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The war on antisocial behaviour rationeles underlying antisocial behaviour policies : comparing British and Dutch discourse analyses

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2 | Administrative measures in crime control[■]

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 nuisance¹ 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 behaviour² and organised crime and their possible paradoxical net-widening results.

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1 In this chapter, first published in 2008, the term nuisance and ASB are both used. Later on in the research project the term ASB was singled out (see chapter 1 for the explanation of this choice).

2 In this chapter the abbreviation ASB for Anti-social behaviour on the street is not applied. This chapter was first published in 2008, at that time I did not yet use the term ASB as such.

1 INTRODUCTION

A decade ago, the British New Labour government claimed a general failure of the judicial system (Garret, 2006). 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 (Garland, 2001).

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 (Clarke, 1997). 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 (van der Bunt & van der Schoot, 2003). 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,⁴ actors other than the traditional agents of criminal justice 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.

3 Scotland introduced the ASBO as well in 1999.

4 In short, the policy of making more people in society responsible for reducing 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 effects⁵ can already be identified (Steventon, 2007). 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' (Brants, 1998). 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.

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,⁶ this consideration will be shown to be highly relevant.

5 In short, the effect that has been demonstrated that both adult and juvenile diversion practices are being applied largely to clients who were previously not subject to justice system insertion.

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

With the introduction of the Anti Social Behaviour Order (ASBO⁷) 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 (Bright & Bakalis, 2003). 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.⁸

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 (Burney, 2005; Home Office, 2004).

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 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 (Bright & Bakalis, 2003; MacDonald, 2003; van Stokkum, 2007).

One can go to a civil court – via, for example, the Social Landlord⁹ – and ask for an ASBO (Burney, 2005; Home Office, 2004; MacDonald, 2006). This is an unmistakable example of a 'responsibilisation strategy' in which other agencies, such as Social Landlords, help in the fight against insecurity (Bright & Bakalis, 2003). Some large cities in the UK greeted the new order with enthusiasm. In the period 1999 to 2005, around 7000 ASBOs were issued (Home Office, 2004). 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 (Ashworth, 2004). One could even argue that the ASBO serves a noble cause: to make neighbourhoods more liveable

7 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.

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

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

and to fight feelings of insecurity in the public domain. However, many pitfalls can be identified.

2.2 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 (Garret, 2006; Pakes, 2005; MacDonald, 2006). 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 definitional specificity leaves room for the inclusion of an extensive range of behaviours (Burney, 2005). 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 (MacDonald, 2006; Steventon, 2007). 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 (Hudson, 2003). 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 (Steventon, 2007). 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 (Hodgkinson & Tilley, 2007). 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 (Ashworth, 2004). 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 (Steventon, 2007). It appears that more problematic

behaviour is being addressed by the law instead of by social policies.¹⁰ 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 (Hörnqvist, 2004; Burney, 2005; Cobb, 2007; Matthews & Easton, 2007; Donoghue, 2008). Even 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 (Pakes, 2004). 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.¹¹ 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.¹² 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 (Cobb, 2007). As a result, according to some critics the ASBO system is 'demonising' young people (von Hirsch & Simester, 2006). 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.¹³

3 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 percent do – he/she can go to prison (with a maximum sentence of 5 years), as 50 percent do.¹⁴ Hence, although the ASBO is a private

10 Steventon argues that it has been demonstrated that both adult and juvenile diversion practices are being applied largely to clients who were previously not subject to justice system insertion.

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

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

13 BBCnews, Asbos viewed as badge of honour <http://news.bbc.co.uk/2/hi/uk_news/6107028.stm>.

14 (Home Office, 2004) the case of the aggressive beggar who 'got' 3.5 years imprisonment.

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 (Ashworth, 2004). 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.¹⁵ 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.¹⁶ 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'.¹⁷

Notwithstanding the academic concerns, the British public appears not to mind. Eighty-five percent of the people support the existence of the ASBO (Mori, 2005). According to Blair, the ASBO is the best solution for the problem of anti-social behaviour (Blair, 2005). 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 to basic legal principles. (...) But the basic liberties of the law-abiding citizen should always come first.'¹⁸ 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.

15 McCann and others v. Crown Court at Manchester.

16 McCann and others v. Crown Court at Manchester.

17 Council of Europe, *'Preventive Legal Measures against Organized Crime- Organized Crime – Best Practice Survey n°9'* (Strasbourg: 2003) PC-S-CO (2003) 3 E.

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

3.1 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 (van Stokkum, 2007; van Swaaningen, 2008). 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 Amsterdam¹⁹ 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.²⁰ He referred to the new British laws 'as the best way to respond to problems in the public domain'.²¹

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 success are especially remarkable because up to the present the actual effects of the ASBO on reducing anti-social behaviour are not yet clear.²² 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 in short 'severe anti-social behaviour',²³ 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

19 Resp. Slovervaart and de Baarsjes.

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

21 As stated in the *Volkscrant* (June 13, 2007).

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

23 'aanwijzingen ernstige overlast.'

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.²⁴ If the order is breached, it becomes a criminal act (article 184 Sr) and the case can be brought before a criminal court.²⁵ 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.²⁶ 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.'²⁷

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 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.²⁸

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 (Brown, 2004).

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

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

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

26 Restraining order, duty to report, contact injunction.

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

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

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.

4 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 (Jacobs, Friel & Radick, 1999).

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 (Fijnaut & Jacobs, 1991). During the conference, policy-makers became convinced that this type of crime could also be tackled by an administrative approach (Fijnaut, 2002).

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 (Ministry of Justice, 1992-1993). 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 com-

missioned 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 (Struiksma, 1994).²⁹

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 the Netherlands (Fijnaut, 1998). 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 (PEO, 1996).

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.³⁰ 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,

29 This study was appropriately titled 'Gewapend Bestuursrecht', which can be translated as 'Armoured Administrative Law.'

30 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).

embraced the idea of taking administrative measures against 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.³¹

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 (PEO, 1996).

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 (Fijnaut, 1998). After an experimental phase, the Van Traa approach has been implemented as a regular policy of the city administration (Huisman, 2005).

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, 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

31 Council of Europe, *'Preventive Legal Measures against Organized Crime- Organized Crime – Best Practice Survey n°9'* (Strasbourg: 2003) PC-S-CO (2003) 3 E.

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 (Huisman, 2005).

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 responsibility and situational crime prevention strategies.

4.1 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 (van der Schoot, 2006). 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 branches, the team explicitly stated that other branches might have been selected, given other criteria (Fijnaut, 1998). 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 (van der Schoot, 2006). 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 percent 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 (de Voogd, Doornbos & Huntjes, 2007).

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.' (B&W, 1998).

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, 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. (Huisman, 2005).

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 (Kleemans, 2007). 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 (van de Bunt & Huisman, 2007). 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 (Huisman, 2005). 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.³²

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 marihuana 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 (Brants, 1998). 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 vulnerable to organised crime would render them crime-free after legalisation (Naylor, 2007). 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 (Huisman & Nelen, 2007). 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

32 *Het Parool* (October 6, 2007).

remaining legitimate entrepreneurs feeling stigmatised and it discourages bona fide businesses from investing (Huisman, 2007).

4.2 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 criminal law enforcement (Huisman, 2007). 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 (van der Schoot, 2006). 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 (Huisman, 2007). A recent evaluation of the application of the BIBOB Act still showed that a large percentage of administrative authorities were reluctant to apply it (de Voogd, 2007).

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 (Huisman, 2007).

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 stored. After the closure of the investigation, this file is handed over to administrative authorities for follow-up actions (Nauta & van Soomeren, 2006).

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 (Bitter & Veldhuis, 2006). 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 (de Voogd, 2007; van den Berg & Heijnen, 2007). 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 twenty BIBOB cases had been

brought to court. In all of these cases, the contested decision of the administrative authority was confirmed.³³

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 (Anechiarico & Jacobs, 1996). 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 (de Voogd, 2007). 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 (Huisman, 2007).

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 (de Voogd, 2007). Perhaps because of this the application of the administrative approach has not resulted in many cases being brought before the administrative courts.

5 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 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

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

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 2004, the Commissioner for Human Rights, A. Gil-Robes, expressed concern about ASBO practice³⁴ (Koffman, 2006). 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.³⁵ 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.

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

34 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.

35 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>.

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.