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BOOK REVIEW

Reviewing:

Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds.), Criminal Law and the Authority of State, Oxford: Hart Publishing, 2017, 252 pp.

Although the notion of state, its attributes and its role in public life has been a subject of perennial and constant discussion, one could argue that the very function and objective of the state is the creation and maintenance of peace and safety of subjects under its dominion. In fulfilling these essential functions the state enjoys various sovereign rights, which, inter alia, include put in Hobbesian terms, the *potestas coactive*, i.e. the power to impose punishments, and the *gladium iustitiae*, the power to carry out punishments.[1] And since at least the paradigm shift carried out by Hobbes claimed to be the founder of modern political philosophy, "the philosophical justification of the political system and the law is no longer accomplished by relating the existing order and the law as practiced to their ontological basis. Instead, the state and the law are analytically de-constructed and reconstituted with a view to the specific goal of creating peace and security for the individual […]".[2] In line with this tradition of rational construction of state's authority, Max Weber provided the most influential definition of the modern state: "a state is that human community which (successfully) lays claim to the monopoly of

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[1] Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory, Selected Writings*, Miriam Künkler and Tine Stein (eds.), Volume I, Oxford: Oxford University Press, 2017, pp. 62–63.

[2] Böckenförde (n 1), p. 59.

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legitimate physical violence within a certain territory […]".[3] Thus, legitimacy of the state authority, that is, the legitimate use of power including *ius puniendi* is without doubt one of the central themes of modern political philosophy and jurisprudence. In the footsteps of this tradition, the present collection of essays brings together criminal lawyers, criminologists, legal theorists and public lawyers who, in a wide variety of ways, address the question how the modern liberal state relates to those under its jurisdiction through the criminal law (p. 1). In the engaging introductory chapter, the editors emphasise the fact that the required exchange between criminal lawyers and public lawyers has been neglected so far, and they argue that the separation of different discourses on the legitimacy of criminal law, public law, criminal law theory and sociologically oriented criminal justice scholarship is problematic as it now stands. Such a dialogue among various discourses and scholarly approaches is not only desired but also required on the face of the fact that the criminal law in most instances wreaks such havoc in people's lives and the criminal punishment is such an extraordinary abomination, that it patently needs all the justificatory help it can get.[4]

A product of Anglo-Scandanivian Dialogue, the present collection of essays deserves close attention of not only but especially those interested in the questions concerning justification, legitimacy and delimtation of criminal law and its complex and multifaceted relationship with the authority of the state. The contributions in the collection are quite diverse both in respect of their subject of inquiry, focus and scholarly approach (pp. 2–3). As a consequence of this diversity and a bewildering variety of subjects contained therein, it would be more appropriate to treat them separately, which is also justified by the fact that each essay is, as it were, a reflection of the respective author's normative universe.

The opening chapter by Malcolm Thorburn furthers his argument for a robust public authority that the author has advanced in an earlier work in which he, among others, argued that the relations in the constitutional order are set out in terms of the rightful use of coercion, a public law account of criminal has the resources to explain when the state is justified in using coercive force toward its

[3] Max Weber, *Political Writings*, Peter Lassman and Ronald Speirs (eds.), Cambridge: Cambridge University Press, Cambridge 2018, pp. 310–311.

[4] Malcolm Thorburn, "Criminal Law as Public Law", in: *Philosophical Foundations of Criminal Law*, RA Duff and Stuart Green (eds.), Oxford: Oxford University Press, 2011, pp. 21–43, p. 28.

citizens, and the public law model is a much better fit with existing doctrine than the moralist and instrumentalist alternatives that have been advanced in the last thirty years in Anglo-American criminal law doctrine (pp. 10–16).[5] Thorburn puts emphasis on the state's monopoly on the determination and enforcement of criminal law, and argues that "the moral justification of 'true criminal law' is indeed wrapped up with the business of government, but it is concerned with something even more basic to the project of government than the enforcement of specific legal rules" (p. 9). Thorburn's justification for the state's authority to punish could broadly be classified as Hegelian, which becomes more explicit in his following remarks: "when one of the state's subjects intentionally assaults another in violation of the legal prohibition, he thereby arrogates to himself the mantle of law-maker, imposing his of favourite terms of interaction on the rest of us to place of the rules set down by the state." (p. 9). According to this view, punishment has a function and meaning that transcends the immediate offence to be punished, in other words, each act of punishment is a reassertion and/or reestablishment of the authority of state, or more concretely of the violated (criminal) norm.[6] From this vantage point, the institution of criminal punishment is the ultimate vindication of the rule of law (p. 10), and, therefore, "we cannot make sense of the institution of criminal punishment simply as a feature of the relations between individuals as moral equals, it is an institution that has its place only within a relationship of robust public authority" (p. 17). The author further argues that the idea of criminal punishment is tied up with a larger notion of the state's exclusive authority over a certain subject matter has been lost in contemporary Anglo-American criminal law theory (p. 25). After establishing or identifying the connection between robust public authority and the operations of criminal justice, the author ultimately formulates two prospective research tasks regarding the delimitation of legitimate public authority, that is, to formulate an account of the legitimacy conditions for a robust public authority and to contribute to the substantive political debate about how the public authority ought to exercise its legitimate powers in the operation of criminal justice institutions today (p. 31).

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[5] Thorburn (n 4), p. 24.

[6] cf. Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, Allen W. Wood (ed.), H. B. Nisbet (trans.), Cambridge: Cambridge University Press, 2007, para. 97 (p. 123).

Petter Asp presents a theoretical and methodological approach with respect to the scope of extraterritorial ambit and extraterritorial jurisdiction. He initially makes a conceptual distinction between substantive and procedural aspects of extraterritorial jurisdiction. The substantive leg of the extraterritorial jurisdiction, which the author terms as the substantive ambit, deals with the question whether the offence in consideration has an extra-jurisdictional application. Whereas the procedural court competence involves the question whether criminal justice authorities have procedurally allowed putting the substantive law into action in a particular case (p. 34). Then, drawing on the Jareborg's crime conception[7] he adopts the radical crime conception according to which the wrongfulness of an offence lies in the fact that the offender by committing the offence harms the protected interest in question (p. 37). He takes this harm-based conception of crime as a starting point of his analysis regarding the substantive ambit, and argues that on the matters of extraterritorial jurisdiction this approach should be adopted as a default position. And he further suggests that "the default position must be that offences should be applicable worldwide, unless we find reasons for taking a different position in relation to specific offence" (p. 40). To be sure, as the author acknowledges what he proposes is a far-reaching position with regard to extra-territorial ambit and he, therefore, emphasises that his substantive test which he terms as default position is subject to exceptions and limitations such as offences, which involve less serious disturbances of the public peace only when committed within the state in question, that is, in such instances solely the territoriality principle must be applied (p. 41). He also takes the common limitations to extra territorial jurisdiction into account, which includes the possible breach of the principle of non-intervention and costs, procedural and evidentiary issues and the issues concerning double criminality, for instance (pp. 42–45). He characterises such limitations as procedural rules, and suggests that the normative ambit of criminal prescriptions will be broader than their practical reach (p. 45). He then refers to the relevant discussion in the German doctrine. It may be noted at this juncture that there are examples that are akin to the default position and it's procedural delimitation in the existing laws. Indeed, whereas the German

[7] See Nils Jareborg, *Scraps of Penal Theory*, Uppasala: Iustus Förlag, 2002, pp. 72 ff.

International Crimes Code article 1[8] stipulates that the offences contained in the Code are subject to universal jurisdiction, the German Code of Criminal Procedure art. 153f provides a leeway for prosecutorial discretion in the application of universal jurisdiction.[9] Asp suggests a similar solution with regard to the extra-territorial jurisdiction by adopting a far-reaching harm-based default position. He could have more fleshed out his argument, however.

Anthony E. Bottoms and Justice Tankabe provide an extensive analysis of the state authority and police legitimacy by drawing upon two concepts from political philosophy, more concretely, Williams'

[8] Article 1 of the Code provides universal jurisdiction for the crime of genocide, crimes against humanity and war crimes without any qualification relevant part of which reads as follows: "The Code shall apply to criminal offences contained in §§ 6 to 12 even when the offence was committed abroad and bears no relation to Germany […]"

[9] Article 153f of the German Code of Criminal Procedure reads: (1) The public prosecution office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, if the accused is not resident in Germany and is not expected to so reside. If, in the cases referred to in Section 153c subsection (1), number 1, the accused is a German, however, this shall only apply if the offence is being prosecuted before an international court of justice or by a state on whose territory the offence was committed or a citizen of which was injured by the offence.(2) The public prosecution office may dispense with prosecuting an offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, in particular if

1. no German is suspected of having committed the crime;
2. the offence was not committed against a German;
3. no suspect is, or is expected to be, resident in Germany;
4. the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence.The same shall apply if a foreigner who is accused of a criminal offence that was committed abroad is resident in Germany but the requirements of the first sentence, numbers 2 and 4, are met and transfer to an international court of justice or extradition to the prosecuting state is admissible and intended.(3) If, in the cases referred to in subsections (1) or (2) public charges have already been preferred, the public prosecution office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings.

''Basic Legitimation Demand'' (pp. 61–63) and Amartya Sen's ''impartial spectator'' (pp. 65–70), and prior criminological work on police legitimacy. The main novelty of the contribution is the import of the aforementioned two concepts of political philosophy into a criminological study on legitimacy. The main addressee of the study are police leaders, who in day-to-practice exercise the authority on state's behalf, and the authors endorse Williams's suggestion that those who are invested with state powers to be able to offer a legitimation to every subject as to why the use of those powers is normatively justified. That said, the authors acknowledge the fact that legitimacy is dialogic process involving many layers, many players, and unfolding series of events, and in case of doubt, the authors contend that Amartya Sen's impartial test would reduce failures that would be committed by the police in discharging their duties.

The primary focus of the Lucia Zedner's chapter is the relationship between criminal law and the requirements of due process, and the profound significance that it has with regard to the legitimacy of the state authority. She argues that without such a relationship there can be no effective limits on the scope of coercive state authority (p. 89). The author provides an analysis on the relationship between legitimacy and the exercise of authority in a criminal justice system, and she contends that the recent changes to the criminal process of the United Kingdom such as the new forms summary justice, restrictions on access to justice and the spectre of secret trials, seriously erode procedural protections, the right to a fair trial and open justice (pp. 89–90). She further argues that prosecution, trial, conviction and criminal sanction are not merely characteristic of and peculiar to criminal proceedings; they are what defines crime as crime, and criminal process is necessary condition of the legitimate exercise of the criminal law (pp. 91–92). She, therefore, suggests that ''criminal procedure must not only guide the exercise of discretion but also anticipate error, seek to limit abuse and to provide the means and structures needed to facilitate redress'' (p. 98). She, then, draws the readers' attention to recent developments in the UK criminal procedure that are cause of concern such as access to justice and court charges, corrosion of summary justice and resort to a partially secret trial (pp. 100–109). She concludes that these recent developments call into question authority, and undermine the basic protection of security against the state promised to the individual by the criminal process. She at the end of her study raises a long-standing issue, that is, the historic ''irrelation'' between criminal law and

criminal justice scholarship, which in her view partly responsible for current state of affairs in the criminal justice system (p. 110).

Iain Cameron examines the possibilities regarding the delimitation of the power of democratically elected to legislate about the use of criminal offences and sanctions at the example of Sweden. His main object of study, as he declares, is to examine the general legal rules in Sweden on the preparation of legislation, and the institutions which apply such rules. He, after providing a brief description of the Swedish legislative process (pp. 113–118), embarks upon an analysis of the constitutional rules that are of particular relevance to criminal law (pp. 118–121). He subsequently provides two examples of how the legislative process in Sweden works to prevent over-criminalisation in practice (pp. 121–123). He then discusses the principles of criminalisation adopted by the Swedish parliament in 1994 (p. 123–124), and the criminalisation principles that have recently proposed by a Commission of Inquiry on the Use of the Criminal Law (pp. 125–127), and accordingly he compares and contrasts the existing list with the ones contained in the new proposal (pp. 127–130). In his concluding remarks he discusses factors influencing a rational dialogue in the legislative process most of which common to legislative processes in various jurisdictions (pp. 130–132). The chapter would be an interesting read for those interested in the relationship between constitutional law and the processes of criminalisation.

Anat Scolnicov examines the crime of treason and addresses the question of whether the existence of such an offence can be justified in a liberal state (p. 134). The object of inquiry is of interest, for it deals with a type of offence which constitutes a direct challenge to the authority of the state (p. 134). She provides mainly an analysis of what she calls 'pure treason' the definitional element of which would be satisfied by the mere act of treason without requiring any resulting harm (p. 136). In the ensuing discussion she rejects possible justifications for the offence which have been put forward in the legal doctrine. That is, she repudiates the harm principle justification, the duty justification, allegiance and loyalty arguments, the community justification, the social contract justification, wrongfulness and upholding the integrity of the state, respectively (pp. 136–153). She claims that the fundamental problem of the present offence is that it postulates not just a specific duty of the citizen towards the state, such as paying taxes or obeying criminal prohibitions enacted by law, but a general duty (p. 153). While rejecting the arguments of protection, self-recognition and gratitude towards one's own polity, she para-

doxically demands allegiance to an imagined global citizenry (p. 153), which would demonstrate that the present subject of inquiry shall be remained controversial in the criminal law doctrine as well as in political philosophy.[10]

Erik Svensson approaches the discussion regarding criminal law and the authority of the state from a different angle. Instead of dealing with the issue of external justification of criminal law *per se*, he chooses rather to concentrate on the question of how can criminal law be justified in its internal practices, i.e. in individual cases, which is, to be sure, quite relevant in terms of justifying the criminal law's day-to-day practices. He suggests that legal dogmatics (*Rechtsdogmatik*) has a central role to play in justifying the actual use of punishment in individual cases (pp. 155–156). The notion of dogmatics is distinguished from the term legal doctrine primarily by the claims and ambitions that are found in the former. In his view, dogmatics is not only about describing the existing norms, but also about forming the legal material into a coherent structure (p. 157). Besides, dogmatics operates through interpretation of the legal norms, and the systematisation of these norms. The legal theory, however, is not about legal norms as such, but works on a more abstract level. He makes an important point with regard to his methodology, that is, the fact that many scholars start by developing a theory first, and then ask the legal questions which the theory supposed to answer. Nonetheless, in his view the legal dogmatics is rather concerned with rational reconstruction and systematisation of a body of legal materials such that this material forms a coherent and structured whole. Accordingly, he formulates the departing point of argumentation in a different way: ''the question is not 'is this system of norms coherent with my theory?' but rather what theory is needed to apply this system of norms in a coherent way?'' (p. 166). He, therefore, thinks that dogmatics is an appropriate tool by which legal issues can be solved from a legal perspective. He eventually advances the argument that the limits of state authority in criminal law matters could be appropriately identified and set through the methodology of legal dogmatics which shapes legal decision-making in concrete cases (pp. 168–169).

Matthew Dyson explores an important aspect of the relationship between criminal law and tort law, that is, the state's obligation to provide a coherent system of remedies across crime and tort from a

[10] Cf. George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships*, Oxford University Press, Oxford 1995, pp. 41 ff.

comparative law perspective. He mainly investigates what remedial framework national law must provide across crime and tort in order to be logically and practically coherent. Before embarking upon his discussion, he seeks to clarify the basis and the history of the distinction between tort and crime (pp. 173–175). Methodologically he approaches the framework across crime and tort as a matter that should be regarded as a whole, rather than as two separate and unconnected remedial mechanisms (p. 175). He bases this approach on the practical argument that the state's responsibility of the effective resolution of disputes amongst its citizens. Accordingly, he investigates minimum questions concerning the remedial framework provided by crime and tort, which a legal system must address based upon a comparison among several European legal systems. In this vein, he addresses, for instance, questions of whether concurrent and parallel proceedings in both crime and tort should be possible, or what effect should the outcome of the criminal trial have on the civil proceedings. He, then, analyses the models through which compensatory elements are integrated into criminal procedure (pp. 196, 198). He firstly identifies the merits of the so-called ''piggy-back integration'' model of the civil compensation vehicle. As put by Dyson this model ''sees the civil rules purportedly applied by a criminal court, and the burden of the would-be claimant carried by the state long enough for him to obtain the appropriate civil order. This is normally accompanied by a rule that the civil claim outside the criminal process is suspended until the prosecution is complete, for reasons of efficiency and sometimes also through fear of contradictory resolutions of the two courts'' (p. 196). In other words, this model is based on the premise that tort law takes notice of rules or outcomes of criminal law. The other paradigmatic model identified by the author is ''the hybrid model'' which simply means the integration of some civil concerns into the criminal ''by creating a new object, often criminal in form but typically doing the work of its civil law origins'' (p. 196). A paradigmatic example of such a hybrid instrument would be the compensation order in English law, which is created as a means to overcome the limits of criminal and the limits of tort law (pp. 196–197). Both of these models are the paradigmatic answers to the most significant questions regarding the relationship of crime and tort, and they emphasise the role of practical effectiveness as one of the simplest ways to achieve law reform.

Antje du Bois-Pedain puts forward a conceptualisation of the sentencing judgment appropriate for a liberal state, and she defends

and develops a re-integrative conception of state punishment. She, firstly, identifies a missing element in the standard definitions of punishment, namely, the element of reestablishment of relationships between punishee and society (pp. 201–206). According to this conception of punishment, a sentencing judgment in a liberal-constitutional state must also be future-oriented, that is, it must be aimed at creating the conditions under which full equality and full community with the perpetrator is re-established (p. 215). Drawing primarily on the Hegelian notion of the state's responsibility to create conditions for self-realisation in an order of freedom and the Fichtean notion of an expanded social contract theory, which applies to each and every legal relation between state and subject, including the act of punishment, du Bois-Pedain argues that a legitimate sentencing judgment is the one which offers the punishee, as it were, a way back to community, namely, it offers terms of atonement to him in the form of a contract of atonement, which sets appropriate terms for a polity's continued future relations with the perpetrator (pp. 206–215). Accordingly, she defends a 'bifocal' humanistic proportionality assessment approach, where the sentencer must look not just at the gravity of offence, ''but also consider the effect of the contemplated punishment on the offender considered as a socially embedded human being'' (pp. 217–225). Thus, in the light of the constitutional values humanity and welfare she proposes a thicker conception of constitutional proportionality which mandates a moderate and non-destructive punishment (pp. 218–225). The conception of punishment put forward by the author is significant as a normative ideal which would guide and inform legislative and adjudicatory decisions with regard to punishment in that it reminds the public of the offender's common membership to the particular populace and its non-forfeitable character in a liberal constitutional state, even though it would be at times difficult to sustain such a commitment in the reality of social relations.

In the closing chapter of the collection, Alon Harel with respect to the models designed to address and justify the nature of publicness, which is one of the central concepts employed by the author throughout the chapter, defends an agency-based conception vis-à-vis a reasons-based conception (pp. 229, 234–242). He argues that even when private entities are moved by reasons that may share the characteristics of decisions made by public entities such as accountability, impartiality, due process and the like, this type of reasoning and decision-making does not remedy the problems resulting from

privatisation, which, roughly speaking, means the shifting of responsibility from public to private entities. Thus, it is "not *the reasons underlying the decisions* that count, instead, *the identity of the agent* making a decision or performing the act" (pp. 229, 231). This discussion pertains to an important aspect with respect to the relationship between criminal law and the authority of the state, for practices like that of the privatisation of public prisons which involve a shifting of responsibility from state to private entities in areas related to the state's monopoly of violence (pp. 232–236). He defends an agency-based perspective as the defining feature of publicness, since only decisions made by public officials could be regarded as being made in the name of citizens (pp. 236, 240–241). He then concludes that "there is a fundamental difference between public officials and private entities. This difference does not rest on the reasoning characterising public officials or on the quality of their decisions. Instead, it rests on the fact that public officials speak in our name; their acts are attributed to us as citizens. In contrast, private entities cannot speak in the name of citizens and their decisions should not be attributed to citizens" (p. 241). He takes note that his observations in this regard do not imply that every case of privatisation is in and of itself wrong. Thus being so, as he forcefully argues the privatisation of punishment and prisons would be utterly wrong due to their ontological embeddedness to the very essence of publicness and the authority of the modern state.

Overall, *Criminal Law and the Authority of the State* delivers what it promises by offering a range of perspectives on the breadth and extent of nexus points of the multi-faceted functions and roles of the state in criminal law ensuing from its authority, which has been subjected to a wide variety of legitimacy tests that have been developed, defended and argued for throughout the collection. This book deserves to be read cover to cover, and invites its readers to reflect on the complex challenges relating to internal as well as external justification and legitimisation of criminal law in any polity which seeks to uphold the substantive limb of the rule of law.