Law Quarterly Review* 263.

¹⁹ E.g. Garret, above n. 1 at 2-18; F. Pakes, ‘De Britse aanpak van antisociaal gedrag’ (2005) 47 *Tijdschrift voor criminologie* 284; MacDonald, above n. 15.

definitional specificity leaves room for the inclusion of an extensive range of behaviours.²⁰ This can lead to draconian uses of ASBOs: for instance, a suicidal woman was forbidden to be around certain bridges and railway roads; an 87-year-old man was prohibited from making sarcastic remarks to his neighbours; a car thief was not allowed to enter a car park in England or Wales; and a prostitute was prevented from carrying condoms.²¹ The enormous scope of this list can be partially explained as a result of the vague definition of anti-social behaviour. Hudson defines the ASBO as *an act of frightening vagueness* because a term like *feelings of distress* in the definition of the ASBO is extremely subjective.²² In these examples, an ASBO is disproportionate, since it not only prohibits the anti-social behavior but it also imposes restrictions on forms of behaviour that are themselves not anti-social. Steventon points out that such a wide interpretation can encourage intolerance to all kinds of petty nuisance, or simply towards individuals who behave oddly.²³ The second reason for the length of the list of ‘forbidden conduct’ is that different actors are allowed to ask the court for an ASBO: namely, local councils, the police, and Social Landlords. For this last *non-legal* actor, the primary aim is to help the complainer, not to defend the accused.²⁴ This can lead to awkward situations. For instance, a 17-year-old was forbidden to use his front door, while a 13-year-old boy was ordered not to use the word ‘grass’.

Ashworth considers the ASBO – although part of private law – as an individual crime law for the reason that almost anything can be called anti-social behaviour.²⁵ So in a way, the ASBO was introduced to enable people from ‘problem neighbourhoods’ to act and thereby increase their feelings of security. However, in the end it appears to work the other way around. It enhances the power of the British State in the sense of *a net-widening* of the law.²⁶ It appears that more problematic behaviour is being addressed by the law instead of by social policies. Recent research and publications confirm that constructive preventive measures to address the root causes of antisocial behavior, such as parenting orders, seem less likely to be used.²⁷ Even

²⁰ Burney, above n. 12.

²¹ *Id.* MacDonald, above n. 15; G. Steventon, ‘Complicity or Coercion? Social Control and the Antisocial Behavior Order’ (2007) 174 *Prison Service Journal* 21.

²² B. Hudson, *Justice in the Risk Society: Challenging and Re-affirming Justice in Late Modernity* (London: Sage 2003).

²³ Steventon, above n. 21.

²⁴ S. Hodgkinson and N. Tilley, ‘Policing Anti-Social Behaviour: Constraints, Dilemmas and Opportunities’ (2007) 46 *The Howard Journal* 385.

²⁵ Ashworth, above n. 18.

²⁶ Steventon, above n. 21.

²⁷ M. Hörnqvist, ‘Risk assessments and public order disturbances: New European guidelines for the use of force?’ (2004) 4 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 4; Burney, above n. 12; N. Cobb, ‘Governance

though it is most probable that support and social work programmes are more likely to succeed in the initial stages of nuisance behavior by young people, it appears now that the law (civil and criminal) is used as a dragnet. All kinds of nuisance behaviour that is otherwise lawful can now be trawled by the law.

Pakes addresses another problem: the idea of net-deepening of the law.²⁸ He refers to the example of prostitution. In general, prostitution in the UK is not a criminal offence as such, but because of an ASBO (a restraining order that can prevent a person from standing on the corner of a street) it can be criminalised when the term is breached. As a result, more behavior is being criminalised. This criminalisation of otherwise regular anti-social behaviour can lead to other problems as well. For example, in 2006 the Youth Justice Board addressed the problem of what was termed *badge of honour*.²⁹ Its one-year study in England and Wales revealed that many teenagers viewed the ASBO as a ‘diploma’ that boosted street credibility. Hence, the ASBO can have a reverse effect when it is seen as ‘glamorous’.

Research performed by the Policy Research Bureau identified another problem.³⁰ Teenagers who are given ASBOs can be publicly ‘named and shamed’ in the local press. Since 2004, pictures of ASBO children have been printed in leaflets and sent to all the neighbours. Therefore, such youngsters are ‘labelled’ criminals and are treated as such at school and in their neighbourhoods.³¹ As a result, according to some critics the ASBO system is ‘demonising’ young people.³² Home Office minister Tony McNulty reacted to these concerns and said ASBOs were used sparingly and only as a last resort to change behaviour that badly disrupted communities.³³

2.1.2 Administrative measures and the execution of criminal justice

Phase two of the ASBO is probably the sting in the tail: if a person breaches any term – which 50 per cent do – he/she can go to prison (with a maximum

Through Publicity: Anti-Social Behaviour Orders, Young People and the Problematisation of the Right to Anonymity’ (2007) 34 *Journal of Law and Society* 342; R. Matthews and others, *Assessing the Use and Impact of Anti-Social Behaviour Orders* (Bristol: Policy Press 2007); J. Donoghue, ‘Anti-Social Behaviour Orders (ASBOs) in Britain. Contextualizing Risk and Reflexive Modernization’ (2008) 42 *Sociology* 337.

²⁸ Pakes, above n. 19.

²⁹ <<http://www.yjb.gov.uk/en-gb/>> (accessed May 30, 2008).

³⁰ <<http://www.prb.org.uk>> (accessed May 30, 2008).

³¹ Cobb, above n. 27.

³² A. von Hirsch and A. Simester, *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart publishing 2006).

³³ BBC news, ‘Asbos viewed as “badge of honour”’ <http://news.bbc.co.uk/2/hi/uk_news/6107028.stm>.

sentence of 5 years), as 50 per cent do.³⁴ Hence, although the ASBO is a private law measure, breaching it is a criminal offence and a criminal court decides over it. The problem here is the admissibility of hearsay evidence in these proceedings. The initial idea was that the ASBO (by keeping offenders out of court) could enable local authorities to act quicker in a problematic situation.³⁵ However, in some cases this intention has been used in an improper manner. For example, authorities sometimes choose to place an ASBO on a criminal act, such as burglary, rather than to prosecute before a criminal court, because it is easier and much quicker: no criminal evidence is needed and hearsay evidence is allowed. However, the problem is that the 'offender' does not have the same 'safeguards' as he/she would have had in a criminal court. This problem was addressed in a procedure in the House of Lords.³⁶ The outcome was that indeed the ASBO should be considered civil in nature and that, therefore, hearsay evidence could be admitted. One of the reasons given by their Lordships was that *if* the ASBO was criminal rather than civil in nature, '...it would inevitably follow that the procedure for obtaining anti-social behaviour orders is completely or virtually unworkable and useless', given the problem of witness intimidation.³⁷ Hence, the House of Lords did not reclassify the ASBO as criminal, although in practice it often is. In 2005, the Council of Europe on Human Rights expressed concern about the way in which the ASBO was being used. In a report, the Council suggested ASBOs be screened by a responsible authority to 'guarantee against excessive use'.³⁸

Notwithstanding the academic concerns, the British public appears not to mind. Eighty-five per cent of the people support the existence of the ASBO.³⁹ According to Blair, the ASBO is the best solution for the problem of anti-social behaviour.⁴⁰ He said:

Our critics, who usually do not live in the communities most affected by crime and anti-social behaviour, often describe these measures as overly punitive and a threat

³⁴ Home Office, above n. 12 (the case of the aggressive beggar who 'got' 3.5 years imprisonment).

³⁵ Ashworth, above n. 18.

³⁶ *McCann and others v. Crown Court at Manchester*, above n. 13; see Ashworth, above n. 18.

³⁷ *McCann and others v. Crown Court at Manchester*, above n. 13.

³⁸ Council of Europe, 'Preventive Legal Measures against Organized Crime-Organized Crime - Best Practice Survey n°9' (Strasbourg: 2003) PC-S-CO (2003) 3 E. <http://www.coe.int/t/commissoiner/default_en.asp and <http://news.bbc.co.uk/2/hi/uk_news/politics/4071968.stm>.

³⁹ MORI, opinion poll (2005) available at <<http://www.ipsosmori.com/polls/2005/asbo-top.html>>.

⁴⁰ T. Blair, 'Our citizens should not live in fear' *The Observer* (11 December 2005).

to basic legal principles. (...) But the basic liberties of the law-abiding citizen should always come first.⁴¹

Other countries were inspired by the use of the ASBO. In 2006, Ireland became the first common law jurisdiction outside the UK to introduce it. And recently, in 2007, the New Zealand government, as well as the Australian government, announced proposals for the introduction of their own ASBO. Identical developments can be detected in The Netherlands.

2.2 The Netherlands

In October 2004, the Dutch Minister of Justice, Hirsch Ballin, was pressured by parliament to adopt the British anti-social behavior order. Extra heat developed due to a widely publicised case in which a couple had been 'forced out' of their house by harassment from a group of Moroccan youths. In short, the couple no longer felt safe in the *Diamantbuurt* in Amsterdam because they were tormented and called all sorts of names by these youngsters.⁴² The group had ended up throwing stones through the couple's window, and the two moved out of the area. Many politicians called for tougher measures to tackle 'street terror' and they referred to the British ASBO. In the end, the idea was withdrawn because the Minister expected the costs of introducing this new measure to be too high and he feared an extra strain on the already over-populated prisons.

In 2007, discussion of the ASBO in the Dutch parliament was rekindled. In June of that year, two chairpersons representing local boroughs in Amsterdam⁴³ suggested introducing the ASBO in the Netherlands. They stated that in the UK it was successful in reducing anti-social behaviour in inner-city areas. 'The ASBO helps in the fight against young people terrorising the streets, before criminal law comes into the picture,' said local council chairman Arco Verburg.⁴⁴ He referred to the new British laws 'as the best way to respond to problems in the public domain'.⁴⁵

But it was never mentioned that in the UK the ASBO was controversial, to say the least (it is unclear whether this omission was the result of ignorance, wishful thinking, or negligence). These statements of

⁴¹ <<http://www.number-10.gov.uk/output/Page8745.asp>>.

⁴² B. van Stokkom, 'Regulering van antisociaal gedrag. Aanpak van persistent overlastgevende jongeren in Engeland en Nederland' (2007) 6 *Tijdschrift voor veiligheid* 36; R. van Swaaningen, 'Sweeping the street: civil society and community safety in Rotterdam' in J. Shapland (ed.), *Justice, Community and Civil Society: A Contested Terrain across Europe* (Cullompton: Willan 2008) 87.

⁴³ Resp. *Slovervaart* and *de Baarsjes*.

⁴⁴ <http://www.nicis.nl/nicis/dossiers/Zorgenwelzijn/Jeugdzorg/verrijkt dossier/Jongerenoverlast_1132.html> (accessed May 30, 2008).

⁴⁵ As stated in the *Volkskrant* (June 13, 2007).

success are especially remarkable because up to the present the actual effects of the ASBO on reducing anti-social behaviour are not yet clear.⁴⁶ Nonetheless, the ASBO continues to inspire Dutch politicians as they consider implementing similar legislation.

The most recent example is of a proposal by the current Dutch cabinet. At the beginning of September 2007, the cabinet presented a plan to deal with the problems of forty *probleemwijken* (problem neighbourhoods), and the council of ministers agreed on a proposal for a new act (article 172a Gemeentewet). The law, titled 'severe anti-social behaviour',⁴⁷ gives more power to local authorities. For instance, mayors can issue restraining orders to people who have displayed anti-social behavior, without the interference of a judge and for a longer period of time than the current law allows. Although the ASBO is a mixture of *civil* and *criminal* law rather than *administrative* and *criminal* law, as is the case with the Dutch proposal, the ideas behind it are very similar.

This new law is designed so that the mayor can act quickly when he considers the anti-social behavior to be a serious problem. A precise definition of anti-social behavior is not given in the proposal, but it declares that the behavior should be 'persistent and grave'. Information on the case can come from partners in the judicial system, like the police, but also from administrative authorities, like social services and the local Department of Education. The restraining order can be issued for a year and must be revised every three months.⁴⁸ If the order is breached, it becomes a criminal act (article 184 Sr) and the case can be brought before a criminal court.⁴⁹ Thus, like the ASBO, it is a multi-stage approach.

In the Netherlands, mayors have more power than their British counterparts. According to current law, they can also issue restraining orders, but with the new law they can prolong this period and couple it to 'a duty to report'. In addition, the public prosecutor has more authority as well.⁵⁰ The Minister of Justice gave examples of disorder caused by animal rights activists, hooligans, and rowdy youth, and stated, '[I]t is a very important expansion of the ability to act in a case of anti-social behaviour'. Prime Minister Balkenende added that the new law would help 'to create safe communities'.⁵¹

The notion behind this administrative measure, according to the explanatory memorandum, is that anti-social behavior in the public domain adds to the feelings of insecurity in inner-city areas. This proposal is part of

⁴⁶ At the end of 2008, the Home Office in England will publicise an effect study.

⁴⁷ 'aanwijzingen ernstige overlast'.

⁴⁸ Or one can be ordered to report at certain times.

⁴⁹ A prison sentence up to three months or a fine can be the end result.

⁵⁰ Restraining order, duty to report, contact injunction.

⁵¹ *NRC Handelsblad* (September 8, 2007).

the government's strategy to make the Netherlands a safer place to live in and to reduce criminal conduct, as can be read in the memorandum.⁵²

Of course, it is still a proposal and so the results can not yet be evaluated, but the political rhetoric surrounding the new law in the Netherlands is similar to that in the UK. Both the Dutch proposal and the ASBO have been introduced as a supportive element for the overburdened criminal justice system and as an additional weapon against crime and feelings of public insecurity. Local authorities are accorded more responsibilities, and in both cases the definitions of anti-social behaviour are very broad.⁵³

Whether the Dutch proposal will also lead to a net-widening and a net-deepening effect of the law, and to the stigmatisation of youngsters, will remain a crucial question. At first glance, however, it appears that certain anti-social behaviour, often not criminal in itself, is being approached as a security threat rather than as a social problem. Furthermore, it is consequently addressed by the law instead of by social policies. It would be interesting to see whether administrative law in the other domain, the prevention of organised crime, is also exercised as an instrument for crime control.

3 The prevention of organised crime

The administrative approach to organised crime is another example of that was inspired by a purportedly successful method from abroad. According to the biographers of the New York City authorities' fight against organised crime, this battle was successful partly due to the introduction of administrative measures alongside a very intensive criminal policy:

... the mobilization of local regulatory authority to attack organised crime is a New York City-specific innovation. Until recently, mayors viewed organised crime control as the responsibility of law enforcement agencies. The Giuliani administration accepted responsibility for cleaning up racketeer-ridden industries, arguing that they impeded the city's growth and prosperity. The city's regulatory initiatives have significantly expanded the repertoire of organized-crime control strategies.⁵⁴

⁵² Wetsvoorstel (2007) Dutch title: maatregelen bestrijding voetbalvandalisme en ernstige overlast (31 467).

⁵³ A. Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *The Howard Journal* 203.

⁵⁴ J.B. Jacobs, C. Friel and R. Radick, *Gotham Unbound: How New York City Was Liberated from the Grip of Organized Crime* (New York: New York University Press 1999) at 230.

The Giuliani administration introduced screening procedures and licensing systems to end the power positions that five Italian-American crime syndicates had built up in several legitimate economic sectors in the city. The applicant had to be screened to obtain a licence, and if any connections to organised crime were found, the licence was refused. A similar pre-qualification procedure was used to prevent building contracts from being given to Mafia-controlled construction firms.

Dutch police and justice officials were introduced to the New York approach to organised crime at the Dutch-American Conference on Organised Crime in The Hague in 1990. According to its organisers, this conference caused a major turnaround in Dutch thinking about combating organised crime.⁵⁵ During the conference, policy-makers became convinced that this type of crime could also be tackled by an administrative approach.⁵⁶

Not only was it this conference but also the rise – and assassination – of the first ‘Godfather’ of Dutch organised crime, *Klaas Bruinsma*, that led to a white report from the Dutch Minister of Justice on organised crime and its containment.⁵⁷ The report addressed the risk of the infiltration of criminal organisations into legitimate sectors of Dutch society, such as branches of industry and local administration. The report stated that administrative authorities should not cooperate with this infiltration, and that they had a responsibility in the prevention of organised crime. However, the report did not provide administrative authorities with any tools to adhere to this responsibility. It was the Dutch Ministry for Internal Affairs that commissioned a study into the extent to which certain public regulations could be equipped with grounds for refusal so that the abuse of these regulations by criminals could be prevented.⁵⁸

The awareness of the problem of organised crime and the increase in unregulated investigation methods applied by the Dutch police led to a parliamentary inquiry in 1995. To assess the threat of organised crime and its interlacing with legitimate society, the inquiry committee commissioned four leading criminologists to study the nature and the scale of organised crime in

⁵⁵ C. Fijnaut and J. Jacobs, *Organized Crime and Its Containment: A Transatlantic Initiative* (Deventer: Kluwer Law and Taxation Publishers 1991).

⁵⁶ C. Fijnaut (ed.), *The administrative approach to (organized) crime in Amsterdam. Public Order and Safety Department* (Amsterdam: City of Amsterdam 2002).

⁵⁷ Ministry of Justice, *Georganiseerde criminaliteit in Nederland: Dreigingsbeeld en plan van aanpak, Kamerstukken II* (1992-1993) 22838, no. 2.

⁵⁸ J. Struiksma, *Gewapend Bestuursrecht: Een onderzoek naar de mogelijkheid om misdadige activiteiten te bestrijden met behulp van de regelgeving op het gebied van de bouwvergunning, de milieuvergunning en de aanbesteding* (Zwolle: W.E.J. Tjeenk Willink 1994); This study was appropriately titled ‘Gewapend Bestuursrecht’, which can be translated as ‘Armoured Administrative Law’.

the Netherlands.⁵⁹ This study partly focused on its prevalence in four cities – among which the capital city of Amsterdam – and several branches of industry. The selection of branches was clearly inspired by American examples: car sales, transport, seaports and airports, waste management, construction, and the catering business. Based on the findings of this study, the parliamentary inquiry committee also stressed the importance of administrative prevention, and it called for regulation of the exchange of criminal intelligence between law enforcement agencies and public administration, as well as the possibility to refuse and withdraw licences, grants, and public contracts on grounds of suspicions of connections with criminal activities.⁶⁰

The conclusions and recommendations of the parliamentary committee led to the development of administrative responses to organised crime on two levels: national, for which the BIBOB Act was drafted, and local, for which city administrations set up their own action plans.

The goal of the BIBOB Act – which came into effect in 2003 – is to provide administrative authorities with tools to prevent the facilitation of organised crime.⁶¹ The BIBOB Act allows the refusal or withdrawal of licences and subsidies and the refusal of participation in public tenders or contracts. This is applicable if there is a serious risk that the favourable decision will also be used to utilise any benefits that have been or are to be gained through criminal acts and that have a financial value, or that it will be used to commit criminal acts. Administrative authorities decide on the refusal or withdrawal after asking advice from the national BIBOB bureau located at the Ministry of Justice, which conducts the risk assessment by using confidential data. The application of the BIBOB Act is limited to a selection of branches of industry, in which one recognises those branches assessed before the parliamentary inquiry: the hotel and catering industry, brothels, construction, transport, and waste management.

While the BIBOB Act was being drafted, several initiatives on the local level were taken. Border towns in particular, such as Venlo, Almelo, and Maastricht, embraced the idea of taking administrative measures against

⁵⁹ C. Fijnaut and others, *Organized Crime in the Netherlands* (The Hague: Kluwer Law International 1998).

⁶⁰ Parlementaire Enquêtecommissie Opsporingsmethoden (PEO) (1996), *C. Fijnaut en F. Bovenkerk, Inzake opsporing; enquête opsporingsmethoden, Bijlage XI: deelonderzoek IV onderzoeksgroep Fijnaut: De georganiseerde criminaliteit in Nederland: Een analyse van de situatie in Amsterdam – Een analyse van de situatie in Enschede, Nijmegen en Arnhem*. Available at <<http://www.burojansen.nl/traa/b11.htm>>.

⁶¹ BIBOB is an abbreviation that stands for *Bevordering Integere Besluitvorming Overheidsbeslissingen*, which is translated as ‘Law for the promotion of integrity assessments by the Public Administration’, 216 *Bulletin of Acts, Orders and Decrees* (2003).

organised crime problems related to the cross-border ‘drug-tourism’ that is attracted by the lenient drug policy in the Netherlands. A local project that even received international recognition as being a best-practice in the prevention of organised crime was the Van Traa project in Amsterdam.⁶²

The outcome of the study by the parliamentary research group on the organised crime problem in Amsterdam was the immediate cause for the administrative approach. The conclusions came as a shock: Amsterdam is a ‘centre’ of both national and international organised crime, and both foreign groups and native criminal groups, have – mainly in the inner city districts and especially in the Red Light district– built up economic positions of power in the hotel and catering sector, the gambling sector, the prostitution business, and the property sector. Furthermore, it was noted that criminal entrepreneurs set the boundaries within which the city administration and the police can still freely operate, and this has apparently occurred without local authorities having taken the necessary measures to prevent it.⁶³

A consequence of these findings was that the city of Amsterdam, as an administrative authority, decided to develop a policy to prevent the facilitation of organised crime. In 1997, a Red Light District manager was appointed at the request of the city council with the objective to improve the prevention of organised crime in the Red Light District. The manager and his team were asked to develop a methodology for the administrative approach to organised crime. Since 2000, this methodology has also been used in other city districts and in specific economic branches. The project was renamed the Van Traa project, after the aforementioned late chair of the parliamentary committee.⁶⁴ After an experimental phase, the Van Traa approach has been implemented as a regular policy of the city administration.⁶⁵

The methodology developed in the Van Traa project has many similarities to the BIBOB tool: (1) it provides for a screening by assessing data from several sources, including confidential data from the police and the tax department; (2) the outcomes are used to take administrative measures; and (3) the application of this methodology is also limited to selected areas and sectors in which a vulnerability to organised crime influences is suspected. However, differences exist as well. First, the Van Traa approach is more integrated. Different agencies work together, and so a wider range of measures can be taken; these vary from the refusal or withdrawal of licences and permits, the levying of taxes, the closure of certain establishments, to the instigation of a criminal investigation, and,

⁶² Council of Europe, above n. 38.

⁶³ PEO no. 20 (1996).

⁶⁴ Fijnaut, above n. 56.

⁶⁵ W. Huisman and others, *Het Van Traa-project. Evaluatie van de bestuurlijke aanpak van georganiseerde criminaliteit in Amsterdam* (Den Haag, Boom Juridische uitgevers 2005).

under certain circumstances, the acquisition of real estate by the city itself, all in order to prevent criminals from investing their money in specific objects. Second, it has a more pro-active nature. While the BIBOB instrument is used when there are specific indications of organised crime connections in individual cases, in the Van Traa approach, all businesses and persons in selected areas can be subjected to screening, regardless of whether there are previous indications of such connections.⁶⁶

A central premise of both the BIBOB Act and the Van Traa project is that services or facilities of the public administration can be exploited to carry out criminal activities or to invest illegally acquired capital. When criminal organisations can be excluded from public contracts or from receiving subsidies or licences for certain activities, the investment of criminal capital and the infiltration of the legal economic sectors will be to a large extent hindered. For this purpose, administrative bodies have become involved in combating a form of crime that previously had been the sole reserve of the police and the judiciary. Therefore, this approach can be seen in the light of both responsabilisation and situational crime prevention strategies.

3.1 Defining the crime problem

Although serious organised crime problems were the immediate reason for introducing both the Van Traa project and the BIBOB Act, the application of the latter is not limited to organised crime. The goal of the BIBOB Act is to fight organised crime, but its tools are applicable to the broader notion of 'criminal activities'. And although its reach is limited to economic sectors that are vulnerable to forms of organised crime, in the operationalisation of this vulnerability, the explanatory memorandum of the Act states that this not only involves sectors where organised crime interference has already been observed but also those that fulfil certain criteria that indicate a vulnerability to crime in general. This means that the BIBOB Act is initially aimed at organised crime, yet not to the exclusion of other crime.⁶⁷ However, the legislator did not want the application of the BIBOB Act to be open-ended. Therefore, it aligned itself with the view of the parliamentary research team on organised crime, which listed as the most vulnerable sectors transport, waste disposal, construction, hotels and catering, and coffee shops. The research team based this selection partly on hypothetical criteria for the vulnerability of sectors to crime and partly on experiences abroad, particularly in the US. In addition to this justification of the selected

⁶⁶ *Id.*

⁶⁷ C.R.A. van der Schoot, *Organized Crime Prevention in the Netherlands. Exposing the Effectiveness of Preventive Measures* (Den Haag: Boom Juridische uitgevers 2006).

branches, the team explicitly stated that other branches might have been selected, given other criteria.⁶⁸ Furthermore, no indications of organised crime were found in several of the investigated branches. This has led Van der Schoot to the conclusion that the basis for the selection is not as solid as it is probably assumed to be.⁶⁹ Moreover, the evaluation study report regarding the application of the BIBOB Act calls for a re-examination of the criteria for the selection of sectors that fall within the scope of the BIBOB Act.

The result of the selection is that branches of industry in which no clear indications of organised crime influences were found are brought within the reach of instruments that have been designed to fight organised crime. This also means that these sectors are publicly related to organised crime. In fact, if the BIBOB instrument had been restricted to the sectors in which penetration of organised crime was actually observed, the instrument could have been applied only to the hotel and catering industry, including the involved real estate. Nevertheless, a survey among all administrative authorities that can make use of the BIBOB Act found that 24 per cent are in favour of expanding the scope of the BIBOB Act to new sectors, such as public phone booths, employment agencies, and real estate transactions.⁷⁰

To conclude, it is plausible that the BIBOB Act has a net-widening effect and, as a result, a *de facto* criminalisation effect. The same tendency not to limit the application of an instrument that aims to prevent organised crime to situations where its influences are actually observed can be identified in the Van Traa approach. In the formulation of the target of the Van Traa-project in official documents, the term ‘organised’ was usually placed between brackets. According to a statement by the mayor and aldermen during the presentation of the project plan for the Red Light district to the city council, this was a deliberate choice.

The administrative approach to (organised) crime is aiming at a broader spectrum: the prevention or repression of crime, excluding high volume crime’. ... For this reason, the word ‘organised’ will always be put between brackets.⁷¹

As a result, the target and limits of the project were not clear and so created the risk of net-widening. And while the Dutch legislator formulated – although questionably – criteria for the selection of sectors subject to the BIBOB instrument, no such criteria were formulated in the Van Traa project,

⁶⁸ Fijnaut, above n. 59 at 51.

⁶⁹ Van der Schoot, above n. 67 at 109.

⁷⁰ M.C. De Voogd, F. Doornbos, and L.C.L. Huntjes, *Evaluatie Wet BIBOB. Een meting* (Utrecht: Berenschot 2007).

⁷¹ Burgmeester en wethouders, ‘De bestuurlijke aanpak van de (georganiseerde) criminaliteit in Amsterdam’ (1998) 189 *Gemeentebld* 1149 at 1150.

thus creating an even greater risk of net-widening. As a result, the connections to organised crime remained unclear in some of the selected areas and sectors. And in the end, no such organised crime was found.⁷²

There are also other reasons that the administrative approach to organised crime has a net-widening effect. The approach is not aimed at the core activities of organised crime as it manifests in the Netherlands: the trafficking of illegal goods and services.⁷³ This trafficking occurs in illegal markets that are not regulated by formal laws. Instead, the approach is aimed at the interfaces between organised crime and the legitimate environment that provides services that facilitate criminal activities. This means that the approach is expanding the struggle of organised crime against this legitimate environment. Actors from this legitimate environment were theoretically already subject to criminal investigation, but these white-collar relations to organised crime were given a low priority in criminal policy.⁷⁴ This has changed through the application of the administrative approach to organised crime.

Because whole economic sectors are subjected to preventive measures such as BIBOB screening, entrepreneurs in these branches feel criminalised.⁷⁵ Entrepreneurs in the Red Light District in Amsterdam even banded together to publish a half-page ad in the local newspaper complaining about the proportionality of the administrative measures taken to fight organised crime and about their sense of being criminalised.⁷⁶

Interestingly, some of the entrepreneurs who feel criminalised by the BIBOB and the Van Traa approach work in sectors that have recently been decriminalised in Dutch criminal policy: namely, prostitution in licensed brothels and the coffee shops in which consumer quantities of marijuana and hashish are sold. The intention of this decriminalisation and of the regulation of these former illegal activities was to deprive organised crime of illegal markets, and to make these markets accessible to legitimate entrepreneurs.⁷⁷ However, in recent policy plans of the city administration of Amsterdam, based on the reports of the Van Traa team, these branches are labelled as 'criminogenic' and are seen as part of a 'criminal infrastructure' that, therefore, has to be suppressed. From a criminological point of view, it could be naïve to think that legalising markets that have traditionally been

⁷² Huisman, above n. 65.

⁷³ Kleemans, Edward R., (2007) 'Organised Crime, Transit Crime and Racketeering' in M. Tonry and C. Bijleveld (eds.), *Crime and Justice in the Netherlands* (Chicago: Chicago University Press), 163.

⁷⁴ H.G. van de Bunt and W. Huisman, (2007) *Organizational Crime in The Netherlands* in M. Tonry and C. Bijleveld (eds.), *Crime and Justice in the Netherlands* (Chicago: Chicago University Press 2007) 217.

⁷⁵ Huisman, above n. 65.

⁷⁶ *Het Parool* (October 6, 2007).

⁷⁷ Brants, above n. 7.

vulnerable to organised crime would render them crime-free after legalisation.⁷⁸ On the contrary, it could be expected that organised criminals would transform their business from *vices* – providing goods and services in illegal markets – to *racketeering* – illegally exploiting legitimate markets – as they are familiar with these markets. Therefore, the analysis of the Van Traa team makes sense. However, it is also understandable that entrepreneurs who were attracted by the city administration's search for *bona fide* businessmen, or those who took the chance to blot out the stains of illegitimacy, feel betrayed by the shift in policy.

In addition, the policy theory of the Van Traa project assumes that run-down neighbourhoods and marginal economic sectors are breeding grounds for organised crime. Although this assumption is hardly affirmed by empirical research, theoretically connecting these neighbourhoods and branches to organised crime also creates a net-widening effect.⁷⁹ Situations and activities that had previously been qualified as 'marginal', 'irregular', or 'non-compliant' are suddenly connected to organised crime. And they are subjected to far-reaching screening and crime-control measures when the Van Traa team targets such a neighbourhood or sector for action. And again, a self-fulfilling prophecy of this *de facto* criminalisation can be identified. While one of the goals of the project is to up-scale the selected run-down neighbourhoods and the marginal economic activities, the media attention that is – often deliberately – generated by the start of such projects underlines the dubious reputation of these neighbourhoods or sectors. This leaves the remaining legitimate entrepreneurs feeling stigmatised and it discourages *bona fide* businesses from investing.⁸⁰

3.2 Administrative measures and the execution of criminal justice

The administrative approach to organised crime is a clear example of a responsabilisation strategy. Administrative authorities are called upon to safeguard their integrity by not facilitating criminal activities, thereby – in close cooperation with other actors – contributing to the combat against organised crime. This means that the administrative approach should be seen as an addition to the more traditional criminal law approach. However, the evaluation of the Van Traa project in Amsterdam showed that the judicial authorities actually used the administrative approach as an alternative to

⁷⁸ R. Naylor, *Wages of Crime. Black Markets, Illegal Finance and the Underworld Economy* (Ithaca: Cornell University Press 2007).

⁷⁹ W. Huisman and J.M. Nelen, 'Gotham Unbound Dutch Style. The Administrative Approach to Organized Crime in Amsterdam' (2007) 48 *Crime, Law & Social Change* 87.

⁸⁰ Huisman above n. 65.

criminal law enforcement.⁸¹ Cases that were dealt with unsuccessfully by the police were handed over to the Van Traa team. To a certain degree, the administrative approach became a panacea for various regulatory problems.

The evaluation of the administrative approach to organised crime illustrates that responsabilisation is not an easy process. The common interest in fighting organised crime that is assumed to be present is not experienced by all actors involved.⁸² In Amsterdam, the establishment of a special team responsible for the new approach became an excuse for other agencies to be less active and aware.⁸³ A recent evaluation of the application of the BIBOB Act still showed that a large percentage of administrative authorities were reluctant to apply it.⁸⁴

Furthermore, while the administrative approach is presented as an addition to criminal law, the success of its application is largely dependent upon criminal intelligence. The evaluation of the Van Traa project demonstrated that although the team had the authority to match city administration data with criminal intelligence, an assessment of the risk of facilitating organised crime proved to be very difficult. When can indications of money laundering or other organised crime-related activities be inferred from an overview of property, leasing and letting, and the financing and exploitation of properties? It was anticipated that the analysis of databases managed by the city administration (for instance, the land register) would provide a first assessment of risks of organised crime-related activities. However, the format and structure of these databases give only limited insight into the actual property relations. It was usually information from the police and judiciary concerning the person involved that was decisive in determining whether an organised crime case could be assumed. An analysis of the BIBOB cases that have been brought to court gives the same impression: criminal intelligence is crucial for assessing serious risk. Therefore, the result of administrative analysis relies to a great extent on the availability of criminal information. Administrative authorities are unable to check the origin and reliability of this information, but they do have to act on the basis of it.⁸⁵

Partly as a result of this dependency and partly because of the limitations of criminal justice to diminish opportunities for criminal opportunities, the Council of Chiefs of Police decided to introduce an 'administrative file' in large criminal investigations. In such a file, all data that is not directly relevant to a criminal conviction, but that could be relevant to the making of the decision to take administrative measures, are

⁸¹ *Id.*

⁸² Van der Schoot, above n. 67.

⁸³ Huisman, above n. 65.

⁸⁴ De Voogd, Doornbos and Huntjes, above n. 70.

⁸⁵ Huisman, above n. 65.

stored. After the closure of the investigation, this file is handed over to administrative authorities for follow-up actions.⁸⁶

Due to this dependency upon criminal intelligence and the refocus of criminal investigation for the benefit of administrative measures, the distinction is blurring between administrative law and criminal law in their fight against organised crime. Although the impact of an administrative measure can be quite harsh (e.g. losing a licence and thus being out of business), the person subjected to such a measure does not enjoy the same rights as a suspect in a criminal trial. For instance, the principle of *presumption of innocence* does not apply to administrative law, and therefore a criminal suspicion is sufficient to assume there is a serious risk for criminal activity. Moreover, the BIBOB Act limits the possibilities to receive information about reasons for the refusal or withdrawal of licences when this is confidential.⁸⁷ For these reasons, legal scholars argue that a BIBOB decision should be equal to a criminal charge in the sense of Article 6 of the European Treaty of Human Rights.⁸⁸ The first case was recently brought before the European Court of Human Rights.

Although in administrative law the burden of proof is much lower than in criminal law, efficiency reasons do not seem to be part of the motivation for the application of an administrative approach. Rather, the principles of not facilitating criminal activities and the responsabilisation to contribute in the fight against organised crime are the primary motivations. However, it is interesting to see what effects the administrative approach could have on the efficiency of the administration of justice.

It is difficult to assess whether the administrative approach has a 'staying out of court' effect, since that was not one of its aims. On the one hand, such an effect could be predicted. In contrast to Dutch criminal law, in Dutch administrative law no judge is needed to issue a measure or a sanction. This would reduce the number of court cases when suspicions of organised crime connections are not dealt with by criminal law but by using administrative measures. After all, an administrative authority does not have to initiate court proceedings to obtain approval to impose a measure. On the other hand, appeal procedures are open to the decision to issue such measures and fines: in the first instance, to the administrative authority that took the decision, and in the second instance, to the administrative court and finally to the Council of State. However, up until September 2007 only

⁸⁶ O. Nauta and P. Van Soomeren, *Tegenhouden nader bekeken* (Amsterdam: DSP 2006).

⁸⁷ C.M. Bitter and R.W. Veldhuis, 'De wet BIBOB, een tussenstand' (2006) 1164 *Nederlands Juristenblad* 1488.

⁸⁸ De Voogd, Doornbos and Huntjes, above n. 70; A.E.M. van den Berg and P.C.M. Heijnen, 'Wet BIBOB en wetsvoorstel Bestuurlijke maatregelen nationale veiligheid: te kort door de Straatsburgse bocht?' (2007) 7285 *De Gemeentestem* 611.

twenty BIBOB cases had been brought to court. In all of these cases, the contested decision of the administrative authority was confirmed.⁸⁹

The administrative approach might not have led to an increase in formal court procedures, though it did generate efficiency costs in the form of increased bureaucracy. Screening and auditing instruments inevitably lead to more bureaucracy. This was also observed by Anechiarico and Jacobs in New York City.⁹⁰ They concluded that all instruments installed to safeguard the integrity of government operations had serious downsides in the form of costly inefficiencies. The evaluation study of the application of the BIBOB Act points to a considerable increase in the administrative burden due to extra paperwork that requires additional manpower and that also leads to longer periods needed for decision making.⁹¹ In Amsterdam, the collection and analysis of data relevant to taking administrative measures proved to be highly time-consuming. As a result, in some projects the participants seldom got round to actually taking measures.⁹²

Perhaps because of this administrative burden the number of BIBOB cases fell short of expectations. Before the Act came into force, it was expected that 500 cases annually would be brought to the central BIBOB bureau. However, in the first three years, only 193 cases were filed.⁹³ Perhaps because of this the application of the administrative approach has not resulted in many cases being brought before the administrative courts.

4 Conclusion

The administrative measures discussed above have been introduced as instruments for tackling deviant behaviour without applying criminal law. Nevertheless, these recent reforms and policy proposals can have unexpected and paradoxical consequences.

The objectives of the administrative measures reviewed are different from the outcomes. The primary principle of the introduction of the ASBO was to protect those people in society who are most vulnerable to the effects of human disorderly behaviour. The objective of the administrative approach seems to be twofold: on the one hand, the principle aim is to protect the integrity of the public administration by preventing the facilitation of organised crime; on the other hand, it is because of this prevention that the

⁸⁹ <<http://justitie.nl/onderwerpen/criminaliteit/BIBOB/wet-BIBOB/Jurisprudentie/>> (accessed 2 February 2008).

⁹⁰ F. Anechiarico and J. Jacobs, *Pursuit of absolute integrity: How corruption control makes government ineffective* (Chicago: University of Chicago Press 1996).

⁹¹ De Voogd, Doornbos and Huntjes, above n. 70.

⁹² Huisman, above n. 65.

⁹³ De Voogd, Doornbos and Huntjes, above n. 70.

administrative approach is also being presented as a tool for combating organised crime.

Another objective of both instruments is the mobilisation of administrative authorities in order to take preventive measures. Although administrative approaches to crime are officially sold as preventative strategies, they appear to have a repressive side. Measures are individualised and are based on information (suspicions of) regarding previous behaviour. The consequences of these administrative measures can also be more far-reaching than those of criminal sanctions, while the safeguards of due process are considerably less so. In 2005, the Commissioner for Human Rights, A. Gil-Robes, expressed concern about ASBO practice.⁹⁴ Furthermore, Dutch legal scholars have predicted that the BIBOB measure will be viewed as being equal to a criminal charge, and that as a result the procedural rights of criminal law should apply. However, the first case still has to be brought before the European Court of Human Rights.

Rather than being autonomous instruments of crime control, the administrative measures discussed in this paper should be viewed as an extension of criminal justice. The British ASBO and the Dutch restraining order are respectively a civil and an administrative order, but to breach either one is a criminal offence. And although the application of the BIBOB tool is an administrative decision, the motivation is strongly dependent upon data obtained by means of a criminal investigation.

The ideas behind ASBO and BIBOB legislation appear popular across nations. Moreover, many similarities in political rhetoric can be identified. In the case of anti-social behaviour, run-down neighbourhoods and irregular or marginal economic activities are automatically linked – with little debate – to criminal behaviour. However, a direct causal relationship is difficult to identify. Moreover, the empirical sturdiness of this assumption and the effectiveness of administrative measures on organised crime or antisocial behaviour have yet to be tested.⁹⁵ Therefore, it is striking that the newly developed administrative approach to organised crime is being sold as a success internationally, and just as easily as was the British ASBO measure.

⁹⁴ A. Gil-Robes, the Commissioner for Human Rights, strongly criticised the anti-social behaviour strategy of the British government (Report by Mr. Alvaro Gil-Robes, Commissioner for Human Rights, on his visit to the United Kingdom, 4th-12th November 2004, The Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005, pp 34-37). He was especially concerned about the use of the ASBO for children; L. Koffman, 'The Use of Anti-Social Behaviour Orders: An Empirical Study of a New Deal for Communities Area' (2006) *Criminal Law Review* 593.

⁹⁵ ASBOs appear to become less popular in England. Recent Home office figures for 2006 show a drop in ASBOs issued by a third. Home Office (May 2008) available at <<http://rds.homeoffice.gov.uk/rds/horrrpubs.html>>.

Furthermore, the definition of behaviour, activities, and situations that the measures aim to counteract is often vague, which can lead to a *net-deepening* and a *net-widening* of the law. In addition to these problems, in the UK the trend of staying out of court has resulted in certain paradoxical situations. Dutch politicians are also eager to stress that new administrative measures are necessary to fight the problems of inner city areas because existing tactics are not sufficient. These measures will increase the power of the state in controlling the public domain as well. In the end, one might wonder whether this form of crime prevention is a Trojan horse, in the sense that the new measures increasingly criminalise what can be seen as everyday behaviour.

REPUTATIONAL SANCTIONS IN PRIVATE AND PUBLIC REGULATION

*Judith van Erp**

Abstract

This article analyses how reputation functions as a mechanism for social control in private and public regulation. It discusses three cases of private markets where reputation is a powerful and effective mechanism for social control. From the case studies, four characteristics of markets with effective reputational sanctions are identified. Reputational sanctioning is not limited to the private sphere. More and more, public regulators are disclosing names of sanctioned companies or experimenting with naming and shaming, in the expectation that this will enhance the impact of their enforcement strategies on compliance. However, this article argues that the conditions that contribute to the strength of reputation as a regulatory mechanism in private markets are often absent in public regulation.

1 Introduction

Many commercial markets are characterised by long-term cooperation, informal relationships and high levels of mutual trust. In these markets, upholding a reputation of trustworthiness is crucial for successful business performance. When an entrepreneur does not keep his promises or fails to

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compensate for a broken agreement, he will not be granted deals in the future. A reputation of reliability thus enhances the chance of future deals. Therefore, reputation can be considered a form of capital, even more important than a company's financial capital. After all, financial capital can be regained, but it is much more difficult to rebuild a reputation that has been damaged. In these markets, the prospect that broken agreements will result in reputational damage is enough to ensure compliance to contractual agreements. Therefore, law is not the most important mechanism to influence and control corporate behavior.¹ On the contrary, compliance to the obligations of parties, whether or not they are written down in contracts, is enforced through out-of-court mechanisms of social control. In other words, entrepreneurs keep their promises not because they fear being sued, but because they fear developing a bad reputation.² As this article will show, there are even markets in which reputational regulation is so powerful and efficient that legal conflict resolution is virtually nonexistent.

The first aim of this article is to explore the way in which reputation functions as a mechanism of social control. What characterizes markets where reputation is an effective regulatory mechanism? How is information about reputations exchanged and what do reputational sanctions consist of? What mechanisms and conditions underlie the effectiveness of reputational sanctions in business relations? More insight into the functioning of reputation regulation is not only important for a better understanding of markets, it is also highly relevant for the public regulation of corporate behaviour in markets. More and more, public regulators are trying to incorporate reputational mechanisms in public regulation, using reputational sanctioning as an instrument of public policy.³ Public disclosure of corporate offenders, or naming and shaming, is gaining popularity as a regulatory tool. In many European countries, regulators are experimenting with the public disclosure of inspection results, offender indexes, or shaming offenders in the media. Of course, press releases or public notices following incidents have long been practice. What is new is the systematic and detailed character of the information published, as with the disclosure of all names and

¹ D. Black (ed.), *Toward a general theory of social control, vol. 1: Fundamentals* (Orlando: Academic Press 1984), R.C. Ellickson, *Order without law, How neighbors settle disputes* (Cambridge: Harvard University Press 1991).

² E. Posner, *Law and Social Norms* (Cambridge: Harvard University Press 2000) at 12.

³ D. Kahan and E. Posner, 'Shaming White Collar criminals: a proposal for reform of the federal sentencing guidelines' (1999) 42 *Journal of Law and Economics* at 365. J.G. van Erp, 'De dreiging van negatieve publiciteit: Is reputatieschade een alternatief voor handhaving?' in F. Leeuw, J. Kerseboom and R. Elte (eds.), *Turven, Tellen, Toetsen, Over toezicht, inspectie, handhaving en evaluatie en hun maatschappelijke betekenis in Nederland* (Den Haag: Boom Juridische Uitgevers 2007) 79.

offences of violating companies in a public register or on a blacklist. Here are some examples:

- The British Health and Safety Executive keeps a public register of convictions, where an overview of convicted companies can be found.
- The Dutch Authority for Financial Markets (AFM) issues warning lists with the names of companies that offer securities services without the required license. The AFM informs the public that these companies are infracting the law and ‘strongly advises’ investors not to do business with these companies.
- The European Directive on public access to environmental information obliges member states to publish names of polluting companies in the European Pollutant Emission Register.
- The European Commission has established a public list of airlines considered to be unsafe and therefore not allowed to carry passengers or cargo within European airspace.
- Both in Denmark and in the UK, ‘scores on the doors’ of restaurants show the extent to which the restaurant complies with hygiene standards. A positive smiley denotes compliance, a negative smiley indicates discrepancies.

The academic evaluation of the effectiveness of naming and shaming as a policy instrument has not kept up with its increasing use. Therefore, the second aim of this article is to draw lessons from successful reputational regulation in private markets, for public regulation. Understanding the strengths and weaknesses of reputational mechanisms in non-legal settings can help us understand whether, and when, reputational sanctions can be successfully used as part of governmental social control. In what circumstances can legal and reputational sanctions reinforce each other, and can reputational sanctions that are initiated by governments be just as powerful as reputational sanctions in markets?

To answer these questions, I will present three cases of successful reputational regulation in commercial markets (section 2): the market for Cotton in the American South,⁴ the diamond trade in New York,⁵ and the Dutch construction industry.⁶ These cases were chosen because of the detailed insight they provide into the working of reputational mechanisms.

⁴ L. Bernstein, ‘Private commercial law in the cotton industry: creating cooperation through rules, norms, and institutions’ (2001) 99 *Michigan Law Review* 1724.

⁵ B.D. Richman, ‘How community institutions create economic advantage: Jewish diamond merchants in New York’ (2006) 31 *Law & Social Inquiry* 383.

⁶ H. van de Bunt, ‘Rekeningen vereffenen in de bouw’ (2008) 50 *Tijdschrift voor Criminologie* 130.

Despite the fact that the authors originate from different theoretical backgrounds – law and economics, law and sociology, and criminology respectively – the case descriptions have several characteristics in common. All three cases are examples of situations that are very vulnerable to conflicts, but where legal regulation is either considered undesirable or is unavailable. In the case of the market for cotton, the volatile nature of the merchandise calls for a strong mechanism for conflict prevention, whereas legal dispute settlement provides an ex post solution. The same goes for the diamond market, where traders need to entrust their precious stones to potential buyers without receiving advance payment or formal security. The third case deals with the Dutch construction industry, which was involved in a market-wide cartel for many years. In this case, the illegal nature of the cartels makes it impossible to settle conflicts via a legal procedure. In all three cases, reputational sanctions function as mechanisms of social control that is so effective that markets flourish without any legal backup.

On the basis of these cases, I will identify characteristics of markets with successful reputational regulation (section 3). Finally, I will analyse the extent to which situations where public regulators disclose reputational information about offenders, or attempt to name and shame, correspond to these characteristics (section 4). In other words, I will ask the question whether the conditions that account for the effectiveness of reputational sanctions in commercial markets are present in public regulation. The article ends with a brief conclusion.

2 Effective reputational social control: three examples

2.1 The Cotton trade in the American South⁷

For many years, the city of Memphis in the American South has been the centre of the cotton trade. The cotton trade provides us with an example of a market where traditional forms of social control have been able to survive by adapting to modern times. Information about traders' reputations are exchanged through both formal and informal communication channels, providing knowledge about traders' past behaviour to third parties without their personally experiencing this behaviour.

⁷ For a further analysis of this case, see Bernstein, above n. 4 and J.G. van Erp, 'Naming en Shaming in het contractenrecht? Het reputatie-effect van schadevergoedingen tussen ondernemingen' in W. van Boom, I. Giesen and A. Verheij (eds.), *Gedrag en Privaatrecht, over gedragspresumpties en gedragseffecten bij privaatrechtelijke vraagstukken* (Den Haag: Boom Juridische Uitgevers 2008) 153.

Trust is a defining characteristic of the American cotton trade. The highly volatile prices and quality of cotton and the difficulty of judging that quality beforehand is the reason for this. Deals, even if worth millions of dollars, are made face to face or by telephone, and only later does the buyer actually assess the quality of the merchandise. Agreements are only documented for tax or customs reasons. Because of these characteristics of the cotton trade, it is crucial that cotton traders have a reputation of trustworthiness on the subject of timely delivery and payment; flexibility; and quality-price assessment. As a trader explains,

You want to do business where you know people and can depend on what they say on quality, since it is so subtle and so subjective. You are more likely to rely on quality when you know the guy.⁸

To cotton traders, commercial and tort law are not suitable mechanisms for enforcing compliance with agreements. For most traders, obtaining compensation for damages through a court procedure is not a very comforting scenario. Litigation is costly, insecure and complex and business people generally want to prevent problems from occurring instead of remedying them afterwards. Compensation of damages is not an effective sanction because it does not adequately prevent conflicts. Instead, it simply puts a price on non-compliance.⁹

To ensure that agreements are complied with, cotton traders choose trading partners with a reputation of reliability. The cotton market is generally characterised by long-term, cooperative relations. However, the market is too complex for traders to be fully informed about all interactions of their business partners. This calls for a network in which reputation information can be exchanged. The various cotton trade associations provide this information by actively registering and disclosing information about the traders' reliability. The American Cotton Shippers Association, for example, keeps a register of breaches of contract and is authorised to inform a potential trade partner confidentially on the reliability of a trader on request. Membership of a trade association generally requires breaches of contracts of business partners to be reported, to ensure the association has complete and up-to-date information. Names of traders that have broken promises are published in a newsletter. Serious offenders are suspended or expelled from the trade association, making it impossible for them to participate in the trade. Finally, an active trade press and specialised commercial banks contribute to the distribution of information on the reliability of traders.

⁸ Bernstein, above n. 4 at 1746.

⁹ J.S. Johnston, 'Should the Law Ignore Commercial Norms? A Comment on the Bernstein Conjecture and Its Relevance for Contract Law Theory and Reform' (2001) 99 *Michigan Law Review* 1791.

In addition to these formal disclosure mechanisms, there are informal ones that facilitate the exchange of reputational information. These informal mechanisms aim to strengthen and maintain the connection between business relations and social relationships. Traditionally, the small trading towns in the South constitute a community in which commercial and social relationships are strongly intertwined and the reputation as a businessman goes hand in hand with his social status and position. Today, this interdependence of personal and professional reputation is actively kept in existence. Although telephone and the Internet have replaced face-to-face trade, Front Street in Memphis remains the regional trade centre and constitutes a physical meeting point for traders. Traders explain, 'Front Street is worse than a bunch of old women' and 'It is like a sewing circle'.¹⁰ Also, trade associations organise or support all kinds of social events, thus expanding social control from business life to the social circle. There is an annual debutante ball, Memphis Mardi Gras, a Cotton Wives Club with its own *Cotton Tales* magazine, and there are golf and other sports tournaments. These events make sure that family members are actively involved in the cotton trade community. Thus, when information about dishonest behaviour circulates, it not only damages the economic position of a trader but also negatively affects his social position and that of his family. The financial consequences of breach of contract could even be perceived as less damaging than the social consequences in terms of shame and expulsion from the community.

2.2 The diamond trade

The American cotton trade exemplifies a market where traditional forms of out-of-court social control have survived in modern times through an active role of trade associations. The next case study shows that the reputation mechanism even effectively operates as a social control mechanism in the market for the most expensive and exclusive product on earth: diamonds. In the New York diamond trade, social control is so powerful and efficient that it even replaces commercial law.

Trading diamonds is a risky business. Aside from the immeasurable value of the stones, the trade offers many other opportunities for cheaters. Firstly, diamonds are usually traded on installment. Secondly, countless intermediating parties and traders handle and transport the stones to inspect and value them before they reach their final owner. And thirdly, there is a flourishing black market for diamonds. These characteristics provide traders with an enormous need for information about the trustworthiness of business partners. The diamond trade is concentrated in closed communities, both in geographic terms – Antwerp and New York are the diamond capitals of the

¹⁰ Bernstein, above n. 4 at 1752.

world – and in socio-cultural terms: the diamond trade is traditionally the domain of Jewish traders. In both communities, diamond traders have established trade associations that function as platforms for the exchange of information and for conflict resolution. In Antwerp, the Hoge Raad voor Diamant (HRD) is the centre of the trade; in New York, it is the New York Diamond Dealers Club (DCC), located on 47th Street in Manhattan.

Siegel characterizes the Antwerp trade as a high-trust subculture that is closed to outsiders.¹¹ The task of regulation and conflict resolution is not performed by the government but by the Hoge Raad voor Diamant. This HRD aims to protect the reputation of the diamond traders by excluding newcomers from membership. For example, Jewish gold traders from Georgia or Russia are not admitted to the HRD because they are associated with organised crime in Eastern Europe. The HRD continuously stresses the difference between the diamond trade and the supposedly mala fide gold trade, and even has summoned the assistance of the criminal prosecutor in order to prevent the Mafia from infiltrating into the diamond market.

Richman provides a case study of the New York diamond trade that permits a closer understanding of the functioning of reputational mechanisms within the diamond trade.¹² The New York Diamond Dealers Club serves several purposes. It serves as an exchange. 95 per cent of the diamond trade in the US takes place on its 25,000 square foot trading floor; the trade value is 30 billion dollar per year. In addition, the DCC is a traders association and provides its members with numerous advantages. It has a heavily secured trade room. But more relevant in the light of this article is the fact that the DCC has the sole right to collect and disclose reputation information. In case there is a conflict, members are obliged to resort to the DCC's arbitration committee. Members who bring their conflicts to court are fined or expelled. This ensures that DCC is well informed about all non-compliant members.

Next, DCC actively discloses this reputation information in a way that is surprisingly simple, if we take the value of the merchandise into consideration. One of the walls in the large trading room is used as a members' picture gallery and for posting all relevant information on their reputation. Candidate members see their picture attached to the wall for a period of ten days, during which other members can post remarks on their reputation. The decisions of the arbitration committee are published on this wall, which also displays the pictures of traders that have failed to pay their debts, in a format that somewhat resembles a *Wanted* message. It is clear that traders will prevent at all cost their picture from being displayed in this manner.

¹¹ D. Siegel, 'De joodse gemeenschap en de Antwerpse diamantsector in historisch perspectief' (2002) 44 *Tijdschrift voor Criminologie* at 338.

¹² Richman, above n. 5.

Besides this wall, the trading floor also provides the opportunity to physically exchange the latest news and gossip and to ask for references about potential business partners. Thus reputation information is quickly disseminated. And finally, we find a mixture of commercial and personal relations: 85 to 90% of the DCC members are orthodox Jews, many traders come from trading families, and family and community ties are strong.

2.3 The Dutch construction industry

Thus far, I have presented two examples of markets in which reputation provides a mechanism for out of court social control that overrules legal enforcement. Participants to these markets prefer informal enforcement through the reputational mechanism to legal conflict resolution. However, it cannot be denied that both markets still operate under the shadow of the law, in the sense that criminal activity can be prosecuted. For those cases in which out of court arbitration fails to solve appropriately, parties can always use the law as last resort. Complete non-existence of legal social control is in fact only the case in illegal markets. After all, criminals cannot go to court to settle their disputes. However, even in illegal markets, reputational sanctions are a pervasive and effective mechanism for social control, as the next case study shows.

An excellent example of the role of reputation in illegal markets can be found in the Dutch construction fraud.¹³ The Dutch construction industry is characterised by a history of private contracting, and informal price coordination and work distribution. This has contributed to a continuous work flow for construction companies and thus to a stable and long-lasting market. Nevertheless, this system of informal coordination was forbidden in 1992, when the Dutch Antitrust Act was adopted. The new legislation did not end the system of price agreements, however. Almost all construction companies were involved in secret pre-bidding consultation in practically every contracting procedure. This conspiracy only came to an end after the publication of a parliamentary investigative report, which was initiated by the revelations of a whistle-blower. This whistle-blower, a former director of one of the largest construction companies, published the handwritten shadow administration he had kept for ten years. The setoffs in this administration were related to market sharing, price fixing and mutual compensation.

The construction fraud gives rise to two questions, to both of which the reputation mechanism provides an answer. Firstly, the scale and operational detail of the fraud is exceptional. Almost every construction company in the Netherlands was involved, and the system was also open for participation to Belgian and German companies. For each construction agency, it would have been very easy to blow the whistle and reveal the

¹³ Van de Bunt, above n. 6.

secret cartel. This would no doubt have raised this company's position in governmental, and probably also in commercial biddings. What kept parties from breaking the conspiracy?

The answer is the companies' concern to uphold a reputation of being a fair player to their business partners. Apparently, a reputation of compliance to the law was not as important to contractors as a reputation of reliability with their colleagues. This is because construction companies are not only competitors but also constantly cooperate in subcontracting relations. A construction company cannot execute a large order alone: it needs the cooperation of reliable subcontractors. However, the incidental company that had stepped out of the cartel found itself in a pariah position. They were not assigned subcontracts and all kinds of obstacles were created by the others to participating in public biddings. Not participating in pre-tender consultation was considered to be extraordinarily non-collegial. The construction industry is characterized by strong social ties, and the forbidden pre-bidding gatherings were a much valued social event 'with very nice coffee and sandwiches', as one of the participants remarked. Cheaters could be sure that they would be the subject of extremely negative comments at social meetings.

The second question is how agreements of such detail and financial importance were enforced without legal means. It is striking that conflicts occur relatively seldom. One mechanism of conflict prevention is the meticulous documentation of agreements in a so-called shadow account. Companies that passed an order on to someone else built up a claim that they could trust to be compensated in future tender negotiations. At various times during the year, companies came together to clear their credits and debts with each other. Under the leadership of a retired, authoritative businessman, they tried to settle their claims. Since the exchange of money was highly undesirable (for risk of financial streams being discovered by the tax authorities), claims that could not be settled were paid out in work, in goods, or in last resort by postponing a claim to the next year.

Another factor promoting informal conflict resolution is that it pays to have a reputation of cooperativeness. A reputation for unfairness in the resolution of disputes that may arise in the course of transactions is held at high cost of being passed over in future contracts. The informal pre-tender consultations and the settlement meetings provide the occasion for the rapid dissemination about businesses failing to comply with market-share agreements. Because many companies have existed for several generations and the sector is relatively small, a strong common culture and code of honour has developed. In this shared culture, breaking a promise is considered to be dishonourable and not-done.

3 Characteristics of successful reputational regulation in commercial markets

In the previous section, I have shown that reputation is a most powerful and effective mechanism for social control. We find it successfully regulates markets that operate under unique pressure, either because of the financial value of the merchandise or because of their illegal nature. In these markets, reputational sanctions replace legal sanctions, the last being either inappropriate or unavailable.

In this section, I will analyse the characteristics of markets where effective reputational regulation is exerted. I have identified four characteristics of markets with successful reputational sanctions. Firstly, the nature of the activity in these markets calls for high levels of trust. Secondly, a broken agreement directly damages the market position of traders in these markets. Thirdly, the markets are characterized by a small amount of relational distance. And finally, compliance to agreements is not only valued for reasons of self-interest, but also for moral reasons.

3.1 Absence of formal mechanisms of social control

All three cases I have presented are markets that are characterized by information asymmetry and high transaction costs, where compensation for breaches of trust or violations of agreements is problematic. In the market for cotton and diamonds, legal conflict resolution is perceived as inefficient and inadequate. In the Dutch construction industry, legal enforcement is not available because of the illegal nature of the trade. In these asymmetric markets, entrepreneurs preferably only interact with business partners that have proven themselves reliable. This is of course not possible. As the sociologist Simmel observes in his classic work on trust and social control,

Very few relationships are based entirely upon what is known with certainty about another person, and very few relationships would endure if trust were not as strong as, or stronger than, rational proof or personal observation.¹⁴

To avoid contractual problems arising from the difficulty of assessing the quality of products or services or uncertainty about other people's motives, people rely on information about their reputations. Thus, reputation can be seen as a simplifying device, providing efficient contractual relations.¹⁵ It is the absence of the possibility of effective ex post enforcement through legal conflict resolution that stimulates business partners to actively gather and

¹⁴ G. Simmel, *The philosophy of money* (London: Routledge 1978) at 178-179.

¹⁵ B.A. Misztal, *Trust in modern societies: the search for the bases of social order* (Cambridge: Polity Press 1996) at 121-122.

exchange reputation information. In other words, the exchange of reputational information thrives when a need for this type of information arises from the inefficiency or impossibility of external regulation.

3.2 Market position

A second common characteristic of markets with effective reputational regulation is the fact that a broken agreement seriously damages the market position of the noncompliant party, because of the reactions of third parties. A broken agreement not only damages the relation with the business partner involved, but with many other potential business partners as well. If information about past transactional behavior is available to a significant number of participants, breach of contract with one transactor will be transformed into breach of contract with numerous market transactors as far as a transactor's commercial reputation is concerned. The costs of losing one contract is multiplied by the costs of losing business opportunities with all market parties. This multiplying effect is what makes fear for reputational damage a strong motive for compliance in commercial relationships.¹⁶ In the cases that I have presented, being known as an unreliable business partner makes it impossible to acquire contracts. Reputational damage can consist of withdrawal of support and cooperation of business partners, customers no longer buying goods or services, or investors refraining from investment. Reputational damage thus not only works as an ex post sanction but also prevents non-compliance by serving as a deterrent.

It follows from this argumentation that reputational damage only represents an effective regulatory mechanism for parties for whom a good reputation is necessary to obtain future contracts. Companies with many alternating business partners, end-game actors facing bankruptcy, and monopoly actors do not depend on a good reputation.¹⁷

3.3 Relational distance

A third factor causing the reputational mechanisms in the cases described to be so powerful is the effective dissemination of reputational information. Information on past performance is spread both through formal publication and through informal chat and gossip. This implies that markets in which reputation is an effective regulatory mechanism consist of a relatively limited number of parties that frequently exchange information on the

¹⁶ D. Charny, 'Nonlegal sanctions in commercial relationships' (1990) 104 *Harvard Law Review* 373. Bernstein, above n. 4. Posner, above n. 2. S. Macaulay, 'Non-contractual relations in business: a preliminary study' (1963) 28 *American Sociological Review* 55.

¹⁷ Posner, above n. 2.

quality of products and services, and that they have close ties. In business communities where reputational mechanisms appear to be strong, whether they are a legal market or a market with illegal practices, we see a strong social embeddedness of business transactions. An underperforming cotton trader experiences the consequences of his unreliability not only in business, but also in his private life. This is the result of the strong social ties within the community. This type of market can be characterized as market with a relatively short 'relational distance'.¹⁸ In close relationships, there is little legal social control and alternative non-legal social control is very intense. As communities grow larger and become more connected with the outside world, the relational distance between members tends to increase and informal sanctions are employed with decreasing frequency. Instead, the various activities comprising social control are delegated to specialists who perform this role full-time and exclusively.¹⁹ Although markets with strong reputational mechanisms have institutionalised reputational sanctioning in a trade association, these associations have the task of keeping membership exclusive and to diminish the distance between the members by exchanging information and organising meetings.

3.4 Morality

There are two types of reasons for parties to value their reputation. One arises out of self-interest: the expectation that a good reputation will pay off in terms of utilities. The other comes from moral obligation.²⁰ In the cases that I have presented, these two reasons are present at the same time. Complying to agreements is a matter of long-term self-interest, but also a matter of honour and decency. Those trying to cheat are not only excluded from business contracts but are also morally disqualified.²¹ The business relationships in the cases I have reviewed are more than just self-interested exchange relationships. Instead, they can be characterized as *fictive friendships*: obligating, public, strongly instrumental relationships, in which scarce resources are distributed.²²

Moral disapproval of norm infractions, in addition to the financial consequences, is a powerful regulatory mechanism. Case studies show that

¹⁸ Black, above n. 1 at 45-46.

¹⁹ J. Griffiths, 'The division of labor in social control' in D. Black (ed.), above n. 1.

²⁰ Misztal, above n. 15 at 127-128.

²¹ M. Hertogh, 'Van naleving naar beleving van regels. Bouwwereld en Bouwfraude vanuit een rechtssociologisch perspectief' in T. Barkhuysen, W. den Oudsten and J. Polak (eds.), *Recht realiseren, Bijdragen rond het thema adequate naleving van rechtsregels* (Deventer: Kluwer 2005) 62.

²² S. Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719.

norms that have a moral element are self enforcing; external enforcement is hardly necessary. External enforcement is not able to bring about the emotion that is so predominant in social relations: shame. Criminologist John Braithwaite claims that it is not the severity of the sanction in financial terms, but the amount of public shame that it invokes which is the most important motivator of compliance. In other words, 'The nub of deterrence is not the severity of the sanction but its social embeddedness'.²³ Fictive friendships are filled with mutual respect. The disappearance of this respect is an important part of the working mechanism of a reputational sanction.

4 Reputational sanctions in public regulation: strengths and weaknesses

Public regulation of corporate behaviour in markets was long characterised by external social control by public enforcement authorities. Increasingly, however, regulators have come to realise that external supervision alone cannot prevent organisational misbehaviour. Currently, regulators are attempting to shift from classic command and control regulation to forms of non-hierarchical regulation or governance that are more congruent with existing mechanisms of internal social control and self regulation within markets.²⁴ Regulatory theories such as 'responsive regulation'²⁵ and 'smart regulation'²⁶ have inspired this new approach. These theories advocate a mix of regulatory instruments that make more use of the influence of consumers, significant peers or market forces.

A manifestation of this approach is the increasing use of regulatory disclosure, or naming and shaming, techniques, which aim to increase the transparency of markets and to invoke reputational mechanisms. Disclosure of inspection results is meant to better inform consumers, in the expectation that they will weigh the compliance status of companies in their decision to do business with a certain company. Thus, it is attempted to invoke a market follow-up of public sanctions and to increase the impact of public sanctions on corporate reputations.

An important reason for the increasing use of naming and shaming is that reputational sanctions are considered more effective than traditional

²³ J. Braithwaite, *Crime, shame and reintegration* (Cambridge: Cambridge University Press 1989) at 55.

²⁴ H.G. van de Bunt and R. van Swaaningen, 'Privatisering van de veiligheidszorg' in L.W. Winkel and J.J.M. Jansen (eds.) *Privatisering van veiligheid* (Den Haag: Boom Juridische uitgevers 2005) 5.

²⁵ I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press 1992).

²⁶ N. Gunningham and P. Grabosky (eds.) *Smart regulation, designing environmental policy* (Oxford: Oxford University Press 1998).

sanctions in deterring regulatory offences or stimulating regulatory compliance. A clear example of this argument is found in the *Macrory Review* on effective sanctions, the report of Better Regulation Executive professor Richard Macrory to the British Government. 'A company's reputation and prestige is an important and valuable asset,' professor Macrory argues.

The consequences of damaging a firm's reputation can potentially exceed the effect of a maximum fine that a court could impose. A company that loses its reputation even for a short time can suffer significant damages to consumer confidence, market share and equity value. (...) The threat of this type of sanction may encourage firms contemplating not complying with regulatory objectives to re-consider, even if the noncompliance would generate significant financial benefit.²⁷

The argument of consumer empowerment and regulatory effectiveness is also found in the Dutch policy programme 'Towards a practical legal order', which argues that the external pressure of stakeholders will leave public regulation with less costs and regulatory burden, and a larger effectiveness and public acceptance of enforcement and sanctioning.²⁸

Academic evaluation has yet to answer the question whether naming and shaming used by public authorities as a policy instrument can indeed meet the expectations. There are several questions that empirical research should address.²⁹ Are regulators able to effectively influence reputations and predict and control the effects? Does shaming effectively deter corporate crime or does it have little effect or even encourage criminal behaviour? And is there evidence that shaming changes people's views about the harmfulness of criminal behaviour? This article is an attempt to analyse the potential strengths and weaknesses of naming and shaming by learning from situations where reputational regulation is successful. In the previous section, I have identified four conditions for reputational regulation that account for the effectiveness of reputational regulation in commercial markets. The next step is to analyse to what extent these conditions are present in public regulation.

Firstly, we have seen that reputational sanctions flourish in markets where legal enforcement is problematic. However, regulatory disclosure of

²⁷ R.B. Macrory, *Regulatory Justice: Making Sanctions Effective Final Report* (London: Macrory Review, Cabinet Office 2006) at 83.

²⁸ Tweede Kamer der Staten Generaal, Nota Bruikbare Rechtsorde, nr. 29279, nr. 9, vergaderjaar 2003-2004 20-21.

²⁹ Kahan and Posner, above nr. 3. R. Pawson, 'Does Megan's law work? A theory-driven systematic review', *ESRC UK Centre for Evidence Based Policy and Practice Working Paper 8* (ESRC: UK Centre for Evidence Based Policy and Practice 2002).

the names of offending companies is diametrically opposed to this situation. We must ask whether the fact that external regulation is already taking place does not make non-legal sanctions and informal social control redundant. For example, it is unclear what incentive European airline passengers have to consult the European list of banned airlines, since these airlines have already been forbidden to execute flights in the European skies. Since it is impossible to book a flight with these airlines, disclosure of this information seems unnecessary, at least in the form of a blacklist designed for the general public.

Secondly, I have argued that successful reputational regulation requires that an offence or broken agreement negatively affect a company's market position. However, the publication of legal offences does not always lead to a negative evaluation by relevant parties. Legal offences often do not damage the interests of stakeholders directly. On the contrary: public regulation is often designed to protect those interests that do not have a clear stakeholder. Offences of this nature do not result in a bad reputation, and in many cases they hardly affect a company's reputation at all. Research by the economist Karpoff illustrates this.³⁰ He has calculated the size of reputational sanctions for large American companies in terms of loss of stock value, both for financial misrepresentation and for environmental offences. Financial misrepresentation, or 'cooking the books', leads to a huge decline of stock value. The impact of legal sanctions is multiplied by the reputational sanctions in the shape of loss of stock value of a company. However, the case for environmental offences shows quite a different picture. The publication of environmental offences also leads to a drop in stock value, but this loss can be entirely accounted for by the costs of fines and restoration of the damage. There is no extra reputational sanction: stockholders do not value the company less for its unreliability to comply to environmental regulations or for unethical behaviour. As long as the environmental offence is not harmful to the quality of the products that are delivered, business partners have no incentive to limit the demand for the product and to impose a reputational sanction.

Many other examples illustrate that legal norms are not always shared by stakeholders and that the publication of an offence is not a signal for unreliability of a company or institution. A remarkable example was the recent rush of pupils to the Islamic primary school As Siddieq in Amsterdam. This school had just been rated as functioning poorly by the Dutch Board of Education and was placed under a strict regime. The new

³⁰ J.M. Karpoff, J. Lott and E. Wehrly, 'Reputational Penalties for Environmental Violations, Empirical Evidence' (2005) 68 *Journal of Law and Economics* 653. J.M. Karpoff, D. Scott Lee and G.S. Martin, 'The Cost to Firms of Cooking the Books' *Journal of Financial and Quantitative analysis* (forthcoming) available at <http://ssrn.com/abstract=652121>.

pupils' parents were aware of this status, but attached more importance to the Islamic character of the educational programme than to legal rules concerning the independence of the school board. 'The parents came to our information evening with the inspection report in their hands', one of the directors remarked.³¹

Thirdly, successful reputational regulation can be found in markets that are characterised by a small relational distance. The three cases I have provided are all examples of such markets. However, it will be clear that markets of this kind are relatively rare and that in most markets the dissemination and exchange of information is imperfect.³² Therefore, in most markets, reputational sanctions do not have the strong effect that they have in the three cases that I have described. Also, reputational sanctions are imposed by governments, which are rarely strongly socially embedded. Most of the time, governmental agencies do not form part of a close community; on the contrary, the size and disintegration of the community was the very reason for outsourcing social control to specialised governmental agents.³³

Finally, we have seen that reputational sanctions are the most effective when commercial effect and moral evaluations go hand in hand. However, most public regulation is not inflicted with morality in the same way as social norms among fictive friends are. Public regulation is not as widely accepted as collective rules in a business market. Offending cartel regulations, committing tax fraud or employing illegal staff does not meet with the same amount of social disapproval as the breaking of an agreement with a business partner. What's more, governmental sanctions usually do not invoke a sense of shame. 'The only shaming that induces shame is disapproval of the act by those who we respect very highly,' Braithwaite and Drahos argue.³⁴ It is doubtful if the public offenders indexes or registers that are published on the Internet by many public authorities are the best way of invoking shame. The information provided in these registers is impersonal and the registers do not invite the circle around the offender to express their disapproval, as the Wall of Shame in the diamond bourse does. The publication format makes it easy to neutralise the offence and to brush aside feelings of shame.

³¹ *NRC Handelsblad*, June 21, 2007.

³² Charny, above n. 16.

³³ Griffiths, above n. 19.

³⁴ J. Braithwaite and P. Drahos, 'Zero Tolerance, Naming and Shaming: Is there a case for it with crimes of the powerful?' (2002) 35 *Australian and New Zealand Journal of Criminology* 269 at 273.

5 Concluding remarks

This article has analysed the functioning of reputation as a mechanism for social control in private and public regulation. I have discussed three cases of markets where reputation is a powerful and effective mechanism for social control. We find that it successfully regulates markets that operate under unequalled pressure, either because of the financial value of the merchandise or because of their illegal nature. Reputational sanctions can be so powerful and efficient that they make legal sanctions redundant. We have seen several cases of reputational regulation taking the place of commercial law, which sometimes is considered unsatisfying as a conflict resolution mechanism, and in other situations is unavailable.

From the case studies, I have identified four characteristics of markets with effective reputational sanctions. Firstly, the nature of the activity in these markets calls for high levels of trust. Secondly, a broken agreement directly damages the market position of traders in these markets. Thirdly, the markets are characterised by a short relational distance. And finally, compliance with agreements is not only valued for reasons of self-interest but for moral reasons as well.

Reputational sanctioning is not limited to the private sphere. As a reaction to the growing criticism of command and control regulation, and the call for alternative types of regulation that are in better accordance with existing mechanisms for social control, public regulators are experimenting with reputational sanctions. Regulators expect the publication of inspection results to affect the reputation of a company and the threat of negative publicity to prevent companies from offending the law. However, I have argued that the conditions that contribute to the strength of reputation as a regulatory mechanism in private markets are often absent in the context of public regulation. Company offences of public regulation are not always considered a sign of unreliability. These offences are usually not heavily damaging to the market position, social position or moral evaluation of a company. Therefore, we should put the effectiveness of naming and shaming by public authorities into perspective. It is highly doubtful that they will be as effective as reputational sanctioning in commercial markets.

EUROPEAN STRATEGIC INTELLIGENCE: HOW FAR INTEGRATION?

*Nicholas Dorn**

Abstract

In the light of international and European pressures for greater cooperation in exchange of information, this paper attempts to assess the prospects for strong integration of the underlying information methodologies and systems and discusses the potential consequences of such system integration for risk assessment and security governance. The author draws on work by financial market analysts as well as on the criminological literature, arguing that there is a danger that the systemic integration of separate public and private intelligence functions would narrow perspectives to the point that minor risks could be over-emphasised and major vulnerabilities overlooked. He concludes that, with regard to the architecture of strategic intelligence best capable of informing and supporting policy, a multiplicity of loosely linked information sources and methodologies, connected though an 'arms length' cooperation structure, remains best for the European Union. Ironically, the capability to construct high-quality strategic intelligence may be safeguarded by the apparently 'bad' old habits of each agency constructing an information system fit for its own specific purpose. Fortunately, those 'bad' habits may be underpinned by certain structural conditions, briefly explored here through the literature on security governance.

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1 Introduction

Common threat assessments are the best basis for common actions. This requires improved sharing of intelligence among Member States and with partners.¹

Despite the existence of motivating factors for increased cooperation, obstacles... probably will prevent the creation of a supra-national European intelligence authority.²

When lawyers and criminologists encounter the world of strategic intelligence, they encounter a huge information-processing and risk-management machine that is, by definition, outside the criminal justice system, the courts, and the checks and balances involved in preparing cases for adjudication. Strategic criminal intelligence is 'big picture' information for the formulation of policies, as distinct from operational information for specific policing actions. It draws upon diverse information sources including policing and related agencies, auditors/forensic accountants, regulators, private sector firms, and of course 'open sources' such as media and academia. This paper describes contemporary international and European Union contexts for the development of strategic intelligence. It also notes some standard criticisms of risk assessments, risk mentalities, and 'risk society', and explores what can happen when previously 'siloes' (separated) information sources and methodologies are fused together.

At the level of policy, public-private cooperation in the sphere of intelligence appears to be quite formidable.³ We may think of the linking of European Union internal and external security concerns, the increasing emphasis on partnership and cooperation, and the information exchange between the public and private sectors. More attention is also being paid to governance generally. Over the past few years, there has been greater sharing of both operational and strategic intelligence between public sector agencies and private sector actors. The development of the concept of security in Europe seems to imply a widening surveillance net, covering all public and private sectors, obviating all information 'silos'.

However, the information flow appears to have stronger quantitative than qualitative characteristics, and questions have arisen about quality. Surveillance agencies have reported being 'swamped' with low-grade

¹ EU Security Strategy - Council of the European Union 2003: 12.

² CIA study: O. Villadsen, 'Prospects for a European Common Intelligence Policy' (2000) 44 *Studies in Intelligence* (unpaginated) available at <<https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/summer00/art07.html>>.

³ P. Gill, 'Not Just Joining the Dots But Crossing the Borders and Bridging the Voids: Constructing Security Networks after 11 September 2001' (2006) 16 *Policing & Society* 27.

information: for example, in relation to money laundering. In contrast, the sharing of higher-quality information may well have decreased. This may be partly because of ‘needle in a haystack’ problems – the bigger the haystack, the greater the potential difficulty in seeing the needle – and partly because sharing may be the exception rather than the rule when it comes to the most sensitive information.⁴ Policy discussions about cooperation are not automatically reflected in practice, especially where there are structural, motivational, reputational, and competitive grounds for public and private sector entities to retain ownership of ‘their’ information on irregularities and illegalities.⁵

In the following pages, we suggest that policy-makers should in fact be grateful for these apparent difficulties. Negative consequences could follow the integration of currently distinct methodologies and systems – spanning both public and private sectors – that are relied upon for strategic criminal intelligence and thus for policymaking. It may be better, in the sense of being safer, to have access to diverse (‘silo’) approaches to risk management. In the following pages, we scan the international and European context and drivers of intelligence activities spanning the public and private sectors; discuss the pressures towards and away from further integration of those worlds; and examine possible consequences of further movement towards the integration of intelligence sources and systems.

2 Contexts and drivers of intelligence sharing

Whether one looks at the worldwide reach of the ambitions of the last and only ‘superpower’ left, or to the rather different project of the creation of a European Union, the boundaries between what is ‘internal’ and what is ‘external’ in matters of security seem to have become irremediably fuzzy. This is quite clear also in the way in which disciplinary boundaries are giving way to the assault of historical change. Does one really know today in Europe when one is speaking of ‘domestic’ law, ‘European’ law, or ‘international’ law?⁶

A currently influential idea in strategic intelligence is combine into one comprehensive ‘product’ all available data from diverse public and private sector sources and approaches to risk assessment and risk reduction

⁴ J. Walsh, ‘Intelligence-Sharing in the European Union: Institutions Are Not Enough’ (2006) 44 *Journal of Common Market Studies* 625.

⁵ J. Williams, ‘Reflections on the Private versus the Public Policing of Economic Crime’ (2005) 45 *British Journal of Criminology* 316.

⁶ D. Melossi, ‘Security, Social Control, Democracy and Migration within the Constitution of the EU’ (2005) 11 *European Law Journal* 5 at 5-6.

methodologies.⁷ The resulting product would be more powerful than a multiplicity of discordant views.

The policy emphasis on international cooperation against serious ('organised', if one wishes) crime and, since 2001, terrorism is so well established that there is no need to labour the point here. A key aspect of this cooperation is intelligence sharing, which consists of (a) real-time sharing of specific, current, and sometimes highly sensitive information about targets, and (b) much more general appraisals of situations, trends, and possibilities, made on the basis of a very wide variety of sensitive and non-sensitive sources. It is the latter that is of primary concern in this paper.

A full analysis of the historical development of defence intelligence and the implications of its entry into criminal intelligence is beyond the scope of this paper. Suffice it to say that successive triggers to defence intelligence were the US-USSR ballistic missile race, subsequent concerns about biological weapons and counter-measures, concerns relating to domestic terrorism in some European countries (notably the UK, Germany, Italy, and Spain) in the post-war period, and international terrorism from the 1990s onwards. Military and security doctrine and language have developed through these historical shifts but the underlying concepts of threat and of threat assessment (or analysis) have remained fairly stable. The conceptual merging of international threats and organised crime threats progressed through roughly three stages: during the Cold War period, threats posed by Italian and other 'mafia'; in the aftermath of the break-up of communism, concerns about foreign corruption and international crime within and radiating outwards from weak and/or what were called 'rogue' states, including some on the immediate borders of the EU; finally, particularly post-2001, terrorism and its possible links with organised crime (an unsettled area). This attempt to provide a summary of the development enforcement preoccupations should not be read as an endorsement of them as necessary or rational, nor as implying that the intelligence activities were or are very effective, which seems unlikely.⁸ At this point, we are merely giving an overview of the merging of views on external (defence) and internal (crime) aspects of security, a process in which terrorism – the threat within – was to become the lynchpin.

As part of this process of fusion of external and internal concerns, by 2000 an international threat assessment on international crime had been drawn together by a US interagency working Group, involving the Central Intelligence Agency, the Federal Bureau of Investigation, the Drug

⁷ Gill, above n. 3.

⁸ See for example the United States General Accounting Office (GAO), *International Crime Control: Sustained Executive-Level Coordination of Federal Response Needed* (2001) Available at <<http://www.gao.gov/new.items/d01629.pdf>> at 2.

Enforcement Administration, the US Customs Service, the US Secret Service, the Financial Crimes Enforcement Network, the National Drug Intelligence Centre, the Departments of State, the Treasury, Justice, and Transportation, the Office of National Drug Control Policy, and the National Security Council.⁹ The 2000 report described global changes favouring crime and impeding crime control, growing geographical reach and operational sophistication of crime groups, involvement of 'insurgent, paramilitary, and extremist groups', corruption and institutional shortcomings,¹⁰ and a range of international crimes 'affecting US interests'. These included terrorism, drug trafficking, alien smuggling, trafficking in women and children, environmental crimes, sanctions violations, illicit technology transfers and smuggling of materials, weapons of mass destruction, arms trafficking, trafficking in precious gems, piracy, non-drug contraband smuggling, intellectual property rights violations, foreign economic espionage, foreign corrupt business practices, counterfeiting, financial fraud, high-tech crime, and money laundering. The report went on to describe criminality in geographical and national terms.¹¹ In other words, this US report covered the broad environment for crime, some crime markets, and specific settings/national groups.

A number of European drivers for the development of intelligence can also be identified. These include: the perception of a need for security measures in the context of the development of the single market and the opening of internal borders; increasing concern from the 1980s onwards about and cooperation against trans-national organised crime; the use of financial systems for purposes of laundering the proceeds of crime; recognition that considerable damage may be done by serious/organised crime, not only to individuals but also to economic growth and competitiveness; the closer linking of anti-crime actions in the domestic sphere with those in foreign policy, with the enlargement process helping to form a 'bridge' between domestic and foreign policies; and, finally, linkage between security issues and the Lisbon Agenda on employment and innovation. Thus, the EU has emphasised the need for closer cooperation on security between the public and private sectors, as well as for sponsoring conferences and encouraging the formation of various fora, including a European Public Private Security Forum.¹² With regard to technical aspects

⁹ US Government Interagency Working Group, *International Crime Threat Assessment* (Washington: 2000) (unpaginated) available at <<http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270index.html>>

¹⁰ *Id.*, Chapter 1.

¹¹ *Id.*, Chapter 2.

¹² EPPSF, *Background & Approach* (Brussels: European Public Private Security Forum 2005) available at <<http://www.eppsf.org/eppsf2006/website.asp?page=background>>.

of security planning, products, and services, the EU has adopted a Work Programme on Security Research.¹³ The overall development of strategic intelligence is intended to take place with reference to a 'strategic concept' of organised and cross-border crime.¹⁴ This will involve an emphasis on greater cooperation, non-silo thinking, and information sharing on the basis of its availability, beyond a consideration of the purpose for which the intelligence may originally have been collected.

It was not just the US influence on the EU that prompted a joining of traditionally separate criminal intelligence and defence intelligence, nor was it just the events of September 2001. Rather, it was the disarray of EU member states when faced with the US demand to support and participate in the invasion of Iraq. The 'Iraq crisis' was a crisis for the European Union for two reasons: firstly, because it split it politically; secondly, when attempting to find common ground in terms of information about the existence or otherwise of Iraqi 'weapons of mass destruction', the EU found so no such common ground.

The absence of a shared threat assessment was an important reason why EU countries ended up so divided. Each country first formed its own national viewpoint, and only then engaged in half-hearted attempts to form a common stance with its European neighbours. [Subsequently] EU leaders realised that, based on this dynamic, EU foreign policy would never succeed. A new clause was quickly inserted into the Constitution, stipulating that the EU should work out a coherent vision of its strategic objectives. Concretely, leaders tasked Javier Solana with drawing up an EU security strategy.¹⁵

The subsequent development of EU foreign policy came to provide a 'bridge' between (a) the international security situation after 2001, (b) EU enlargement to its east and, (c) action on organised crime and terrorism. In the process, boundaries between anti-crime policies within and outside of the EU, which had become more permeable in the 1990s, became even more fluid, with police being deployed in external security situations¹⁶ and

¹³ European Commission, *Decision of 9 February 2006 Concerning the Adoption of the Programme of Work 2006 for the Preparatory Action in the Field of Security Research*, C(2006) 331 (Brussels: EU 2006) available at: <<http://www.tpa.lt/SMTP/Naujienos/files/2006-03-06/ANNEX3%20Work%20Programme%20PASR-2006.pdf>>.

¹⁴ European Commission, *Communication from the Commission to the Council and the European Parliament on "Developing a strategic concept on tackling organised crime"*, COM(2005) 232 final (Brussels: EU 2005) available at: <http://ec.europa.eu/justice_home/doc_centre/crime/doc/com_2005_232_en.pdf>

¹⁵ S. Everts and D. Keohane, 'The European Convention and EU Foreign Policy: Learning from Failure' (2003) 45 *Survival* 167.

¹⁶ European Commission, *Communication from the Commission: a Strategy on the External Dimension of the Area of Freedom, Security and Justice*, COM(2005) 491

defence-related methodologies being taken up by a range of agencies within the EU. Views diverge about the desirability of all this, amongst academics¹⁷ as well as other groups; our point is that it is fact and is relevant to understanding how law enforcement agencies think about and compile assessments. In summary, in EU policy terms, the internal/external division has almost completely melted as far as security policy is concerned. High Representative Solana's statements on the European Security Strategy position large-scale organised crime within this wider theatre:

... the European Security Strategy [...] is, in a way, the European Union's 'strategic identity card': a global player, vigilant as regards both terrorism and the proliferation of WMDs, and more traditional sources of instability – regional conflicts, the break-up of states, large-scale organised crime – especially as these different types of threat fuel one another in many parts of the worlds.¹⁸

Within this context:

The Secretary General/High Representative was mandated to report on the creation of an intelligence capacity on all aspects of the terrorist threat within the General Secretariat of the Council (SITCEN). [...] The Council will now ask SG/HR Solana to implement such arrangements as soon as possible and to keep this question under constant review and to report on progress made at the December 2004 European Council.¹⁹

In 2004, the Council of the EU agreed that external (second pillar) and internal (third pillar) security assessments would be merged, with a

compilation of Country Threat Assessments to be used by Second and Third Pillar formations in the development of policy. Further work will be taken forward in the context of the HR/SG Solana's report on the development of an intelligence capacity within the Council.²⁰

final (Brussels: EU 2005) available at: <[http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com\(2005\)0491/_com_com\(2005\)0491_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0491/_com_com(2005)0491_en.pdf)>.

¹⁷ D. Bigo and others, *The Changing Landscape of European Liberty and Security: Mid-Term Report on the Results of the CHALLENGE Project* (Brussels: CEPS 2007) available at <http://shop.ceps.be/downfree.php?item_id=1468>.

¹⁸ J. Solana, 'Preface' in N. Gnesotto, (ed.) *EU Security and Defence Policy: The First Five Years (1999-2004)* (Paris: Institute for Security Studies 2004) at 6.

¹⁹ European Presidency, *Report to the European Council on the Implementation of the Declaration on Combating Terrorism*, 10009/3/04 (Brussels: EU 2004) available at: <http://ec.europa.eu/justice_home/doc_centre/criminal/terrorism/doc/cs_2004_10009_1_en.pdf> at 7.

²⁰ European Council, *EU Plan of Action on Combating Terrorism*, 10586/04, LIMITE (Brussels: EU 2004) available at <<http://www.um.dk/NR/rdonlyres/>>

And thus we come to the present time, with public sector criminal intelligence, in its strategic aspirations and context, being influenced to a certain extent by defence intelligence.

3 Structural limitations to integration of intelligence systems

A variety of views are expressed in the criminological and wider literature on 'security governance' – the extent to which the political and business ownership of public sector and private sector security and intelligence activities keep those activities separate or bind them together. Whatever position is arrived at, it has implications for how one understands the prospects for strategic intelligence sharing.

For example, if the security space is compact – in the sense of all public and private sector agencies being closely interconnected – then, in principle and from a policy point of view, integration of at least part of their intelligence procedures, practices, and products would be relatively simple, even if in practice some challenging technical barriers to cooperation might remain. If, however, the security space is highly dispersed, with different 'players' having widely diverse security interests, indeed with some competitive issues between them, then intelligence cooperation might be a more uncertain and edgy affair.

One may summarise the governance debate by referring to a dimension along which the concept of security governance may be placed. The mainstream view within criminology – going back well before terrorism and cooperation on it became such a major as well as controversial issue – is that there is a general convergence and 'blurring' between public and private policing systems.²¹ Some experts go further, suggesting that all approaches to security come together to form a tight-knit bundle, the social effects of which are uniform and determinate. This is the view,

postulated in some of the neo-Foucauldian writing on governmentality, that the diffusion of risk mentalities is the linear product of a singular governing rationality (neo-liberalism being the most obvious candidate) and that it leads ineluctably to the furtherance of coercion and control.²²

BCE09042-A511-4A9A-8FED-4D323E6FA315/0/EUPlanofActiononCombating Terrorism.doc> at 71.

²¹ T. Jones and T. Newburn, *Private Security and Public Policing* (Oxford: Clarendon Press 1998).

²² For a critical summary, see I. Loader and N. Walker, 'State of Denial? Rethinking the Governance of Security' (review of Johnson and Shearing) (2005) 6 *Punishment and Society* 221 at 221.

That approach, called governmentality – the critical flipside of the wider, normative concept of ‘good governance’ – informs many analyses of the intersection of public and private security post-2001.²³ The work of Edwards and Gill describes policy making as a process of coalition-building between political groups.²⁴ Groups or interests constitute themselves around notions of their own moral qualities and, conversely, the dangers posed by other groups.

[R]ecent history suggests that policy change and learning is fundamentally a product of the normative belief systems of advocacy coalitions and how these constrain lesson-drawing about policy within the parameters of what is thinkable and acceptable from the perspective of these normative beliefs. For example, if it is believed that crime is a product of moral turpitude [...] [T]he axiomatic belief that crime is a product of moral deficits in debased individuals delimits the scope of policy-oriented learning to various projects for the re-assertion of moral authority and ‘zero tolerance’ for those who transgress this authority. [N]ormative beliefs are the foundations of competing governmentalities around which policy actors coalesce.²⁵

This process of policy-making is said to occur in four stages: firstly, coalitions problematise an issue in ‘such a way as to establish their own role as indispensable for its resolution’; secondly, they employ various ‘devices of intéressement’ to get their claims noticed; thirdly, they form and lead coalitions, typically using political and/or other inducements; finally, they ensure ‘the disorganisation of competing coalitions’.²⁶ This description of the policy-making process relies upon the notion of competition between coalitions or alliances. It reads as a description and critique of the success of the political right wing in mobilising success for various approaches to security (fight, war, coalitions of the willing, and other neo-conservative motifs). It does not offer an alternative vision or direction.

How could it be that leftist and liberal criminologists adopt a perspective so closed and disempowering? Dario Melossi suggests,²⁷ as does the philosopher Richard Rorty,²⁸ that the work of Foucault and his school have acted as a conceptual bridge, over which the concerns of US social and

²³ G. Mythen and S. Walklate, ‘Criminology and Terrorism: Which Thesis? Risk Society or Governmentality?’ (2006) 46 *British Journal of Criminology* 379.

²⁴ A. Edwards and P. Gill, ‘The Politics of “Transnational Organized Crime”’: Discourse, Reflexivity and the Narration of ‘Threat’ (2002) 4 *British Journal of Politics and International Relations* 245.

²⁵ *Id.*, at 249.

²⁶ *Id.*, at 250.

²⁷ Melossi, above n. 6.

²⁸ R. Rorty, *Consequences of Pragmatism* (Minnesota: University of Minnesota Press 1983).

political scientists have been imported into Europe. Thus, the governmentality discourse is similar to that of ‘social control’. The key point is that the state is no longer seen as the factor, rather it itself is created, as the result of many social practices thorough society. As Melossi describes, Foucault set aside a historical political conception in which the state ‘was seen as the “author” of social control, which “does” this and that, “organizes”, “imposes”, “prohibits” [etc]’.²⁹ In place of this state-focused view, Foucault

allowed for the introduction within European social thought, through the elaboration of an apposite new vocabulary, of themes and motifs that had somehow been central to American political and social sciences for a long time already. And he did this exactly at the point when the social model produced in the North American context was readying itself to become hegemonic.³⁰

Here Melossi is suggesting that Foucault provided a language in which mainstream North American concepts – according to which, social control is dispersed throughout society, is created through a complex mix of social relations, and involves the active involvement and consent of citizens, rather than being imposed by the state – could be made palatable within European social science. The most welcome starting point of this is a historical evolution of thought, reflecting democratic progress; however, a less welcome consequence is that of perceiving the old bogeyman of oppression as having been generalised from the state to every nook and cranny of society.

In contrast to that way of thinking about society, governance, and security – as a tightly woven social mesh – some commentators perceive the possibility of real and wide differences between the practices of many of the numerous entities that have an interest in crime control. Of course, the extent of variety and flexibility will depend upon the particular contexts concerned and, just as importantly, on how these are understood and developed by participants. Proponents of this activist perspective include criminologists Johnson and Shearing, whose work drawing on public and private policing is well known.³¹ Loader and Walker have given a useful summary of the Johnson and Shearing position:

Johnston and Shearing develop an argument for ‘re-aligning’ security and justice under conditions of dispersed, multi-site governance... This strategy is informed by two theoretical propositions. Johnston and Shearing argue, first, for a ‘problem-solving’ as opposed to an ‘interest-based’ view of policing, one that makes no

²⁹ Melossi, above n. 6 at 6-7.

³⁰ *Id.*

³¹ See for example L. Johnston and C. Shearing, *Governing Security: Explorations in Policing and Justice* (London: Routledge 2003).

'essentialist' claims about the functions, ends, means or historical trajectories of the police, and proposes, more generally, to conceive of the provision of security as 'the application of any means that will promote safe and secure spaces in which people live and work'. Second, and relatedly, in an argument which connects with broader debates within the study of social control, they contend that the relationship between the mentalities of security provision and its institutions, technologies and practices is 'enabling' and open-ended rather than either 'determining' or 'functionally differentiated' – one where the flow of influence between these different security modalities is reciprocal and a range of diverse rationalities vie for ascendancy in fluctuating political conditions.³²

Likewise, Williams points to 'bifurcation' or 'structurally constituted boundaries' between public and private policing.³³ Lippert and O'Connor show that contracts between private sector purchasers and providers of private security disincline the latter to exchange information with public sector police.³⁴ The present author has suggested elsewhere that such limits reflect the normal market sensibilities of the private sector.³⁵ In this regard, Levi and Pithouse find little evidence of boundary maintenance by public authorities.³⁶

Thus, are public and private security characterised by a nexus that is 'enabling and open-ended' (in the above words of Johnson and Shearing) – or is it a tight and indeed 'linear product'? On the one hand, the claims of the 'tight' position would be supported by the governmentality school and also by a face-value reading of public policy declarations on intelligence sharing and formal declarations of fealty by representatives.³⁷ On the other hand, the daily experience of those 'at the sharp end' of intelligence may point towards 'dispersal', as do some studies.³⁸ Perhaps it is always the case that a detailed examination of practices yields a more heterogeneous picture than does a top-down or normative analysis. At the end of the day, there

³² Loader and Walker, above n. 22 at 221.

³³ Williams, above n. 5.

³⁴ R. Lippert and D. O'Connor, 'Security Intelligence Networks and the Transformation of Contract Private Security' (2006) 16 *Policing & Society* 50.

³⁵ N. Dorn, 'Proteiform Criminalities: The Formation of Organised Crime as Organisers' Responses to Developments in Four Fields of Control' in A. Edwards and P. Gill (eds.) *Transnational Organised Crime* (London: Routledge 2003).

³⁶ M. Levi and A. Pithouse, *White-Collar Crime and its Victims* (Oxford: Clarendon Press, forthcoming).

³⁷ Chairman's Conclusions, *Outcome of the European Public Private Security Forum 19-20 December* (Brussels: European Public Private Security Forum 2005) available at <http://www.eppsf.org/eppsf2006/website.asp?page=chairmans_conclusions>.

³⁸ N. Dorn and M. Levi 'Regulation of Insurance and Corporate Security: Integrating Crime and Terrorism Seriousness into the Analysis' (2006) 12 *European Journal on Criminal Policy and Research* 257.

must remain some element of choice for the analyst and policy-maker alike. Depending on the perspective adopted on the wider structural and political conditions – as a pervasive and ever-tightening net of social control, or as a looser and still-contingent world still open to surprises – so vary the possibilities for the future development of European strategic intelligence. And, we go on to suggest, so vary the consequences.

4 Consequences

Each of the above approaches involves an assumption that risk assessment is a technical matter, in which experts or specialists take the lead in determining the nature and levels of risk. Communication to ‘customers’, in particular the general public, occurs after the technical exercise has been completed. However, there are approaches to risk assessment in which the public is placed at centre stage. The growing realisation – or to put it more honestly, the acceptance – of the difficulties of understanding risk and particularly the difficulty of predicting it, has resulted in some acceptance that wider stakeholders, not just policy-makers, managers, and experts, need to be involved in risk assessments. The public is installed ‘inside’ risk assessment, as a producer of information, rather than being viewed simply as an end-user/consumer of the information.

The limitations of risk science, the importance and difficulty of maintaining trust, and the complex, socio-political nature of risk point to the need for a new approach—one that focuses upon introducing more public participation into both risk assessment and risk decision making in order to make the decision process more democratic, improve the relevance and quality of technical analysis, and increase the legitimacy and public acceptance of the resulting decisions.³⁹

Psychologists such as Slovic argue in favour of

introducing more public participation into both risk assessment and risk decision making in order to make the decision process more democratic, [to] improve the relevance and quality of technical analysis, and [to] increase the legitimacy and public acceptance of the resulting decisions.⁴⁰

Indeed, from the point of view of efficiency of risk assessment, the involvement of wider constituencies of stakeholders may lead to a better quality of assessments. Additionally, looking at things from the point of view of accountability and responsibility, wider involvement spreads the

³⁹ P. Slovic, ‘Trust, Emotion, Sex, Politics, and Science: Surveying the Risk-Assessment Battlefield’ (1999) 19 *Risk Analysis* 689.

⁴⁰ *Id.* at 699.

blame in those cases when something occurs that was not predicted or not even imagined as a possibility. In an unpredictable world, it is not surprising to find the government turning to public consultation.

4.1 Stimulation of social anxieties

Mainstream criminological accounts concern the consequences of paying close attention to possible risks, assessing them, trying to measure them, and disseminating the results. Risk assessment increases the extent to which risk is perceived, because it brings it more clearly into focus:

Implicit also is the notion that more knowledge leads to more risk. [...] whatever else risk may refer to outside technical definitions it is to some degree a social and psychological construct. A risk must be identified and appraised. Without human attention it is not a risk in the modern sense of the word. [...] Attention and judgement create a risk in this sense; modern systems of risk assessment, that classify, select and respond, bring attention to bear on a danger and give the newly formed risk meaning and technical precision.⁴¹

Accordingly, some commentators have suggested reducing the expectations being placed upon risk assessment 'experts' and their methods, suggesting that a greater degree of disorganisation and ambiguity should be tolerated. Perhaps public faith in risk assessment could also be safeguarded by greater modesty.

Risk management would [should] be characterised more by learning and experiment, rather than rule-based processes. It would depend essentially on human capacities to imagine alternative futures to the present, rather than quantitative ambitions to predict the future. [...] A new politics of uncertainty would not seek to assuage public anxiety and concerns with images and rhetoric of manageability and control, and would challenge assumptions that all risk is manageable. States and corporations would not need to act as if all risk is controllable and would contest media assumptions to that effect. Public understandings of expert fallibility would be a basis for trust in them, rather than its opposite. Regulatory organisations would be publicly conceived of more as laboratories, rather than as insurers.⁴²

⁴¹ J. Jackson, N. Allum, and G. Gaskell, *Perceptions of Risk in Cyberspace* (London: Cyber Trust and Crime Prevention Project 2004) available at: <<http://www.lse.ac.uk/collections/methodologyInstitute/pdf/JonJackson/Perceptions%20of%20risk%20in%20cyberspace.pdf>>.

⁴² M. Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* (London: Demos 2004) at 62-63.

4.2 Magnification of disaster

Turning from subjectivist to objectivist perspectives, another line of criticism concerns the consequences of actively trying to manage and reduce the risks, if the means involve standardised approaches to good practice, governance, and regulation. In an analytically radical move, some students of market and regulation suggest that risks may actually ('really') increase as a result of attempts to manage them in standardised ways.

Avinash Persaud, global head of research at State Street Bank, believes not only that such an early warning system does not exist but that the regulatory and risk management systems in place today are creating additional risk. He says the regulatory mantras of common standards and market-based risk management encourage the herd mentality that characterises investment flows and increase the correlation between events that spread instability through financial markets.⁴³

The technical details of this view are beyond the scope of this discussion, but relate to observations of several financial crises in which a large number of financial market players were pursuing the same hedging (risk reduction) strategies.⁴⁴ As a result of that, the strategies no longer reduced risk. When market conditions became unfavourable, many large financial players all tried to reduce their exposure but, in doing so, exacerbated the volatility that they had sought to avoid.

The problem is not that market participants try to hedge their risk but rather that they have a tendency to use the same risk models, and may hedge in very similar ways – not realising that the assumptions of the models did not include that common behaviour. Whatever the validity of the risk assessment models might have been at the onset, they become increasingly less valid as more parties follow them. This is a version of the 'madness of crowds', as found in financial markets.

4.3 The exceptional is not rule-bound

Further support for such observations could be derived from debates about the nature of statistical distributions. Whilst some categories of events follow the 'bell curve' familiar from textbooks, in which unusual events and extreme values are so unusual as to be dismissed as 'outliers' and smoothed

⁴³ V. Boland, 'Spotting the dangers in risk management', *Financial Times* (London, 11 March 2002) available at <http://62.237.131.23/inmedia/inmedia2002/in-media-2002-15.pdf>.

⁴⁴ See for example A. Persaud, 'Sending the Herd off the Cliff Edge: The Disturbing Interaction between Herding and Market-Sensitive Risk Management Practices', *BIS Papers No. 2*, 233-240 (2002) available at <http://www.bis.org/publ/bispap021.pdf>.

out of the analysis, other categories characteristically exhibit discontinuity and extreme values. As Benoit Mandelbrot and Nassim Taleb put it:

What is wild randomness? Simply put, it is an environment in which a single observation or a particular number can impact the total in a disproportionate way. [... For example, considering people,] while weight, height and calorie consumption are Gaussian [so-called normal distribution], wealth is not. Nor are income, market returns, size of hedge funds, returns in the financial markets, number of deaths in wars or casualties in terrorist attacks.⁴⁵

For present purposes, the point is that the future likelihood of large planes flying into tall buildings and killing thousands of people could not be deduced from the number of past instances of smaller planes flying into smaller buildings containing fewer people, as a 'normal' risk analysis might attempt to do. The likelihood of occurrence of a new category of event cannot be extrapolated from a past lacking such an incident; it has to be seen as a new response to the closing off of other opportunities – a form of displacement – although not entirely a new category, since the events of September 2001 followed many years of attacks on infrastructure and shipping.

The connection between this and observations arising from lemming-like behaviour in financial markets is that, in both arenas, the adoption of a single risk model — whether by traders, using industry-standard, 'state of the art' risk modelling, or by government agencies bringing consistency into top-level strategic intelligence⁴⁶ — can create a blind-spot corresponding to the increasing probability of new types of event. The practical issue in risk management is whether future trends and events may be anticipated, using methodologies developed by the private sector, the specialist risk industry, law enforcement agencies, and regulatory bodies. This paper suggests not, for a number of reasons. These include: (a) over-reliance on narrow fields of technical expertise undermines the possibilities for prediction, (b) social and market risk-amplification via 'the madness of crowds' is a danger inherent in strong integration of public and private strategic intelligence, and (c) traditional ideas about statistically 'normal' distributions, underpinning virtually all forecasting tools, can dull our

⁴⁵ B. Mandelbrot and N. Taleb, 'A focus on the exceptions that prove the rule,' *Financial Times*, (London, 23 March 2006) <http://news.ft.com/cms/s/5372968a-ba82-11da-980d-0000779e2340,dwp_uuid=77a9a0e8-b442-11da-bd61-0000779e2340.html> (accessed 16 June 2008) at 1, see also N. Taleb, *Foiled by Randomness: the Hidden Role of Chance in Life and in the Markets* (New York: Random House 2004).

⁴⁶ National Commission on Terrorist Attacks upon the United States, *The 9-11 Report*, (Washington: National Archives and Records Administration 2004) available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

sensitivity to the unexpected. Any one of these considerations would be reasonable grounds for concern about the prediction of uncommon but highly adverse events, such as terrorist impacts. Taken together, they certainly signal a need for caution.

5 Conclusion

It used to be seriously believed by policy-makers that, by gathering into one place increasingly more information about the past, one could glimpse the possible future – and could then change it. However, this belief has weakened, following the intelligence failures that led to the events of 11 September 2001 and the failures of financial regulation that resulted in the business crash of 2007-2008.

The security- and market-based critiques touched upon above suggest that increasing the commonality of methods and systems between the public and private sector could actually increase risks. This could be true in three senses. Firstly, the greater the convergence between intelligence systems, the greater the danger that divergent views and insights become squeezed out (see sections above).

Secondly, even an intelligence model that may have been quite reasonably specified at one time could become dangerously vulnerable at another. For instance, if the model has been adopted by all key ‘customers’, and if their actions on the basis of their common adoption change the situation, the model’s assumptions are rendered invalid. Even were the model to be well specified at the start, common adoption by all public and private intelligence entities would necessarily generate ‘blind spots’, which could be large. In such cases, risk management becomes its own worse enemy.

Thirdly, as readers will be well aware, sophisticated criminals and terrorists are surely capable of thinking, learning, and innovation, and they are flexible and entrepreneurial in their activities. As a consequence, they could outflank any necessarily slower-moving strategic intelligence systems based in public-private partnership – which necessarily become even more slow-moving as more partners integrate. Hence, with regard to operational intelligence, too much convergence and standardisation of intelligence methods could magnify the advantages enjoyed by ‘small is beautiful’ economic crime networks and terrorists. Suppose, furthermore, that currently-converging but still somewhat diverse public-private intelligence were to be replaced by one standardised approach. If potential criminals could be confident that all security thinking and systems were more or less the same, then they would have the information needed to evade them. Since the level of investment needed to connect all public and private sector intelligence capabilities would be huge, they could not be changed in a

hurry; hence, the tilt to the advantage of criminals would be long-lasting. In contrast, individuals and groups currently considering illegal action face a situation in which different scrutinisers – police, auditors, regulators, private firms, and others – have a variety of means of collecting information. This puts criminals at risk.

5.1 The leading edges of political action

Interestingly, for political reasons the prospects for (and danger of) tighter integration of European strategic intelligence would seem to be greater in relation to economic crime in the context of the internal market (EU first pillar) than in that of justice and home affairs (third pillar). In important areas of public law, such as competition law, anti-money laundering measures, and environmental protection,⁴⁷ the EU has strong competencies and these are likely to remain stable. In contrast, in the ‘third pillar’ the competencies of the EU remain patchy, even after the (currently stalled) 2007 Treaty of Lisbon (‘Reform Treaty’). Even if the headline policy focus has been on intelligence regarding terrorism and other aspects of criminal law, social scientists and lawyers will not forget the first pillar aspects of strategic intelligence as they track ongoing shifts in the relationship between public and private sector criminal intelligence and cooperation.

Safeguarding the rights of individuals is an essential aspect of information gathering and sharing.⁴⁸ This has been underlined by the well-known cases on SWIFT, air travel, and the freezing of financial assets of suspected terrorists/sympathisers. Whilst the EC court had no difficulty in finding illegalities in the former two cases, it has had to develop its jurisprudence on the basis of *jus cogens* in order to address the actions of the UN Security Council in freezing assets and the actions of the EU through its member states in implementing measures.⁴⁹ Taken together, these cases demonstrate aspects of information collection and the use of that information in the short term. The aspect that is most germane to this paper regards what use is being made of the combined datasets in the broader and longer-term task of constructing a strategic intelligence overview – which in turn informs the further development of policies, including the possibility of creating

⁴⁷ Case 176/03, Judgment of the Court (Grand Chamber), Action for annulment, Articles 29 EU, 31(e) EU, 34 EU and 47 EU, Framework Decision 2003/80/JHA [2005] OJ 2005 C 315/2.

⁴⁸ J. Vervaele ‘Terrorism and Information Sharing between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law?’ (2005) 1 *Utrecht Law Review* 1.

⁴⁹ Case C-403/06 P, *Appeal brought on 27 September 2006 by Chafiq Ayadi against the judgment of the Court of First Instance (Second Chamber) delivered on 12 July 2006 in Case T-253/02: Chafiq Ayadi v Council of the European Union* [2006] OJ C 294/32.

further surveillance powers. The possibility exists that, in order to be capable of drawing together a wide range of data from many different private and public sector sources, the authorities might wish to encourage further and rapid convergence of information collection categories and methodologies. If so, we move closer to the prospect of having a ‘one-tune band’, with the attendant aforementioned dangers.

In conclusion, the considerations presented point to serious issues. They call into question any idea that crime and terrorist risk assessment methodologies should become standardised between public bodies, and between them and the private sector. A common public-private methodology could generate authoritative outputs, thus reducing the variety of views available and increasing the risk of everyone getting it all wrong. We need checks and balances. To maximise flexibility, the EU should encourage a security model of public-private partnership, emphasising excellence in diversity in relation to information systems, data collection, model assumptions, analytic models, and reporting. Difference, a degree of incompatibility, the toleration of some mutual incomprehension, and a willingness to give and accept challenges are hallmarks of a learning system. *Vive la difference.*

There may be lessons here not only for enforcement and intelligence agencies but also for universities – and particularly for law schools and criminology departments. These cannot help but be part of the wider ‘intelligence community’, contributing models and making critiques, and preparing students to enter the security sector and government. The recent tendency in academia to understand ‘research skills’ in terms of quantitative methods needs to be balanced by a degree of scepticism about the utility and predictive power of such approaches. Following the events in New York in September 2001, some observers at least have understood that crunching ever-larger historical datasets does not open a sightline to the future. Business schools and financial regulators also are reviewing the implications of an over-reliance on ‘quant’ skills, as they digest the financial meltdown of 2007-2008. Where scholarship is constituted by a creative confrontation of traditions from law, the social sciences, and business schools, our opportunities for learning deepen.