CRIME PROOFING AS A METHOD OF CRIMINAL PREVENTIVE RISK ASSESSMENT IN THE LAW-MAKING PROCEDURE

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1. INTRODUCTION

Anticipatory crime risk assessment in the legislation process is a rather new idea in the field of the evaluation and development of more evidence based criminal policy programs. The idea is to develop a kind of systematic screening of legislation in order to prevent the exploitation or abuse of legislation by criminals, in particular in the context of organized crime control. Originally, the idea comes from the EU commission which is likely to establish a procedure of 'crime proofing' of its policy and legislation programs.

To date, policies in general and criminal policies in particular most often are of a rather ad hoc character. Accordingly, most legislation lacks of a comprehensive and coherent reflection on the complexity of all norms which are currently in force. This is true with regard to the national as well as to the international level. The reasons for this situation are manifold and cannot be discussed here at all. Legislation proofing offers the chance for a systematic review of all laws, rules and regulations that directly or indirectly might affect the opportunities for crime and the extent to which they might be exploited. In addition, also the interplay of actors including the different law enforcement agencies can be assessed by such a methodology. It is, therefore, a new, broadened approach to the prevention of crime in general and organized crime in particular.

2. LEGISLATION PROOFING AS A METHOD OF RISK ASSESSMENT

Let me shortly summarize the relevant areas of such an approach. In general, two risk dimensions can be differentiated:

- the control of the *intended effects* of legislation, and

- *non-intended or unwanted effects* of legislation (or policies).

The central point of interest is in the search and analysis of possible opportunities of exploitation, evasion or even abuse of rules of any kind. It has to be explicitly mentioned that the focus is *not* (at least not primarily) on *criminal legislation* but on the whole complex of legal norms from all branches of law. In principle, not only primary, but also secondary law must be subject to such an analysis.

Which kinds of exploitation or abuse of legislation are relevant in such an analytical context? Without claiming comprehensiveness, especially the following situations can be differentiated:

- *Direct opportunities*, as provided especially in rules, in the whole area of offers, subsidies, services and invitations to bid
- *Indirect opportunities* through prohibition, deliberate shortage, creation of hurdles of entry, etc.; the most prominent example in such a context is certainly that of the drug markets
- Another area of *indirect opportunities* are potentials of abuse resulting from a totally different context of regulation
- Legal *grey areas* belong to the interface between direct and indirect opportunities; they can be found, e.g., at the interface between fraudulent acquisition of subsidies on the one hand and skilful but still legal exploitation of legal gaps, uncertainties etc., on the other hand
- Further considerable areas are unexpected *side effects* of laws or measures, for example, by insufficient density of monitoring (fiscal law) or deliberate reduction of control in certain areas (e.g., the abolished border control amongst the Schengen states)
- Special forms of unexpected side effects are *counter-productive effects* resulting from badly conceived controlling strategies, and
- *Interaction effects* between different (sub-) systems of rules and regulations
- *Displacement or moving effects* play an important role as well, as they exist, e.g., in the field of money laundering, where illegal activities are

thought to move from the official/legal to the para-banking area or alternative remittance systems (Hawalah, etc.) which are not yet subject of the administrative money laundering control with its compulsory rules of registration and reporting of suspicions money transactions

- And, finally, its opposite, the *attraction effect* that plays an increasing role in the context of international policy making. Legislation may produce differences as regards the legal situation in other countries, and with that may provide more favorable conditions in particular for transnational crime than in neighbouring countries.

This latter effects are especially interesting for the policies of the European Union, which focus on supra-national or harmonized laws that minimize the effects of displacement or attraction. It should, therefore, be the starting-point for a legislation screening on an EU level. Sooner or later, however, any of such effects and side effects should be take into consideration. The aim should be to develop a model for the systematic scanning (or proofing) of policies and legislation in order to identify all kinds of weaknesses and gaps in particular norms, or within a certain piece of legislation, or in the interplay with other norms.

3. LEGISLATION PROOFING IN THE BROADER CONTEXT OF CRIME PREVENTION

Such a criminological proofing of legislation is a quite new element in the context of crime prevention. As mentioned already, the rationale is to prevent or at least reduce the opportunities of exploitation or abuse of legislation by criminals. It has to be discussed, however, in which way this additional instrument can be theoretically fit into the existing models of prevention.

Crime prevention is in general, defined as the whole of state and private efforts to prevent crimes. In Germany, the structural model of crime prevention is clearly prevailing. It differentiates between primary, secondary and tertiary prevention:

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

- *Secondary* prevention is to keep potential offenders from crime commission by either changing the opportunity structure or active support of conformist behaviour.
- *Tertiary* prevention finally, aims at fighting recidivism by preventing the commission of further crimes.

According to this model, crime prevention through legislation proofing had to be located on the level of secondary prevention. However, the point is that it seems not comparable to the other strategies of secondary crime prevention which have been in practice so far. It is neither technical nor situational nor administrative crime prevention. It is more an indirect approach of prevention by cutting back or even eliminating *opportunity creating* law. Legislation is sometimes very clearly (and very simply) a precondition of crimes and criminal behavior; legislation providing for opportunities of subsidies evidently represents the most prominent example on national and European levels. It was in the early 1980s already, that the so-called *Gabert Report* pointed out very clearly how legislation and fraud are related to each others[1]. The report draws the conclusion that it is, first of all, the complicatedness of regulations which produce incentives to commit fraudulent practices; secondly, differences in implementation structures are mentioned as facilitators of fraud. Such a primary focus on the legal framework is clearly beyond the scope of what the structural model understood so far as secondary prevention. And opportunity structure has been explained in a situational sense, and not with regard to the legal (macro) setting.

Moreover, this structural model has been criticized with regard to several aspects. Kaiser, in particular, complains that the model is too much oriented on criminal law and criminal justice. In such a theoretical framework, law is understood as a means of intervention, not as a creator of *criminogenic opportunities*. The systematic appliance of anticipatory risk prevention through a review of legislation is not included in such a perspective. Therefore, it appears somewhat questionable to me, whether it can be inserted into the structural model of prevention.

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

In contrast to the structural model there is another model available: i.e., the functional model of crime prevention (Kaiser). Based on a trias of functionally defined elements – *prevention*, *intervention* and *postvention* – the interplay of the different strategies of prevention *and* crime control can be considered much better, because the different measures and instruments can be assessed with regard to their function. In addition, it has not such a behaviorist bias as the structural model. Of course, also the functional model has not yet been more deeply discussed with regard to legislation proofing as a new means of crime prevention. However, I think, with regard to its function as *a-priori-containment of criminogenic opportunities*, it is clearly an instrument with a preventive function – although it has, from a traditional perspective, nothing to do at all with crime control in the classical sense.

4. AREAS OF CRIME (MOST) SUITABLE FOR RISK ASSESSMENT

As mentioned already, the idea of a criminal preventive legislation proofing was created as an instrument to counter organized crime. The reason is, of course, evident. If we strip the common definitions of organized crime of the components of violence respectively the criminal commission, what stays as dominating characteristics are the business-like or commercial structures, economic profit orientation and – above all – maximization of profits. This profit orientation is the crucial element in the causation of any kind of large scale economic or organized crime which can only succeed when operating on the basis of the rules of business management. With regard to this dependency on the economic reality organized crime can generally be considered as "rational crime" (Albrecht). Especially in the area of organized crime economic *rational choice theories* thus offer a promising starting point also for further development of a method for such a legislation focusing risk assessment.

Based on these characteristics of organized crime, potential risks of abuse by economic crime in general and organized crime in particular probably might – at least to a certain extent – be predicted on the basis of rationality assessments. Moreover, it even might be predicted more easily, respectively more precisely than the risks of conventional delinquency which depends from the multi-layered individual factors influencing the individual perpetrator – who could also act

irrationally. It should, therefore, be possible to operationalize the potential or probability of exploitation and abuse of legislation.

5. CONCLUSION AND OUTLOOK

I think, the general idea is, without doubt, convincing. It is indeed high time to undertake a systematic revision of the whole framework of norms and regulations as a criminogenic factor. However, a methodology has not yet been developed. In the beginning, such analyses will certainly remain on a descriptive level at most. But in the near future computer-operated model analyses and simulations appear a promising endeavour – although it cannot be predicted yet whether it will be possible to assess the likelihood of criminal exploitation within a complex set of variables.

As mentioned already, the DG JHA of the European Commission recently launched such a project. In a first step, a method for the screening of *new* community legislation shall be developed. A joint research project headed by TRANSCRIME in Trento/Milan aims at developing a feasible methodology for such a procedure. The Max Planck Institute is one of the research partners.

The next steps should then be to include existing legislation as well. The subject of analysis should then include all kind of primary and secondary law including soft law. Similar review projects should also be conducted within the EU member states in order to proof the national legislation and to get better prepared for European harmonization. Currently only the Swedish legislature has introduced already a kind of risk assessment as a regular part of preparing new legislation.

Before concluding, a basic policy problem that comes up with such a new instrument, has to be considered, too. Crime proofing can only be *one* aspect amongst others which have to be taken into consideration during the process of legislation. There are, of course, other legitimate – political – goals that have to be weighted against a possible criminogenic potential of a certain piece of legislation. At this point, the issue of crime proofing is going to become a *democracy issue* as well. Law-making is primarily a matter of political decision-making, and the members of parliament in their role as legislators are absolutely

free in their decision-making power. This means that they are of course not restricted to pass (only) laws which have been optimized, i.e., *'crime proofed'* in advance. Otherwise, the political dimension of legislation would disappear on a long term basis – a problem now and then being discussed as the danger of the replacement of democratic legislation by technocratic.

However, one must keep in mind that improvements in the scientific approach to legislation must always reach its limits, as it is impossible to come to a point of total rationality. The idea that a kind of certificate could be developed equipping laws with a *«crime proof» stamp*, seems not very realistic in the foreseeable future. "There is no such thing as perfect law [...]; improvement and perfection of law can only consist of improving the degree to which its aims and purposes are reached" (Schmidt-Eichstaedt).

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