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Foreword. Towards evidence-informed law and policy making in the EU, some introductory notes from a criminologist.

1. Crime and criminal justice policies in motion

We live on a daily diet of criminal justice narratives and images in which criminalisation and penalisation are mostly depicted as tied to the nation state. In reality, crimes cross borders easily and increasingly take place at least partially in cyber space. In a 'world in motion' in which products, services and people cross borders all the time, crime is all but an exception.[1] For the EU and its Member States, these developments pose major challenges. In reaction, collaborations in the Area of Freedom, Security and Justice have rapidly increased, which has also had serious implications for the policies within Member States. Not only do criminal justice actors work together more intensively and have more opportunities to do so, the Member States' previously unquestioned competence to define criminal offences and the applicable criminal sanctions is also no longer a question outside the influence of EU law. We only have to think of the broad competences for the EU to enact legislation in several areas of crime, such as human trafficking, sexual exploitations and organised crime. These are deemed necessary when dealing with present realities of crime.

The conference THE FUTURE OF EU CRIMINAL JUSTICE POLICY AND PRACTICE held at Leiden Law School, on which the present volume is based, touched upon several crucial issues regarding criminal justice policy, among them the relation between policy and practice and the role evidence can and should play therein. As Jannemieke Ouwerkerk[2] notes in her chapter, the EU aims to adopt legislation only when it has added value and does not go further than required. Social scientific evidence, including findings based on criminological research, is increasingly cited as an important aspect to take into account when designing laws and policies. This holds at the national level, but for reasons of legitimacy even more so at the EU level. As a result, the search for empirical evidence has moved up the agenda of EU crime policy and criminal law, but Christopher Harding and Joanna Beata Banach-Gutierrez note in their chapter[3] that finding evidence that something might work is: 'a research activity beset with challenges and difficulty'. My introductory remarks to this innovative volume tie in with these observations and critically reflect on this ideal based on my own experiences as a criminologist and propose more modest and potentially more fruitful expectations from my own discipline of criminology.

2. The complexities of evidence

The ideal of evidence-based laws and criminal justice policies is rooted in the medical metaphor. As Thibodeau, McClelland and Boroditsky observe: 'Our language for discussing

[1] KF Aas, 'Analyzing a World in Motion' (2007) 11 Theoretical Criminology 283.
[2] Present volume, chapter 3.
[3] Present volume, chapter 4.

war, crime, politics, healthcare, and the economy is suffused with metaphor'.[4] In its most straightforward formulation, the medical metaphor assumes that if we have a well-based diagnosis, we are able to prescribe the right cure for health problems. Following this model implicitly and explicitly, the 'What Works' movement in criminology has promoted high expectations of finding 'objective' and 'validated' evidence for rational policy-making in the criminal justice sphere[5] which we can also apply to the domain of law-making. Many critical remarks have been made with respect to this ideal which I can only briefly touch upon here. First of all, this use of the medical metaphor is an oversimplification of the medical domain. Some cure may work for some people but not for others, to name only one aspect. And in certain cases, a diagnosis may only follow from a treatment, rather than the other way around. But most fundamentally, this approach fails to engage with the highly political nature of law-making and the complex, multilayered process of decision-making in the criminal justice sphere. It also underplays the huge potential for cherry-picking, ignoring, interpreting and misusing 'evidence'.[6]

An important issue is that the evidence-based approach assumes that knowledge and evidence are or can be fully decontextualised. As criminologist Nelen and others have convincingly argued, policy decisions should not only assess whether measures are effective but also why this is the case and under which conditions this holds[7]. Moreover, measuring success or effectiveness is very tricky.[8] A wide array of factors, often even outside the researchers' view, can influence outcomes of a certain law or policy measure. In particular, measuring outcomes related to a highly complex societal aim, such as a safer society or a lower level of crime, is neigh impossible. As early as in 1973, Rittel and Webber coined the term 'wicked problems' for many social policy and public policy issues that can neither be rationally defined nor solved.[9] Last but not least, there is the crucial factor of implementation. As Lipsky and many others have shown consistently, policy is translated and altered at several levels of policy implementation, which can have major influence on outcomes and cause different outcomes in different settings.[10]

Drawing on my own field - the criminalisation of irregular residence - we can for instance see that criminal law and criminal policy offer little in terms of an effective answer to a highly complex social issue. Even if there are laws and policies in place, which is the case in many countries, including the Netherlands, practices of implementation are much more stable than formal policies and even if criminal law is used in practice, it is used very instrumentally at the street level. First of all, this causes difficulties when assessing the effectiveness. How do

[4] P Thibodeau, J McClelland and L Boroditsky, 'When a bad metaphor may not be a victimless crime: The role of metaphor in social policy' (2009) Conference Paper, 809 <www.researchgate.net/publication/281033612>.
[5] R Pawson, *Evidence-based Policy: A realist perspective* (Sage 2006).
[6] J Parkhurst, *The Politics of Evidence. From evidence-based policy to the good governance of evidence* (Routledge 2006).
[7] H Nelen, *Evidence maze. Het doolhof van het evaluatieonderzoek* (Oratie Maastricht, Universitaire Pers Maastricht 2008).
[8] R Pawson and N Tilley, *Realistic Evaluation* (Sage 1997).
[9] HWJ Rittel and MM Webber, 'Dilemmas in a general theory of planning' (1973) 4 Policy Sciences 155.
[10] M Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services* (Russel Sage Foundation 1980).

we measure effects of laws which are implemented very selectively? Research has constantly revealed unintended consequences of laws and policy measures in this area. For instance, in a quantitative analysis we made over the years 1997-2003, we showed that all the policy measures together in the Netherlands had led to rising crime figures of illegally residing migrants who did not leave the country.[11] This was the complete opposite of what was intended with the legislative and policy changes. Qualitative research revealed that as a result of their marginalisation, all kinds of opportunities for these migrants had been blocked, which in some cases stimulated unconventional modes of making a living in the informal and criminal economy. The main conclusion of this analysis was that the increase in internal border control by means of excluding illegally residing migrants from the formal labour market and public provisions had stimulated criminal involvement, predominantly in the form of subsistence crime and drug-related crime. We observed an unintended cycle: criminal involvement or the fear thereof stimulated stricter policies, which in turn led to rising crime figures and subsequently to more repression at the level of formal regulations. Findings like these have never resulted in fundamental changes in policy or law-making. They may even have contributed to stricter laws and regulations in the same direction. In fact, in the policy domain of migration control no attempts have been made to work evidence-based, nor to take into account the realities of illegal migration.[12] Attempts to monitor these unintended societal effects were completely lacking. In practice, there seem to be very little to no attempts to even be rational, as the symbolic and political message of policies is more important than the practical implications. This may be seen as a rather extreme example, as the issue of illegal migration is politically sensitive. But the observed processes and mechanisms are in no way unique and apply widely to the realm of criminal justice.

With these challenges and caveats in mind we should not overstate the case of (criminological) evidence when it comes to informing the law-making process and criminal justice policies. Sociologist and socio-legal scholar Schuyt has summarised the debate by concluding that there is very little evidence from criminology, or other social sciences, that can be translated into law-making or policy in a linear fashion.[13] When looking from an EU perspective, these challenges and criticisms hold even more. An additional challenge here is that criminologists often depart from (national) legal categories of criminal behaviour which differ across jurisdictions and may be perceived differently in different settings.

The chapters in this volume and my introductory reflections are not meant to suggest that evidence is useless and that we should give up on using it. There is enough reason to work together as lawyers and social scientists and help develop laws and policies that are not divorced from our understanding of human behaviour, as Persak suggests in her chapter.[14] The main message that I take from the present highly innovative volume, as well as from my

[11] A Leerkes, G Engbersen and J van der Leun, 'Crime among irregular immigrants and the influence of internal border control' (2012) 58 Crime, Law and Social Change 15.
[12] M Boone and M Kox, 'What works for irregular migrants in the Netherlands?' (2012) 4 European Journal of Probation 54; RHJM Staring and R van Swaaningen, 'Irreguliere migratie en illegaal verblijf: beleid, conflicten en contradicties' (2013) 3 Tijdschrift over Cultuur en Criminaliteit 3.
[13] K Schuyt, 'Kameleontisch beleid, stekelige wetenschap' in K Schuyt, JW Duyvendak and T Roes, *Werken op de grens van wetenschap en beleid* (SCP 2006).
[14] Present volume, chapter 1.

own experiences in the criminal justice field, is that there is need for a middle road. A combination of principled decision-making and reflexive empirical work seems to be much more promising than assuming that the law-making process should proceed only on the basis of scientifically validated research findings, which often implicitly or explicitly boils down to positivist research divorced from its context. What would this middle road require?

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3. Towards modest expectations and fruitful collaborations

In order to move forward we have to acknowledge not only the moral and socially contested dimension of law-making but also the political, contextualised, non-technical and partial nature of much of our social scientific 'evidence' in the field of crime and transnational crime. We are not talking about simply 'applying evidence' but rather about a complex process of selecting which evidence we take seriously, weighing pros and cons, reconciling different aims and means and so much more. Even if this 'governance of evidence' can only be a complex and long-term exercise, how can we take small steps in the right direction?

Firstly, it seems realistic to assume that we need some kind of institutional structures in order to move on from where we are now.[15] As it is now, there are very few structured ways in which law-makers and researchers team up in order to come up with laws that do what they are supposed to do. Especially in times in which researchers are pushed to publish rather than to engage with practice, and people outside the world of academia are overwhelmed with the endless stream of specialised publications which are not always easily accessible and often contradictory, it would be helpful to think about designing flexible institutional arrangements in the law-making process. These should ideally include knowledge brokering roles, transparency, debates on alternatives and monitoring of consequences without depending solely on individual law-makers, policy-makers and researchers reaching out to each other to work towards evidence-informed law-making in a more interactive way. We can only hope that the increasing emphasis on societal relevance and impact that can now be witnessed in academia will help strengthening these kinds of ties in the near future.

Secondly, academics themselves can also take steps to support this interactive process. Knowledge can become more accessible and much more helpful when scholars from different interdisciplinary backgrounds – including law and social sciences – join forces in their writings and reflect on these issues in collaboration. This helps build connections between the law-making process and potentially relevant findings based on non-legal studies. Building these collaborations that are able to cross disciplinary boundaries and take into account international commonalities and differences is likely to be more fruitful than attempting to pile up decontextualised 'evidence' which may not be so helpful in the long run. It is therefore that I am very pleased with the ways in which the present volume documents how the products of these collaborations can immensely improve our understanding of matters of EU criminal law, policy-making and the relations with society.

[15] J. Parkhurst 2006 (n 6).

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