Theoretische beschouwingen

Enkele beschouwingen over prioriteiten op het gebied van het criminologisch onderzoek

Ch. J. Enschedé, Universiteit van Amsterdam

Voorwoord

In de eerste helft van het vorige jaar schaarde ik mij in het gelid van de circa 80 criminologen, die op verzoek van het secretariaat van de Raad van Europa een rapport hebben ingediend over plaats en betekenis van het criminologische onderzoek voor de praktijk van de strafrechtspleging. Dat rapport volgt hier in ietwat gewijzigde en verkorte vorm; hier en daar is een noot toegevoegd. Ik schreef het in het Engels en laat het onvertaald.

1. Criminology

1.1 Criminology is an elusive business. It asks for definition and baffles those who undertake to define it. This holds good for its scientific status as well as for its subject-matter. Still in order to deal effectively with our problem we must, I fear, suggest at least some more or less coherent remarks on both topics.

1.2.1 Criminology — whether conceived as an art, a science or a method — can be practised for its own sake or as a means to social ends. Of course every criminologist has his own reasons to engage in the criminological field. He often is driven by personal convictions, wishes and ideas about the reform and humanization of the social body in general and the administration of criminal justice in particular. And indeed, criminology may be able to further such ends. Nevertheless it would be a fallacy to conclude from the personal incentives of criminologists that, with a view to the drafting and integration of research-programmes, the same quality of usefulness for practical ends adheres to all kinds of criminological research.

1.2.2 Possibly it would be advisable to categorize the field of criminological research in a dichotomy 1): — fundamental research of a purely scientific character, and — research-activities, that fall into the context of an applied criminological science. The

desirability of this dichotomy for our purposes is meant to be explained in the following sub-paragraph.

1.3.1 So far for the scientific status of criminology. As regards the subject-matter of criminological effort it seems desirable to set forth the following observations. Criminology, whatever its character may be, presupposes the concept of crime. Historically the notion of crime came first into being; the idea to take the crime-phenomenon as an object for intellectual endeavour could only arise afterwards. On the other hand, both crime and criminology being cultural phenomena, the contents of the crime-concept influences the scope of criminology at the same time as criminological endeavour elucidates, refines and redefines the concept of crime.

1.3.2 Now crime as a concept of daily life is closely connected with law. The subject of criminology, therefore, is closely linked to the legal side of the cultural system insofar as criminology took its major concept therefrom.

1.3.3 At the same time it stands to reason that criminology in its purely scientific form — as the pursuit of knowledge for knowledge's sake — emancipates itself from this legalistic matrix and pupates into deviology. Under a legal aspect "crime" connotes certain types of human behaviour that deviate from the legal rules. From a sociological viewpoint crime is recognized as a special type of behaviour, deviant from a social rule, legal rules being a category of social rules.

1.3.4 Emancipating itself from the legal starting-point, criminology gains room exactly for fundamental research in two fields of major importance for the further development of society as a community of free men: — the problems of social control in relation to traditional and rational rules, whether set by the state or any other corporation, or by some other cultural institution such as the medical profession, economy, psychological science etc., and — the problems concerning the treatment of the individual who behaved contrary to such rules.

1.3.5 In this conception the subject-matter of criminology is not restricted to deviant behaviour in general or, more specifically, to criminal behaviour. It has to do equally well with problems of social control in general, the sanctioning of deviant behaviour only being one of the means of social control. Criminology is, moreover, concerned with the growth or creation and the withering or abolition of legal and other social rules, and with social mechanisms which influence behavior.

1.3.6 Of course this transformation of criminology into deviology may easily lead to a scientific product that is very far removed from the actual needs of criminal practice either in its legislating, its judicial or its executive functions. This need not to be considered a drawback, if only one keeps in mind the necessity of the simultaneous development of applied criminology. This applied criminology; — could profit from deviology for its fundamental notions and theoretical basis, and — could choose and define its research-programme in view of the needs of the legislator, the judicial functionaries — defence included — and the executive officials and functionaries.

2. Criminal law and criminal practice

2.1 What are governments' exertions with crime and delinquency? In the context of our deliberations it is acceptable to decide such questions against the background of
the rule of law. The modern states have, in principle or in practice, monopolized the administration of criminal justice even if they allow the subsistence, next to the state's criminal law, of different kinds of disciplinary sanctions in the context of private corporations etc.

2.2.1 Once having taken over full responsibility for the administration of criminal justice, governments have to expand activities in several fields.

a. The state has to look after the development of substantive criminal law, denoting what behaviour is deemed to be criminal behaviour in view of the sanctions that are admissible etc. (see para. 2.3).

b. Furthermore the state has to pay due care to the organization and the upkeep of the machinery of criminal justice: police-organization, judiciary, prison-system, probation-system etc., with all its implications of personnel-management, spatial and financial provisions etc. (see para. 2.5).

c. The same can be said about the rules of procedure, governing the powers and duties of all these functionaries in the handling of criminal cases (see para. 2.5).

d. The modern Welfare-state has to mould its policy on many different fields of action. It is wise, thereby to pay due attention to the necessity of crime-prevention. The maintenance of the road-traffic-rules, for instance, probably can better be pursued by way of preventive inspection and supervision on the roads than by way of fines or imprisonment. And the same holds good in the fields of social insurance, socio-economic planning etc. (see para. 2.5.14).

2.2.2 In all these fields of action applied criminology can deploy its activities in support of criminal reform.

2.3.1 Substantive criminal law (a). First of all, I think, a distinction must be made here between two kinds of legal rules. On the one hand there are legal rules, which address themselves to the citizen, telling him what, given certain circumstances, he has to do or to leave off, if he wishes to comply with the law. For the sake of simplicity I dub such rules "material rules".

2.3.2 On the other hand there are sets of sanctioning rules (for instance the rules of substantive and adjective criminal law) distributing among injured parties and other parties concerned and the state's authorities (police, judiciary, prison-officials, departmental authorities etc.) powers and duties to be acted upon in case of a suspicion or establishment of a breach of the law that is to say: a breach of a material rule.

2.3.3 As criminal law and criminal practice always have to do with suspected or established breaches of such material rules it is easily overlooked, that these rules in fact do not belong to the subject-matter of criminal law. The question, for instance, whether abortion ought to be forbidden or allowed is not a problem of criminal law nor of criminology or deviology. The realm of these disciplines starts after material rules have been set. Infringements of abortion-laws indeed are within the orbit of deviology and applied criminology. The choice of the appropriate governmental reaction, the decision about the introduction of a criminal sanction included, is certainly inside the boundaries of criminology and, eventually, of criminal law too.
2.3.4 It follows, that the legislator's needs for scientific information as regards the setting up or upholding of material rules falls outside the scope of the present report. We can confine ourselves to the sanctioning-problems.

2.3.5 As regards the sanctioning of a material rule, the legislator in principle has four possibilities: — he can abstain from any legal sanction, thereby leaving the enforcement of his rule entirely to other means of formal or informal control; — he can admit either the civil, the administrative or the criminal system of sanctioning in case of infringement of the rule. Eventually he can combine these systems. In other words: it usually is up to the legislator to decide whether the introduction of a criminal sanction is an apt way to further the citizen's obedience.

2.3.6 The possibility to abstain from criminal sanctions or to replace them by civil or administrative sanctions is sometimes overlooked. Often proposals to alter material rules are presented under the disguise of a criminal reform-bill.

2.3.7 In fact, every lawyer knows, that the concepts of illegal behaviour and of offence do not necessarily coincide. Still many people, lawyers included, usually take it for granted that acts like murder, manslaughter, theft, offences against morality, are to be sanctioned by criminal law.

2.3.8 But is this to be taken for granted indeed? In order to decide that one can adopt two attitudes. One can approach this question from a merely traditional or from a rational angle. The acts mentioned just now traditionally are criminal offences. But of course an appeal to tradition may in many cases fall short of rational standards. Under rational aspect one is looking for an answer that accounts for penalization as a suitable means to an end, more specifically: to a social end, acceptable under the rule of law; and here we are thinking in the first place of the prevention of crime.

2.3.9 Rational considerations giving guidance to the legislator in questions of criminal law can bear upon two dimensions of social reality: — upon the effect of criminal law and criminal practice in the social body in general; — more particular upon the effect on the offender and his direct environment. Retribution as an ethical exigency or as a metaphysical concept stays outside the social context which the state's justice appertains to. Of course public opinion sometimes requires retribution of crime; the offender himself can sometimes feel that way, and it may be sound policy to take such urges into consideration, in the same way as possibly deterrence may be a fit object of criminal policy. But how can the legislator or the criminal practician possibly know whether such is the case in a given situation?

2.3.10 Naturally this is where social research in the context of applied criminology has to come in, in the same way as its penological branch is helping law and practice to the necessary rational data about the influencing of the offender. Violation of a social rule — legal rules included — usually is relevant to several sanctioning-systems at the same time. It is up to applied criminology to explain what causal chains the legislator puts into motion if he allows the state's authorities to apply criminal sanctions on account of specific infringements of the law. At the same time criminology should analyze, what would be the position if the law would abstain from sanctions altogether or give preference to other sanctioning-systems (see para. 2.3.5).

2.3.11 Applied criminology of course can only fulfill such tasks, if a coherent
research-programme is designed, fit to provide a general outline of the functioning of criminal law as a means of social control in the social dimension as well as in the offender’s personal life. Here indeed there is a key problem for applied criminology. For only if these general outlines are available there is any real chance for a scientific covering of the legislative work in the field of criminal law.

2.4 Adjective criminal law (c). From a legal viewpoint the concept of “criminal sanction” is confined to the penalties and other measures defined in the sentencing stage of the criminal trial. But from a social aspect all action taken on account of a suspicion by police-officers and judicial authorities against a suspect — arrest and custody, bail, seizure, preliminary investigation, public trial etc. — may function as sanctions. On that score the legislator is as much in need of criminological information about the social implications of his policy in the field of adjective criminal law, as he is as regards substantive criminal law.

2.5.1 Machinery of criminal justice (b). The legislator’s work on the field of criminal law can be made or broken by the men called to handle it, to put it into practice. Preeminently here criminology is called to contribute to the improvement of criminal law and criminal practice.

2.5.2 Criminal law can be characterised as a permissive legal system. As a rule police and judicial authorities have no rights to interfere with a suspect’s way of life without express backing of the law, either written or unwritten. On the other hand the law normally only has a very limited range, when it tries to define the exact use such authorities have to make of their legal powers. The law permits them to use their powers, but normally does not compel them to do so. What, then, are the criteria governing the police-, judicial and executive authorities in the forming of their policy in such matters as arrest, bail or custody, in matters of investigation and trial, sentence, probation, conditional release etc.? For certainly there must be criteria; such powers are not given to be used arbitrarily. What criteria are steering these authorities? What kind of steering-system is complementary to the law’s permissive system?

2.5.3 Here again one has the choice between a merely traditional and a rational approach. And again: as long as rational criteria that can be applied in daily practice are lacking, tradition, often based on prejudice, will reign supreme and will have to furnish the criminal practician with the guides for his policy. For traditional criteria are better than no criteria at all. To put it differently: it is up to applied criminology to construe a rational steering-system that can replace the traditional criteria guiding the police- and judicial authorities in their handling the law’s permissive system.

2.5.4 This antithesis and connexion between the criminal law as a permissive system, employed by the state’s authorities in a sound way under the guidance of a rational steering system holds good for the whole field of criminal practice: for the police as well for judicial investigation, trial and sentence and in the phase of execution of punishments and other measures.

2.5.5 How is such a steering-system going to be construed? Just the same as in relation to legislation this will be a task for applied criminology (see para. 2.3.10). Clearly this will be a work that asks for coordination and integration of the research-
programmes in order to use the available research-capacity as economically as possible. A plan of action might probably profit from the following considerations.

2.5.6 Under the aspect of the rule of law the administration of criminal justice must comply with exigencies of equality. Now it is well known that with "equality" nothing much is said if we do not agree about the standard to be used in measuring equality. Several such standards might be offered. In the context of these reflections however we ought not to elaborate too much on this subject. For the sake of the argument (and as a personal choice) I propose to handel a standard, suggested by Roger Hood. Hood (Sentencing in magistrates' courts, London 1962) says: equality is to be equality in consideration in deciding upon the sentence. How is equality in consideration to be achieved?

2.5.7 The answer is twofold. If several separate persons have to solve similar social problems equality in consideration can only be reached:
— if they have the same information in kind and amount about such problems at their disposal, and
— if they possess the same abilities to draw the relevant inferences from this information, that is to say: if they have got the same kind of training for their job.

2.5.8 So the riddle of equality seems to hinge on two exigencies: equality of information rendered to the men who have to make decisions and equality of training of these men in the integration of this information in their decisions.

2.5.9 But there is a third item. For in para. 2.5.7 we started with the supposition of several persons going to solve "similar social problems". Now what social problems are similar? More specifically in criminal practice: what criminal offences are similar, what makes them similar? Every criminal offence is a compound of a man acting and a man's act. Now I submit that from a social viewpoint this problem of similarity in criminal matters certainly is not insuperable, and that the solution in the same time will help us to a pragmatic approach of our problems of priorities in research-matters.

Of course social science will influence the concept of similarity of offences. But on the other hand social science can take its initial notions from social reality. Criminology can start and take its notions of similarity from daily practice it is going to influence.

2.5.10 Some rough and simplified Dutch statistical data may serve as instances. In 1965 the Netherlands' police dealt with about 1,799,000 offences that have led to some kind of criminal sanction.
(p) Of these some 1,758,000 were simple traffic-offences or other petty offences of small importance (see para. 2.5.13; 2.5.14).
(q) About 40,000 cases can be characterised as middle-range cases, sentences varying between a simple fine or a conditional sentence and imprisonment of less than one year (see para. 2.5.14; 2.5.16).
(r) A third category consists of about 1000 "serious" cases in which offenders were sentenced to one year imprisonment or more, or to some other kind of long-term deprivation of liberty (see para. 2.5.14; 2.5.15).

Each of these categories has its own needs as regards the scientific accompagnment of police- en judicial or executive practice.

2.5.11 Equality of information being a condition for equality in consideration (see para. 2.5.7), and equality of information being inexorably linked up with similarity
of offences (see para 2.5.9), something now must be said about the relation between:
— the available information (see para. 2.5.12 (x), (y) and (z)), and
— the three categories of offences (see para. 2.5.10 (p), (q) and (r)).

2.5.12 To put information at the disposal of the functionaries of criminal practice, it first has to be collected. In criminal matters information can bear upon three kinds of data:
(x) the offence itself;
(y) the social context of (1) the relevant type of offence and (2) the particular offence to be dealt with;
(z) the offender’s personality, his circumstances etc.

2.5.13 Now in every criminal case information about the offence itself (x) is indispensable. In small cases (p) this indeed is practically the only kind of information available, and its scope as a rule is limited to some few standarized external data about the offence, the offender staying entirely in obscurity except for his formal identity. To put it somewhat paradoxically: equality here consists of the lack of further information. Equality in consideration here can only mean: equality in fine, the set amount of the fine functioning as the social symbol of equality. Indeed it would not be feasible nor in agreement with the rule of law to obtain more information about the offender (z). More often than not this kind of information can only be collected at the expense of an encroachment upon the citizen’s privacy which can only be justified in more important matters.

2.5.14 Now criminal policy in general ((p), (q), (r)) might profit immensely, if more general information about the social context of certain types of offences (y1) were available. Applied criminology, for instance, in this context might elucidate the effectivity of preventive inspection and supervision and of repressive practices. This applies too for the great mass of small offences (p) (see para 2.2.2 (d)).

2.5.15 It stands to reason that in the class of the most serious cases (r) all information that humanly speaking can be had ((x), (y), (z)) ought to be put at the disposition of all authorities concerned. There is too much at stake for society as well as for the offender to leave anything out. Here, too, criminal policy could profit from a better insight, provided for by way of social research, in the social context of crime and punishment (y). What, for instance, are the effects of public trials of murder cases and such from the standpoint of social mental hygiene?

2.5.16 In the middle range of criminality (q) things are more complex. Here applied criminology has much to do indeed. Lack of empirical information can have disastrous results in this sphere. But it is difficult to know where to begin, since there is a great disparity in kind and seriousness in this group, which is too big, as a whole, to lend itself for uniform treatment. The group might be broken up in parts according to a certain typology. It might be feasible to compose a list of types of offences, each type connoting a number of actual offences that according to general opinion of insiders and outsiders belong together, even if they belong to different legal categories (e.g. shoplifting, housebreaking in schools and factories, instalment-frauds, assault and battery in pubs), the whole list of such types covering, say, 30-60\% of a year’s criminal practice. Criminology, cooperating with law, might then work out for such
types, one after the other, general outlines for rational criminal policy. Along these lines the traditional criteria of justice and equality in investigation, sentencing, execution etc. might, step by step, be replaced by a set of rational criteria steadily growing, with the advance of the research work, into the rational steering system, mentioned in para. 2.5.3.

2.5.17 Last but not least: equality in consideration has been reduced, in the foregoing reflections, to equality in information rendered and used. Applied criminology can help to provide the authorities with the necessary rational data for their decisions. But the dichotomy mentioned in para. 1.2.4 in reality is only part of a triad. Fundamental research of a purely scientific character (1) can provide applied criminology with fundamental notions and basic theories. Applied criminology (2) can help the practician to the necessary rational tools. But the application of science (3) is guaranteed only if the social organization is prepared for it. It is no use making tools and constructing rational machinery if the officials and institutions that have to handle them are not capable to do so. Stronger: applied science cannot achieve its aims without the comprehending cooperation from the practicians' side. Therefore governments and legislators are in need of scientific advice in the field of organization, decision making and such, in order to bring about the necessary reforms in society's organizational equipment. This organizational reform-policy has a claim to high priority, and will have to be supported by reforms in the field of legal and criminological education. Here too applied criminology has its specific tasks and its value.

2.5.18 To summarize: applied criminology, lending its theoretical concepts and thought-systems from deviology and sociology of law, can best tackle the problems of daily practice in a topical way, the topics of criminal policy being formed by way of tripartition (see para. 2.5.10) and typology of middle-range offences (see para. 2.5.16).

3. Epilogue

This report had to be written in a hurry. I did not have any time to look up my sources. The result possibly is a concoction of other peoples' ideas without due reference to the authors. For that I express my regrets. Anyway I do not claim any idea in this report to be mine.