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Panel Paper

Perspectives on organised crime between policy and research: a criminological analysis of the new offences of participation in organised crime activities in England and Wales.

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Abstract

Section 45 of the Serious Crime Act 2015 contains new offences for participation in organised crime groups' activities. This section mentions for the first time 'organised criminal groups and activities' in the law in England and Wales. This paper will interpret and critically analyse the new offences for organised crime from a criminological perspective in light of evidence found in research. It will argue that this legal change is informed by political narratives on organised crime rather than by variations in the criminal panorama. The paper will then identify three perspectives for concern: the narrative perspective, which reflects on the overlapping of meanings of the words 'organised crime'; the evolution perspective, which reflects on the origins of the new participation offences with reference to both national and international pressures; and the management perspective, which reflects on some of the immediate effects of the new offences of organised crime on the criminal justice system.

Keywords: Organised crime; policy construction; security threats; participation in organised crime; national security.

Introduction and Background

When we talk about organised crime, inevitably we encounter the old dilemma of what organised crime is, how we define it and most of all why we need to define it. Such a dilemma is based upon the controversial nature of the concept itself that cannot at once encompass both national manifestations of the phenomena of organised crime and internationally harmonised legal constructs. Definitely, the difference between the criminological and sociological dimensions of organised crime and its political conceptualisations is a very problematic topic (Van Dijck, 2007).

Arguably, while sociological and criminological researchers on manifestations of organised crime can use their own interpretation of the concept according to what the research is about - in terms of empirical data and fieldwork - the political discourse of organised crime is often bound to assume a certain degree of universality in its terminology. However, how the narrative of organised crime is developed at the political level affects both the perceptions of organised crime phenomena at the social level (Woodiwiss and Hobbs, 2009) and also the response of law enforcement to what become pre-agreed threats as found in acts and regulations (Sergi, 2015a).

As a criminological/sociological field of research, organised crime has known an unprecedented escalation in interest and outputs of research projects in England. Whereas British organised crime until the 1990s was a highly local, neighbourhood-based type of gangsterism, after the 1990s professional criminals moved towards an “entrepreneurial trading culture driven by highly localized interpretations of global markets” (Hobbs, 1995:115). The implications of globalised new markets with changing perceptions of ‘glocal’ perspectives (Hobbs, 1998) still characterised organised crime in Britain as a local phenomenon. Moreover, in 1994 a Home Affairs report approached organised crime in the country formally, thus formulating institutional responses and observations about the phenomenon, *de facto* introducing the term ‘organised crime’ into public and political debates (Home Affairs Committee, 1994).

By the 2000s organised crime in the UK had become a “high profile policy concern” (Hobbs and Hobbs, 2012: 251), although a concern that was not necessarily well-evidenced by reliable data and innovative research (Gregory, 2003). The difficulties in researching this phenomenon can be linked to the fact that British organised crime often harbours a nostalgia for “those traditional forms of organised crime that were so reliant

upon [...] traditional family structures” (Hobbs, 1988: 409), which were often co-operatives of crime with no leadership and no long-lasting commitments (Hobbs, 2013).

Research in England in recent years ranges from investigations on different criminal activities - grouped under a very controversial label of ‘serious organised crime’ for policing purposes (Sergi, 2015a), to investigations focussed upon on networks of offenders. Evidence from the latest research shows how “it is a scenario in which relatively sophisticated, highly networked organised crime groups run small-scale, high-frequency operations across a diverse set of criminal and legitimate activities” (Edwards and Jeffray, 2014:xi). On the other side in the past organised crime has become a policy label in the UK (Sergi, 2014a; 2015a), in the form of a peculiar national security issue (Home Office, 2010; Home Office, 2013; Woodiwiss and Hobbs, 2009), characterised by both a focus on local criminal networks, and strategies to counter serious crimes at a national level (Campbell, 2014; Home Office, 2013; Sergi, 2015a). Shepticki’s (2003) observations still seem valid: organised crime in the UK has historically developed both a denotative and a connotative dimension. At the denotative level, organised crime is the ‘illicit economy’ and specifically the field for illegal trade and trafficking that intuitively ought to be ‘organised’ in crimes such as drugs or trafficking in human beings or money laundering. Organised crime in the UK, in research, is still described within the denotative dimension. At the connotative level organised crime is, instead, understood as a unique monolithic, often alien, threat (Hobbs and Antonopolous, 2013), and therefore should not apply to the UK where criminal networks fluidly, and often with low profiles, run illegal trades. At the policy level, however, the connotative dimension has prevailed in past years, with a notion of organised crime (singular, not plural) associated with very different threats, costs and harms, without proper evidence to back up the claims (Hobbs, 2013).

This paper will primarily discuss the narrative of organised crime in criminal law and justice in England and Wales at the dawn of the changes within the Serious Crime Act 2015 (hereinafter ‘the Act’). Among other things, the Act introduces a new offence of participation in criminal activities of organised crime. In particular, it criminalises both direct and indirect participation in criminal activities of an organised crime group. For the purposes of these offences, the Act also defines organised crime groups and their criminal activities. The aim of this paper is twofold. First, the paper will interpret and critically analyse the new offence and the evidence from research on the topic. It will do

so by presenting the law and its immediate criticisms. Second, following the commentary on the new offences for organised crime participation in the new Act, the paper will assess three perspectives which are directly linked to the implementation of the new law and its preliminary criticisms:

1. The *narrative perspective*, which reflects on the overlapping of meanings of the words 'organised crime';
2. The *evolution perspective*, which reflects on the origins of the new participation offences with reference to both national and international pressures;
3. The *management perspective*, which reflects on some of the immediate effects of the new offences of organised crime on the criminal justice system.

Organised Crime in English Criminal Law

Before the Serious Crime Act in England and Wales organised crime had never been a criminal category - neither in the form of illegal enterprise nor in the form of unlawful association - rather it was only a concept of criminal policy (Hobbs, 2013; Sergi, 2014a; 2015a). This was in line with the framework of the UN Palermo Convention 2000, which notices how common law countries tend to target organised crime through the use of conspiracy and the focus on serious crimes (UNODC, 2004; 2012). Common law countries are often found to have a distrustful attitude towards 'guilt by association' offences (Boister, 2012; Walker, 2013), and will more readily accept offences with individual, rather than collective, liability in criminal law. The Serious Crime Act, however, now uses the language of international provisions when criminalising participation in organised crime activities.

Hitherto, conspiracy has been the chosen charge in organised crime cases in England and Wales, as confirmed by the Attorney's General Office (2012). In this case, organised crime is serious crime, which is organised (Campbell, 2013). Crimes that fall under the umbrella of organised crime are (serious) crimes as indicated both in the Serious Crime Act 2007 Schedule 1 and in the Proceeds of Crime Act 2002 Schedule 2 and involve crimes such as drug trafficking, arms trafficking, money laundering, terrorism, people trafficking, child exploitation, fraud, corruption, bribery and so on. This, again, is

coherent with a focus on (the seriousness of) the activities of organised crime rather the structure of the criminal partnership (Sergi, 2014a).

On two occasions changes to the offence of conspiracy in favour of an offence of participation in organised crime activities or membership of an organised crime group have been turned down by policy makers: first by the Home Affairs Committee in 1994 on the occasion of a report on Organised Crime and second by the Home Office in 2004 on the occasion of the new Serious Organised Crime and Police Act 2005. Offences of membership in organised crime were rejected on the basis that conspiracy and serious crimes were adequate charges to prosecute criminal networks engaging in illegal trades (Campbell, 2013; Sergi, 2014a; 2015a). Nevertheless, in the latest Serious and Organised Crime Strategy (Home Office, 2013: 37), the Government announced that a proposal for a new offence would be brought forward to “better tackle people who actively support, and benefit from, participating in organised crime, learning from legislation that is already being used elsewhere in the world”. Reference was made to the offences proposed by the UN Convention and by the Council of Europe as above and also to legislation in the United States of America, the RICO Act 1970 and other countries, such as Italy for example, or Germany. The Serious and Organised Crime Strategy (Home Office, 2013), amongst other things, also introduced a national security policing model for organised crime, by presenting the 4-Ps (Prevent, Protect, Pursue, Prepare), borrowed from counter-terrorism, as a viable policing strategy for the National Crime Agency and other law enforcement authorities when fighting organised crime. The national security dimension of organised crime policing on one side and the translation and transposition of concepts from other countries to tackle organised crime in English criminal law is changing the whole criminal justice system.

The New Offences against Organised Crime in the Serious Crime Act 2015: Immediate Criticisms.

The Serious Crime Act 2015 ('the Act') is a Government Act sponsored by the Home Office that was presented to the House of Lords in June 2014 and passed in March 2015. The Act includes, among other things, new provisions for involvement in organised crime groups. In particular, section 45 within Part 3 of the Act introduces the offence of participating in activities of an organised crime group. In order to introduce such an

offence, the Home Office also defined 'organised crime group' as generally as possible (section 45 Serious Act 2014-14 (6)):

"Organised crime group" means a group that—
(a) has as its purpose, or as one of its purposes, the carrying on of criminal activities, and
(b) consists of three or more persons who act, or agree to act, together to further that purpose.

Section 45, on the basis of this broad definition of 'organised crime group', clearly adopts the UN Convention on Transnational Organised Crime definition and further postulates that:

- (1) A person who participates in the criminal activities of an organised crime group commits an offence.
- (2) For this purpose, a person participates in the criminal activities of an organised crime group if the person takes part in any activities that the person knows or *reasonably suspects*
 - (a) are criminal activities of an organised crime group, or
 - (b) will help an organised crime group to carry on criminal activities.

Criminal activities (section 45(3)) are “activities within subsection (4)¹ or (5)² that are carried on with a view to obtaining (directly or indirectly) any gain or benefit”. Gain or benefit are intended as financial in nature, as specified in section 45(7)³.

The Explanatory Notes to the Act at section 142 (Home Office, 2014) state:

The new participation offence in England and Wales is intended to provide a new means by which the NCA, the police and prosecutors can tackle serious organised crime. The new offence can be used to target not only those who head a criminal organisation and who plan, coordinate and manage, but do not always directly participate in the commission of the final criminal acts; but also the other members of the group and associates who participate in activities such as the provision of materials, services, infrastructure and information that contribute to the overall criminal capacity and capability of the organised crime group.

In other words, the offence targets both direct and (more controversially) indirect participation in criminal activities of an organised crime group. These activities are intended as serious and financially driven criminal activities. The spectrum of the wrongdoing is quite vast because the offence targets not only those who engage in criminal activities, but also enablers of crime - when they can be construed to ‘reasonably suspect’ that their actions will support criminal activities. Both the Law Society and the Institute of Chartered Accountants in England and Wales have advanced harsh critiques. In particular, the Law Society warned that there are other concerns with “the breadth of the offence; the overlap with existing

¹ Section 45 (4) Serious Crime Act 2015: Activities are within this subsection if—

(a) they are carried on in England or Wales, and

(b) they constitute an offence in England and Wales punishable on conviction on indictment by imprisonment for a term of 7 years or more.

² Section 45 (5) Serious Crime Act 2015: Activities are within this subsection if—

(a) they are carried out outside England and Wales,

(b) they constitute an offence under the law in force of the country where they are carried out, and

(c) they would constitute an offence in England and Wales of the kind mentioned in subsection (4)(b) if the activities were carried out in England and Wales.

³ Section 45 (7) Serious Crime Act 2015:

For a person to be guilty of an offence under this section it is not necessary—

(a) for the person to know any of the persons who are members of the organised crime group,

(b) for all of the acts or omissions comprising participation in the group’s criminal activities to take place in England and Wales (so long as at least one of them does), or

(c) for the gain or benefit referred to in subsection (3) to be financial in nature.

criminal and money laundering offences; and the additional administrative burdens caused by a potential increase in due diligence measures". Similar concerns on the breadth and uncertainty of these provisions were raised by the Institute of Chartered Accountants of England and Wales (ICAEW), which went even further in their critique by declaring to *Economia* (Irvine, 2014) that the new offence:

[...] would have a number of serious unintended consequences, not only in potentially criminalising many innocent (if naïve) citizens but also reducing access to valuable intelligence currently unavailable to law enforcement authorities and unnecessarily burdening some businesses.

In practice, says the ICAEW, the new offence could make it more difficult for reformed criminals to receive legal and financial advice because professionals will be less comfortable in advising high-risk clients.

Direct and Indirect Participation in Organised Crime Activities: Assumptions and Implications.

Section 45 criminalises both direct and indirect participations in organised crime activities. Moreover, at a closer look, while criminalising two new conducts, the Act 'squeezes in' a conceptualisation of both organised crime groups and their criminal activities. In the Act an organised crime group is seemingly unproblematically described as a group of three or more people who act together (substantial offence) or agree to act together (conspiracy offence) to commit criminal activities as the main purpose of their association. Moreover, these criminal activities shall be indictable offences in England and Wales, punishable with imprisonment for a term of 7 years or more: thus, serious offences for sentencing purposes. More importantly, the organised crime group carries out these criminal activities with a view to obtain (directly or indirectly) gain or benefit 'financial in nature' (section 45(7c)). This means that any serious criminal activities not committed for the purpose of financial gain or profit by a criminal group, would not be meeting the requirements of the offence. The law, therefore, assumes that serious criminal activities, which are committed by organised crime groups, will necessarily aim to achieve financial gain or profit, which might not be the reality

of organised crime activities at all. As argued by some scholars (Broadhurst et al, 2014; Kleemans and de Poot, 2008; Kleemans and van de Bunt, 2008; Makarenko, 2004; Van Duyne, 2000), the motivation behind 'careers' in organised crimes (especially in trafficking activities and in organised cybercrime) can be most varied, involving quests for power, control, sexual gratification, desire for notoriety and political ideology. Most of all, organised crimes can include a variety of offences that can differ in seriousness (Edwards and Levi, 2008). Even though many outcomes of criminal activities can hypothetically fall within financial advantages, gains or profits, the terminology remains confused.

Digging even deeper, section 45 of the Act uses the adjective 'organised' superficially: if three or more people act or agree to act together they automatically fall into some degree of organisational structure. As observed in established literature on the subject, not all crimes perpetrated with a degree of organisation are crimes of organised crime groups, and likewise not all criminal associations commit crimes in an organised way (Maltz, 1990; Van Djick, 2007). Indeed, the paradigm of organised crime as 'disorganised crime' (Reuter, 1983; 1985) instead argues that the illegal provision of services and goods usually associated with organised crime groups (Paoli, 2002; White, 2006) is actually disorganised in the way the networks operate. Moreover, the adjective 'organised' has been proving inadequate when investigating new typologies of crimes, especially internet-enabled crimes or cyber-crimes, as well as some forms of drug trafficking or illegal trades in tobacco and alcohol. Some scholars (Broadhurst et al., 2014; Chang, 2012) have also argued for the possibility of one offender only committing organised crimes in the virtual space. Most crimes have been changing in the past decades to take various forms and to include different types of criminal actors that can range from highly hierarchical gang-style or mafia-style groups to looser networks, from white-collar criminals to online adventurers (Edwards and Jaffrey, 2014; Lavorgna, 2014a; 2014b; Paoli, 2002). The legislation appears unwelcoming and non-inclusive of all the behaviours and conducts that it could embrace, while at the same time it risks unintended consequences. The concerns of professionals and the unpacking of the new offences with their assumptions and implications, raise various problems concerning the effectiveness and timeliness of this change in the law.

I identify three perspectives – one of narrative, one of (legal) evolution and one of management - which directly link the interpretation of the new offences in the Serious Crime Act 2015 with the conceptualisation of organised crime as a research category. These perspectives call for a deeper understanding of the nature of organised criminality itself, which is the object of this new law, in order to assess the reach and consequences of the new offences.

Three perspectives on organised crime between policy and research

The narrative perspective

There is a very sharp and visible difference between the narratives of organised crime for policy purposes and the reality of criminal associations, networks and activities in the country as presented by researchers. The former appears like a compact and multi-purpose policy category, while the latter still preserves its scattered and disorganised character. In policy, organised crime is a 'singular' policy category; when the phenomena linked to organised crime are researched in their various manifestations, they appear complex and different 'plural' crimes. Hence, the narrative dilemma: in a country where research suggests that: a) criminal networks/actors involved in illegal trades cannot be unified, b) do not appear 'formally organised' and c) even when there is a degree of organisation that is not their core connotation, can we still justify a unified narrative of 'organised crime' for legal purposes?

It can be argued that this represents an example of Hume's Law, an *is-ought* fallacy according to which the way organised crime should be (a compact and multi-purpose category of crime for policy purposes) becomes directly – and fallaciously - the way organised crime is (in legal terms) (Sergi, 2015a). A narrative dilemma emerges from the differences between narratives of research findings and narratives of policy for the terminology of organised crime. If meaning is use - as argued by Wittgenstein (1968) - then only by using a word or sentence in a meaningful way for others can we demonstrate our understanding of that word or sentence. This use however, is necessarily dynamic and contingent. The meaning of organised crime, therefore - when measured against research

and snapshots of reality - is functional, contingent and constantly changing through language practices. The meaning of the words 'organised crime' cannot be established *a priori* but is the result of on-going production of meanings at various levels, which functionally serve various discourses and also feed the dilemma of its narrative. In this view, if it does seem neither feasible nor desirable to agree upon a definition, we are left to think that the only proper meaning or sensible interpretation of words or sentences is essentially measured by the success in achieving good results in practice. The politically pragmatic success of the terminology of organised crime for policy purposes in the UK and especially in England, from this point of view, is undeniable. Evidence of this success is the language used, for example, by the media and/or the seemingly unproblematic use of the words 'organised crime' by politicians, lawyers, prosecutors and law enforcement officers. What we have in England is a conceptualisation borrowed from other countries, international policing and even literature and cinema, that well serves political purposes and national security agendas today more comfortable with single-named globalised threats (Bigo, 2012). When this conceptualisation migrates from policy discourses into the law, however, the contradictions between policy and research resurface and the narrative dilemma, therefore, persists.

The evolution perspective

Success in the modulation of the narrative of organised crime to the needs and requirements of politics and policy-making does not necessarily correspond to the success of legislation, like the Serious Crime Act 2015, that uses that successful – yet confused - narrative. The scepticism of commentators and the criticisms raised against the new participation offences – too broad, too general, too demanding – are not only relevant points from practitioners' perspectives, but also reminders that in truth the narrative of organised crime has changed only in the use of the language and not in the reality of the phenomenon, as research shows. Hence the evolution dilemma: why has the law changed at this historical moment if the reality of the phenomenon does not seem to have changed? Why has the conspiracy offence, deemed to be enough until now, suddenly become insufficient?

On one side, research keeps confirming the extremely complex, extremely varied nature of groups and individuals engaging in serious (and) organised *crimes* (emphasis on

the plural). On the other side, institutions adopt a very broad definition of organised *crime* (emphasis on the singular) in their latest strategies. As a first point, it seems obvious to conclude that organised crime as a concept in England and Wales is still torn between singularity and plurality. The former is justifiable because of policy needs and the latter is instead confirmed by research on illegal markets and trades. Without resolving this dichotomy, but rather complicating it, the legal 'restyling' proposed by the Home Office in the new provisions of the Serious Crime Act 2015 represents primarily an attempt to fill an existing gap between the mandate of intelligence agencies (the NCA fights 'organised crime', intended as a list of serious crimes) and the prosecution instead has to bring to trial cases of organised crimes (drug conspiracies, trafficking activities). Moreover, the introduction of the new offence is confirmation that the concept of organised crime – as a singular concept, threat to national security - is now established in policy-making (Bigo, 2012; Walker, 2013). It is not compatible with the too-generic offence of conspiracy that does not have a label and does not provide the stigma of 'unlawful association' (Sergi, 2015b). Despite their apparent innovative and revolutionary character, the new offences do not reflect any expressed concern from law enforcement in handling these crimes through single offences or conspiracy. The reason why this change in the law has happened now and not earlier or later is coherent with the acceptance of the narrative of the organised crime threat in policy-making. The international experience, alongside borrowed notions from other countries, has penetrated into the national narrative at the point of merging with it even while excluding actual evidence of the local manifestation of organised crimes in England and Wales. The result is the confirmation of the policy narrative into criminal law.

The management perspective

The management dilemma relates to the procedural administration of the new offences in the criminal justice system. Both experiences with membership offences in other countries and provisions in counter terrorism – as another national security threat - can be used to question the management of the new offences. In fact, on one side, as previously argued, the new offences of participation are largely borrowed from international provisions and, on the other side, they will be used within a national strategy largely modelled upon the counter-

terrorist strategy (Home Office, 2013). It is therefore justifiable to wonder if lessons from abroad as well as from national experiences with the law on terrorist organisations can be useful in this case.

Considering international experiences with offences of organised crime, the effects of these new offences on the criminal justice system can be substantial, as evidence from US and Italian experiences with RICO illegal enterprise offences suggests. The whole justice system needs to adjust to offences, like the new offence of participation in organised crime, which introduces collective criminal responsibility. In fact, even though criminal liability is still arguably individual in the new offences in the Serious Crime Act (a single person can be charged and convicted of participation in organised crime activities), these offences still require proof of the pre-existence of an organised crime group with a criminal plan. On one side, this opens up the possibility of joint charges and, like in Italy and in the US, the possibility of 'mega trials'. On the other side, the associative dimension of organised crime groups has led other countries to provide special sentencing/prison regimes for (convicted) members of organised crime (to prevent further criminal association), or special rules for lifetime management of these offenders outside prison. Indeed, the new offences, once implemented, will eventually establish a new class of convicted offenders (organised criminals). The label of organised crime is a powerful one because of international discourses and popular narratives. It can be expected that this label will stigmatise convicted offenders, which will prove burdensome for the criminal justice system to absorb and for defence counsel to bear in daily business.

Managing offences of participation in organised crime activities can also prove burdensome from the point of view of prosecution and case building. In terms of evidence, for example, it is not clear how the ban on interceptions is going to work with a distrustful attitude towards 'guilt by association' offences in the English system. As happened for the offence of membership of a proscribed terrorist organisation⁴, the evidence requirements can become too onerous, which is the reason for very low prosecution and conviction rates for membership in terrorist association (Cole, 2013; Gov.uk, 2014). The counter-terrorism

⁴ Terrorism Act 2000, sections 11-12

legislation, in this case, also teaches that there is a risk of a net-widening effect of the offences (Walker, 2009; 2013).

Conclusion

This paper has discussed the new offences of participation in criminal activities of organised crime groups as included in the Serious Crime Act 2015. While presenting the novelties of the new offences and their immediate criticisms, this paper proposed a criminological critique of the conceptualisation of organised crime in the country between policy discourses and research evidence. In particular, section 45 of the Serious Crime Act defines organised crime groups and their criminal activities; this paper has questioned the suitability of such definitions when matched with the evidence related to the phenomenon of organised crime as provided in criminological research. In interpreting and critically analysing the new offences this paper has ultimately identified three dilemmas of organised crime in the new law, its preliminary criticisms and its interpretations against the complex reality of the phenomena.

The narrative dilemma suggests that there is a mismatch between the research narrative - which addresses organised crime as illicit trade and therefore as a plural phenomenon - and the policy narrative, which addresses organised crime as a single threat with various constituent elements. The new law, instead of resolving this dilemma, overlaps the two narratives and eventually creates even more confusion in terms of definition.

The evolution dilemma looks at the reasons why - notwithstanding the difficulties in understanding the phenomena linked to organised crime and the competing narratives - the law has changed now and not earlier. The evolution of the law is linked more to international sources and frameworks than to national needs. There seems to have been a transposition of international rhetoric within national policy not directly justified by law enforcement requirements.

Lastly, the management dilemma is linked to ancillary issues, which will originate from the new law once in force. These are procedural concerns related to prosecution

powers and sentencing/punishment guidelines. In consideration of both the narrative and the evolution dilemmas, there is a risk that the new offences will carry with themselves procedures coming from abroad and/or problems seen in other national security frameworks, such as counter-terrorism legislation and its proscribed association offences.

While the new provisions in the Serious Crime Act 2015 represent a step forward from the political point of view to 'take organised crime seriously', a thorough assessment of the effects and consequences of the law is needed to avoid waste of resources and confusion in the system.

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