

Corruptio Legis: *Law as a Cause of Systemic Corruption*

Comparative Perspectives and Remedies also for the Post-Brexit Commonwealth

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Abstract— Law, as a set of sources including legislation, administrative regulations, custom, and judicial decisions, is one of the causes of systemic corruption, intended as the generalised practice of various forms of abuse of entrusted power for private gain as part of the culture and the institutional system of a country. This paper assesses the validity of the outcomes of the most significant research conducted in Europe on the unintended criminogenic effects of legislation and the viability of the mechanism of legislative crime proofing developed for EU law in the particular legal context of Commonwealth countries. The first objective is to offer some original theoretical perspectives and practical solutions, and, particularly, to develop a comprehensive, principled strategy capable of suiting the most disparate legal systems. A secondary objective of this paper is to stimulate further discussion and research on the crime and corruption risks of the law, as a necessary step towards the elimination of systemic corruption.

Systemic corruption; law; legislation; regulation; crime proofing; risk assessment; Commonwealth

I. INTRODUCTION

The global exposure of corrupt practices in the most disparate regions of world – and, also, between different regions of the world – is increasingly raising concerns for the spreading of that particularly virulent form of corruption “entrenched” [1] in the social and political fabric of a country, which is generally, and somehow vaguely defined as systemic [2] or endemic [3]. While developing economies (according to the United Nations’ classification) [4] provide the most macroscopic instances of such forms of corruption, recent events – such as the Panama Papers or the FIFA scandals – prove that developed countries are not immune from the risk of systemic corruption. Initiatives undertaken at a global level, however, show awareness of such risk and willingness to eradicate it. The Anti-Corruption Summit hosted in London last year is a good example of this [1].

Despite the promise of “innovative solutions” [1], however, these initiatives often result in rhetorical proclamations of inevitably undefined values (e.g. integrity) and unnecessary reiterations of the need for implementing well-known measures. Moreover, the perspective proves to be particularly

short-sighted inasmuch as the focus falls eminently, if not exclusively, on anti-corruption law – that is, a range of legal instruments directly aimed at preventing, discouraging or repressing corruption, such as the drafting of ethical codes, the establishment of anti-corruption authorities, the criminalisation of corrupt behaviours, etc. This approach may be the most intuitive, but it fails to see (and inadvertently divert the focus from) one of the subtlest causes of systemic corruption: the law itself, as the major conveyor of policies and resources. Poor laws and poor law-making can indeed motivate or facilitate corrupt practices. The most paradigmatic case is procurement law, whereby too much rigidity or bureaucracy might encourage circumvention of legal requirements. But the examples can be many. An effective strategy to counter corruption, particularly when it is deeply rooted in politics and society, cannot afford to disregard the (mostly) unintended risks of corruption that the legal regulation of several areas of social life can determine.

The idea of the unintended criminogenic effects of law is not new, but certainly, it is under-researched. Only in the last fifteen years, scholars have started exploring the issue and the possible techniques to “crime proof” legislation. Apart from few exceptions [5], these studies, however, are mostly limited to European countries [6] and to EU law [7] and, after quite a considerable initial drive, which also led to experiment some crime proofing mechanism within EU legislative processes, they do not seem to have been developed or expanded any further. It is especially surprising that the promising suggestions and outcomes of such research have not been applied more extensively to the specific area of corruption crimes and to the context of regions where corruption is more widespread. In the global scenario outlined above, the needs for reliable research in this field are more pressing than ever.

In this regard, the Commonwealth requires particular attention and, at the same time, lends itself to be a stimulating workbench, for several reasons. First of all, various member States are affected by deep-rooted corruption. On the other hand, though, the Commonwealth includes amongst its members some of the countries, such as New Zealand, Singapore, Canada and the United Kingdom which are considered exemplary in preventing corruption. Despite this

contrast, clearly originating from very different socio-economic conditions, the majority of Commonwealth legal systems are founded on the English law. These features should allow to pursue various research objectives – namely, achieving a better understanding of the causes and dynamics of systemic corruption in countries from different world regions, assessing whether the law-making mechanisms and processes devised by less corrupt countries can suggest solutions also in other jurisdictions, and prevent the latter countries to be affected by systemic or widespread corruption in the future. Secondly, the fact that most Commonwealth jurisdictions are common law systems offers the opportunity to reconsider the outcomes of existing research on the criminogenic effects of legislation from the characteristic point of view of a legal tradition based on a notion of law different than that of continental European countries. This could also pave the way to exporting this research and any further findings to non-Commonwealth common law systems.

The recent developments of Brexit provide a further reason to analyze the potential criminogenic effects of the law in Commonwealth countries, starting from the UK. As confirmed by Prime Minister Theresa May in her letter of 29th March 2017 to EU President Donald Tusk triggering article 50(2) of the Treaty on European Union, an impressive amount of law-making is expected now in the UK, to convert the body of existing EU law into UK law, also with a view to ensuring continuity and certainty, in particular for businesses [8]. As for the rest of Commonwealth countries, the UK leaving the EU is expected to present new challenges and opportunities for Commonwealth trade, which will also call for new regulation [9]. In such a phase of transition, a thorough assessment of the impact of such legislation and regulation on crime is certainly needed and, however, beneficial.

This paper aims at verifying the thesis that law can be one of the causes of systemic corruption in the particular legal context of Commonwealth. I will consider a broad notion of law, as a complex set of sources including legislation, regulations, custom, and judicial decisions. By systemic corruption I mean the generalised practice of various forms of abuse of entrusted power for private gain [2] as part of the culture and the institutional system of a country. The paper will further try to suggest possible directions towards the implementation of solutions to this problem. This task will entail assessing the effectiveness of the remedies experimented in Europe – particularly, the mechanisms of legislative crime proofing – and their viability in Commonwealth countries. Hopefully, this analysis will stimulate further discussion and research on the issue of the unintended criminogenic effects of the law, as a necessary step towards the elimination of systemic corruption.

II. THE PROBLEM: THE UNINTENDED CRIMINOGENIC EFFECTS OF THE LAW

A. *Law as a Cause of Systemic Corruption: a General Theoretical Framework*

That some laws might inadvertently be criminogenic seems to be quite an established acquisition, at least in legal and criminological literature. An easy example is that of

prohibitions on drugs and alcohol, which can lead to the development of new criminal enterprises to meet the demand for these goods [5] [10]. The first comprehensive and systematic study of the issue was conducted between 1999 and 2001 by several European scholars within a comparative research project funded by the EU and the Max Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau (Germany) aimed at answering the question of how and to what extent legislation might be shaped in order to maximise preventive effects [6]. The project culminated in a report collecting convincing evidence on the unintended criminogenic effects of legislation in twelve European countries (Belgium, Denmark, England and Wales, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and Sweden). The study also illustrated the various mechanisms existing within the legislative processes of each country to assess legislation and, to a certain extent, regulations, also with a view to establishing whether and how they could accommodate some form of crime risk assessment of legislation. This research seems to show that the unintended criminogenic effects of legislation mainly concern financial crimes, also of organised nature, rather than violent crimes [11].

Following these outcomes, in 2003 the European Commission established a Steering Committee on Crime Proofing to advise on the development of a crime risk assessment mechanism for EU legislation – which I will illustrate in the next paragraph. The initiative prompted more research on the indirect effects of EU legislation (and not criminal legislation and its direct effects) particularly on the following crime types: fraud, corruption, various kinds of unlawful trafficking, environmental crime, counterfeiting and product piracy. Case studies review conducted within such research suggested that any regulation carries the risk of unintended crime consequences, which: (1) introduces product disposal requirements or any other new or more burdensome fee or obligation; (2) introduces a concession on a tax, or a concession on any other fee or obligation; (3) introduces a grant, subsidy, or compensation scheme; (4) introduces or increases the tax on legal goods, or in any other way increases the costs of legal goods; (5) prohibits or restricts a demanded product or service, or in any other way decreases the availability of demanded goods and services; (6) introduces or removes a law enforcement capacity, increases or decreases funding for enforcement activity or in any other way impacts the intensity of law enforcement activity; and (7) provides officials with regulatory power [5]. These are considered “general risk indicators,” useful for detecting policies and regulation that might carry unintended crime risks.

Drawing upon the results of these studies, we can outline three main different ways in which law can unintentionally be criminogenic.

a) Opportunity-increase: the law can somehow inadvertently create or expand the opportunities for the commission of particular crimes.

b) Facilitation: the law can somehow facilitate the commission of a crime or impunity, which happens when law

inadvertently reduces the risks or the efforts for committing a crime or increases the chances for impunity.

c) *Inducement*: the law can somehow induce people to commit certain crimes, which happens when the law negates or makes it difficult to access to certain resources and, therefore, to satisfy human needs and ambitions, thus encouraging the circumvention of the law to pursue them.

Incidentally, these three criminogenic patterns mirror the criminogenic factors addressed by situational crime prevention (opportunities, lesser efforts and risks, and rewards) [12] – and, indeed, legislative crime proofing is considered a measure of situational prevention [10], as any other form of rule setting [13].

Before moving to the specific implications of this framework on systemic corruption, it is worth addressing the fact that the existing studies on the criminogenic effects of law focus eminently on legislation and regulation. In principle, there is no reason to exclude judicial decisions from the scope of the analysis, given that legislation and regulation are subject to the interpretation of the courts, which, even when non-binding for future cases, as it happens in non-common law jurisdictions, contribute to shaping the law of a country. And, indeed, well-established court interpretations might have the same criminogenic effects as any other form of regulation.

With specific regard to corruption, law, including judicial decisions, might have a double causal impact. On the one hand, the law might contribute to the immediate commission of particular corruption crimes, as much as of any other crime, according to the three criminogenic patterns outlined above. On the other hand, low-quality law-making in general – such as obscure legislative provisions, burdensome overregulation, unfair or too bureaucratic procedures – indirectly contributes to the systemisation of corruption at large. Indeed, each ill-conceived judicial decision or piece of regulation or legislation is bound to be perceived as unreasonable and, therefore, unjust by those called to implement it, thus fostering feelings of frustration and mistrust towards law and, more generally, the values and the public bodies it represents, which may eventually erode the willingness to spontaneously abide to its prescriptions. This confirms the importance of including court decisions within the scope of the notion of law relevant to our investigation, as delayed, ineffective or miscarried judicial decisions can contribute to undermining systemic trust and legality in the same way as any other source of law. When it comes to corruption, therefore, the unintended risks carried by the law are not only the direct risk of corrupt practices by certain individuals but also the indirect risk of the radicalisation of corruption within the social and political system. According to the framework outlined above, this indirect risk of systemic corruption would fall into the broad category of inducement.

B. The Context of Commonwealth and its Special Research Needs

Commonwealth is not exempt from the problem of systemic corruption. Out of the fifty-two member countries, twenty-two scored below 50 on the scale of 0 (highly corrupt) to 100 (very clean) in Transparency International's Corruption Perceptions Index 2016, with some of them – such as Tanzania,

Malawi, Sierra Leon, Nigeria, Mozambique, Kenya, Cameroon, Uganda, Pakistan, Bangladesh, Trinidad and Tobago, Guyana, Papua New Guinea – occupying quite worrisome positions in the world ranking of the perceived levels of corruption [14]. In 2015, six of these countries had the highest bribery rates in Sub-Saharan Africa, after Liberia: 48% of public service users paid a bribe in Cameroon, 43% in Nigeria, 41% in Sierra Leone, 38% in Uganda, 37% in Kenya [3]. In the Asian Pacific region, India and Pakistan have the highest bribery rates (69% and 40%, respectively) [15]. In general, the people's answers to the survey by Transparency International for the Global Corruption Barometer regional series seem to suggest that corruption is perceived as endemic in several Commonwealth countries.

This applicability to these countries of the theoretical framework and arguments sketched in the previous paragraph on the corruption risks entailed by law, already intuitively suggested by inductive reasoning, is also supported by clear evidence of the links between poor or criminogenic law and systemic or widespread corruption drawn upon several reports by Transparency International. In Zambia, for instance, high risks of corruption are created by customary land law, which lacks a system of formal registration of an individual's rights to land and, together with the Land Act, gives too much power to traditional authorities in relation to the allocation, alienation and the general administration of land, with the consequence that the degree of tenure security often relies on the word of a single person [16]. Another example is Bangladeshi tax law. The "enormous range" of exemptions, incentives, and special regimes gives tax officials and political elites significant scope to grant relatively discretionary benefits, thus undermining equity, revenue collection, and administration [17], and increasing the risk of corruption [18]. Both examples correspond to some of the general risk indicators cited above, as Zambia's land law provides officials with regulatory power (indicator n. 7), while Bangladeshi tax law introduces concessions on taxes (indicator n. 2).

Together, the alarming data on systemic corruption and the evidence of causal links between such corruption and the law in various Commonwealth countries shows that the need for thorough research aimed at understanding, raising awareness about and developing effective interventions to reduce the unintended criminogenic effects of law in these countries is more pressing than in European or other Western areas. Indeed, particularly to the benefit of developing countries, such interventions could be framed into a more comprehensive strategy to support such jurisdictions in the development of increasingly clear, rational, efficient, and, ultimately, just law. Such research and interventions would also have the advantage of providing useful instruments to address similar corruption risks in regions and countries that, while not being members of Commonwealth, still share cultural, legal, socio-economic or political features with certain Commonwealth states. While very diverse, African countries, for instance, share common patterns of poverty and underdevelopment and similar behaviors and politics [19].

Moreover, law and law-making processes seem to be far less uniform in Commonwealth than in Europe. While the common roots in the English legal system might provide with

common analytical and practical frameworks, the colorful diversity amongst the various Commonwealth jurisdictions requires a preliminary comparative understanding of the ways in which each local system works. As the example of Zambia's customary land makes clear, this entails expanding the focus to a broader notion of law than mere legislation and regulation, so as to include all the possible sources of law.

III. A POSSIBLE SOLUTION: CRIME PROOFING OF LAW

In the attempt of finding some remedy, the first comparative studies on the criminogenic effects of law focused particularly on the mechanisms and processes of general impact assessment of legislation existing at a national level [6]. Apparently, in all European Union member states, the routine response of political systems to respond social, crime or other problems is the introduction of new legislation [11] [20]. Scholars found that European systems of legislation are also quite similar. They generally refer to a system of problem analysis, drafting, controls and discussion, whereby draft legislation is developed by committees and ministerial bodies and then sent to institutions and professional organizations concerned with its implementation, in order for them to provide comments, before rallying for political and practical support [11]. Within these processes, there are various examples of ad hoc expert committees or investigatory or inquiry commissions established for specific law projects. According to Albrecht and Kilchling, this structure of organizing legislation presents some constructed paths which may be used to analyze crime risks and to enter such analyses into the legislative process [11].

A. *The Crime Risk Assessment Mechanism (CRAM) for EU Law*

A more structured effort to find a practical solution to the problem of legislative crime risks was made, although with exclusive regard to EU legislation, by the already mentioned EU Steering Committee on Crime Proofing. This solution would consist of a formal "legislative crime proofing" process, according to a sophisticated methodology – so called Crime Risk Assessment Mechanism (CRAM) – gradually developed [21] [22] [23] [24] and tested in different areas generally related to financial crimes [7] [25]. The process consists of two phases: (a) assessment of the risk of unintended criminal implication/consequences that may be produced by legislation; (b) action to "close the loopholes" in the legislation [10]. This way, a clear distinction between the operations of risk assessment (a) and crime proofing strictly considered (b) is introduced.

The process is intended to apply only to legislation and policies – to be identified through an Initial Screening (IS) [23] [24] – falling in one of the categories at risk, according to the seven general risk indicators outlined by Morgan and Clarke [5]. After the initial screening, a Preliminary Crime Risk Assessment (PCRA) should be conducted by the EU Commission's Directorate General competent for that particular regulation [24]. In this step, the overall coherence of regulation and the vulnerability of the regulated market sector to crime should be measured through a series of questions, such as: is the regulation likely to produce regulative overlaps? Is the regulation easily applicable within the EU? Is the market

already infiltrated by economic and organized crime? Is the market sector profitable for criminals? And so on and so forth [10] [23]. The next step would be an Extended Crime Risk Assessment (ECRA). This is a detailed analysis of the components and the magnitude of the crime risk individuated through the previous assessment, to be carried out by experts in different relevant fields (law, criminology, economics etc.) through a very technical questionnaire on the nature of the crime object of the risk, its authors, its victims and its costs and harms [10] [23]. Complex formulas based on different variables, such as textual deficiencies of the proposed regulation, profitability and risk of detection, were also elaborated to assist this step of the process [24]. The final step would be the formulation of conclusions and recommendations on the measures and amendments to be adopted to reduce the crime risk. These expert recommendations are clearly (and declaredly) non-binding on policy- and lawmakers [24]. According to its proponents, such crime proofing mechanism, although designed to apply to EU law, could be easily applied to other types of legislation, at international, national, local level [24].

While being the result of commendable efforts, the CRAM has some shortcomings. In the first place, due to the scope of the research that prompted it, the mechanism is limited to legislation, while there is an increasing need to address the criminogenic effects of every possible source of law, particularly when the aim is to prevent systemic corruption. This limit is also quite a considerable constraint to the exportability of the mechanism in legal traditions outside continental Europe, including those of many Commonwealth jurisdictions, which, as we saw, are often based on different sources of law than mere legislation, such as customary law and case law. Secondly, the CRAM is declaredly limited to "ex ante crime proofing" [23], meaning that it does not cover the crime risk assessment of legislation after it has entered into force, which is nevertheless required in order to remove criminogenic effects and, thus, strengthen social trust in law and public bodies. Thirdly, the mechanism reduces the crime risk assessment of policies to an expert evaluation confined within a specific stage of the legislative process preceding the drafting of proposed legislation [23]. This has the effect of excluding from the discussion several actors involved in other stages of the legislative process, such as the general public and relevant stakeholders, who might be able to and interested in flagging crime risks for instance through consultations. This exclusion is exacerbated by the very technical and broad nature of the questions to be answered particularly in the PCRA and the ECRA, such as "How will the socio-demographic characteristics of victims (natural persons) vary? Please assess and explain the expected effects of the considered policy option/main action on the main socio-demographic (e.g. educational level, sex, age, ethical origins) characteristics of the victims" or "How will social costs vary? Please assess and explain the expected effects of the considered policy option/main action on any non-private cost, such as costs imposed on a whole sector/area or on the society" [23]. Answering such questions presuppose considerable technical knowledge and (possibly time-consuming) research are not necessarily univocal, as they might vary according to the personal opinions of the experts. Moreover, even if the results

of the expert assessment of crime risks is meant to circulate amongst the subjects involved in the legislative procedure, it might be too complex for non-experts to discuss certain technical issues. Not to mention the risk that experts end up in engaging in academic dissertations of little practical use for the enactment of the proposed legislation, or, on the contrary, that the mechanism ends up in mere box-ticking, thus making the risk assessment process a sterile exercise.

The crime risk assessment of law (not just legislation) and its crime proofing cannot be entrusted to an isolated and rigid segment of the legislative process. Instead, it should be the result of an overarching strategy encompassing every moment of the life of any source of law, possibly taking advantages of any existing opportunity for assessment and discussion, and involving the highest possible number of stakeholders. The approach I suggest to adopt is, therefore, from the general to particular. It seems more reasonable to start from acknowledging a basic and largely shared set of principles that should govern crime proofing of law and, more generally, good law-making, rather than from detailed risk assessment mechanisms or procedures. Such principles should enable the subsequent individuation – based also on sound comparative research of the relevant features of different legal systems – of the specific measures to be taken to implement them, allowing for the margins of flexibility required to adjust such measures to the peculiarity of each jurisdiction.

IV. A PRINCIPLED STRATEGY: SUGGESTIONS FROM AND FOR THE UK AND THE COMMONWEALTH

In its diversity and with four member states amongst the ten least corrupted countries in the world [14], the Commonwealth of Nations offers several useful instruments to start building such a principled comprehensive strategy. Given the explorative nature and the economy of this paper, I will limit myself to consider some aspects of the English legal system, the mother of all common law systems [26], and few other countries, including those that are very effective in combating corruption, such as New Zealand – the least corrupted country in the world together with Denmark –, Australia, and Canada, and countries, such as India, Sri Lanka, South Africa, Uganda and Tanzania, where corruption is a considerable problem. Future research should enlarge the scope of comparative analysis so as to include all Commonwealth jurisdictions.

The fundamental principle of our proposed strategy should not be that law should be free from any (intended or) unintended risk of crime, as this might not be enough to prevent systemic corruption which, as we said before, might well be fuelled by poor law-making. Instead, the principle upon which we should found our strategy is that law should always comply with the highest formal and substantive quality standards – which includes respecting, amongst others, the principles of fairness, equality, reasonableness, competence, necessity, proportion, effectiveness, certainty, clarity, precision, coherence, non-contradiction, accessibility. This principle and all its corollaries are direct implications of the rule of law. If the law has to rule, then it has to be immune from faults, risks, and side-effects of sorts, which might frustrate its purposes.

Interestingly enough, there is a normative foundation to this idea: the Charter of the Commonwealth, adopted by Commonwealth Heads of Government in 2012. Article VII, in particular, affirms an instrumental conception of the rule of law “as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government”, whereby “an independent, impartial, honest and competent judiciary” and “an independent, effective and competent legal system” are integral to upholding the rule of law, “engendering public confidence and dispensing justice”. Article VIII further reiterates Commonwealth countries’ commitment to “promote good governance through the rule of law, to ensure transparency and accountability and to root out, both at national and international levels, systemic and systematic corruption.” Not only does the Charter explicitly entrust what I called “good laws” (i.e. the independent, effective and competent legal system, including an independent, impartial, honest and competent judiciary) with the duty of supplying public trust and justice, but, by considering the (rule of) law as a means of good governance and by including transparency, accountability and the prevention of systemic corruption in the notion of good governance – as proved by the title of article VIII –, it also seems to implicitly recognise the links between poor law-making, including judicial decision-making, and systemic corruption.

We can, therefore, establish the following fundamental principles of our strategy:

(I) Law shall engender public confidence, dispense justice, and promote good governance, which includes ensuring transparency and accountability and preventing systemic corruption.

(II) In order to achieve these objectives, the whole legal system, including the judiciary, must comply with the highest possible standards of quality, both formal and substantive, which include compliance with the principles of justice, fairness, equality, reasonableness, competence, necessity, proportion, effectiveness, certainty, clarity, precision, coherence, non-contradiction, accessibility.

(III) Law must be free from the risk of engendering crime and systemic corruption. It is a duty of the bodies and persons responsible for drafting and issuing regulations, legislation, judicial decisions and any other source of law to take any measure needed to prevent any crime or corruption risk deriving from such sources.

These are quite obvious, although not trivial, principles in every society governed by the rule of law. What might be more challenging, of course, is to determine how they should be implemented. Drawing upon the criticisms of the CRAM mechanism outlined above, we notice that one of the most problematic elements was the prominent role of experts. I suggest replacing such a top-down approach, with the experts advising public officials in charge with drafting and discussing legislation, with a bottom-up approach, whereby the latter receive specific training on the crime risk assessment and crime proofing of the law. This would entail several benefits. First, this would allow every public actor involved in law-making processes to be aware of the phenomenon of the unintended criminogenic effects of law and to have at least a sufficient

knowledge of the instruments to prevent them. Secondly, such training could be easily provided both to members of ministries and parliamentary assemblies and to judges, to sensitize them to the problem and prepare them to avoid issuing criminogenic decisions. Thirdly, such training could be used to provide training on good governance and law-making, including notions of ethical decision-making, with a view to strengthen the integrity of public officials involved in law-making. This is particularly important in jurisdictions already affected by systemic corruption. Finally, it would save time and money, since education on these matters as part of their training would enable public officials to cope with them effectively throughout their entire career, thus reducing the need for resorting to ad hoc panels of experts, at least to sort certain basic criminological aspects out. Of course, resorting to experts is always possible and should be encouraged at least whenever the subject matter requires specific knowledge of research. In fact, there might be even scope for a stage specifically dedicated to expert consideration and opinion in law-making processes, but this should not replace training of the relevant operators.

Our fourth principle would, therefore, be the following:

(IV) All public officers involved in the processes of drafting and issuing regulation, legislation, judicial decisions and any other source of law, including parliamentarians, judges and members of relevant ministries, must receive specific training on good administration, good law-making and good decision-making and on the unintended criminogenic effects of the law and the remedies to prevent them.

The question, at this point, is what these remedies should consist of. Introducing, out of thin air, innovative, sophisticated crime proofing mechanisms might not be feasible in many legal systems, especially those which are still far from satisfying the standards required by the rule of law. The implementation of the above principles should rather take place gradually, taking advantage of any possible opportunity already offered by the particular context of each system, to facilitate the progressive formation of a common culture of good law-making, without which not even a perfect mechanism would have the slightest chance of success. Indeed, concrete plans for promoting better law and regulation are already in place around the world and in different Commonwealth jurisdictions. In response to the failures of deregulation, many countries have experimented regulatory reform agendas, often fostered by international organisations such as OECD, to promote proper institutional design, and efficiency, accountability, consistency, and transparency of regulation through the most disparate means, such as simplification, reduction of administrative burdens, consultation, access to regulatory policy formulation, notice and comment procedures, and regulatory impact analysis or assessment (RIA or IA, in Europe) [27]. An example is provided by the “Better Regulation” government strategy in the UK, which led to the establishment of the Better Regulation Executive, a permanent body working with government departments to monitor the measurement of regulatory burdens and coordinate their reduction, and to ensure that the regulation remains smarter, better targeted and less costly to business. Another example is the “Good Law” initiative launched by the UK Office of the Parliamentary Counsel, which is based on a

vision of the good law founded on some of the principles we listed above, such as necessity, clarity, coherence, effectiveness and accessibility. The very same CRAM mechanism was developed in the spirit of these agendas.

While the whole variety of instruments devised in such plans are essential to the culture and implementation of good law, in the sense outlined above, and therefore to the reduction of the risk of systemic corruption, three of them, particularly, might result providential with regard to direct crime/corruption risk assessment and crime proofing of legislation: (a) regulatory impact analysis policies and procedures; (b) consultations; (c) post-legislative scrutiny.

a) Regulatory Impact Analysis (RIA): RIA is a systematic approach requiring policy makers in departments and agencies are required to undertake an impact assessment of the costs and benefits of proposed and existing regulations and non-regulatory alternatives. RIA is a vital element of an evidence-based approach to policy-making, and it might encompass a range of methods, according to the different legal systems. Although RIA is conceived as a continuous analysis to be performed throughout the entire law-making process, the distinction between initial, partial and final RIA is very common. The initial RIA is to be performed as soon the proposal is being formulated, the partial RIA should form part of the consultation process, and the final RIA is submitted to ministers and parliamentary assemblies. RIA often results in a document to be published together with the respective regulation, as it happens, for instance, in the UK. This document is very useful to support *ex post* assessments of the newly introduced law. Research shows that the RIA approach is sufficiently malleable to serve a variety of different purposes [27] and that it can successfully increase the capacity of governments to produce efficient and effective regulations are efficient and effective [28]. Several countries adopt RIA processes, including Commonwealth developed economies, such as the UK, Canada, Australia, New Zealand, and developing ones, such as South Africa, Tanzania, Uganda [29]. The CRAM developed for EU law could be considered a form of RIA on its own. Given the flexibility of RIA mechanisms, though, it seems advisable to incorporate the crime risk assessment more harmonically into broader RIA processes accompanying the whole law-making procedure, rather than isolating it into a dedicated moment in the pre-draft stage of the proposal, so that legislative crime risks are considered alongside with other positive and negative effects of the proposed policy and, especially, by different subjects in different phases of the law-making procedures.

b) Consultations and participation: consultations are a valuable component of the legislative process in many jurisdictions and an essential complement to RIAs. They consist of the publication of draft legislative proposals aimed at eliciting responses and comments from the general population, pressure groups, and relevant stakeholders. The use of consultations varies across different countries, and it is getting increasingly diffused. Pre-legislative consultation policies are in place in UK, Canada, Australia or New

Zealand, India, Pakistan. Moreover, new ways for public or external participation in law-making are being explored. In the UK the Good Law initiative pushing the openness of law-making processes beyond mere consultations, promoting the involvement of a range of partners, also beyond government and Parliament, to build a shared accountability for the quality of the law, and to create confidence amongst users that legislation is for them. Consultations and other forms of external participation in law-making are an extraordinary opportunity to prompt different inputs on the possible criminogenic effects of law. This could be done including some questions or issues on crime risk in the communications accompanying the publication of draft regulation. Of course, in order for consultations or other participation mechanisms to be effective a previous campaign of information and awareness-raising on the importance of being involved in law-making and on the issues concerned by the proposed regulation is necessary.

c) *Post-legislative scrutiny*: these are inquiries conducted by specific bodies, such as select committees of parliamentarians, on the practical functioning of legislation since its entry into force. Most countries lack a formal and comprehensive system for the post-legislative review of legislation, as this review is often left to sunset clauses and mandatory review provisions scattered in different statutes or to ad hoc procedures [30]. Nevertheless, in the recent years, post-legislative scrutiny is receiving increased attention, particularly in the UK, where significant steps towards a uniform review process are being taken [31]. The Cabinet Office's Guide to Making Legislation (2015) established that normally three to five years after Royal Assent, the responsible department must submit to the relevant Commons departmental select committee a memorandum including a preliminary assessment of how the Act has worked out in practice, with regard to the objectives identified during the passage of the bill. The select committee will then decide whether it wishes to conduct a fuller post-legislative inquiry into the Act. Post-legislative scrutiny seems a promising opportunity to conduct *ex post* assessment of crime risks of existing legislation, which would also produce evidence for crime risk assessment and proofing of future legislation. There is still much work to do, though, to promote the introduction of a sound and comprehensive system of post-legislative review in several countries. It would also be interesting to assess the possibility of inviting the general public and other stakeholders to participate to such review, through post-legislative consultations or other means.

The limit of these practices is that they merely apply to legislation and, possibly, to other forms of regulation. It is possible, however, to use them as models to devise equivalent mechanisms for other sources of law, particularly customary law and court decisions. For instance, *ex post* impact assessment processes and consultations might be used to assess existing customary law and the opportunity of replacing it with new legislation. The issue is more problematic when it comes to case law, due to the nature of independent judicial decision-making under the rule of law. Still, there is scope for

intervention. As we said, already, adequate training on the unintended criminogenic effects of judicial decisions would be helpful. Other than this, *ex post* mechanisms to flag crime risks raised by judicial decisions and consider possible remedies could be envisaged.

The analysis conducted so far allows us to outline other principles for our strategy.

(V) *Proposed legislation and regulation must be subject to continuous crime risk assessment by competent and impartial officers throughout the entire law-making process, including the phase preceding the drafting of the proposed legislation or regulation, the phase following the publication of the draft legislation or regulation, the consultation, and the parliamentary or governmental discussion.*

(VI) *Mechanisms to ensure periodical ex post crime risk assessment needs to be conducted on enacted legislation and existing customary law must be in place. The judiciary should also conduct periodical crime risk assessments of judicial law-making and judicial policies, without compromising the independence and the functions of the court system.*

(VII) *Whenever possible and convenient, crime risk assessment mechanisms should be integrated with existing processes of risk assessment and scrutiny of law. States must take any appropriate measure to ensure such processes are in place.*

(VIII) *Law-making processes, including any risk assessment mechanism, should be as much as open, transparent and participative as possible. Ex ante and ex post consultation should take place, and appropriate education and awareness-raising campaign should be in place, together with any other measure to support effective participation.*

These eight principles, derived as they are from well-established principles of good law and governance, are intuitive enough to be widely shared, at least in those countries, such as Commonwealth members, who proclaim themselves committed to the rule of law. Moreover, they are sufficiently general, and therefore flexible, so as to suit different legal systems and to address various sources of law. At the same time, they are pervasive enough to prompt innovation and change even in the most sophisticated and evolved systems. Nothing prevents, of course, that, at least in those countries which have already established some process of risk assessment of the law, such as RIA, useful suggestions might be drawn from previous research and experiments developed within the EU, such as CRAM.

CONCLUSIONS

I have demonstrated, through reference to evidence and previous studies, that law can be one of the causes of corruption. Law can carry the risk of expanding opportunities for, facilitating or even encouraging corrupt practices. Moreover, poor law – that is, incomprehensible, incoherent, useless, unreasonable and unjust law – undermines social trust in the legal system and fuels systemic corruption.

While there has been pioneering research on the unintended criminogenic effects of legislation in Europe, the debate seems

a bit dormant nowadays and need to be further stimulated. In fact, there is a need for more research addressing specifically the relationships between law and systemic corruption in other world regions. This new research should address every possible source of law, including customary law and court decisions, as it seems to me demonstrated that they might have a criminogenic impact no different than that of other forms of regulation.

More research is also needed to devise appropriate solutions to the problem. While the crime risk assessment mechanism (CRAM) conceived for EU law might offer interesting suggestions, particularly for countries relying on a developed and solid legal system, it might be too advanced to suit developing legal systems which are still working on a better compliance with the rule of law tenets, as our comparative overview on Commonwealth countries showed.

I suggest to start from the basics and develop a comprehensive common strategy to guide the most diverse jurisdictions to adopt processes of crime risk assessment and crime proofing of the law that are as much as uniform and coherent as possible while being flexible enough to respond to the different features and demands of each legal system. Commonwealth has proved to be a very effective workbench to develop such a strategy, for a number of reasons. First, its member countries are the expression of an inspiring diversity, which prompts efforts to find overarching solutions capable of embracing and reflecting it. Secondly, some of its members are some of the least corrupt countries in the world and have already adopted quite efficacious processes of risk assessment and post-legislative scrutiny of legislation, also through the involvement of external stakeholders and the general public. Finally, the fact that most Commonwealth countries belong to the tradition of common law requires to include case law in our strategy.

The eight principles I developed here seem general enough to be adapted to and adopted by any possible legal system governed by the rule of law. They are not, however, a point of arrival. They are rather a starting point. Hopefully, they will be criticized and inspire other solutions. Appropriately perfected and expanded, with the support of further research, they could be adopted by the Commonwealth. The creation of a new Commonwealth Office of Civil and Criminal Justice Reform announced at the London Anti-Corruption Summit, could be a good opportunity to incorporate them in specific guidelines on crime- law-making. In any case, it will be enough if this paper will help to revitalize the attention of scholars and lawmakers on these problems.

REFERENCES

- [1] Anti-corruption Summit – London 2016, Communiqué, 12 May 2016 < <https://www.gov.uk/government/publications/anti-corruption-summit-communication> > accessed 31 March 2017.
- [2] EU Anti-Corruption Report, COM(2014) 38, Brussels 3 February 2014.
- [3] Transparency International, People and Corruption: Africa Survey 2015. Global Corruption Barometer, Transparency International, 2015 < http://www.transparency.org/research/gcb/gcb_2015_16 > accessed 31 March 2017.
- [4] United Nations, World Economic Situation and Prospects 2017, New York: United Nations, 2017 < <https://www.un.org/development/desa/publications/world-economic-situation-and-prospects-wesp-2017.html> > accessed 31 March 2017.
- [5] R. Morgan, R.V. Clarke, “Legislation and Unintended Consequences for Crime”, *Eur. J. Crim. Policy Res.*, vol. 12, pp. 189–211, 2006.
- [6] H.-J. Albrecht et al., Eds., *Criminal Preventive Risk Assessment in the Law-Making Procedure*, Freiburg: Max Planck Institute for Foreign and International Criminal Law, 2002.
- [7] E.U. Savona, *The Crime Risk Assessment Mechanism (CRAM) for Proofing EU and National Legislation against Crime. Final Report of Project MARC – Developing Mechanism for Assessing the Risk of Crime Due to Legislation and Products in Order to Proof Them against Crime at an EU Level*, Milano: Università Cattolica del Sacro Cuore and Transcrime, 2006.
- [8] Prime Minister’s Office, Department for Exiting the European Union, and The Rt Hon Theresa May MP, Prime Minister’s letter to Donald Tusk triggering Article 50, 29 March 2017 < <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> > accessed 31 March 2017.
- [9] M. Razzaque, B. Vickers and P. Goel, “Brexit and Commonwealth Trade”, *Commonwealth Trade Policy Briefing*, November 2016 < <http://thecommonwealth.org/sites/default/files/news-items/documents/BrexitPolicyBrief18112016.PDF> > accessed 31 March 2017.
- [10] E.U. Savona, “Proofing Legislation against Crime as Situational Measure”, in *Crime Prevention in the 21st Century. Insightful Approaches for Crime Prevention Initiatives*, B. Leclerc and E.U. Savona, Eds., Berlin: Springer, 2016, pp.
- [11] H.-J. Albrecht, M. Kilchling, “Crime Risk Assessment, Legislation, and the Prevention of Serious Crime - Comparative Perspectives,” *Eur. J. Crim. L. & Crim. Just.*, vol. 10, pp. 23-38, 2002.
- [12] R.V. Clarke, “Situational Crime Prevention”, in *Crime & Just.*, vol. 19, pp. 91-150, 1995.
- [13] L. Pasculli, *Le Misure di Prevenzione del Terrorismo e dei Traffici Criminosi Internazionali*, Padova: Padova University Press, 2012.
- [14] Transparency International, *Corruption Perceptions Index 2016*, Transparency International, 2016 < http://www.transparency.org/news/feature/corruption_perceptions_index_2016 > accessed 31 March 2017.
- [15] Transparency International, *People and Corruption: Asia Pacific Survey 2017. Global Corruption Barometer*, Transparency International, 2017 < http://www.transparency.org/whatwedo/publication/people_and_corruption_asia_pacific_global_corruption_barometer > accessed 31 March 2017.
- [16] Transparency International, *REDD+ and Corruption Risks for Africa Forests. Case Studies from Cameroon, Ghana, Zambia and Zimbabwe*, Transparency International, 2016 < http://www.transparency.org/whatwedo/publication/redd_and_corruption_risks_for_africas_forests_case_studies_from_cameroon_gh > accessed 31 March 2017.
- [17] M. Hassan, W. Prichard, “The Political Economy of Domestic Tax Reform in Bangladesh: Political Settlements, Informal Institutions and the Negotiation of Reform”, *The Journal of Development Studies*, vol. 52, issue 12, *The Politics of Taxation*, pp. 1704-1721, 2016.
- [18] J.M. Marín, “Bangladesh: Corruption Risk in the Public Financial Management System”, *Anti-Corruption Helpdesk*, Transparency International, 2015.
- [19] T. Lubumba-Kasongo, “Reflection on Capitalism and Liberal Globalization. Lessons for a Proposed Union Government”, in *Imagining the United States of Africa: Discourses on the Way Forward*, E.I. Udogu, Ed., Lanham: Lexington Books, 2015, pp. 61-86.
- [20] J. Shapland, “Crime Prevention Risk Assessment and the Creation of Legislation in England and Wales”, in *Criminal Preventive Risk Assessment in the Law-Making Procedure*, H.-J. Albrecht et al., Eds., Freiburg: Max Planck Institute for Foreign and International Criminal Law, 2002.
- [21] E.U. Savona, “Initial Methodology for the Crime Proofing of New or Amended Legislation at the EU Level”, *Eur. J. Crim. Policy Res.*, vol. 12, pp. 221–228, 2006.

- [22] E.U. Savona, S. Martocchia, "Developing the Crime Risk Assessment Mechanism", *Eur. J. Crim. Policy Res.*, vol. 12, pp. 325–2, 2006.
- [23] E.U. Savona, M. Maggioni, F. Calderoni, S. Martocchia, *A Study on Crime Proofing. Evaluation of the Crime Risk Implications of the European Commission's Proposals Covering a Range of Policy Areas*, Trento-Milano: Università degli Studi di Trento, Università Cattolica del Sacro Cuore, Transcrime, 2006 < http://www.transcrime.it/wp-content/uploads/2013/11/Final_Report-A_study_on_Crime_Proofing.pdf > accessed 31 March 2017.
- [24] E.U. Savona, F. Calderoni, S. Martocchia, S. Montrasio, "Finalising the Crime Risk Assessment Mechanism for the Crime Proofing Activities of European Legislation/Regulation", *Eur. J. Crim. Policy Res.*, vol. 12, pp. 365–397, 2006.
- [25] F. Calderoni, E.U. Savona, S. Solmi, *Crime Proofing the Policy Options for the Revision of the Tobacco Products Directive*, Trento: Transcrime – Università degli Studi di Trento, January 2012.
- [26] P. Darbyshire, *Darbyshire on the English Legal System*, 11th ed., London: Sweet & Maxwell, 2014.
- [27] C.A. Dunlop, M. Maggetti, C.M. Redaelli, D. Russel, "The many uses of regulatory impact assessment: A meta-analysis of EU and UK cases", *Regulation & Governance*, vol.6(1), pp.23-45, 2012.
- [28] R. Deighton-Smith, A. Erbacci, C. Kauffmann, "The Role of Regulatory Impact Assessment. Promoting inclusive growth through better regulation", *OECD Regulatory Policy Working Papers*, No. 3, 2016.
- [29] C. Adelle et al., "Regulatory Impact Assessment: A Survey of Selected Developing and Emerging Economies", *Public Money & Management*, vol. 36(2), p.89-96, 2016.
- [30] Law Commission, *Post-Legislative Scrutiny. A Consultation Paper*, Consultation paper no. 178, London: The Stationery Office, 2006.
- [31] House of Commons, Section Parliament and Constitution Centre, *Post-Legislative Scrutiny*, Standard Note: SN/PC/05232, 23 May 2013 < <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05232> > accessed 31 March 2017.