NEW FRAUD: A WESTERN POINT OF VIEW REGARDING AN EVER-PRESENT CHALLENGE FOR EAST AND WEST

Professor Georges Kellens
University of Liege
Belgium

As a criminologist coming from the so-called West, I should like to stress the relativity of the models and standards dictated by geographically or historically located cultural frameworks.

In his inaugural lecture at the 10th International Congress on Criminology (Hamburg 1988), Professor Horst Schüler-Springorum has shown that criminology is far from being a 'One World' discipline. As a benefit of his various visits to East Asian countries, he brought home the understanding that, on the ground of their specific national culture and tradition, some of those methods of solving social conflicts are still alive and practised there, the vitalisation (or re-vitalisation) of which we in the West are trying to propagate at the cost of expensive programs (Schüler-Springorum 1989). Let us think for instance of the re-discovery of the negotiation process in America and Europe (Duffee & McGarell 1990), whereas musyawarah seems to be so traditional in Indonesia.

This paper deals with a topic of global interest which will be examined from a western stance, firstly, examining the permanence and development of criminal law as regards the revival of fraud.

A kind of cat and mouse game takes place between the legislature and the fraudulent party:

- The legislature amends texts. Thus, within the space of twelve years, the French legislature drew-up three statutes intended to combat computer fraud: the statute of 1987, the so-called Computers and Liberties Act which comprises the duty of company bosses to inform themselves about the security aspects of computer systems, the statute of 1985 which extended the right of copyright to computer programs and the statute of 5 January 1988 on computer hacking which punishes illegal intrusion into a computer system as well as entering into it by mistake and remaining there (Vincent 1989). The legislature tries, with all its force, to plug the holes left by the law.
The courts apply a progressively developing interpretation: for instance, the Belgian Supreme Court has admitted the application of the concept of 'lottery' to that of 'sweepstake', and the Brussels and Antwerp jurisdiction accepted as 'theft' the copying of a computer program (Ost & van de Kerchove 1989).

The discussion here will be limited to two points: the first, whether modern-day fraud is a new phenomenon requiring more urgent needs as regards the adaptation of law; the second, as to the role and efficiency of criminal law in the regulation of fraud.

The Fraud Phenomenon

'Panta Rhei' said Heraclites: everything flows-by whilst at the same time being permanent and self-renewing. There is nothing older than the creation of an appearance and in some ways, appearance guides the world.

Jean Cosson (1974) suggests a fine general definition of fraud:

Fraud, whether it be fiscal or more generally, financial, tends to create an appearance, to lead into error those who deal with the fraudulent party and those who judge him. Knowing (...), now the shell companies, the men ready to act as vehicles for fraud, as well as the men of straw, phantom company directors who have their real master operating in the shadows, will we decide as did Roman law, that fraud negates everything (Fraus omnia currumpit) and will we attempt, before passing judgment, to re-establish the truth by all available means? or will we latch onto the security furnished by official deeds to base the decision solely on the documents submitted to the judge?

'She has got eyes enough to make you forget that she is bald . . .' (Alphonse Allais, quoted by Lascoumes 1986). Fraud is eternal. Quoting the book of Proverbs and Deuteronomy, the Californian Professor Gilbert Geis showed-up the timelessness of the maxim 'caveat emptor' which translates the natural double dealing of the market and the precautions that the buyer must take against 'dolus bonus' (Geis 1988).

In the 'Divine Comedy', Dante described Hell as being like an immense corn or rather like a gigantic up-turned funnel, divided into nine concentric circles getting progressively smaller as they approached the centre of the Earth, whilst the gravity of the tortures inflicted on the damned got ever worse as one passed from one circle to the other. The eighth circle was reserved for fraudsters, that is to say ruffians, seducers, adulterers, sellers of their soul, corrupt officials, hypocrites, thieves, treacherous advisers, sowers of discord and forgers, who were subdivided into four groups: falsifiers of metals or alchemists, impersonators, that is, those who usurped the identity of another, counterfeitors and the falsifiers of words, double-dealers and liars.

Dante reflected religious morals which regarded fraud and abuse of intelligence, much more severely than violence, abuse of strength or unrestrained or misplaced passion. He reserved the hideous picture of the Geryon for fraud, that terrifying beast with the razor sharp tail 'which plagues the whole world . . . Its head was that of a just man, and its exterior benign but the rest of its body was that of a serpents' (Constant).

A new element was introduced in nineteenth-century Europe which led to the arrival of modern fraud. At that time, tortious activities within commercial companies (abuse of common property, fraudulent bankruptcy) or by companies created with a directly tortious activity in mind, acquired specific visibility. Today, these various forms exist side-by-side, being complemented by others of a highly heterogeneous nature and ranging from individual practices using new technology (computer fraud) to grandiose operations conducted on a
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world scale by hyper-organised groups sometimes connected to 'organised crime', the 'underworld' (Lascoumes 1986).

Modern day fraud depends on two particular ingredients. The first is internationality, the second is technology.

- **Internationality** presents various advantages for the fraudster. A border is, first of all, a rampart. A border allows the traditional scenario of second-hand cars being sold to imaginary garage owners and then the imaginary foreign companies allowing the fraudster to recover Value Added Tax which was never paid by the first 'garage owner' or by the 'exporter'. Borders allow fraud to be perpetrated against foreign governments, as is shown with the new breed of suppliers of illegal manpower. Secret money finds refuge in the multiple shelters that internationality offers (Walter 1986).

To tell the truth, borders were already good business in days gone by. Thus, Andre Zysberg found amongst a population of galley slaves, that there were numerous cases of salt and tobacco smuggling by taking advantage of the existence of internal 'diplomatic' boundaries, imposed by true provincial customs, to carry-on a highly profitable smuggling trade.

The game consists of going by foot, on horse-back, by carriage, or even by boat, alone or in great company, in families, in groups, with or without arms, to carry prohibited goods from the free or tax-free provinces where it was sold at market prices to high tax pressure zones or areas where tythes or dues were claimed (Zysberg 1987).

One is reminded in the present day of the fraud arising out of the difference in the Value Added Tax rates for gold in The Netherlands, Belgium and Luxemburg.

- **Technology** is the second ingredient in the efficiency of modern fraud. Thus, just as the French legislature has presumed the driver's responsibility for a vehicle by virtue of kinetic energy, in the same way modern technology allows the efficiency of fraud to be multiplied, thereby making its detection more difficult. It cannot be stressed enough that data computerisation has resulted in considerable delay in the detection of fraud.

The Role of Criminal Law

Three aspects of the role of criminal law in the field of fraud will now be discussed in detail: efficiency, artificial structures and morality. However, some other points need to be mentioned first.

Let us consider 'understatement', in cases which ought to be dealt with by the criminal law, but for which the law seems inadequate, as for example with crimes against humanity. A colleague from Antwerp, Chris Vandenwinggaert, has transformed an old maxim by saying *De maximis non curat praetor*: certain phenomena are beyond the scope of criminal law. Let us imagine, for instance, the possibility of General Pinochet being put on trial before a Criminal Court in one of our countries. As a consequence of this understatement, we experience feelings of impotence and it may translate into disarray as regards the classic means of dealing with criminal activity, because the crimes out-stretch them.

Secondly, let us refer briefly to the theme of seeing the 'criminal law side-of-life' in every human action, which is a frequent feature of academics and practitioners. The citizen
does not have the Criminal Code as a bedside book. He does not permanently model his conduct on the Criminal Code. Did the former Japanese Prime Minister, Nakasone, have the criminal model permanently in mind when he allegedly became involved in financial scandals? Lieutenant Colonel Oliver North, explaining his conduct before the American Congress Commission in the 'Irrangate' case, said 'I never in my wildest dreams or nightmares envisioned that we would end up with criminal charges. It was beyond my wildest comprehension' (Geis 1988). It is not criminal law which leads someone to refrain from acting criminally; it is for example the personal links which were the subject of Hirschi's criminological theory, that is, bounds to conventional society: criminal law is but an extra contribution which often is considered too late; even a murderer does not think of the criminal law risks until it is too late.

Finally, there is a conflict between criminal law logic and economic logic. Classic criminal law sanctions past mistakes. Economic logic is mindful of future efficiency; it wishes to avoid the problems to come. It is economic logic which prevails throughout all kinds of agencies which occasionally or frequently have to deal with economic or financial fraud. As between these bodies and the judicial bench mutual misunderstanding may arise. Preventative bodies often do not see the utility of criminal law and the judicial bench do not always perceive the seriousness of technically complex conduct denounced by certain of these bodies. It is a lot more difficult in these areas than in that of ordinary misfeasance to combat the problem with a united front.

Let us now examine the three points mentioned earlier in relation to the functions of criminal law: efficiency, artificial structures and morality.

**Efficiency**

This concept has been studied in depth by such writers as Mireille Delmas-Marty (1979). To what extent are charges effectively followed up? Charges in a theft case are often followed-up whereas irregularities in a company annual general meeting are rarely pursued. In order for the weapon of criminal law to be put into action in the case of fraud, one must first of all perceive the fraud.

In a study I carried out a number of years ago on the subject of collusion in credit-based sales, concerning, at that time, the sale of knitting machines to poor people looking for some 'easy after-hours work', I noted that it took some one hundred formal complaints for the criminal judicial bench to deem it necessary to take action in a structure which was 'a priori' commercial (Kellens 1967). On a world-scale and in a very big way, the I.O.S. case is highly representative in this respect: using investment monies by way of pyramid finance, Bernard Cornfeld was able to build-up a financial empire of some two billion dollars without anybody suspecting any element of fraud for a number of years (Raw, Hodgson & Page 1971).

Once fraud has been detected, it has still to be judged. There are numerous traps on a procedural and legal level, in particular in countries which have an accusatorial system where criminal procedure resembles an obstacle course guaranteeing the due process of law and not control. Cullen et al. (1987), in their book recounting the course of the 'Pinto' case, show us the difficulties in controlling economic cases in the USA. Mann's book (1985) shows the peculiarities of defence in 'white-collar crime' cases. The net result is a process encapsulated in the criminal law system and serving as a discouragement and disorientation when faced with a lot of effort for very little return, much ado about nothing . . .
**Artificial Structures**

As already mentioned in relation to galley slaves, fraud delights in legal complexity. All artificial structures bring problems with them. Tax fraud mechanisms come out of complex tax systems, as successful smuggling of alcohol followed the Volstead Statute in the United States of America, and at the present time enormous profits are to be made out of the outright prohibition on drugs rather than enlightened control. Likewise, non-exportable currencies create multiple blackmarkets. The problem is whether, in all these various sectors, to create armies of inspectors, or as Sulitzer suggests (in Walter 1986), to gravitate towards a truly free market, whilst contemplating at the same time its enormous inconveniences.

**Morality**

For Kant, morality represents a categorical necessity. When squeezed, morality becomes adjusted in terms of vocabulary, as we saw earlier in Colonel North's statement. Cosson (1974) uttered prophetic words when speaking of fraud:

Fraud and the indulgence from which it benefits, as much for those whose task it is to combat it as for the population at large, reflects the decline of public morality. In spite of technical and scientific progress, moral strength remains the decisive element of success, whether for men on an individual basis or for societies as a whole, whether in war or in times of peace, when it slowly conditions the ascent or decline of nations. As regards these nations, the greatest are those who are intransigent in upholding the rules of the game, the *fair-play* of the Anglo-Saxons . . . The examples of history and of current values show us that the degeneration of moral values comes from on high, from the ruling and owning classes, who are also the most educated and, in many places, the only ones educated. The scholars' betrayal means the loss of a civil sense amongst those who should set an example to the less well-off.

Ralph Nader, the father of American consumerism said 'like fish, societies go rotten from the head downwards'. Somewhat alarmingly, recent publications reveal a general consensus as to the role that good faith plays in morality. John Braithwaite, a specialist on white-collar crime, recently developed a general theory dealing with the root-causes as well as the prevention of delinquency, focused on reintegrative shaming, in which practices such as advertising the sentencing of an individual plays a part in the reintegration of the misfeasant. He writes in his book 'Conscience (the sense of social responsibility) is a more important safeguard against organisational crime, than fear of formal punishment' (Braithwaite 1989).

In the same way, Jean-Paul Brodeur (1990), commenting on the work of the Canadian Commission on Sentencing, pointed out that this Commission intended to establish a distinction between two notions regarding the sentence passed by the magistrate.

According to the first notion, the sentence is considered as the expression of a positive will to punish; according to a second version, it is merely the limited display of a refusal to bestow impunity on certain aspects of the conduct of a victimised person. The CSC sided with this second notion, affirming that the function of the sentence is to avoid the demoralisation of the public body, constantly showing that laws cannot be transgressed without consequences. This substitution of a negative function—the sentence presents an obstacle to the social generalisation concerning irresponsibility—to a will to control exercised
against individuals implies ... that the sentence stems rather from an anti-
impunity than the necessity to punish.

In his book on corruption in seventeenth and eighteenth century Florence, Waquet
(1984) refers to the danger of:

an arbitrary causal link between corruption and certain structural aspects of the
society. This relationship could well have existed. It would not have sufficed to
to condition the individual’s conduct radically since they too have a conscience. It
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Does this fact mean that corruption is without remedy? No, because history
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Waquet (1984) finishes his book with the observation: the state is always threatened
by plague.

The press has setup ethical juries to filter advertising. To what extent should we protect
victims against themselves?

Morality is ever present in current events. The Hamburg Chaos Computer Club
justified computer hacking by ethical standards designed to show the fallibility of data
systems in listed companies (Erneux 1989).

For the victims of Bhopal, the American multinational Union Carbide agreed, at the
start of 1989, to pay by way of 'total and final compensation' the sum of half a billion dollars.
The next day the New York Stock Exchange, which was expecting the worst, registered a
10 per cent rise in Union Carbide’s shares.

In the French insider trading cases, the Pechiney boss, Jean Gandois had a fit of anger
on the radio. He said: 'If you only want to do business with people who go to confession
and take communion every day, you should not frequent the business world!' (Cordy 1989).

Probably, the picture of César Birotteau, a former bankrupt reinstated in his rights
described by Balzac in his Histoire de la grandeur et de la décadence de César
Birotteau, is the most reassuring. César knew what it was like to be on the top, then the
bottom, and finally triumph. 'Here is the death of a just man', says Abbot Loraux, pointing
to César with one of those divine gestures that Rembrandt knew how to conjure up: 'Jesus
commanded the Earth to render its prey. The holy priest pointed to Heaven, a martyr of
commercial honour decorated with the eternal medal of honour.'

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