

Changing conditions for fighting economic crime: What constitutes an efficient criminal justice system?

Summary of symposium organised by the Faculty of Law, University of Bergen on 30 October 2013¹

Governments around the globe struggle when it comes to anti-crime initiatives. Vested interests prevent efficient solutions in many countries. Even under steady political will, however, we see significant cross-country variation in the choice of anti-crime approaches, especially when it comes to criminalisation, surveillance, use of prison terms and fines, enforcement and restitution. There are some regional tendencies and differences, for example quite notably between the U.S. and Europe. For most governments, however, it is important to be seen as acting, regardless of how uncertain they are on what works. In general, a country's many official aims for crime control are not necessarily consistent, and considered in a critical perspective, its combination of measures will often appear arbitrary and difficult to defend from a principled, practical or impact oriented standpoint.

New patterns of crime-related risks, emerging at the backdrop of financial crises, rising income differences within countries, and cultural and religious differences coming to a clear and sometimes violent expression, have tended to expand the range of observed policy solutions. Too often the criminal justice system adheres to an incumbent political regime and the ruling elite, instead of serving an independent state function. Particularly in developing countries, its position for promoting justice for development is still too weak. Variation in risks and responses to crime motivated a symposium organised by the Faculty of Law at the University of Bergen, held at the Bergen Resource Center for International Development in late October 2013. The event brought together researchers from Norway and abroad with different views on development, crime and governance, most of them lawyers, economists and political scientists.

Acts are criminalised because they pose a serious risk to safety and/or a society's development; if not relevant for the category the acts may well be legalised. Through criminalisation it becomes possible to hold individuals responsible for harmful acts, which makes particular sense for acts committed on purpose and with an understanding of the potential risks. In this symposium we addressed "economic crime" – a category where offenders more often than not can be found (truly) responsible for their acts. *Economic*

¹ For details of the symposium programme, see the Faculty's and Resource Centre's websites: <http://www.uib.no/jur/> and <http://www.resourcecentre.no>. Thanks to participants and audience who contributed to the symposium.

crime typically refers to strategic acts motivated by financial gain. They are usually a result of rational trade-offs, with less attention to crime committed on impulse or stirred by overwhelming feelings, like revenge or jealousy. From this perspective, relevant criminals could include the fraudulent financial analyst, the mafia leader, the weapon dealer, the corrupt civil servant and the tax evader – many of them actors who generate significant material wealth, and since they are easily mistaken for successful leaders in business, politics or religion, they are often treated as such. Intuitively, the assumed rationality behind their crime should make the acts easier to regulate by help of preventive criminal justice initiatives, especially if compared to the less rational forms of crime.² What we find in practice, however, is that these offences are often condoned, there is significant uncertainty around policy impact, damaging acts are not necessarily criminalised, and influential offenders avoid being brought to court, even if their crime is well-known. From different perspectives, this symposium addressed the challenge of holding offenders responsible, a question which obviously depends not only on national criminal justice systems, but also the broader governance context at the national and international level.

The symposium included nine presentations organised in three sections, in addition to introduction by Tina Søreide and conclusion by Linda Gröning (Faculty of Law, Bergen). The first section, chaired by Elin Skaar³ (Chr. Michelsen Institute (CMI)), addressed framework conditions for crime control. Jørn Jacobsen (Faculty of Law, Bergen) introduced the section by briefly describing the Nordic, and especially the Norwegian, criminal justice system. It became clear how a fair assessment of these systems' function and efficiency should recognise distinctions in their motivation and underpinning principles.⁴ They are nevertheless co-categorised when compared to a developing country context, and in this symposium, their performance was placed in sharp contrast by Arne Strand's (CMI) presentation of criminal law in Afghanistan. Security and stability are prime official objectives for Afghan authorities, but these goals are now misused to overrule almost any principle otherwise associated with a criminal justice system. At the same time, representatives of several government authorities have proved to have personal agendas in conflict with overall development goals, and the legal system is left exposed to corruption and power misuse. Rasmus Wandall (Faculty of Law, Bergen and Public Prosecutions

² For debate on rational crime regulation, see Harel and Bar-Gill. "Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited", *J. Legal Stud.* (2001), pp. 485-502; Arlen, "Corporate criminal liability: theory and evidence". In Harel and Hylton (Eds.) *Research handbook on the economics of criminal law*, (Edward Elgar Publishing, 2012); and various chapters in Garoupa (Ed.), *Criminal Law and Economics; Encyclopedia of Law and Economics, Second Edition, Volume 3*. (Edw. Elgar Publishing, 2009).

³ Elin Skaar is the author of many books and journal papers on legal institutions and development, including *Judicial Independence and Human Rights in Latin-America: Violations, Politics and Prosecution*. (Palgrave Macmillan 2011) and *Courts and Power in Latin America and Africa* (Palgrave Macmillan, 2010), co-authored with S. Gloppen, B. Wilson, R. Gargarella and M. Kinander.

⁴ Jørn Jacobsen has authored *Fragments Concerning the Criminal Law in a Democratic Rechtsstaat (in Norwegian)*, (Fagbokforlaget 2009), and many articles on the criminal justice system.

of Denmark) gave such challenges further perspective when presenting research on the status of trust in the Ethiopian criminal justice system, also this a country where many citizens have low confidence in state organised conflict resolution and high preference for private solutions and informal courts.⁵ As a main lesson coming out of the debate, we can ignore neither agreed upon principles, nor the relationship between citizens and government, when assessing the role of a criminal justice system.

The second session, chaired by Ivar Kolstad⁶ (CMI and Norwegian School of Economics (NHH), Bergen) addressed the consequences of weak harmonisation in international law. While markets are becoming increasingly more global, criminal justice systems are inherently national and they move in different pace and direction.⁷ The current patchwork of legislation and enforcement is not only exploited by criminal actors; it poses added costs on legitimate business and hinders development. As an unintended consequence of one country's law reform, Charles Kenny (Center for Global Development (CGD), Washington DC) described the risk of crime spillovers to areas with weaker regulation and enforcement, including developing countries. Using the illegal production of drugs as a case in point, he explained why such risks will depend on the costs of moving production and pointed specifically at a generally high price increase associated with entry into a new jurisdiction.⁸ Asymmetric enforcement was addressed by Kjetil Bjorvatn (Norwegian School of Economics (NHH), Bergen) too, who explained the consequences of corruption in a situation where market players headquartered in different jurisdictions have different technology and risk of being prosecuted if caught in the crime. The asymmetries force the players to operate with different external constraints in one and the same game, in the given case causing 'competition between bribes and productivity' and thwarted market mechanisms with implication for tax revenues and contract allocation.⁹ From a legal perspective, Linda Gröning¹⁰ underscored why harmonisation is a response to transnational challenges, and not an arena for claiming ideological and norm hege-

⁵ Rasmus Wandall authored *Decisions to Imprison. Court Decision-Making Inside and Outside of the Law*. (Book-series: *Advances in Criminology*). (Ashgate Publishing 2008).

⁶ Ivar Kolstad is Research director and economist at CMI with many publications on natural resources, poverty dynamics, corporate social responsibility and corruption.

⁷ There are tendencies of competition between jurisdictions as well, for example to increase sanctions, see Teichman. (2005). "The market for criminal justice: federalism, crime control and jurisdictional competition". 103 *Michigan L. Rev.* 1831. And Harel: "Economic analysis of criminal law: a survey". In Harel and Hylton: *Research Handbook on the Economics of Criminal Law* (Edw. Elgar Publishing 2012).

⁸ Charles Kenny, a former World Bank economist, studies law and economics in practice with a particular focus on developing countries. He is the author of *Getting Better: Why Global Development is Succeeding, and How We Can Improve the World Even More*, (Basic Books 2011).

⁹ For details, see Bjorvatn and Søreide "Corruption and competition for resources", *International Tax and Public Finance*. (released online 2013; forthcoming in print 2014).

¹⁰ Linda Gröning has published extensively on transnational criminal law with particular focus on EU member states, including the textbook *EU: konstitution, institution, jurisdiktion* (Liber 2010) – co-authored with Ola Zetterquist.

mony. Harmonisation is not only a matter of cross-country views, laws and enforcement, but also a balance between coordination and recognition of the uniqueness of national solutions. For this reason, the legal ambition behind coordination efforts rarely reaches further than a set of minimum standards and solutions, and therefore, conflicts due to legal asymmetries arise even when harmonisation efforts have been fairly successful.

The symposium's third category of presentations, chaired by Rasmus Wandall, centered on how to criminalise right. Peter Whelan (School of Law, University of Leeds) presented a systematic analysis of the question of criminalising cartel activity, a relevant approach for questions of criminalisation more generally.¹¹ The acts of criminalisation depend not only on their expected preventive impacts, but also on the applicability of criminal law given the moral character of these acts. Evelina Gavrilova (Dep. of Economics, University of Turin), who studied implications of legalising marijuana given a comprehensive dataset from US states, presented an alternative approach for determining the question of criminalisation. Regardless of moral assessments, her convincing empirical results on the consequences of legalisation suggested that criminalisation is not necessarily the optimal solution.¹² Siri Gloppen (CMI and Faculty of Comparative Politics, University of Bergen) argued for a combination of approaches in such important decisions, and underscored the value of understanding 'what forces drive criminalization' and 'whose incentives will be altered how'; questions which clearly depends on the country context: In some countries a new law is recognised and respected right away (the smoking ban in Norway); in others citizens demonstratively violate the law (the smoking ban in Russia).¹³ An important question raised by the audience is whether non-criminal sanctions are preferred if that implies a lower barrier for evidence and that cases are processed faster.¹⁴ The actual option for holding individuals responsible for acts conducted jointly by several players, relevant both in the case of drugs sales and cartel collaboration, was duly noted as another area in need of better solutions.

The symposium confirmed an often raised concern, that while similar research questions motivate work in different academic disciplines, research collaboration across disciplines is at best sporadic. A methodology considered the most applicable in one academic context, may well be rejected in another, and thus, each researcher hesitates to accept "extraterritorial results" and important insights fail to reach their potential normative impact. From an economic perspective a study of crime may well start with the indi-

¹¹ Peter Whelan is the author of *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges*, Oxford University Press, forthcoming.

¹² For details, see Evelina Gavrilova's paper "The Effect of Medical Marijuana Laws on Crime" (joint with Floris Zoutman), SSRN working papers. Forthcoming 2014.

¹³ Siri Gloppen, a political scientist (CMI and University of Bergen) focuses on the intersection between law and politics, established the CMI's *Courts in transition* research program, and is the author of numerous books and papers on legal institutions in developing countries.

¹⁴ Thanks in particular to Gert Johan Kjelby (Faculty of Law, Bergen).

vidual's rational (or not so rational) propensities to commit a crime given trade-offs of costs and benefits and given a set of legal alternatives. From a legal perspective, however, the study will often begin with a citizen's intrinsic rights, the question of criminalisation and the grounds for actually holding individuals responsible for their acts. Political science is especially useful for understanding how framework conditions determine or steer observed actions. The disciplines nevertheless tend to agree about the need for more cross-disciplinary collaboration, better understanding of the causes of crime, and more solid empirical results on the impacts of anti-crime initiatives. In this symposium it became clear why law, economics and political science all are needed for addressing crime as an obstacle to development, particularly crime involving influential players and their allies.

Tina Søreide

Post doc researcher and economist at the Faculty of Law, Bergen, studying crime, governance and development (tina.soreide@jur.uib.no)