The End of Pragmatism: On Jacobsen's Kantian Reading of Nordic Criminal Law

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When starting to read Jacobsen's book *Power, Principle, and Progress: Kant and the Republican Philosophy of Nordic Criminal Law* (2024), my first impression was a certain confusion and even surprise. The general traits of Nordic law include an idea of a welfare state in which the legislature is actively steering social life and thus incorporating social justice and social policy concerns in the legal system. Dynamism and progressiveness have colored the approaches. Low level of repression and high emphasis on addressing modern crime, such as economic and environmental offenses, have been a trademark of Nordic criminal policy. [1]

I

The first thing that comes to mind in theorizing about Nordic criminal law, the loose idea informing the various normative legal systems of this region, would not be to start reading Kant. However, taking into account Jacobsen's scholarly profile, especially his massive previous study on the rule of law and criminal law, the effort cannot be regarded as entirely unexpected.[2] In that work he set out to present a normative scholarly account of Norwegian criminal law as the usual pragmatic approaches did not seem able to handle pressures of the time. Clearly, this study dealt with many of the materials and issues that we meet again in the new work, now in a much elaborated and systematically organized form.

In fact, Kant's thinking has also otherwise been influential in recent political philosophy, since Rawls's magnum opuses on theory of justice and political liberalism. And even Habermas's key work has clearly Kantian traits. In the Nordic setting, the links between political philosophy and criminal law have not been recently systematically explored, which makes the study so significant.

In pragmatic legal thinking, Scandinavian legal realism was deeply anti-metaphysical, and even after its heyday passed, the anti-metaphysical attitudes sit deep. Johs. Andenaes was the key Norwegian figure. Alf

Ross, to give an example, started his work as a Kelsenian, the formalism of which is not that far from Kant's philosophy, but then turned into a realist, and finally ended up closer to analytical philosophy.[3]

Nordic criminal law has been characterized by its flexibility and ability to adjust to social needs and perceptions. Bringing in Kant and stating that all this is in line with what we can learn from his work is indeed a brave thesis and forces us to sharpen our views and to rethink the bigger picture. Enlightening the Nordic theoretical discussion and linking criminal law with political philosophy raises high promises and can be helpful even if one would not buy all of it. It is also refreshing to read about the various strands of liberalism and republicanism, as especially the latter strands of thought have not been much discussed amongst Nordic legal scholars. Probably the Pettit/Braithwaite critique of just deserts stands out as the most renowned example. Presenting the relevant parts of Kant's thinking, including his republican political thinking, in a clear and understandable manner is an achievement itself.

The book aims to overcome overly pragmatist perspectives and instead to provide Nordic criminal law with a deeper-level foundation aligned with republican political ideals taken in the spirit of Kant. The starting point is not so much Kant's retributive theory of punishment, but his anthropologically founded view of human beings provided with reason and the implications of that view for issues of freedom, order, and the state. On that level, Nordic criminal law certainly can be viewed as epitomizing a deeper-level rational order. Criminal law is the part of public justice that should secure the protection of external freedom against breaches. Criminal law should also be seen as a part of the republican political order that concretizes the content of rights, thereby complementing fundamental constitutional rights.

Digging into Kantian moral and political theory has required an extensive reading and rereading of Kant, and the presentation is pedagogical for criminal law scholars who seldom get such insights. We learn that Kant's work opens up to new readings and that the few citations we usually repeat from him do not deliver a full picture. One cannot, however, easily overcome the problem that Kant's theory of punishment was directed at the rising utilitarian alternatives.[4] In Nordic criminal policy, rehabilitation and crime prevention have been clear emphases from early on, and still are today. Jacobsen takes the route of approaching the role of punishment through the lenses of republican political theory. At this point, the reader notices that similar efforts have been made in German criminal law scholarship, such as Pawlik's more Hegel-inspired theorizing.[5] Sometimes one wonders whether it would not have been more fruitful to pay less attention to Kantian orthodoxy and to distance oneself from Kant's conservative, and even sometimes inhuman, views on punishment, and instead to work out other ideas of one's own. But as we keep reading the

book further, we learn that Kant is actually only being used to provide us with a basic normative and conceptual structure of thinking about justice, criminal law and the state.

The main weight of the presentation is on the side of general theorizing and less on what Nordic criminal law is or should be about. Much of the study can be read even if one had no particular interest in Nordic criminal law. Nordic criminal law is a vague idea involving internal tensions and fractions. The Nordic countries are a region sharing a lot of history and culture. The history of Nordic criminal law has not been linear. Nordic criminal law has also had its shadows and dark sides. One example: the influence of von Liszt and the German sociological school brought about, or contributed, to the rise of the treatment ideology which was so heavily criticized by reformers in the 1970's. Accordingly, the practices of criminal justice have not always been particularly progressively republican and inclusive. In the 1920's, the Nordic countries introduced measures to incarcerate dangerous recidivists. This was a kind of enemy criminal law of that time. What we today call "Nordic criminal law" emerged partly as a critique of the earlier excessively instrumental standpoints, as a kind of dialectical move somewhat reminding us of Duncan Kennedy's presentation of the history of globalization of legal thought, where the most recent phase has brought the return to rights and formalism.[6]

II

I mentioned above the anti-metaphysical tendencies of Nordic legal theory. The embrace of "neoclassicism," which captures the ideological commitments of Nordic criminal law thinking in the 1970s, did not mean a full return to classicism. It was rather only a step back. The neoclassicism of the 1970s was a pragmatic critique of the excesses of treatment ideology. The principle of proportionality was emphasized, not as a matter of "just deserts," but as a commitment to act-proportionality understood as limiting the severity of the punishment without dictating the end result. It was always possible to decrease the sentence on different grounds.

I would have expected to read more about this step back. We should not risk losing the benefits of incorporating the society into the study of criminal justice, by linking criminal law with the social sciences and social justice issues. It remains somewhat unclear in which camp Jacobsen now stands. Is he propagating a bigger move towards the classics, or is he simply repeating the corrective move from the 1970s, but now with more elaborate tools? Towards the end of the book we learn more about where Jacobsen stands.

Jacobsen has a point in that the 1970s neoclassical move was not so much about addressing the issue of power. In the Nordics, there was fertile soil for reading Foucault as well as for critical criminological thought, but

liberal neoclassical theorizing was not part of that camp. Neoclassicism was also very different from the respective movements in economic theory that stressed the role of the market and sought to minimize the role of the state.

One concern that I have is that a normative justification and reconstruction of criminal law would need to have a critical edge. This is often where it all begins. Enemy criminal law, excessive fight against terrorism with problematic measures, abuses of state powers, putting security above law, all these phenomena should be seen as calling for principled approaches to secure that our criminal law does not become a tool for the state to suppress its people. How we deal with the prohibition of torture says a lot; this is where a utilitarian mode of reasoning risks leading us onto a slippery slope, and Kantian deontology can help us to recognize and control that risk.

Even though I believe Jacobsen would see this as significant, and he addresses such issues near the end of the book, the main drive of his work is not to defend law and legality against securitization or authoritarianism, but simply to construct a better theory of the law.

Why Kant, why not Hegel? Thinking back on the history of ideas, at least for Finland, Kant was too early to have influenced academic debates during his own time. Finnish law professors turned their attention to German universities only somewhat later. It was only the Hegelians who informed modern national doctrines on criminal liability in Finland. It was the classical school inspired by Hegel which was crucial when criminal law scholarship was established in Finland in the 19th century, K.G. Ehrström being the central figure.[7] Likewise, constitutional developments in Finland were more influenced by Hegelians than by Kantians. For instance, the academic-turned-statesman J.W. Snellman, in 1842 published his influential work *Läran om staten*, The Doctrine of the State. Finland became the nation-state par excellence. Why not deal more with Hegel's philosophy of law? It is a very comprehensive account, built partly on Kantian premises, but discussing matters also within a societal context, from the point of view of civil society. The Hegelian school of criminal law scholars was quite dominant in German scholarship for decades, and Nordic scholars brought it home, so to speak, in the form of the classical school known for its retributivism. Jacobsen's choice not to rely on Hegelian thought makes sense, given its complexity and inaccessibility. Historically, however, it, unlike Kantian ideas, played a critical role in the formative period of Nordic criminal law.

III

It is also questionable whether philosophy can carry Jacobsen's project these days. Even though philosophy of criminal law has regained some

influence and visibility, at least in Norway, due also to Jacobsen's own contribution, the contemporary philosophical literature has—and perhaps even should have—more modest ambitions than it had during the days of German idealism two centuries ago. While philosophy can no longer provide the foundation for all of science, it continues to inform specific scientific disciplines. Philosophy is a *Platzhalter*, it keeps the place. Habermas, for instance, reconstructed the parameters of the democratic Rechtsstaat by showing the co-originality of the democratic principle and a system of rights as a precondition for the emergence of a democratic Rechtsstaat. Philosophy here describes the political processes, not substantive laws. It captures the necessary internal links between rights and democracy if we wish to justify the state's monopoly of force.

Reconstructing Nordic criminal law, by contrast, is concerned with substantive law, i.e., law as a cultural phenomenon. The key lesson from Habermas might simply be that even a social welfare state needs to preserve its structures of legality and rule of law, and it should not ignore the deeper justification challenges that a modern regulatory state poses. One gets the impression that Jacobsen, instead of trying to regain metaphysical stances, reconstructs the elements of a republican political setting to situate criminal law and its functions. He is an analytical thinker who elaborates carefully the necessary pieces of his account. It is a philosophical exercise which has grown out of the obvious need to work out an overall republican perspective.

Republican political philosophy is famous for its analysis of freedom as non-domination. It resonates with the view that criminal law needs to be placed under a constitutional setting that will prevent its abuse—a phenomenon that we witness in many countries in which governmental powers are not duly restricted by effective legal barriers.

Power is the core concept of political thinking. But it is not only a question for philosophy. Sociology and social theory have explored these issues since Max Weber. The entire *Problematik* relates to the monopoly of power. Habermas follows this strand. In Finnish legal thinking, the German critical strand has been rather influential, including the Frankfurt School, with representatives such as Winfried Hassemer, Wolfgang Naucke, and their students. Naucke was the Kantian of the Frankfurt School who opposed the modernization of criminal law. Criminal law should accordingly stick to its traditional role of protecting freedom. Crimes of violence fit the paradigm. Even Hassemer, who was more flexible in his conception of the functions of contemporary criminal law, had doubts concerning how much criminal law can deliver on matters such as environmental protection. The risk was that the new policies render criminal law a symbolical tool that loses its contact with reality. Do we have to be traditionalists and oppose reforming criminal law to protect collective societal interests? Where do victimless crimes stand? Crimes of

endangerment, for instance? It seems that Jacobsen is willing to adopt a moderately traditionalist position (see, e.g., p. 238).

In turning to the republican tradition in political philosophy, do we go fishing too far? In Finnish criminal law, the links to constitutional law have been strengthened since the reform of the Bill of Rights in 1995. A doctrine on criminalization has been elaborated and is being applied in the legislative process. Why not build on constitutional rights and values, and human rights instead? Jacobsen gives the clear answer that criminal law is always needed as a supplement to constitutional principles and constitutional rights. Thus, the republican theorizing in fact is compatible with such ambitions while taking them a step further. A republican framework would justify and explain criminal law and its distinctive nature better than seeing it just as a concretization of the constitution.

A central idea is that criminal law forms a baseline for a republic. Republican criminal law performs a negative-constitutional role. Is criminal law necessary for conceptual reasons necessary as a kind of prohibitive part of the constitution? This would be bad news for abolitionists. The traditional Nordic view has been that, while criminal law is needed at the moment, it might shrink or even wither away along over time. No conceptual links are usually proposed. It is, however, hard to disagree with Jacobsen's argument that criminal law will remain as long as human beings remain as we today are. We will always need a systematic arbiter of public justice.

IV

According to Jacobsen, the three functions of criminal law are declaratory, retributive, and preventive. The declaratory function means simply that criminal law needs to provide the relevant crime definitions in order for us to know what can be a criminal wrong. Only violations of external freedom of individuals may constitute a crime. Retribution seems to mean that the state needs to react to, and only to, actual crimes. And prevention, again, means that the existence of criminal law may prevent crimes from being committed.

It is a merit of this threefold analysis that it provides a clear structure for thinking about the proper sphere of criminal law. But it may be too simple. Are what we call crimes against the environment directed against the external freedom of individuals? Should they be regarded as something else than crimes? Can crimes of endangerment be interpreted as violations of freedom? Clearly, preventionism has deeply affected the ways we regulate crime in modern criminal law.[8]

Also ultima ratio, the last resort. Isn't it a legislative principle that other options should be considered first, before resorting to criminal law? What if the other options are good enough? Aren't we running the risk of using

criminal law for symbolical, declaratory purposes, just to strengthen constitutional rights and values? The different functions should have a critical bite, otherwise, we face a risk of traditionalism.

I'm a bit worried also about the marginal role of the rights of the victims of crimes in the overall picture. The Nordics have been granting victims the right to decide whether prosecution should follow. If we stress the character of an offense as a public wrong, we will give less attention to the victim. We will sharpen the problematic tension that crime is a relationship between the perpetrator and the state/legal order, and not a social conflict. Nils Christie once warned us not to let this happen. Victim-offender mediation, restorative justice, would we be forced to narrow the scope of such alternative ways to handle crimes?

Equality before the law is not much discussed. Racial biases, discrimination, hate speech, for instance, are important topics in our multireligious and multicultural society. Increased punishment for racist acts? This could be relevant as a matter of republican criminal law theory in today's Europe.

Many Nordic scholars have been worried about the excessive use of hard imprisonment, even though in international comparison the figures of imprisonment in Nordic countries are still low. Is this something for a republicanist to be worried about? In the 1970s it was all about finding alternatives to imprisonment. Is that exercise over now?

The critique in the 1970s was about treatment ideology which had obviously failed. But it seems to me that we should not forget that modern rehabilitation is different from what it was then. A crucial problem today is that inmates are merely being incapacitated, serving time, and not receiving the support they should, taking into account their medical needs, psychological issues, substance abuse, etc. The republican theory would have to pay more attention to such realities.

If we take Nordic criminal law primarily to be about rational and humane criminal policy made real, Jabobsen's Kant-inspired theory could provide a formulation and defense of it. The rationality would work on different levels since it presupposes the rationality of every human being as well as the public reason exercised by the legislature. It could also explain why criminal policies would have to be humane: human reason and respect are incompatible with excessive repression. Otherwise, we will have forgotten both the true nature of humans as well as the nature of republican law-making. Public justice also needs to follow the development of society and its sensibilities. Republican criminal law should not be more repressive than what is necessary. These are all ideals stressed by progressive thinkers, such as Antony Duff, more generally.

V

I was happy to see that Jacobsen even discusses John Braithwaite's recent magnum opus, the work on *Macrocriminology and Freedom*.[9] The aim of this book is in fact not that different from Jacobsen's. Braithwaite also takes a republican line in seeking to build a frame in which criminal law would be a guardian of freedom. He refutes the simplified idea that hard repression through criminal justice is the cost of freedom. Rather, we would need an underlying normative yardstick which, in his case, is being provided by the republican notion of freedom as non-domination. For Braithwaite, the Nordics represent a social-democratic view on law and society, according to which the state safeguards the societal conditions of a good and decent life by regulating markets and social life and thus also seeks to prevent the rise of inequalities which would be harmful to social life and create the risk of increased violence and other harms. Braithwaite thus openly links his republicanism to the Scandinavian welfarist way of regulation and seeks to promote an approach in criminology based on sociological, macro-criminological research. For him, the grand challenges of today require a normative tenor for this research agenda. The question of normative justification of criminal justice and crime prevention practices becomes crucial, and even criminology should be alert to such demands. Criminology needs to be linked with political philosophy in order to find the relevant questions and to be helpful in answering them. Jacobsen also searches after a normative justification, but in another sense. Both have found republican political philosophy to provide the key normative reference point.

Braithwaite's approach differs from Jacobsen's in that his main concern is to find and maintain structures that would secure non-domination in society. For him, public law and the rule of law state cannot do this alone, but for various reasons, the private sector and the market need to be considered, and regulated, since markets may serve good as well as bad purposes; he calls these two categories the markets in virtue and markets in vice. By comparison, Jacobsen's look at criminal law is slightly more traditional and state-oriented. It is legal, not sociological, even though such avenues are held open.

In Nordic criminal law the liberal turn took place in the 1970s and after. In Finland the turn was more easily visible than elsewhere. The previous tough-on-crime policies were replaced by what often has been called a rational and humane criminal policy approach. Alternatives for imprisonment were actively pursued and built into the system with the conscious aim to reduce the number of inmates. This succeeded. At the same time Finnish criminal law underwent a massive reform to meet the new demands of a modern society. Corporate criminal liability was introduced in 1995, partly following other Nordic models.[10]

One would have expected to read more about how Nordic criminal law relates to European criminal law. Since European legal integration reached

issues of criminal law cooperation, much has happened. First, starting from the 1990s, the talk was about Europeanization of criminal law. These days we already speak boldly of European criminal law. Usually, this denotes both EU criminal law and the conventions and human rights law of the Council of Europe. The more instrumental and deterrence-based approach to criminal policy adopted by the EU creates a tension between European and Nordic criminal law, and there have been even worries that the Nordics—as Denmark, Sweden, and Finland are part of the EU—will have to change its policy approach accordingly.[11] EU criminal law would need an enlightened republican approach as well. Maybe this would be the topic of the next book.

VI

A Nordic approach to theorizing about crime and punishment was above characterized as pragmatic. Pragmatism includes certain flexibility. For a Nordic legal scholar, it is natural to reach out not only to German debates but also to the Anglo-American ones. In terms of thinking and theorizing, this situating “in-between” has some advantages. Reflecting on the other may help to create an identity of the self, a view of what is one’s own. Jacobsen draws beautifully from various scholarly traditions in ways which advance the discussion. The Nordic approach could even be interesting as a model for others in this flexibility and pragmatism which still has a grounding in values, respecting the rights and the value of every human being.

Despite some critical remarks above, Jacobsen’s effort is both welcome and timely. These days the calm spirit of Nordic criminal law, which sometimes has been called Nordic or Scandinavian exceptionalism, is under threat. The ideas that harsher criminal justice is needed to protect freedom and society are marching forward and there are signs of the end of rational and humane criminal policy. Even after such a turn, should it happen, Nordic criminal law will most likely preserve some of its features. Criminal law has such a rich vocabulary and, ultimately, path dependency will ensure that a total shift of policy profile is unlikely. Pragmatism and policy-orientation go hand-in-hand with openness towards changes. The threat of the main ideas which have informed Nordic criminal law during the last half century render it both understandable and necessary to anchor its foundations more deeply. The liberal rule of law and republican political ideals may be helpful when developing the normative foundations of Nordic criminal law, or decent, rational, and humane criminal law more generally. We should, however, not claim that only Nordic criminal law can incorporate such ideals, even if Nordic criminal law has indeed managed to make real many of the aspirations that accompany such a criminal policy orientation.

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[1] See, for instance, Jaakko Husa – Kimmo Nuotio – Heikki Pihlajamäki (Eds.), Nordic law – Between Tradition and Dynamism. Intersentia 2007; Pia Letto-Vanamo – Ditlev Tamm – Bent Ole Gram Mortensen (Eds), Nordic Law in European Context. Springer 2019.

[2] Jørn RT Jacobsen, Fragment til forståing av den rettsstatlege strafferetten. Fagbogforlaget 2009.

[3] Kimmo Nuotio, Alf Ross som straffrättsfilosof. *Nordisk Tidsskrift for Kriminalvidenskab*, *86*(3),1999, 171–193. https://doi.org/10.7146/ntfk.v86i3.71475; Nils Jareborg, Alf Ross som straffrättsdogmatiker. *Nordisk Tidsskrift for Kriminalvidenskab*, *86*(3), 1999, 161–170. https://doi.org/10.7146/ntfk.v86i3.71474

[4] These stories have been often told. In the Finnish context, the most comprehensive idea-historical presentation has been given in Eero Backman, Rikoslaki ja yhteiskunta I. SLY 1976, p. 40-122.

[5] Michael Pawlik, Das Unrecht des Bürgers. Grundlinien der Allgemeinen Verbrechenslehre. Mohr Siebeck 2012; see also Michael Pawlik, ‘ Norm Confirmation and Identity Balance: On the Legitimacy of Punishing ‘, Critical Analysis of Law, vol. 7 (2020), no. 1, pp. 1-50. https://doi.org/10.33137/cal.v7i1.34018.

[6] Duncan Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000, in David Trubek – Alvaro Santos (eds), The New Law and Economic Development: A Critical Appraisal, 2006, 63 pp.

[7] See, e.g., Markus Wahlberg, Den finska straffrättsvetenskapens födelse I. Calonius, Ehrström och den finska straffrättsvetenskapens födelse. Forum Iuris 2003.

[8] See also Jacobsen’s comments for defense of criminal law doctrine, despite that *the world is burning*, in Jacobsen, How Can Legal Doctrine be a Scientific Discipline? Methodological Groundworks for the Norwegian Criminal Law Doctrine, in Shin Matsuzawa – Kimmo Nuotio (eds.), Methodology of Criminal Law Theory: Art, Politics, Science? Nomos 2021, p. 105-128, p. 127-128.

[9] John Braithwaite, Macrocriminology and Freedom. ANU Press 2022.

[10] See, e.g., Raimo Lahti, Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts. Der Blickwinkel eines nordischen Wohlsfahrtsstaates und dessen Strafgesetzreformen: Finnland. De Gruyter 2019; Raimo Lahti, Towards an Effecient, Just and Humane Criminal Justice. Nordic Essays on Criminal Law, Criminology and Criminal Policy 1972-2020. SLY 2021.

[11] E.g. Raimo Lahti, ‘ Multilayered criminal policy : The Finnish experience regarding the development of Europeanized criminal justice ‘ , New Journal of European Criminal Law, vol. 11 (2020), no. 1 , pp. 7-19 . https://doi.org/10.1177/2032284419898527; Kimmo Nuotio, ‘ A Legitimacy-based Approach to EU Criminal Law: Maybe We Are Getting There, After All ‘, New Journal of European Criminal Law , vol. 11 (2020), no. 1 , pp. 20-39. https://doi.org/10.1177/2032284420903386.

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