

METHODS OF FIGHTING CRIMINAL ORGANISATIONS.

A LEGISLATION UNDER INFLUENCE?

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The aim of this research was to discover whether the principal elements of criminal law and criminal procedure that Belgian legislator has adopted or which are the object of a bill in order (notably) to fight organised crime more effectively have been subjected to significant influence originating outside the country.

In effect, this meant answering a question posed by the second call for research of the federal political science services in the context of the programme 'Belgium in a globalised world'. Within the theme of 'Belgian criminal law in an international context' it was noted that the room for manoeuvre of national decision-makers in the criminal field, and notably in the fight against organised crime, had been steadily restricted by the impact of European and international decisions. The call asked therefore to develop a research programme on 'the interactions between criminal law and certain foreign legal systems', in particular on 'the influence of (certain larger countries) of the European Union and of the United States on Belgian criminal law' and the influence of Belgian law on that of other European countries.

1. The political and juridical context

The growth in international drug trafficking since the 1970s has meant that problems of 'organised crime' have steadily crossed the borders of those countries where mafia-type organisations were present. The fight against drug trafficking, money laundering and organised crime has since become a priority in criminal policies, at both national and international levels.

In European countries, especially since the beginning of the 1980s, the measures available to both criminal law and administrative law have multiplied, with a view to fighting criminal organisations more effectively.

In the 1980s and 1990s two international conventions took place in order to establish shared priorities in the fight against these phenomena. In the context of the United Nations, a convention aiming to strengthen the fight against illicit drug trafficking was adopted in 1988. A Council of Europe convention of 1990 aimed to get methods of fighting against money laundering adopted by a large group of countries with a view to depriving criminal organisations of their profits. While establishing specific criminal offences as their principal element, these conventions also suggested the adoption of complementary measures, such as controlled drug deliveries and the confiscation of profits directly or indirectly acquired criminally.

Since then new criminal provisions, and also sometimes provisions of a more civil and/or administrative nature, have been put in place in a growing number of countries with the principal aim of fighting against organised crime. The European Institutions have also adopted some measures consistent with this trend. Moreover, the struggle against serious and organised crime has become an institutional priority, sanctioned by article 29 of the Treaty on European Union. So, for example, a common action was adopted in 1998 aimed at getting all member States to make participation in a criminal organisation a criminal offence, a measure which Belgium adopted in 1999.

As far as procedural measures are concerned, Italy has been the pioneer. Real ‘anti-mafia legislation’ was adopted there in the 1980s, allowing for example the imposition of restrictions on the property of individuals suspected of belonging to a criminal organisation. Ten years later, benefits were granted to drug traffickers and then to members of criminal organisations who decided to ‘repent’ by collaborating with the criminal justice system.

In Belgium in the past 15 years and more systematically since the end of the 1990s a number of new measures have been established with the principal aim of fighting organised crime more efficiently. Among other measures, the criminalisation of money laundering, the extension of confiscation, the authorisation and legalisation of proactive investigations and, increasingly, the growth of investigatory powers granted to the police, the will to protect threatened witnesses so as to ensure their contribution to throwing light on criminal matters, all constitute a direct link with the fight against serious and organised crime.

Thus, a common legal culture seems to have been steadily created at both national and supranational levels. The existence of a culture and of shared political priorities does not however necessarily mean that the measures concretely adopted are identical. Hence, the question of national legislators’ room for manoeuvre in the fight against organised crime deserved to be asked.

2. The field of research

Our first step was to identify, on the one hand, those Belgian legal measures where it seemed interesting to us to highlight the factors of influence from abroad and, on the other hand, to identify the countries which might have been at the origin of these influences. Furthermore, we proposed to analyse the supranational legal context which might either have inspired the national legislator or have limited its room for manoeuvre.

2.1. Choice of legislation

We have focused our attention on criminal legislation adopted or proposed in Belgium in recent years, of which one of the aims was to improve the fight against organised crime. This includes laws relating to the legalisation of proactive investigation (law of 12 March 1998), the criminalisation of participation in a criminal organisation (law of 10 January 1999), the use of anonymous witnesses (law of 8 April 2002), the reversal of the burden of proof in matters of confiscation (law of 19 December 2002), the legalisation of special investigative methods (law of 6 January 2003), as well as the proposal to introduce into Belgian law the figure of “pentiti” or collaborators with justice, not yet adopted.

However, a comparative study had just been completed¹ which dealt with the definition of the new offences of mafia association in Italy and of participation in a criminal organisation in Belgium and in Switzerland. This study brought to light the existence of certain international influences in the development of the penal definition of the criminal organisation.

The analysis of preparatory work to the Belgian law of 10 January 1999, as well as interviews held with members of the police services, magistrates and members of parliament, had established that the definition adopted by the Belgian legislator was in large part inspired by the definition given in the common action of the European Union on criminal organisations of 21 December 1998, as well as by the operational definition used by the German criminal police. This last definition seems itself to have been inspired by definitions developed in the United States.

¹ Cesoni, M. L. (dir.), *Criminalité organisée: des représentations sociales aux définitions juridiques*, Genève, Georg, Bruxelles, Bruylant, Paris, LGDJ, 2004.

This research has allowed the identification of the central role that new criminal offences play in the adoption of other penal measures, both in substantive and procedural law, and especially those introduced by the new Belgian legislation listed above.

This has led us to exclude from our enquiry the offence relating to the criminal organisation and to concentrate on the analysis of the legislative processes which have led to the adoption of new legislation of a procedural nature² (regarding confiscation it is not the penalty as such which has been the object of our interest, but rather the lightening or sharing of the burden of proof regarding the products of the offences).

2.2. Choice of countries

The choice of countries was initially determined by the desire to develop research complementary to the preceding research. We therefore studied the relevant measures in place in Germany and the United States, whose influence had already been observed concerning substantive criminal law, and (the United States) was specifically mentioned in the call for research.

As far as American law is concerned, we have restricted ourselves to the study of federal law, not only for reasons of resources but also for several more basic reasons. It is generally federal law which influences European legal systems. It contains measures relating to the fight against organised crime, whose activities often cross state borders. It would in any case have been difficult to find, a priori, adequate criteria allowing us to choose the law of certain states rather than others.

We have also included Italy, whose laws in the fight against organised crime are particularly developed because of the presence of mafia-type organisations.

We had foreseen from the outset extending if necessary the analysis to other European countries. A study of the Dutch law has afterward proved unavoidable.

3. Research aims and hypothesis

Based on previous research we proposed to bring to light the influences which may have guided the process of creating the law and which may come from legal texts or from social actors, that is to say, individuals acting on the basis of a particular point of view³.

3.1. Textual influences

Our project aimed to examine the extent to which certain international legal texts (European Union law and international conventions) and foreign legal texts (German, Italian and United States law, to which Dutch law was added) might have influenced the development of Belgian law (or conversely, as regards members of the European Union) in the fight against organised crime and criminal organisations in particular.

The first hypothesis was formulated on the basis of results relating to incrimination, which allowed us to assume that:

A) German and American influences, already noted in relation to the legal definition of a

² We should note that, in addition to the five laws and bills that we initially intended to analyse, we later decided to take into account (with the sole aim of comparative legal analysis) two new laws which aim to facilitate testimony by protecting witnesses: the new law on witness protection of 7 July 2002, as well as the law of 2 August 2002 relating to taking testimony by means of audio-visual media which, among other aims, completes the measures for witness protection.

³ See Ch. Debuyst, *Présentation et justification du thème, in Acteur social et délinquance. Une grille de lecture du système de la justice pénale*, Liège-Bruxelles, Mardaga, 1990.

criminal organisation, should be seen in other Belgian measures too; moreover, the measures adopted by Italy to fight against organised crime should have inspired the Belgian legislator, given their early existence and similar objectives.

Two other hypotheses were formulated.

B) The first concerns the impact of the supranational normative context, which is often represented in political discourse as constraining, and which includes multiple legal provisions, recommendations and resolutions concerning the fight against organised crime. It was therefore likely that Belgian law was influenced by decisions taken at a supranational level.

C) The second related to the possible influences that the Belgian legislation studied might have had on other legislation. On this point, we assumed however that the short delay between the adoption of these laws and the roll out of the research would not have allowed us to show any marked influence.

3.2. *The influence of social actors*

The research also endeavoured to reveal, as far as possible, the potential existence of networks of influence from abroad which might aim to promote or favour the adoption of legislative measures in Belgium (independently of legislative influence). Such networks of influence apparently played a role during the adoption of the law which made participation in a criminal organisation an offence. One definition played an important role as legal and operational reference and was transmitted through police circles and afterwards taken up in politics, the magistrature and the legislature, particularly in Belgium.

International interaction at the ministerial level, in professional bodies and between individuals, might also have influenced (directly or indirectly) the legislator. By legislator, we do not mean the parliamentary assembly in the formal sense, but the whole of different actors (notably the executive's representatives) contributing to the construction of "decisions on criminal policy", i. e. « the response made by the decision-making criminal law system to a social question formulated as a "criminal problem"⁴ ».

3.3. *The concept of influence*

Different aspects of the concept of influence have therefore been taken into account, all closely connected to our working hypotheses. First of all, it has been defined according to its primary sense (neutral in terms of value) of 'action that a thing, a phenomenon, a situation (or a person) exerts on someone or something'⁵ while leaving its mark. When it derives from a person, this action may be either voluntary or involuntary.

We then distinguished different types of influence that might impinge on the activity of the Belgian legislator and, in certain circumstances, limit its room for manoeuvre:

- ***active influence***, which can be either influence derived from supranational texts which *impose* the adoption of certain rules, or influence *actively* exercised by supranational institutions or by institutions, professional bodies, individuals of other countries;
- ***passive influence***, which takes place when the Belgian legislator seeks *voluntarily* to find ideas in supranational legal measures or large measures from other countries;
- ***contextual influence***, i.e. influence deriving from the political and legislative context, due to the participation of representatives of the Belgian authorities in various supranational

⁴ Enguéléguélé, S., *Les politiques pénales (1958-1995)*, Paris, l'Harmattan, 1998, p. 28.

⁵ See « influence », Le nouveau Petit Robert, éd. 1993, p. 1172.

bodies and whose constraining character is in part a function of its appreciation by the Belgian authorities.

4. Methodology and foreign partnership

In order to identify the different factors of influence relating to the legislation under study, our research has been based on an analysis at two levels: the study of the supranational politico-juridical context and of foreign legal texts and the analysis of legislative procedures preceding the adoption of the chosen Belgian legislation, by using classical methodologies of qualitative analysis, documentary study and semi-structured interviews.

Our study of foreign legislation has benefited from the collaboration of colleagues in each of the countries considered. The use of national competencies seemed essential to ensure the validity of a comparison concerning several countries and highly technical measures. Two research seminars brought the teams together, at the beginning and towards the end of the research, in order first to define the field of comparison and later to examine the results.

4.1. Study of the supranational politico-juridical context and of foreign legal texts.

The comparative part was developed on the basis of a classic documentary study. It aimed to highlight the influences of legal texts and the political and normative context.

The reconstruction of the supranational framework was based on a study of normative texts relevant to the subjects studied. Secondary sources were analysed in order to present the wider context in which these subjects develop, in particular the construction of the European area of freedom, security and justice⁶.

National legislation was studied on the basis of analysis of legislative texts, of legal theory and of case law relevant to the comparison.

It was preceded by a selection of key elements chosen to guide the comparison and which were set out according to their relevance to each measure studied: the object of the measure, its conditions of application, the decision-making body, controls and appeals, evidential character, as well as particular characteristics allowing to highlight national differences.

4.2. Analysis of the Belgian legislative processes

The reconstruction of the legislative process for each law studied was carried out using both documentary study and interviews. It aimed to complete the research. In order to reveal the influences from outside Belgium we had to reconstruct the legislative process, allowing us to highlight all the factors, both internal and external, which played a role in the development and adoption of the laws studied. The main participants in the legislative process were also identified, a process which entailed first an idea, then an initiative and finally the adoption of a given law.

A qualitative documentary analysis of official and non-official sources participating in the legislative process was carried out (acts of parliamentary commissions of enquiry and government documents concerning organised crime; parliamentary work and university studies relevant to the laws studied).

In order to examine the reconstruction of legislative processes and to attempt to identify the possible existence of informal influences (which leave no traces in official documents) a certain number of interviews were carried out: six free-form interviews with privileged observers of

⁶ Constituting an area of research in its own right, this section was developed from existing researches and studies.

and experts in organised crime, followed by 22 qualitative semi-structured interviews with selected individuals who participated directly (parliamentarians, civil servants, etc.) or indirectly (experts, policemen, etc.) in developing the legislation in question, or who were noted, either in documents studied or by other people interviewed (snowball effect) as resource people having a particular knowledge of the issues involved in the legislation under study. An interview guide was drawn up to ensure that different aspects of the factors of influence were confronted.

5. Chronology

A chronological presentation of certain events preceding or accompanying the legislative processes under study will help to highlight some important elements of the legislation's origin and to better situate the conclusions that follow.

The affair of the Brabant-Wallon Killers terrified citizens in the *years 1982-1985*⁷. Although various theories have been put forward, ranging from common criminality to an attempt to destabilise Belgian institutions, the affair has never been resolved.

The « Commandant François » affair, in which several police officers were convicted for drug trafficking, was also in the news *in the early 1980s*.

In 1988 the first parliamentary commission of enquiry into the Brabant Killers was established. The commission also looked into the Commandant François affair and concluded that existing means were insufficient to fight organised crime. It recommended that the area of justice should become a political priority; in particular, to regulate special investigation techniques used by the police and undercover operations. The commission raised the question of anonymous witnesses and informers.

The commission referred to foreign experience, in particular to the Dutch jurisprudence, which authorised undercover work, as well as to the bait-sales often used in the fight against drug trafficking in the United States, the Netherlands and Germany. It stressed that the Minister of Justice wished to import American legislation into Belgium. The Minister, speaking to the commission, noted that the police were very eager for a codification of investigation techniques and announced a forthcoming decision relating to surveillance, undercover operations and informers.

The commission presented its report *in 1990*, the year in which the Minister of Justice issued the first (and confidential) ministerial circular relating to special investigation techniques to combat serious and organised crime.

In 1991 the government announced that it was going to set up a commission whose aim would be to improve the criminal procedure and investigation. This came to be known as the Franchimont Commission.

In 1995, following the elections, the new government took into account the priorities already mentioned. The governmental agreement of 1995 gave political priority to the fight against organised crime. It decided to fill in the legislative gaps, notably by regulating the use of special investigation techniques and in allowing the confiscation of criminal profits, based on a reversal of the burden of proof.

The Dutroux affair exploded *in 1996* with repercussions outside Belgium. Within the country it provoked a wave of demonstrations which questioned the functioning of the criminal justice system.

Also *in 1996* an action plan to tackle organised crime was adopted by the government. All the issues which we have studied were already included by that time in the government's priority legislative projects.

⁷ A gang of criminals had carried out a series of armed attacks on supermarkets, jewellers, and armourers, leaving 28 dead and many wounded.

In 1995-1996 the second parliamentary commission of enquiry into the Brabant Killers was created, as well as one regarding the Dutroux affair. In the same year, the Senate instituted a commission of enquiry into organised crime.

In 1996 a first bill was introduced by members of Parliament, which aimed at granting certain penal privileges to those who had committed specific crimes if they collaborated with justice. It has been followed by several others since then.

In December *1996* a confidential circular provided rules for proactive investigations.

In 1997, the second Brabant Killers commission presented its report. It recommended better regulation of investigative techniques as well as the adoption of a law which would establish rules for the use of “pentiti”, in spite of the fact that the commission declared that numerous difficulties had been encountered in this field in Italy.

In 1997 the ‘Dutroux-Nihoul’ commission presented its report. It recommended legislation concerning investigative techniques as well as making the circular regarding proactive investigation law coinciding with the launch of the Franchimont project. In the same year a first report from the organised crime commission was presented. It examined foreign initiatives, notably those of the Council of Europe and of the Van Traa Commission⁸, as well as legislation in other countries. The main focus of the commission, however, was on the question of introducing a new offence relating to criminal organisations.

The second report of the commission of enquiry into organised crime, in *1998*, concentrated on special investigative techniques and proactive investigation, as well as on “pentiti”. The report presented legislation from a variety of countries and compared the methods used in Belgium and the Netherlands. The commission underlined that it was imperative to legislate bearing in mind the Belgian Constitution and the European Convention of Human Rights, since otherwise there would be a risk of an adverse judgement from the court in Strasbourg.

In 1998 a new article 28bis was added to the Penal Code which gave **legal status to proactive investigation** in the framework of the reform known as “petit Franchimont”. This allowed the police, with prior authorisation from the public prosecutor, to carry out a proactive investigation consisting of gathering information on the basis of a “reasonable suspicion” that certain acts liable to penalty, notably acts perpetrated in the context of a criminal organisation, ‘will be committed or have been committed but are not yet known’.

The final report of the organised crime commission, also presented *in 1998*, covers various issues. The commission specifically referred to Belgium’s international commitments in the fight against organised crime. The commission concluded by affirming that it was necessary to adopt a legal framework concerning special investigative techniques as well as the protection and anonymity of witnesses while respecting the case law of the European Court of Human Rights. The commission took a controversial position with regard to “pentiti” and recommended the development of a more wide-ranging legislation with regard to confiscation. *In 1999*, a commission was created to check if the recommendations of the commission of enquiry were implemented.

In 2000, Minister of Justice Verwilghen, testifying before the follow-up commission, affirmed that he wished to ensure continuity with the preceding government in the issues that we are studying. He indicated nevertheless that he had not retained the texts prepared by the preceding government and that he preferred to carry out complementary research before legislating in certain areas. He affirmed that the legislation and working methods of the Netherlands relating to the reversal of the burden of proof⁹ were being studied. In the same year the Federal security and penitentiary policy plan was adopted. It recommended

⁸ Netherlands parliamentary commission charged with enquiring into the investigative methods used by the police.

⁹ More a matter of a simplification as we have stated in our comparative legal analysis.

improving international collaboration in the fight against organised crime, notably by using special investigative techniques, and restated Belgium's international and European commitments. It recommended adopting new confiscation measures, possibly inspired by the American and Dutch examples. Other recommended measures included the protection and anonymity of witnesses and the use of "pentiti".

Still *in 2000* a new confidential circular regulated the nature of proactive investigation.

The law of 8 April 2002 on anonymous witnesses allowed the hearing of witnesses under cover of anonymity in criminal proceedings whenever necessary to avoid the witnesses running risks because of their testimony. In particular, it provided complete anonymity to witnesses if their testimony concerned a crime that had been committed in the context of a criminal organisation.

While confiscation could in principle only apply to goods which had been proven to be of criminal origin, a new *law of December 2002 established a partial reversal of the burden of proof* concerning assets thought to be the result of certain offences, as well as of the illicit activities of criminal organisations.

The law of 6 January 2003 regulated several investigative techniques. Some of them (infiltration, observation using technical means and hidden visual checks) were thought to apply particularly to the area of organised crime either because they contained an explicit reference to organised crime or because of references to proactive investigation, which is particularly concerned with this area.

The Bill on use of "pentiti" or collaborators with justice has still not been debated by parliament.

6. A reconstruction of influences

Regarding the decision to legislate, political influences seem to have been more important than legal restrictions, which were relatively weak. Foreign legislation has influenced both the decision to adopt certain laws and the content of these laws.

6.1. The supranational context

We should first point out that few measures exist, in either international conventions or in European instruments, which are constraining from the legal point of view. We should note, however, that the case law of the European Court of Human Rights (more so than the convention of 1950 itself) has sometimes played an important role in the adoption of a legal provision and has sometimes influenced its content. Moreover, the European context seems to have created a culture based on a suggested threat and affirmed political priorities which have favoured the adoption of the measures we have studied.

6.1.1 The relativity of legal constraints

The impact of the framework of supranational rules is less important than one is often led to believe. Regarding the measures established by the legislation under study, and concerning their purpose in the fight against organised crime in particular, few measures exist, in either international conventions or in European instruments, which are constraining from the legal point of view.

Firstly, if the international conventions relevant to the fight against organised crime recommend the adoption of certain measures, the rule is hedged with precautions making the law non-binding on the member States.

In the context of the European Union, the instruments used to refer to the matters under study generally derive from political agreements, and not from rules imposing an obligation to legislate. Some restrictive measures currently exist, but they were adopted or came into force after the promulgation of corresponding Belgian laws¹⁰. In most cases, the rules existing in Belgium before the adoption of new legislation could therefore have been considered to be sufficient to respect European commitments.

But let us examine in more detail the content of the measures contained in normative supranational texts which bind Belgium.

Concerning the special *investigative methods*, the convention of Vienna of 1998 against illicit drug trafficking allowed the use of controlled drug deliveries, but this measure is not truly binding and nor is the one allowing the use of special investigative methods introduced in the Palermo Convention against transnational organized crime of 2000. In both cases these measures only had to be adopted if compatible with the legal principles of the member States, and could therefore be rejected by the member States.

No supranational text imposes the adoption of witness protection programmes, except the Palermo Convention to a certain extent, but here only according to each State's means

In the same way, there seems to be no real supranational compulsion in the matter of the *use of "pentiti"*. The Palermo Convention states that each state 'shall take' appropriate measures to encourage the cooperation with the law enforcement authorities of members of criminal groups, but the subsequent benefits are only 'considered.' The measures on 'active repentance' in place in Belgium, notably regarding drug trafficking or participation in criminal organisations, therefore seem sufficient to meet the Convention's obligations.

Supranational texts regarding *confiscation* all impose the adoption of confiscation measures of the proceeds from crime or of a corresponding property. The Vienna Convention and the Palermo Convention *propose* the reversal of the burden of proof, but no supranational norm imposed this measure before the adoption of the Belgian law of December 2002. This law therefore considerably exceeds international obligations, which preceding laws had already guaranteed to respect. With regard to the seizure of property the value of which corresponds to that of proceeds of crime, the framework decision of July 2003¹¹, which allows the use of this measure in the context of procedures of mutual assistance, was adopted after the Belgian law and, moreover, on the initiative of Belgium¹². Far from submitting to external obligations, the Belgian model has, in this case, been exported to Europe.

Clearly, an absence of obligation does not imply a total absence of influence. With regard to supranational texts, this influence is more cultural than legal, in other words it results from a voluntary consent rather than from a submission under obligation. From the legal point of view, Belgian legislator had very substantial room for manoeuvre. While we have noted the influence of the European Convention on Human Rights (ECHR), neither the Convention nor the Court of Strasbourg required to adopt any of the measures we have studied.

6.1.2. *Respect for human rights*

The case law of the European Court of Human Rights has been mentioned on several occasions above and in the course of the legislative process, as well as by parliamentary commissions and in academic studies, and even in parliamentary debates. The question was to

¹⁰ The convention on mutual assistance in criminal matters of 2000 imposes the adoption of some of the measures we study (notably with regard to controlled deliveries, undercover operations, and the use of videoconferences) but it did only come into force in August 2005.

¹¹ Framework decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence (*JOCE* L 196 of 2.8.03, p. 45.)

¹² With France and Sweden.

rule out certain propositions which seemed to violate the fixed principles of the ECHR or, conversely, to adopt certain legal measures so as to respect them.

Hence the need to regulate by law the use of special investigative methods, which had only been outlined by a confidential circular, has been reaffirmed on several occasions and yet again in the opinion of the Council of State (*Conseil d'Etat*), noting that « the legal basis must be sufficiently accessible and foresee, with sufficient precision, in what circumstances and under what conditions the authorities may use this type of investigative methods¹³. »

The fear of a possible conviction in the European Court of Human Rights also seems to have been an important factor in the decision to adopt legislation relating to anonymous witnesses, as shown by our interviews and by the explanatory statement of the law. The Belgian procedural system already accepted the *de relato* testimony of an anonymous witness brought before the judge by an officer of the criminal investigation police or an examining magistrate¹⁴. A law was therefore considered indispensable in order to guarantee the adversarial principle¹⁵.

We should note however that a study of special investigative methods and of proactive investigations, entrusted to Henri Bosly, was fundamentally based on the notion of respect for human rights, was not considered as a reference text by the Minister of Justice.

This lead us to underline the fact that the legislator had an important room for manoeuvre, because a prohibition of special investigation techniques or of anonymous testimony should have satisfied the principles of the ECHR.

In fact, the decision of adopting the laws under study seems to be linked mainly to two different factors: European issues and internal affairs.

6.1.3. *European political issues*

Neither the documents analysed nor the interviews carried out lead us to believe that the political initiatives we have studied and which were adopted by the Belgian authorities were influenced in any way by foreign political pressures. The participation of representatives of the Belgian authorities in various European institutional working groups obviously presented opportunities for the exchange of points of view, but none of the documents analysed or people interviewed revealed precise influences on any of the legislation under study.

According to some of our interviewees, the fact that other countries have begun to adopt legislation giving the police new powers or measures aimed to make it easier to use privileged witnesses in order to fight against organised crime has undoubtedly encouraged the Belgian legislator to move in the same direction. Of course, the Belgian legislator wanted to prevent Belgium from becoming a refuge for this type of criminality.

The application of the Schengen agreement and the widespread fear in Europe that the free circulation of goods and persons would benefit criminal networks and, in particular, organised crime forms the background to numerous initiatives developed at the European level.

We can reasonably believe that the European context must have played a supporting if indirect role in the legislative initiatives studied although this precise role cannot be evaluated and there are only a few political statements which support this conclusion.

Two factors seem pertinent here: police cooperation and the gradual creation of an area of freedom, security and justice both factors being mainly based on the claim of need to fight large-scale international and organised crime.

¹³ Avis du Conseil d'Etat, *Doc. Parl.*, Chambre, Session 2001-2002, 50-1688/001, Avis 32.673/2.

¹⁴ Mons, 16 septembre 1993, *Rev. dr. pén.*, 1995, p. 284.

¹⁵ Exposé des motifs, *Doc. Parl.*, Chambre, 2000-2001, 1185/1, p. 24.

The development and strengthening of European police cooperation steadily led the member States to give the police authorities powers of action in foreign territories (Schengen Convention, Benelux Treaty), as well as to institute joint teams.

In this context, the adoption of measures regarding special investigative techniques may, first, allow observation operations carried out by the police of another country on Belgian territory to be better embedded, then facilitate joint police force activities and, in the longer term, may possibly allow all techniques authorised by the law to be available to foreign police officers operating within Belgium. This need seems to have been reinforced since the framework decision of 13 June 2002¹⁶, ordering the early establishment in investigations into drug trafficking, people trafficking and terrorism of the joint teams foreseen by the European convention of May 2000 on mutual assistance in criminal matters.

We may therefore judge that this context implies certain operational advances. However, at the same time these relate to wider political aims intended to establishing a progressive communitarisation of the field of justice and internal affairs. The transitional period of the 1990s saw both the strengthening of the call for fighting against organised crime and the construction of the third pillar of the Treaty on European Union, to which the Belgian authorities were clearly not insensible, having worked for the adoption of the European arrest warrant during the Belgian presidency of the European Union.

6.2. The importance of internal factors

While we must balance external and internal political constraints, internal factors nevertheless seem to be more important, at least in the minds of those who took part in the legislative processes we have examined. A certain number of affairs (François, Brabant Killers, Dutroux) led successive Ministers of Justice to reply to an imperative that the reactions of the Belgian population seemed to impose: to guarantee more safety by the more efficient working of the criminal justice system and the police.

The importance of internal affairs for the processes we have studied is made clear, in particular from the reports of the parliamentary commissions, who reacted by recommending the establishment of new measures, as well as from our interviews.

We may therefore judge that the affair of the 'Brabant Killers' was a trigger for the discussions resulting in the legislation studied in our research. We have seen that the first 'Brabant Killers' commission, established between 1988 and 1990, brought to light dysfunctions in the criminal justice system and highlighted the need to adopt new measures in order to make it more efficient, hence the first circular relating to special investigative methods was adopted in 1990.

Several years later, and with a certain 'delayed reaction' effect, the Dutroux affair facilitated and accelerated the legislative processes leading to the measures recommended by the parliamentary commissions and, moreover, had repercussions outside the country¹⁷.

6.3. Textual influences

Throughout the legislative process, reference has been made to foreign legislation. University teams were entrusted with studying foreign legislation by the Minister of Justice in charge. In this context, some items of legislation were mentioned more than others and seem to have

¹⁶ Framework decision 2002/465/JHA of 13 June 2002 on joint investigation teams (*JOCE* L 162 of 20.6.02, p. 1).

¹⁷ The Dutroux affair was one of the reasons for adopting a joint action regarding the sexual exploitation of children, resulting later in a framework decision.

inspired some of the measures we have studied. The comparative analysis we have carried out allows us to confirm some of these influences .

6.3.1. Foreign references

A certain number of academic studies aimed to formulate proposals in the areas we are concerned with, or to prepare a project for a finalised law. Most often these studies carried out analysis of different foreign legislation. The studies by the University of Ghent refer notably to legislation from England, Scotland, France, Germany, Italy and the Netherlands.

Dutch law has generally been thought to be the most suitable model for Belgian legislation.

Italian legislation has also had much appeal for university researchers and above all for politicians, but in two different ways: sometimes in favouring the adoption of certain legal texts, notably regarding witness protection, but more forcefully in avoiding the adoption of other legal texts, particularly regarding “pentiti”.

6.3.2. Similarities and differences

The comparison of legislative texts moderates the prominence of the Dutch model. Both German and United States law seem to have played significant roles, the former mainly through university studies and the latter mainly through police exchanges.

Belgian measures are close to Dutch law, notably regarding special investigative methods, anonymous witnesses, and extended confiscation. In the first two matters we can also note the influence of German law, and similarities to US law with regard to certain aspects of special investigative methods. As far as extended confiscation is concerned, Germany and the United States apply similar principles to Belgium and the Netherlands (disproportion between personal assets and legitimate revenue).

The comparison confirms the close resemblance of Belgian and Italian laws regarding witness protection and videoconferencing. Nevertheless, we must stress the US origin of measures relating to the protection of threatened witnesses, which strongly influenced Italian law.

Regarding “pentiti”, the latest Belgian bill (introduced by members of Parliament) resembles the New Dutch law (promise and double level of benefits); it seems, however, also to reflect certain aspects of Italian and US measures on witness protection, in terms of providing a written agreement for example.

Finally, although the inspiration seems to have come from the United States, and the desire to impose control by the public prosecutor on all enquiries is just as strong in the Netherlands, Belgium remains unique in its decision to legislate on proactive investigation.

7. The role of social actors

The reconstruction of legislative processes made it possible to highlight the roles of the principal actors who have played a decisive part and who have sometimes imported influences from abroad.

7.1. Institutional influences

Inside Belgium, the executive power played a predominant role.

Although the laws and bills we have studied are nearly all government initiatives, members of parliament were active above all during the emergence of the decision to legislate, on the various parliamentary commissions of enquiry. They highlighted various points of principle

the legislation should respect – but which were not, however, always taken into account. They also referred several times to foreign legislation.

However, political decisions were taken by the government in parallel with the work of parliamentary commissions, and the laws under study are most often of a governmental origin. The executive played a key role in drawing up legal texts. It incorporated elements deriving from foreign legislation, mainly through university studies.

Our analysis of parliamentary proceedings shows that there was little intervention from members of the parliamentary majority; it was essentially members of the opposition who intervened to put forward amendments.

However, on the basis of analysis of parliamentary proceedings and of remarks by interviewees, it seems that their power of obtaining amendments was weak.

Arguments used by members of the Parliament frequently referred to the case law of the Court of Strasbourg and, more rarely, to foreign legislation.

Finally, the particular role played by the Socialist party francophone has to be underlined, because it appears the principal actor in stopping the bill regarding “pentiti”.

7.2. Corporatist influences

Both the principal actors of the criminal justice system and academics played an important role in the definition of legal texts.

7.2.1. The role of the police

The police have been a motivating force since the beginning of the legislation we have studied, mainly because of their practical work and because they are the prime users of such legislation.

Through their cooperation with the police of other countries they have gathered ideas from foreign experience and are in a position to present the Belgian model to their foreign counterparts.

In addition, members of the police have participated directly in the legislative process through their membership of the organised crime working group created by the Justice ministry. They have also been interviewed in academic studies.

Annual reports on organised crime have supported legislative activity by drawing a picture of the phenomenon of organised criminality in Belgium, a picture that the Minister of Justice has presented to parliament on several occasions, at the same time affirming the need to adopt new legislation.

7.2.2. The role of the judiciary

Several magistrates took part in the legislative process through their membership of the organised crime working group or through being interviewed by parliamentarians during the preparatory works. They played a particularly significant role in the matter of special investigative techniques.

The College of Public Prosecutors (*Collège des procureurs généraux*) supported the police demand for legislation regarding investigative methods, which aimed both to extend police powers of action and to define their limits clearly. Moreover, a given magistrate has played a key role in definition of the text of the bill.

7.2.3. The role of academics

Some academics, particularly members of the University of Ghent, played a vital role as experts for different Ministers of Justice by supplying numerous elements of legislative comparison. On the contrary, the study made at the UCL under the direction of Bosly has not had any impact on the formulation of new laws, having been refused by the organised crime working group.

7.2.4. Influential individuals

Certain individuals seem to have played a special role as a result of their personal interest and initiative, together with opportunities linked to their professional positions, which allowed them to intervene in the legislative process.

This is particularly the case with certain magistrates who were members of the Minister of Justice's office, as well as with a number of politicians, parliamentarians or members of the executive.

We should highlight the role played by two individuals who were members of parliament and Ministers. One of them, Tony Van Parys, was deeply involved in the areas which concern us through his parliamentary activity and was also president of the 'Brabant Killers' commission.

After being president of the Dutroux commission the other individual, Marc Verwilghen, finalised the legislation. Moreover, Verwilghen played a motivating role when he introduced an amendment adding the idea of proactive investigation to the future law of 12 March 1998.

Conclusion

Analysis of the data assembled in the course of this research has led us to draw a general conclusion, and then to nuance it by examining it in detail. The Belgian legislator appear to have acted with complete national autonomy concerning the measures we have studied, since the *active influences* we have noted as coming from outside the country are very limited, and powerful internal factors seem to have played a decisive role in decisions to pass legislation. However, *contextual influences* seem to have impacted on these decisions by imposing more general constraints, while *passive influences* have contributed to the content of certain laws.

On the one hand, Belgium's position as an active player in European construction makes its representatives susceptible to the influences of a context in which the adopted measures contribute to regulating investigative powers, aimed at improving police cooperation, and to the progressive transformation of justice and internal affairs as an area of common interest.

On the other hand, the legislator's work has been profoundly influenced by certain foreign legislation, in particular Dutch and Italian, notably through studies carried out by academics.

Finally, as regards the influence of Belgian legislation outside the country, this legislation is too recent to evaluate its significance. However, its influence is becoming evident especially regarding the police and at the European level, for example in investigative methods and confiscation matters.