

Signature Plan: Crime and Criminal Justice in the Age of Globalization and Digitalization

Legal Pathways to address challenges to Crime and Criminal Justice in the Age of Globalization and Digitalization

Introduction

Today's ever-changing and globalising societies are faced with new challenges that undermine democratic values, the rule of law and the functioning of societal institutions and bodies.

Society is faced with crime that increasingly undermines societal institutions – municipalities, businesses, local communities – and affects vulnerable groups. These forms of crime and harmful behaviour are often referred to as subversive crime ("*ondermijnende criminaliteit*"). Subversive crime not only adversely impacts the functioning of society and democratic values within society, but it also creates a feeling of insecurity, mistrust, and marginalisation amongst its members.

Globally, societies are confronted with activities that undermine democracy, the rule of law and fundamental rights. Criminality that can be mentioned in this respect is organized crime, financial crimes, money laundering, terrorism, international crimes (i.e., war crimes, crimes against humanity, genocide), exploitation, and hate speech.

Modus operandi of committing profit-driven crimes have changed. Modern technology generates new forms cybercrimes, such as ransomware and cryptocrimes. Moreover, infrastructures, lack of prioritisation and differences in national prohibitions, regulations and tax structures open opportunities for transnational crime.

In this era of globalization and digitalization, criminal justice responses must change. With the rise of powerful new actors (e.g., big tech) as well as new configurations of traditional governance actors (municipalities, cities, the EU, international criminal courts) we witness new approaches to combat crime. State and non-state entities collaborate to fight transnational and international crime while the digitalization of crime has led to changes in techniques of prevention, detection, and criminal investigation. This can be challenging; in the area of criminal justice, there is a tendency to adhere to sovereignty and parochial practices. Moreover, crime of a global and digital nature requires cross-disciplinary research to regulate and counter it.

The changes to crime, how these materialise and the responses to them, are studied in this programme from three perspectives: (i) their impact on the rule of law and security, and (ii) how they manifest themselves on multiple levels: local, regional, national, European, transnational, and global levels (iii) which actors and institutions on local, national, regional and international levels are or should be involved in addressing these crimes and in what way.

In this broader context, the overall aim of the signature plan **Crime and Criminal Justice in the Age of Globalization and Digitalization** is:

To identify, evaluate and develop legal avenues that address challenges to Crime and Criminal Justice in the Age of Globalization and Digitalization.

In addition to the three perspectives, the signature plan addresses the following five underlying questions:

- (i) How should we understand crime and behaviour 'undermining' the rule of law and security in the current societal context? What are its manifestations, context and causes?
- (ii) How to strengthen legal avenues to cope with these challenges undermining the rule of law and security within complex and globalized societies?
- (iii) How should we understand and assess the multiple and changing governance levels (including its different actors) – beyond the role of the state – at which crime and behaviour undermining the rule of law and security are addressed?
- (iv) How are emerging technologies and digitalisation related to crime and behaviour undermining the rule of law and security – as challenges and as potential solutions?
- (v) How can we counter global crime at a domestic level and strengthen transnational and international collaboration to respond to international crimes and ensure respect for the rule of law and security?

The focus is on studying legal pathways at the intersections of criminal law, labour law, administrative law (e.g., migration law) and tax law, all at various levels: domestic/comparative, European, as well as international and global levels. Gaining such understanding requires insight from and exchange with other disciplines, in particular public governance, criminology, and other social sciences. Thus, this signature plan links to the Signature Plan on Regulating socio-technical change on aspects of regulation and technologies to combat crime e.g., cybercrime and harmful practices. It is also linked with the Signature Plan Global Law and Governance when taking the lens of globalisation and the global level to look at challenges to the rule of law and security.

A critical approach to the role of law, informed by the reality on the ground, might lead to a 'reimagination' of legal pathways that build on findings in dogmatic-legal research, legal theory, socio-legal research, and public policy and public administration.

Themes

Building on expertise and track record within TLS in this field, the signature plan focuses on four distinct, but interrelated themes.

1. Conceptualisation of crime 'undermining' the rule of law and security in the current societal context: manifestations, context and causes

Subversive crime, crime undermining the rule of law and security, often takes place in a transnational context and includes, in particular, drug crime, organized crime groups, financial crime, human trafficking, human smuggling, environmental crime and 'anti-democratic' behaviour such as terrorism, hate speech and incitement.

We will take the conceptualisation of 'undermining' as an important aspect of our research: how should we understand 'undermining' or 'subverting' the rule of law, democratic values, and the integrity of social institutions in the current societal context? When does 'undermining' (making something weaker) develop into 'subversion' (destroying something) and what does that mean for society's reaction to it? Is it still viable to differentiate between undermining societal institutions as a *by-product* of certain types of misbehaviour and crime, e.g., as is the case with corporate misbehaviour

and tax evasion, versus undermining societal institutions as their main goal, e.g., as is the case with terrorism?

A prerequisite for understanding undermining crime and behaviour is knowledge about the causes of misbehaviour, and the type of actors involved. Under this theme, the signature plan includes studying the prevalence, manifestations and causes of such crime and behaviour within its societal context. To what extent is such crime and behaviour facilitated or (at least) not seriously addressed by societal structures? Which persons, groups and institutions are (most) vulnerable to such threats and why? To what extent is the impact of such crime and behaviour unevenly distributed and leads to new or old lines of exclusion and inclusion?

Beyond dealing with 'crime' in the narrow sense – being behaviour that is criminalised – the signature plan will address a broader range of behaviour which is (potentially) harmful to the rule of law or human security and which may or may not be covered by other forms of regulation. Examples are big tech dominance and the spreading of disinformation and conspiracy theories, pollution, unsustainable and obscure financing, crypto abuse, some forms of human trafficking, exploitation, and abuse of (labour) migrants or tax avoidance.

Research at TLS often focuses on those in vulnerable situations in relation to crime and justice, be it a suspect whose rights are at stake, a victim of crime participating in criminal proceedings, those affected by the negative consequences of globalisation including global migration or those victimised by dictatorial regimes. With the signature plan, we further this with a specific focus on human security centralizing the individual or groups whose security is at risk because of acts by other individuals or groups in society. The signature plan thus focuses specifically on the changing modes in which crime and behaviour undermine human security and the causes of these developments.

2. A critical engagement with legal and regulatory avenues utilized to cope with challenges to the rule of law and security

Under this theme, the focus is on criminal justice and other legal and regulatory avenues to target threats to the rule of law and security, including human security. What legal avenues are currently utilized to cope with these challenges? To what extent are these legal avenues and the way they are used sufficiently legitimate and effective and what concepts and approaches are needed to reimagine such legal pathways?

Several features call for critical reflections on challenges and limitations on the way criminal law and regulation are utilised to address threats to the rule of law and security, including human security. The signature plan deals with a double-edged question: on the one hand, the question of how criminal law and regulatory instruments effectively function to combat threats to the rule of law and human security; on the other hand, how laws and policies may threaten (aspects of) the rule of law and human security themselves. To what extent does this response itself contribute to guaranteeing security and fundamental rights? In the process of countering threats to security, authorities at different levels may be (expressly or inadvertently) compromising the rule of law and security with their actions, when repressive instruments such as criminal law are used. Indeed, governments have long been testing the boundaries of the rule of law in performing their security agenda (e.g., in relation to migration and combating terrorism). The signature plan includes studying the way in which authorities themselves creatively apply laws and legal boundaries to deal with what they may see as 'undermining factors' and may thereby negatively impact people's security.

The multi-faceted and multi-layered nature of law and regulatory regimes has led to a lack of clarity in formulation of criminal law and regulatory instruments. This can cause individuals and organisations

to avoid criminal liability by creatively using these loopholes and uncertainties in law, and individuals hiding behind inscrutable (legal and corporate) constructions, often facilitated by globalised structures. Such uses of (semi-)legal pathways are thought to increase the divide between those who benefit from and those who fall victim to globalisation. Furthermore, some of these harmful practices still lack sufficient interest from governments or authorities to act against and enforcement practices often leave those most responsible for the crimes and harms of globalisation untouched, leading to allegations of 'class justice'.

This demands the development of novel legal and regulatory solutions to address these challenges, e.g., through the development of theories on criminalisation in relation to other ways to tackle harmful behaviour, new modes of regulatory and criminal liability, clarifying legal uncertainties, identifying legal loopholes, scrutinising fundamental rights in enforcement policies, and unveiling the effects of these crimes and harms of globalisation. Moreover, it is important to investigate legal and regulatory pathways to deal with the infrastructure that facilitates such harmful behaviour and crimes. 'Business processes' of corporate misbehaviour and crime cannot operate without the legitimate economic, financial and government infrastructure. Companies and criminals, for example, need the financial system, real estate, means of transport and communication. Moreover, they need 'human infrastructure' in the shape of well-educated and internationally oriented professionals such as accountants and tax advisors, who possess knowledge and skills attractive to them.

The signature plan also investigates ways of *preventing* society is undermined, including by analysing factors that increase vulnerabilities for companies, persons, and societies to become involved in harmful behaviour or crime, fostering resilience and preventing recruitment by criminal actors.

The signature plan takes an interdisciplinary approach in which criminal law and regulatory offences are studied in tandem with relevant areas such as labour law, tax law, migration law (as well as the constitutional foundations behind all these areas of law), combined with research from other disciplines, including public administration, criminology, victimology, economics, psychology, and sociology.

3. Beyond the role of the state: Multi-level governance in dealing with crime and behaviour undermining the rule of law and human security

The multiple governance levels at which challenges to the rule of law and human security are dealt with and the legitimacy and effectiveness of the way these different actors address threats undermining the rule of law and security, need to be considered. The state remains a primary actor to guarantee law and order and a safe and secure society by combating criminal, disruptive and harmful practices on the one hand, and by facilitating structures, institutions and practices that contribute to a democratic and secured society on the other. However, other institutions and actors are increasingly important in this field as is for instance reflected in the transfer of tasks to municipalities, privatization of control and enforcement, out of court settlements, restorative justice, and mobilization by civil society actors. The increased importance of European institutions and international actors in combating crime and harmful behaviour further diminishes the role of the state as the central actor to guarantee law and security. In addition to law and regulatory instruments other (governance) strategies and the involvement of other actors might be more facilitating in realising law and security. Research on this theme includes critically engaging with the changing role of governmental powers and the involvement of multiple actors at multiple levels to address challenges to the rule of law and security.

The specific focus on human security in the signature plan also explicitly recognises that the state may have become less powerful in relation to others who create risks to one's human security. Again, the

state is an important albeit not the sole actor in providing human security. In particular, at the international and regional (European) level, other actors and institutions have a crucial role to play, e.g. the ECtHR and EU institutions as catalysts of fair trial rights for suspects and of victims' rights.

The foregoing results in various research questions, such as: how do these multi-level instruments and institutions interact with one another and how can they contribute to combating threats to human security? What are the positive and adverse effects of interventions at different governance levels to tackle behaviour undermining the rule of law and human security? How can the state reconcile its function to combat crime undermining the rule of law and human security with its practices that are intrusive to individuals, groups of individuals or institutions? How should we understand and assess the transfer of state powers to tackle threats undermining the rule of law and security to non-state actors, the EU or other international organisations? If such tasks are mandated to other actors and institutions, what can be expected from the state in terms of monitoring, supervision, and enforcement? How can international and European institutions be supportive to deal with crime undermining the rule of law and security at national levels, including via cooperation in criminal and regulatory matters in the broader sense?

4. Emerging technologies and digitalisation as a challenge and solution to crime and behaviour undermining the rule of law and security

In the present-day context, challenges undermining the rule of law and security and legal reactions to it cannot be fully understood without taking into account the omnipresence of technological developments, digitalisation, and artificial intelligence. Technological developments can enhance and amplify threats undermining the rule of law and security. At the same time, they can be mobilised to address such threats. Both sides of the coin will be part of this signature plan.

This includes understanding and assessing the use of emerging technologies, digitalisation and AI in law enforcement and criminalisation, such as the use of neuroscience (e.g. to what extent can and should the results from neuroscience be used as evidence in courts?), cryptocurrencies (e.g. how can crypto crimes be detected and combatted), crypto-communication (e.g. the possibilities and human rights implications of using data gathered via hacking crypto phones and messaging services), algorithmic surveillance, and more broadly the way digitalisation and particularly social media have created ever-changing possibilities for committing *and* countering crime undermining the rule of law and human security (e.g. terrorism, human trafficking).

Such developments in technology and digitalisation, also through the increasing breadth of data emerging from them, allow various actors to cooperate in ways that used to be unimaginable. The expanding powers at the state level and other governance levels interfere in people's lives, e.g., by collecting data and information enhanced by technologies (such as QR codes, drone cameras, predictive policing, neuroscience) and the disparate impact thereof on different groups in society, force us to assess the effectiveness and legitimacy of how criminal justice and regulatory instruments are utilised to counter threats to the rule of law and security. The signature plan thereby aligns with the signature plan Regulating Socio-Technical Change and the research project Digital Legal Studies.

The signature plan also looks at the influence of digitalisation beyond (criminal) legal instruments as such: digitization is entering the public sector, as a process of social control which chiefly implicates the state. The processes of interference and interventions by the state are made possible by digital technology.

The research under this theme requires collaboration between legal research and research in non-legal fields such as ethics, criminology and media and communication studies.

5. Global criminal justice at the domestic level

Since the establishment of the International Criminal Court (ICC) in 2002, which requires State Parties to investigate and prosecute war crimes, crimes against humanity and genocide domestically, there has been a 'paradigm shift' in the national enforcement of international criminal law (ICL). This research strand focuses on upgrading ICL enforcement, from a disparate, 'each to their own' criminal justice system at the domestic level to a coordinated, collaborative enterprise with clarity regarding policy goals, giving the domestic enforcement of ICL a clear steer and sense of direction. Researchers explore the intersection between international refugee law (IRL) and ICL and provide a concrete solution to the enduring and increasing problem of 'international outlaws'; people who are *undeserving* of protection under IRL because they have (allegedly) committed international crimes but who remain unprosecuted, nevertheless. The research further enables a comprehensive study and full normative appraisal of domestic ICL enforcement and fixes not only ambiguities in ICL but also in IRL. It complements this with a conceptual layer which allows thinking about alternatives to criminal law enforcement and proposes a system of 'universal jurisdiction designation' encouraging coordinated burden-sharing amongst states. Research enables international criminal justice and its scholarship to progress to the next level; from a rather blunt and unaligned system of 'opportunistic' (asylum-related) prosecutions to a full-blooded *justice* system that is based on clear and long-term policy goals, which includes alternatives to punishment and allowing for settlement.

Research Approaches

Doctrinal legal research

Doctrinal legal research in the field of criminal (procedural) law and regulation – be it domestic/comparative, European/regional or international/global – remains a key method of utmost importance with regard to understanding and scrutinising legal responses to these challenges that undermine the rule of law and security, i.e. assessment of legal instruments, analysis of case law, and analysis of fundamental principles of criminal law and regulation. Moreover, effectively, and carefully dealing with such challenges requires coordination between various legal fields. Accordingly, the signature plan includes research into legal fields such as financial law, tax law, labour and social security law and administrative law, where relevant from the perspective of understanding and tackling crime and harmful behaviour, the role of states and institutions and guaranteeing human security.

Multidisciplinary research

Understanding the scope, context and background of crime and behaviour undermining the rule of law and security is based on theoretical and empirical research performed by members of the research group with various disciplinary backgrounds and by synthesizing external research from various disciplines. Amongst other things, new and multi-level interventions by various actors to tackle threats that undermine the rule of law and security will be assessed on their effectiveness. The approach will involve concepts like good regulation, regulatory process, cost-benefit analyses, the role of supervisory authorities and the effect of administrative penalties. A critical reflection on the role of criminal justice and other areas of law to deal with these challenges also necessitates bringing in approaches from legal theory and philosophy, ethics, and other disciplines in the humanities. This is performed with an integrative multidisciplinary research design combining legal techniques with methods from (sub)disciplines such as criminology, victimology, psychology, public policy, and administration.

The multi-agency approach: Field labs

Since 2014, Tilburg University works with Organized Crime Field Labs (OCFLs), in which we collaborate with the Public Prosecution Service, the National Police Force and other key actors in the fight against organized crime. These OCFLs constitute an environment to facilitate practitioners in developing, through experimentation and learning, innovative solutions to 'wicked' crime problems, whilst also allowing research – via interviewing, surveying, and observation – on the design features that enable or hinder effective collaboration. Currently, research labs on subversive crime, organized crime and human trafficking are running in which participants in this signature plan are involved.

New research methods using technology

Apart from doing research into the use of emerging technologies and the role of digitalisation, the signature plan also explores the potential of applying certain technologies as research methods, for instance, in virtual reality and gaming in the context of preventing the recruitment of youngsters and migrants into criminal networks, and remote data collection among hard-to-reach groups via mobile technologies e.g. migrants in Mauritania.