INTRODUCTION: STAYING OUT OF COURT

The ways court procedures can be avoided is a classical theme in socio-legal studies and criminology. The preface to a book published on that theme by the Erasmus School of Law in 1988, on the occasion of its 25th anniversary, covers the then dominant view very well: '[T]hey [people who advocate out of court settlements, *RvS*] consider the judge as an *ultimum remedium*. And that is how it often should be'.[1] Topics covered in that jubilee volume ranged from arbitration and administrative regulation to diversion and alternative dispute settlement. Now, however, it is striking to see that not only the *topics* in this issue of the *Erasmus Law Review* differ substantially from those of twenty years ago but that the *tone* is also quite different. The initial optimism and the belief that avoiding formal court procedures is essentially a good thing seem to have made way for a more sceptical attitude. Here it is questioned whether extra-legal regulations and out of court settlements actually *do* diminish the number of court procedures and whether this would be desirable. Marc Loth's argument is the most explicit, but in more implicit ways it is echoed in each of the contributions.

In many ways, this change follows the general development in socio-legal studies and criminology, which is notably influenced by the fact that we have more experience with out of court settlements and know through research how they work in practice. In the 1970s, the plea for out of court settlements often emerged from discontent about the dysfunctionality of mainly criminal law. Critics argued that there are better ways to solve conflicts, ranging from decriminalisation and diversion to informal dispute settlement.[2] Albeit in a very balanced way, this positive tone is maintained in Judith van Erp's contribution on reputation sanctions (also called 'naming and shaming').

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[1] H.J. Snijders, C. Fijnaut, H.Th.J.F. van Maarseveen, and R. Zwitser, *Overheidsrechter gepasseerd: conflictbeslechting buiten de overheidsrechter om* (Arnhem: Gouda Quint 1988).

[2] L.H.C. Hulsman, 'Kriteria voor strafbaarstelling', E. André de la Porte (ed.), *Strafrecht te-recht? Over dekriminalisering en depenalisering* (Baarn: Anthos 1972), 80 and N. Christie, 'Conflict as property', (1977) 17 *British Journal of Criminology* 1.

In the early 1980s, Donald Black[3] demonstrated that, next to benign reasons to stay out of court, people mostly took the law into their own hands because they perceived justice as being unavailable to them. As an example of this unavailability of law, Black referred to the settlement of conflicts that arose from an illegal transaction (e.g. a failed drugs deal). If people did not have a plausible story or perceived their opponent to be too powerful, they also often refrained from formal litigation, as is the case when law enforcement arrives too late to solve the problem or if one does not trust the prevailing legal order.[4] The debate on private justice as such is not dealt with in this issue, but the idea that certain people have an interest in avoiding formal justice certainly is – as Judith van Erp and Nicholas Dorn demonstrate with regard to business corporations and private intelligence companies, respectively.

The real watershed in the debate was caused, however, by Stanley Cohen's seminal book *Visions of Social Control* in 1985.[5] After analysing all the diversion programmes, non-custodial sanctions, and other out of court settlements, Cohen concluded that these initiatives had merely become 'add-ons' that had widened the net of social control and tightened the mesh so that even the smallest 'fish' were caught. As a result, the criminal justice system caseload was by no means reduced. The argument is dealt with most explicitly in this issue's contribution by Wim Huisman and Monique Koemans, which discusses various new administrative regulations that are aimed at replacing formal court procedures. However, the article also supports Marc Loth's analysis.

Another phase that can be distinguished is David Garland's[6] assessment of the predicament that currently confronts law enforcers: they seem unable to control crime and insecurity adequately. One of the responses to this quandary is the 'responsibilisation' of other, mostly non-legal agencies. In this respect, we can point – as Huisman and Koemans do – to the enhanced importance of local authorities and civil society or – as Van Erp does – to governmental control bodies on financial fraud, food safety, compliance, and corporate governance. One consequence of these 'responsibilisation strategies' is that a large number of cases are dealt with outside of court, at least initially, since conflicts that arise from these settlements indeed often lead to new court cases.

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[3] D. Black, 'Crime as social control', (1983) 48 *American Sociological Review* 34.

[4] Not everybody is in the position of the Italian Prime Minister, Silvio Berlusconi. He has regularly claimed that all the judges are against him, and in July 2008 he changed the law to create his own immunity.

[5] S. Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity 1985).

[6] D. Garland, *The Culture of Control* (Oxford: Oxford University Press 2001).

A next important new field in which a move away from formal law enforcement can be observed is the changing nature of policing. In their book *Policing the Risk Society*,[7] Richard Ericson and Kevin Haggerty argue that rather than the traditional criminal investigation into individual offenders, policing today is more about crime mapping and 'knowledge broking'. Policing is moving away from servicing the prosecution and trial of offenders and increasingly follows the rationale of intelligence. It is, moreover, no longer an issue solely for the state but also includes a growing number of private partners. According to Ericson and Haggerty, the private security sector is hired first as a provider of risk taxation and control techniques; its second task is to do the 'dirty work' that state agencies are not allowed to do; its third function is to do the 'cheap work', for which police officers are overqualified. This informal processing of data and managing risks is touched upon in Judith van Erp's contribution and is referred to at the beginning of Nicholas Dorn's analysis.

Dorn also addresses a possibly even more complex phenomenon: the globalisation of this new style of crime control– i.e. through intelligence and risk management – makes judicial scrutiny even harder. States that hire private military contractors, such as Blackwater, to do the 'dirty work' in the 'war on terror' have made painfully clear how difficult it is to hold these companies accountable for their acts – i.e. a fatal shooting of 17 people in Iraq. In this particular case, the employees could only have been brought to justice if Blackwater had been contracted by the Defence department and not by any other state agency.[8] This is not just an American anomaly: private contractors who operate abroad in *Dutch* service generally also have immunity from local prosecution, whilst it is also very difficult to prosecute them according to Dutch law. The Dutch Advisory Council on International Affairs, which was asked for its advice, holds such immunity to be unacceptable and proposes that Dutch law should be applicable if the protection offered by international public law is 'manifestly deficient'.[9] Also in the case of Frontex, a new European, intelligence-driven hybrid between a military and a police organisation responsible for risk analyses and coordination on the level of the European Union,[10] it is still unclear to whom it is accountable. We only know that the member states do *not* have ultimate

[7] R.V. Ericson and K.D. Haggerty, *Policing the Risk Society* (Oxford: Clarendon 1997).

[8] In October 2007, the US Congress voted for the expansion of the Military Extra-territorial Jurisdiction Act (MEJA) to become applicable also to contractors who work for other US organisations (*The Washington Post*, 5 October 2007), but as yet no contractor has been prosecuted.

[9] AIV, *De inhuur van private militaire bedrijven: een kwestie van verantwoordelijkheid* (The Hague: Adviesraad Internationale Vraagstukken (AIV) no. 59, december 2007).

[10] Established by Council Regulation (EC) No.2007/2004 of 26 October 2004.

control over Frontex. It is not easy to hold institutions, such as the World Bank, accountable if they have been criminally negligent[11]. These are just a few examples of how the phrase 'staying out of court' could acquire a fundamentally different meaning; the list of global actors that cannot easily be held accountable for their acts could be expanded *in extensor.*[12]

I will conclude here with a brief overview of what is to follow in this issue of the *Erasmus Law Review*. In the first article, Marc Loth argues that, despite the increased importance of out of court settlements, there is actually no decrease in the number of court cases in the Netherlands. Moreover, Loth claims there are good reasons to insist on judicial scrutiny in many instances. In the second article, Wim Huisman and Monique Koemans examine the Dutch 'import' of various administrative measures of Anglo-American origin that were introduced to increase the efficacy of the fight against everyday nuisance and against organised crime. Because these measures implicitly widen the scope of criminalisable behaviour, they potentially lead to more rather than to fewer court procedures. In the third article, Judith van Erp examines the 'naming and shaming' of various regulatory bodies that are aimed at the prevention of mainly corporate crime. For the business community in particular, loss of reputation is far more damaging than fines or other penalties. Though these control agencies traditionally work in an informal manner, Van Erp observes a tendency towards formalisation. Nevertheless, only when there is more transparency as well can legal procedures and indeed sanctions be made redundant. In the fourth and final article, Nicholas Dorn examines the integration of public and private intelligence, and concludes that the role of the latter is best limited to informing and supporting state agencies if we still are to take the word 'accountability' seriously. More convergence between the two types of intelligence will leave less room for dissenting opinions and indeed for judicial scrutiny.

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[11] D.O. Friedrichs and J. Friedrichs 'The World Bank and Crimes of Globalization: A Case Study', (2002) 29 *Social Justice*, 13.

[12] P. Andreas and E. Nadelman, *Policing the Globe: Criminalization and Crime Control in International Relations* (New York: Oxford University Press 2006).