

DEMARCATIION-FREE THINKING IN CRIMINOLOGY: THE CASE OF UNDERMINING CRIMINALITY OR CRIMINAL UNDERMINING

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INTRODUCTION: THE PURSUIT OF CLARITY

In retrospect, criminology strived for being a ‘real’ science from its emergence: its pioneers’ ideas and approaches, as advocated by Lombroso – such as measuring delinquents – were not ‘primitive’. These were respectable attempts to clarify criminal conduct and phenomena. Of course, these attempts must be seen within the framework of the contemporary methodology, technical tools and underlying theories. This ‘state of the art’ was in its first phase dominated by the medical discipline. Along with the development of the behavioural science, criminology jumped the bandwagon of sociology, psychology, psychiatry, anthropology and recently ecology as the cradle of ‘green criminology’; naturally all framed in a criminal law system.

Has this led to an enrichment of criminology as a science or has this spreading and proliferation contributed to a fragmentation, weakening its presumed ‘identity’? This question is difficult to answer because this presupposes a ‘core’ criminological science from which to deduce such an identity. However, does the search for such an identity matter? What matters is coining sharp concepts and testable theories which requires methodological and semantic analysis, most of which are not specific for a particular discipline or era. There are some classical methodological works, building on the analytical philosophy of science and its prior history which stretches back to William of Occam and the proverbial ‘Occam’s razor’ of redundant hypotheses.¹

We will not go back in time that far and rather work in the rationalist tradition of the French philosopher *René Descartes* (1596-1650). This philosopher was in search of a true and irrefutable basis of knowledge. In his *Discours de la Méthode* he applied a strict method of doubting anything, whether tangible or spiritual. Today, we would call it a kind of mental road trip in search of a true axiom from which to

1. D. Knowles, *The evolution of medieval thought*, London: Longmans, 1962, p. 318.

deduce a system of knowledge similar to mathematics. Nothing proved to be resistant to Descartes's methodological doubt with the exception of one thing: his self-awareness of doubting, that is his *thinking*. This led to the famous phrase '*cogito ergo sum*': I think, therefore I am. The interesting aspect of the Cartesian method is its independence from a particular scientific branch: like all philosophy of science, it transcends the separate discipline lines.

In this capacity the Cartesian systematic doubting is certainly of relevance to the many branches of criminology (or any behavioural science). It can be considered as the researcher's 'concept grinder' to apply in his preparatory work: grinding basic concepts and assumptions to pieces until only the hardest bits (*claire et distinct*) survive the onslaught. This is particularly fruitful to a prevalent mainstream thinking in which much can be taken for granted. In the past years *undermining criminality* has been dominant in Dutch mainstream criminology, which seems a good candidate for 'concept grinding'.

To this end we will explore the vagueness of the concept of 'undermining criminality'. First how it fares in our 'concept grinder' and then how it is used in criminological and legal settings. Second, we will pay attention to two definitions of the concept of undermining criminality after which we clarify the difference between 'undermining criminality' and 'criminal undermining'. Third, we will examine if there is a future for the legal concept of 'criminal undermining' in the Dutch Criminal Code.

2 THE CONCEPT GRINDING MILL

The number of definitions of undermining criminality abound in policy papers and criminology. We have definitions as formulated by, among others, the ministry of Justice, the Dutch government, the Public Prosecution Office, the police, special expert groups or task forces and academic authors. Unsurprisingly, they all differ as they reflect different interests. Therefore, we select two examples for further discussion. What they have in common is the attempt to include as many criminal phenomena as possible by using open, undefined terms, making the concept anything but '*claire et distinct*'. This makes the definitions useless: one undefined component is sufficient to make the whole formula undefined. For example, the definition of Tops and Schilders is overloaded with unverifiable assumptions and open terms. According to the authors undermining criminality concerns: '*criminal acts that have the potential to imperceptibly develop such social and economic influence that they can undermine the foundations of the rule of law and thereby also the safety and integrity of society.*'² The first problematic component is 'potential': this indicates a power to exert some unspecified influence, but that has not yet been materialised.

2. P. Tops & H. Schilders, 'Naar een meervoudige aanpak van ondermijning', *Tijdschrift voor de Politie*, 2016, p. 12.

But then, how should that potential be determined? The same applies to the phrase 'can undermine', which in addition is just a repetition of 'potential'. The remainder of the definition is an unspecified assumption about the general consequence of crime which makes it difficult to use it as a decision-making rule: to differentiate between undermining and non-undermining crime. Thus, despite the flow of words, the term 'undermining' has remained undefined.

Another definition coined by the National Information and Expertise Centre, reads as follows: "*Undermining criminality*" is crime that affects the legal and intended functioning of the system of society.³ Compared to the unwieldy definition of Tops and Schilders, it is succinct, but it does not bring much clarity. In the first place it contains a redundancy: 'legal and intended' is one component too much unless the wording wants to convey that there is also an intended functioning of society which is *not* covered by legality. Redundancy does not necessarily kill a definition, but it makes it awkward. More important is the pleonasm: the consequence of the affected legal society is already contained in the antecedent unless there is also a non-undermining criminality as discussed in the previous section. Thus, again, the definition as it stands presupposes that there is *non*-undermining criminality.

From the law enforcement context in which the definition was coined, it is clear that the warning against undermining criminality is not directed at petty crime, but serious if not organised criminality. Despite this restricting context the definitions open the gates to all and sundry crime to be included, based on its perceived effect, not based on its nature.

Furthermore, how to determine the 'legal and intended functioning of society'? This stealthily introduces one or more yardsticks for evaluating the functioning of society against unspecified intentions. The intended clarifying note that society must be weakened or abused just adds more unspecified terms or is a notion that is implicitly included in underlying crimes. For example, stealing or defrauding always have the consequence of abusing the financial system by money-laundering, given the all-encompassing coverage of the money laundering concept: from the first moment of illegal possession until a generation or so later: stolen assets do not lose their legal ownership claims and keeping or processing them is abusing the underworld facilities.

Undermining is seen as a consequence of crime, not necessarily intended by perpetrators. This raises a difficult causality question: 'Who have done it? 'Having potential' (as in: crimes having the potential to have an undermining effect) is still nothing more than: it is possible, but not yet and so there is no perpetrator. Undermining can even just slide by as a result of a growth process (the stealth factor) in which everybody can be a perpetrator: from the shoplifter to the highest office holder or even the government. Given the history of the drug policy or

3. LIEC, *Landelijk beeld van ondermijnende criminaliteit*, Den Haag: Landelijk Informatie en Expertise Centrum, 2019, p. 5.

environmental policy, the public administration (or office holders) they can be perpetrators in this process of undermining: the definitions do not place them at the other side of the attempted delineation.

If undermining is a consequence (intended or not), we still have to address the question how to identify its occurrence. Given their 'all-crime' reach, the definitions provide no operational yardstick. And if there is no yardstick, we would have to resort to *perception* followed by the open question: Perceived by whom? Is undermining criminality not just something 'in the eye of the beholder'?

Undermining in the eye of the beholder re-directs the whole issue to the 'political eyes' or the broader societal perception. That would entail another series of questions which leads us to the political field of criminal policy making. The perception of undermining criminality may then be the outcome of political and personal interests and the power to force through an agenda of fighting undermining.

Looking at the outcome of our 'concept grinding' we think there is little left but a heap of conceptual rubble.

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REVERSION OF WORDS: CRIMINAL UNDERMINING

As the concept of undermining has the negative meaning of weakening, worries about the weakening of public authorities should be taken seriously. Therefore, we do not intend to do only 'conceptual demolition' work. We aim to make an attempt to reshape something new out of the rubble. Naturally we keep the word 'undermining', meaning the lessening of the power of an institution, as an uncontested threat to be fended off.

Unsurprisingly, when the police sounded the alarm in 2007 about what they perceive as undermining criminality they mentioned various attempts by 'known' criminals connected with the drug market (the 'usual suspects') who flouted police officers and staff of the local public administration.⁴ The suggestion is that pressure was exerted on office holders by organised crime groups. Despite this loud claim, the way it was mentioned in various policy papers as well as academic publications remained ambiguous. Indeed, there is a lot of wavering in the way undermining is mentioned. Sometimes organised crime is not mentioned or is mentioned but between brackets as if it is an optional attribute. We think there is too much incoherency for well-founded policy making: there is an undermining (organised) criminality and other criminality of which the undermining effect may not even have been intended but which is the outcome of crime and social interactions. This sounds complicated, if not incoherent and, as such, we need simplification. Our simplification is the following.

4. W. Huisman, 'De aanpak van ondermijnende criminaliteit: oude wijn in nieuwe zakken?', *Delikt en Delinkwent*, 2017, p. 331.

We take the statement of the LIEC report of 2019, namely that undermining criminality is a consequence of criminal conduct, as the point of departure. This implies criminal actors contributing to the weakening of the rule of law: so, we put the criminal first and the undermining as a consequence second. This must be reflected in the formulation of the definition by simply reversing the order of words: criminal undermining. This is not a pun: A seemingly small change of words but meaning the same. In fact, this reversion has interesting consequences because it necessitates more precision. First, the acting persons break the law. Secondly, they must have the means to influence a public/civil servant or otherwise the maintenance of law. The means are not necessarily financial: personal (sexual) favours; political or career support can be used as leverage as well. This implies that the means to influence a target can be perfectly legal. These are the 'positive', rewarding stimuli. There are also 'negative means': a threatened exposure of 'skeletons in cupboards'. In the third place, there must be a plausible motivation on the side of the undermining criminal actor.

4 CRIMINAL UNDERMINING AS A LEGAL CONCEPT?

In the Dutch Criminal Code, many definitions of legal concepts can be found. Article 83 Dutch Criminal Code for instance refers to the term 'terroristic crime' and makes clear what this type of crime is. Furthermore, in article 83a Dutch Criminal Code it becomes clear what a 'terroristic intent' is. It states that it is the intent to seriously intimidate the population or any part of the population of a country, or to unlawfully compel any government or international organisation to do, refrain from doing or tolerating anything, or the fundamental political, constitutional, economic or seriously disrupt or destroy the social structures of a country or an international organisation. Should there also be an article in the Dutch Criminal Code that makes clear what 'criminal undermining' is? On the one hand, this seems to be undesirable: there are so many definitions of 'undermining crime', that an attempt to enshrine one of them in the Dutch Criminal Code would be useless. On the other hand, a legitimation for codification can be found in the role this concept plays in Dutch case law. Sometimes judges do use the term 'undermining' as an aggravating circumstance in the sentence.

This can be illustrated by the following case. The suspect has been charged for instigation of intentional fire-setting. According to the Court this is a case of undermining of the rule of law because the suspect tried to intimidate the bankruptcy trustee. The Court states that such a trustee has the task of administering and liquidating a bankruptcy estate for the benefit of all creditors; the bankruptcy trustee also has a signalling function in the event of indications of bankruptcy fraud. This can put a trustee at odds with the bankrupt. However, if a trustee in the performance of this task is intimidated by such serious criminal offenses, this is an unacceptable *undermining of the rule of law*. The court takes this

fact very seriously. The only appropriate response is therefore a long prison term, not only in retaliation, but also to set the standard for the suspect, his environment and society. The suspect has been sentenced for a prison term of seven years.⁵ In this case the Court explicitly uses the term ‘undermining’ as an aggravating circumstance in the sentencing. However, it remains – even in this case – unclear what ‘undermining’ exactly is.

In another case the use of the term ‘undermining’ is also present. The suspect, together with others and as a member of a criminal organisation, was found guilty of handling large amounts of cocaine and having it present. He was sentenced to prison for 72 months. According to the Court the organisation had a cocaine lab in a dwelling and a storage location in a second one. An organisation that commits this type of crime represents a serious and unacceptable *undermining of the rule of law*. Strong action must therefore be taken against this.⁶ Also in this case, what undermining is remains unspecified.

The last example deals with the rejection of the request made at the hearing for the discontinuance of the pre-trial detention of the suspect. The Court of Appeal rejects this request. According to the Court the cocaine trade in The Netherlands is reaching epidemic proportions. Every week, large amounts of cocaine are smuggled into The Netherlands. The cocaine trade usually leads to other forms of serious crime, such as threats of violence and actual violence, as witnessed by the various drug-related liquidations and attempts to do so. Firearms and other forms of violence now appear to be completely normal in the cocaine trade. In addition, large-scale cocaine trafficking also leads to large-scale money laundering. In general, so the Court argued, it can be said that large-scale cocaine trafficking leads to a serious degree of *undermining of society*.⁷

This consideration of The Court of Appeal is interesting because in our opinion a connection seems to be made with the concept of ‘narco-state’. According to some authors The Netherlands can be qualified as a narco-state.⁸ It is also interesting, because the Court of Appeal uses the concept of undermining in a different context than the previous examples showed. Where the Criminal Courts used it in the context of the rule of law, the Court of Appeal used it in the context of the society.

Undermining the rule of law and undermining the society: is it the same? In our opinion the rule of law is a legal concept and society as a holist concept is not. But in all these three cases, the concept of undermining is used by the Dutch criminal court (of appeal), which means that undermining must be understood in de criminal-legal context.

5. Criminal Court Noord-Nederland 23 March 2021, ECLI:NL:RBNNE:2021:932.

6. Criminal Court Den Haag 6 February 2020, ECLI:NL:RBDHA:2020:924.

7. Criminal Court of Appeal Arnhem-Leeuwarden 4 November 2020, ECLI:NL:GHARL:2020:10150.

8. S. Brinkhoff, ‘Nederland narcostaat 2.0. Over de paradox van een land dat op het eerste oog niet de uitstraling heeft van een narcostaat en het tegelijkertijd wel is’, *Ars Aequi*, 2022, pp. 466-471.

The use of the term ‘undermining’ by courts – as described – raises an important question. If this term can be used as an aggravating factor for judicial decision making, is it necessary to define this concept in the Dutch Criminal Code? From the perspective of the suspect and the society it should be clear why a certain sentence has been executed. This also concerns the legality principle. In our view there are no legal arguments that hinder the development of an article in the Dutch Criminal Code that defines ‘undermining’. However, it is important to know what should be defined: is it necessary to define ‘criminal undermining’? On the one hand it seems strange to use the term ‘criminal’ in the Dutch Criminal Code, because everything in this Code has something to do with criminal behaviour. On the other hand, article 140 Dutch Criminal Code deals with ‘criminal organisations’, so from that perspective the formulation of a definition of ‘criminal undermining’ cannot be considered as a breach of the Criminal Code structure. Still, we are somewhat hesitant to define this term in the Dutch Criminal Code, because of its lack of added value. Perhaps more fruitful would be a definition of the terms ‘criminal undermining’ and ‘undermining intent’.

As already stated, article 83a Dutch Criminal Code contains a definition of ‘terroristic intent’. If there is an agreement that ‘undermining offences’ constitute a specific type of crime, then (a) it is necessary to use the term ‘undermining intent’ in these types of crime and (b) to include a general article in the Dutch Criminal Code where ‘undermining intent’ is defined. In our opinion the legislator could develop two new articles on ‘criminal undermining’ and ‘undermining intent’.⁹ We must emphasise that the creation of such legal definitions is only necessary when the legislator creates ‘undermining offenses’ in the Dutch Criminal Code. In all other situations, we do not prefer a legal definition because of the complexity of the concept of ‘criminal undermining’.

5 CONCLUDING REMARKS

Since 2007 the concept of ‘undermining’ has made an impact in the political and academic arena.¹⁰ However, much is unclear about this concept: it excels in vagueness. In the case law illustrated in this chapter, two courts have connected the concept of undermining with the rule of law. When we take (again) a look at the situation of *undermining* the rule of law, this does not necessarily have to be the subject of criminal intent. Most law breaking is directed at other targets, such as valuable assets or prohibited ‘pleasures’. Nonetheless, undermining can emerge from the massive inflow of such small criminal activities which the criminal law system cannot handle efficiently. Individually, the perpetrators do not aim at this

9. This is analogue to article 83 Dutch Criminal Code (terroristic crime) and article 83a Dutch Criminal Code (terroristic intent).

10. W. Huisman, ‘De aanpak van ondermijnende criminaliteit: oude wijn in nieuwe zakken?’, *Delikt en Delinkwent*, 2017, pp. 331-344.

undermining, but their massiveness does contribute to this perceived outcome. So, the meaning of undermining criminality can be related to a criminal intent as well as the widespread law breaking. This double meaning implies a built-in ambiguity which should be avoided.

We argue that reversing the word order to 'criminal undermining' is more than a pun. In this inverted word order 'criminal' is the distinctive feature, the 'undermining' is the intended result by criminal means and purpose.

We think that this formulation reflects the worries of the Dutch authorities more adequately: the criminal intention to subvert the agencies of the public administration. Perhaps policy makers, while elaborating this concept, had this interpretation in mind. At least this phrasing seems to approximate their intentions. In the word order that we advocate, 'criminal' is an attributive adjunct to the main noun of undermining. Hence, we must also look at its *non*-criminal counterpart: non-criminal undermining. Does that exist or is it just a matter of labelling? We think that such undermining takes place. To what extent should lobbyism be considered as a form of non-criminal undermining of the integrity of office holders, delegates or health service providers? For example, the combination of positive and negative stimuli by 'Big Pharma' to doctors to prescribe 'correct' medicines (that is: the most expensive brands); conflicts of interests in procurement or in general, questionable integrity in the private-public interaction concerning the emission of CO₂. To the extent where this interaction is non-transparent there is a risk of non-criminal undermining of the public administration.

Let us summarise the output of the concept grinder. The original phrase is a failure as it does not succeed in delineating or demarcating any phenomenon. It does not differentiate cases of purposeful and accidental undermining. Is it a result of criminal intent or does it just emerge from a massive petty crime input handled inefficiently as is so often the case in the criminal law system? The inverted word order withstands the concept grinder much better: from this angle what matters is the criminal intent of the perpetrator. Without intent no criminal undermining, though other, non-criminal forms of undermining can be recognised.

To conclude, in this chapter we discussed the difference between 'undermining crime' and 'criminal undermining'. Also, we have seen in the three examples of case law that the concept of undermining can be used in different ways: undermining of the rule of law and the broader scope of undermining of society. This is of course a small basis. However, it underlines the need of a stricter definition. When the legislator decides to officially acknowledge 'undermining offences' as a specific type of crime, a legal definition of 'undermining intent' must be formulated in order to heed the principle of *lex certa*.