Book Review: Mireille Delmas-Marty, Ordering Pluralism – A Conceptual Framework for Understanding the Transnational Legal World, translated from the French by Naomi Norberg (Oxford and Portland: Hart Publishing, 2009), 175 pp., ISBN: 9781841139906

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BOOK REVIEW

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Since criminal law has lost its religious and – by definition – universal fundament, the right to punish belongs to the *domaine réservée* of a state. The state may punish its citizens for violating norms that protect essential preconditions for social cohabitation. This is why criminal law is closely linked to the history, culture and values of a society. Thus, a criminal code is not only a text, which tells its addressees what they ought to do; it is also a cultural mirror, which shows them who they are.[1] Correspondingly the traditional understanding of criminal law did not leave much room for international criminal law statutes nor did the international community demand criminal jurisdiction. In fact, the 'universal state of human beings' that Immanuel Kant described in the late eighteenth century was not an international community of individuals, it was a 'state of nations' that regulated interstate-affairs and international commerce.[2] As a matter of course, only a state could claim the right to punish its citizens, not the international community.

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[1] M. Kubiciel, ‚Strafrechtswissenschaft und europäische Kriminalpolitik' (2010) *Zeitschrift für internationale Strafrechtsdogmatik*, 742–748, 742.

[2] B. S. Byrd/J. Hruschka, *Kant's Doctrine of Rights* (Cambridge: Cambridge University Press, 2010), 206–211.

Today, not only the traditional state-focussed conceptualization of international law has altered[3]; the state-focussed understanding of criminal law seems to be outmoded as well. While international *ad-hoc* tribunals and the International Criminal Court are adjudicating war crimes and the European Union has begun to harmonize the criminal law of its 27 member states, the number of international criminal law conventions has multiplied silently in the slipstream of the mentioned spectacular developments.[4] Therefore, an increasing number of conventions adopted by the United Nations, the Organisation for Economic Co-operation and Development or the Council of Europe include criminal law statutes on drug and human trafficking, corruption, money laundering, environmental pollution, internet crimes and many other things. No doubt, in many areas criminal law has become a transnational instrument that crosses political and cultural borders.

Contemporary philosophers have elaborated (secular) concepts of 'hypernorms', which protect the common heritage of mankind[5] and whose violation can be punished by the international community. The phenomenon of international criminal statutes seeking to enforce 'hyponorms', i.e. norms that do not protect core obligations of humanity, but goods whose value may differ from country to country, has been reflected only rarely. The discussion on this issue is still in its fledgling stages. Therefore, the profound analysis of Mireille Delmas-Marty, Professor of Comparative Legal Studies and the Internationalisation of Law at the Collège de France, signifies a growth spurt in international criminal law theory.

To Professor Delmas-Marty it is an irrevocable fact that national criminal law-makers cannot claim complete autonomy anymore (pp. 2, 9). She neither questions the internationalization of criminal law nor does she plead for a comprehensive harmonization of criminal law. Instead, Professor Delmas-Marty asks how the complex conglomerate of diverging national and international law systems can be put in order. Her vision is, in short, an 'ordered pluralism' (p. 13).

Analytically speaking, order can be the result of unilateral power or voluntary co-operation. Correspondingly, legal pluralism could be

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[3] A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1997), 165.

[4] See M. C. Bassiouni, *Introduction to International Criminal Law* (New York: Transnational Publishers, 2003), 121–124, 136–158.

[5] M. Nussbaum, *Frontiers of Justice* (Cambridge, MA: Belknap Press, 2006); R. Rorty, 'Human Rights, Rationality, and Sentimentality', in S. Shute and S. Hurley (eds.), *On Human Rights*, 111–134; A. Sen, '*Elements of a Theory of Human Rights*' (2004) 32 Philosophy and Public Affairs 315–356.

ordered ultimately by the 'hegemonic expansion of national law' (p. 11) or it could be dealt with in the course of 'interactions of heterogeneous legal systems' (p. 15). Professor Delmas-Marty dismisses the first option since it would lead to the 'omnipresence of American law' simply because of the 'linguistic domination' of the English language (pp. 11, 17, 62). This argument will surely convince a French reader more than it convinces an American while the German reviewer has to think of the important role of American law and law enforcement bodies in the discovery of corrupt practices by 'Siemens' representatives in Africa and Asia. Without the U.S. Securities and Exchange Commission and its determined application of the U.S. Foreign Corrupt Practice Act the complete extent of the case would have remained uncovered; neither would the German industry have witnessed the recent avalanche of anti-corruption and compliance programs. However, as the German companies retreated from highly corrupt markets, their European competitors took over. So the swamp of corruption has not been drained – it simply stains others. In this light, the *excessive* influence of American law is not a problem; instead its *limited* assertiveness hinders the fight against corruption.

Where (political, economic and ethical) interests between states differ, a voluntary co-operation is unlikely to order plurality. As Professor Delmas-Marty points out the 'process of cross-referencing', that is the voluntary borrowing of laws between different national legislators or judges, can only reduce contradictions, but it cannot guarantee legal consistency (pp. 34, 37). This is why, both a coherent lawmaking and law enforcement model is necessary. Since her aims are 'compability and not conformity' (p. 44), Professor Delmas-Marty pleads for a harmonization of law with a national margin of appreciation and a limited unification of law (pp. 17–18). Indeed, the harmonization of law cannot be an end in itself, but only a means to solve concrete social problems. Since social problems take different shapes in different societies and different societies do not respond to uniform solutions, supra- and international lawmaking must leave room for adjustments on the national level. Therefore, Professor Delmas-Marty is right when she stresses that the national margin of appreciation is the 'key' to ordered pluralism (p. 44).

As an example for balancing international and national lawmaking Professor Delmas-Marty mentions the principle of subsidiarity in the law of the European Union (pp. 45–46). According to Article 5 of the Treaty on the European Union the 'Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently

achieved by the Member States (…)'. The reality however shows that the European lawmaker tends to interpret its competences widely and that the European Court of Justice (ECJ) supports this tendency even in problematic cases. A good example is the decision from 2007 concerning the harmonization of national criminal laws on marine pollution. Although the court admitted that 'as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence', it held that the European Community 'has broad legislative powers under Article 80(2) EC' since the Article 'does not lay down any explicit limitations as to the nature of the specific common rules which the Council may adopt on that basis'.[6] In other words, Article 80(2), which solely states that 'appropriate provisions may be laid down for sea and air transport', is *vague* enough to allow an exemption from the rule according to which the European institutions have no competence on the field of criminal law. As if this wasn't bad enough, the European institutions neither in this case nor in other cases give any explanation why the harmonization of criminal law is 'an essential measure' for combating offences and they never documented the alleged legal loopholes in national laws.[7] In this light, such harmonization measures appear as a merely symbolic policy or – in the words of Pascal Lamy – as 'gesticulations of declamatory governance'[8] and not as rational applications of law.

Against this background, one has to agree with Professor Delmas-Marty's demand for specifying the national margin of appreciation (p. 54) and must welcome the improvements of the Lisbon Treaty (p. 56). However, all calls for 'self-limitation' (p. 58) will continue to be ignored unless the EU institutions have a political incentive to refrain from further expanding their competences. The decision of the German constitutional court (*Bundesverfassungsgericht*)[9] concerning the Lisbon treaty could give such an incentive, because the court did not only specify the limits of European criminal law competences, but also obliged German representatives to prevent further 'border violations'.[10]

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[6] *Commission of the European Communities v Council of the European Union,* Case C-440/05, Judgment of the Court (Grand Chamber), 23 October 2007, paras. 58, 66.

[7] Cf. Case C-440/05 (n. 6 above), para. 66.

[8] Cf. Pascal Lamy, *La Démocratie-monde* (Paris: Seuil, 2004), 22, also cited by Delmas-Marty, *Ordering Pluralism*, 111.

[9] Bundesverfassungsgericht, ‚*Lissabon-Urteil*', 30 June 2009, BVerfGE 123, 267 (http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html).

[10] M. Kubiciel, ‚Das „Lissabon"-Urteil und seine Folgen für das Europäische Strafrecht' (2010) *Goltdammer's Archiv für Strafrecht* 99–114.

The imminent danger of a conflict with a national constitutional court will surely slow down and thereby rationalize European law-making in the field of criminal law. Moreover, in the time of a growing euro-scepticism the European institutions may recall that neither a supranational organisation nor its law can be stable in the long term without the support of the public. As (national or European) norms depends cannot be enforced simply by means of control and coercion, criminal law depends on the public's willingness to comply with norms voluntarily.[11] Public support is biggest where formal criminal law norms are in line with informal cultural norms. Political and legal cohesion therefore result 'primarily from the cultural, linguistic and sometimes religious make-up of a region' (p. 88). This socio-cultural factor limits the possibility of ordering legal pluralism by means of harmonization or hybridization even in a culturally rather homogenous region like Europe. While it is possible to harmonize legal standards in fields without close links to cultural norms, e.g. legal standards on corporate finance or insider trading, a European criminal law statute that prohibits the mere denial of genocide can be questioned.[12] Such a statute strikes a balance with freedom of speech where, as for example in Germany, the collective remembrance of a genocide is a crucial part of the political identity of

[11] M. Kubiciel, 'International Legal Development and National Legal Change in the Fight against Corruption', in D. Linnan (ed.), *Legitimacy, Legal Development & Change: Law and Modernization Reconsidered* (Newport: Ashgate Publishing, to be published in November 2011).

[12] Article 1 (1c) of the Framework Decision 2008/913/JI of the European Council from 6.12.2008: 'Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.'Also see Article 6 of Council of Europe's Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (2003): 'Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.'

a society. Contrarily, societies with a different political and historic background will surely meet such a restriction of the freedom of speech with scepticism or disaffirmation. To enforce uniform standards of behaviour in such areas means to use criminal law as a "cultural lever". A supranational legislator who depends on the public support would not act wisely if he would utilize this lever. He therefore should concentrate on the elimination of 'manifest injustice' instead of 'agitating for a perfectly just world society', as Amartya Sen, the nobel-prize-winning philosopher, has pointed out.[13] Consequently, ordering legal pluralism means acknowledging the political and cultural diversity of societies and accepting the limits of legal harmonization.

This insight does not only apply to the harmonization of criminal law in Europe; it, *a fortiori,* applies to the internationalization of criminal law in general. The 'list of crimes subject to a supranational criminal justice validated by the establishment of the International Criminal Court' (p. 104) surely falls within the scope of a legitimate internationalization; many of the criminal law statutes included in conventions like the UN Convention Against Corruption do not.[14] Drafting conventions with an impressive set of criminal law tools unlikely to be implemented is a symbolic act of lawmaking, which disavows the lawmaker. Therefore, international organizations should identify truly 'global public goods' (p. 113) and truly global standards of protection, rather than expanding the scope international criminal law conventions to its maximum.

As Professor Delmas-Marty points out this way to order legal pluralism will lead to different speeds in the international legal development. A 'judicial dialogue' between different states and world-regions on common problems may enable a synchronisation in the long term; but in the short term we have to accept the 'asynchronity' of laws, even when 'the temptation may arise to try to impose the same rhythm on every state' (p. 132). We should heed Professor Delmas-Marty's advice. A uniform world with people acting according to the same norms surely is a nightmare – not only for cultural and aesthetic reasons.

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[13] A. Sen, *The Idea of Justice* (London: Penguin Books, 2009), 21, 26.

[14] For the scope of the UN Convention Against Corruption cf. M. Kubiciel, 'Core Criminal Law Provisions in the United Nations Convention Against Corruption' (2009) 9 ICLR 137–151.