

Diskussionsbeitrag

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State Crime

Staatskriminalität

Definitions evolve and are often unable to catch up with the actions they attempt to describe. The following pages intend to convey the definitional uncertainty that surrounds state crime, its ever-changing nature and the permanent difficulties we encounter when trying to grasp its definite features.

Keywords: State crimes; states; power; law; definitional uncertainty; state-corporate crimes

Definitionen entwickeln sich weiter und sind oft nicht in der Lage, mit den Handlungen Schritt zu halten, die sie zu beschreiben versuchen. Dargestellt werden sollen auf den folgenden Seiten die definitorische Ungewissheit, die die Staatskriminalität umgibt, ihr sich ständig wandelnder Charakter und die ständigen Schwierigkeiten, auf die gestoßen wird bei dem Versuch, ihre eindeutigen Merkmale zu erfassen.

Schlüsselwörter: Staatskriminalität, Staaten, Macht, Recht und Gesetz; definitorische Unsicherheiten, state-corporate crimes

Beyond canonical definitions

Established definitions highlight what appears to be self-evident: state crime is constituted by acts or omissions that violate the law (Scraton 2017). Such definitions derive from a specific tripartite approach that regards the state: (a) as a legally organized, coercive, administrative and symbolic apparatus, (b) whose power is exercised over a clearly demarcated territory and (c) upon a permanent or stable population (Jessop 2016).

However, state crime is not confined to violating the law through acts or omissions: it can often change the law it violates. There is a grey area in which conducts adopted by powerful entities (including states) await the outcome of the criminalization-decriminalization conflict, in the sense that they may be subject to regulation or become accepted routine. While setting precedents, some state crimes possess a decriminalization impetus, others implicitly invoke legal pragmatism, in that they challenge legal reasoning and require departure from jurisprudence. Crimes invoking legal pragmatism

can be described as foundational crimes, namely conducts inspired by an “experimental” logic and driven by a consequentialist philosophy. Powerful actors and states so driven adopt illicit practices with the awareness that they are indeed illicit, but with an eye to the social and institutional reactions that might ensue. It is the intensity of such responses that will determine whether violations are to become part of a “viable” routine or are to be carefully avoided. Some violations, in sum, possess a “founding force”, namely they are capable of transforming the previous judicial culture and establishing new laws and new types of legitimacy. Foundational state crime restructures the legal and the political spheres while playing a legislative role. For example, violent state crime may become a law-making conduct: torture, military invasion, kidnappings by secret services, assassinations and the use of prohibited weapons seem to have become acceptable. This confirms that the crimes committed by state actors re-write the international law and re-found the principles of justice.

Canonical definitions show limited validity also in respect of “clearly demarcated territories” and “permanent or stable populations”. Such definitions testify to the blindness in the face of colonialism and empire of the social and political theories from which they derive (Bhambra/Holmwood 2021). The formation of states in the West and North of the world cannot be severed from the atrocities inflicted on distant territories and their inhabitants. Moreover, current neo-colonial international arrangements perpetuate and reenforce statehood and its corollary criminality. States, in brief, commit crimes in lands that do not officially belong to them, therefore, national territories extend to all regions and lands in which vital interactions for their survival take place.

Performative definitions

While the tripartite approach discussed above implies that state crime exclusively victimizes subjects internal to the socio-political space on which it exercises its sovereignty, other definitions contain a variety of different implications. The state as political organization predates attempts to define it and, as a consequence, definitions of the state exercise a performative function that contributes to the shaping of its mandate. In brief, I would suggest that each conceptualization prefigures the types of criminality in which the state is likely to engage. The following are some examples.

The state as a *neutral instrument or benevolent agent* will confound the power asymmetries that constitute its base and conceal its specific criminality. The “neutral instrument”, in reality, mirrors social relations and the differentiated criminal opportunities offered to the different social groups. Crimes of omission, for instance, will be mainly perpetrated against the vulnerable, and such crimes can be grouped under the rubric “systemic violence”. This type of violence refers to the harm people suffer from the social structure and the institutions sustaining and reproducing it. Systemic violence prevents its

victims from satisfying their basic needs, and is an avoidable impairment of the fundamental means necessary for human existence. Although it does not convey an image of direct physical aggression, systemic violence is the cause of suffering, disability and premature death. Engrained in social injustice, it affects people and groups differently. This type of state crime is found in the smooth functioning of economic and political systems, and can be termed “objective”, as it appears not to require specific deliberations by individuals exerting it. State crime as systemic violence is non-behavioural, in the sense that cannot normally be ascribed to decisions made by individuals or groups. However, it manifests itself in higher rates of disability and death suffered by certain social groups, and in the constraints imposed on them that limit their ability to change their condition.

The state as *custodian of constitutional law* obfuscates the conflictual nature underlying predominant legal concepts. Constitutionalists and “pure theorists” of the law separate morality from justice. Laws are valid, in Kelsen’s (1945) argument, if and only if they are enacted in accordance with the procedures authorized by a basic norm. As a logical system of norms, therefore, law is closed on itself, although it constantly refers to *Grundnorm*, a foundational set of legal principles. This logical system is autopoietic, in the sense that, as we see in biology and cybernetics, it maintains itself by reproducing its own components.

From this perspective, it would appear, state crime violates the content of the positive, basic norms constitutionally established. This formulation is an endorsement of the principle that state power should be limited by stringent legal restraints. However, Kelsen also concedes that basic norms themselves are open to change, thus providing representatives of the state novel, incessant opportunities to commit crime. Opportunities for state crime, therefore, are not only enhanced by ordinary legislative changes, but also by amendments to the founding principles that preside over the creation and application of laws. Ultimately, if the *Grundnorm* prohibits certain conducts, well, even the *Grundnorm* can be altered. In such cases, therefore, state crime becomes constitutionally decriminalized.

This formulation brings echoes of the state as *emergency power*, a crisis-fighting political entity that redefines its space for action on the basis of unpredictable contingencies. In fact, states possess a hardwired necessity to revitalize themselves through endless chains of emergencies and crises. And if this necessity is prioritized, we will have to endorse Hobbes’ claim that the crimes of the sovereign are always negligible when compared to those its subjects would commit without an authority keeping them all in awe. Schmitt would concur: power consists in the right to suspend rights. However, these classical formulations need not be solely associated with authoritarian or totalitarian views, as they contain other aspects that typify systems as varied as oligarchies, plutocracies, dictatorships as well as contemporary democracies. One such aspect revolves around the notion of consensus.

The state as *organization shaped by consensus* breeds its specific forms of deviance and crime. If power consists in making all conducts by those wielding it acceptable, it also entails the ability to display privileges as merit and to deem their general approval as a mark of social order. State crime, here, falls under the rubric of “merit”, which grants the privilege of supplementing legitimate opportunities with illegitimate ones.

The enigma faced by classical political theory revolves around what exactly power should command and why people should obey. Let us see how Montesquieu (1973) attempts to resolve this enigma. He imagines an outsider, a Persian, walking the streets of Paris: what he sees are agitated individuals, animated conversers, traders, lawyers, decaying aristocrats, charlatans and priests, all engaged in the aggressive pursuit of their interests. The outsider is bewildered by the ability of those in power to govern such a mass of individuals and to establish invisible bonds of solidarity among them all. The king must be a true wizard, in that he exercises his power upon the very “spirit” of his subjects, making them think like himself: indeed, the whole nation seems to be concentrated in Versailles and the entire city of Paris is metaphorically gathered within the golden perimeter of the royal court. Behind the scene, power coordinates and directs all surrounding energies and the invisible hand of the monarchy moves the numerous, faithful political actors. The Persian, therefore, understands that the king derives his riches from the loyalty of his subjects, an inexhaustible goldmine, and that even when engaging in unnecessary wars he can mobilize support and resources among the masses. In short, Montesquieu appears to advocate a notion of power as the ability to forge subjects who are prepared to condone all its manifestations, be they benevolent or malicious. The crimes of the powerful, including state crime, become here beneficial less for the perpetrators than for society as a whole.

State-corporate crime

The proliferation of state crime over the last three decades or so triggered yet more efforts to grasp its changing traits. State-corporate crime came to be identified with violations “that result from the specific relationship between the state and commercially motivated corporations” (Green 2017: 396). According to a suggested distinction, such crimes can be state-initiated or state-facilitated: the former occur when governments entrust entrepreneurial activities to private agents, while the latter when governments fail to exercise regulatory control over such private agents. Crime, however, can also be initiated or facilitated by corporations, when they coerce states into offending behaviour. Such formulations hint at a process that leads to a symbiosis of institutional and economic actors, a process that deserves a supplementary analytical effort.

Believers in market freedom have historically proven the weakness if not the hypocritical nature of their belief. Markets are never “free”, as oligopolies

and monopolies tend to take shape through direct or indirect entrepreneurial action and through orthodox or unorthodox initiative. Faith in laissez-faire and invocations of state non-intervention in the economy are constantly contradicted by attempts to gain state support in the form of subsidies, licenses, contracts and detaxation, showing how difficult it is to clearly separate the economic from the institutional sphere. This was already evident in the colonization epoch, when companies operating in distant territories, while invoking freedom of enterprise, were in fact “incorporated” by states and granted monopoly positions. Today, this is blatant: governments are filled with businesspeople who commute from posts in state agencies to positions in private firms, while state officials are outnumbered by lobbyists promoting the economic interests of those employing them. Rather than the non-interference of the state in markets, business seems now posed to incorporate the state into the market, turning representative politicians into business agents.

Against these dynamics, a form of legal utopia might envisage the strengthening of the separation between spheres of power, but it is exactly in the sphere of law that, as we have seen, incentives to illegitimate conduct are found. This is the most manifest outcome of a crisis determined by the development of extra-state or supra-state entities such as economic and financial powers which regularly evade legal control.

State-corporate crime derives from a “dualist” theory which, on the one hand, holds that the political authority of the state is prior to the law, and on the other, that a “capacity to act without legal authorization or even in disregard of the law is an essential element of statehood” (Vinx 2007: 16). Whether this formulation justifies or encourages state crime is open to debate, although it certainly constitutes an obstacle in the path of the full realization of the rule of law. Corporate actors and other powerful offenders, in their turn, might find inspiration in this argument, as their power too can be deemed prior to the law, if not all together independent from the process of its constitution.

The penumbra of uncertainty

All the different aspects of state crime examined so far contain implicit allusions to conflict, as they show the competing ways of analyzing the inner nature of conduct norms. Legal constructs seem nebulous, inconstant, even deceitful, or at least they lead to the realization that their linguistic repertoire is limited. Semantically indeterminate, the law may be seen as possessing an open texture that renders its clear and consistent application uncertain. Hart (1961) terms Kelsen’s basic norms “the norms of recognition”, which provide the general inescapable framework within which legislative production has to find legitimacy and validity. Norms of recognition too, however, possess a degree of indeterminacy, and our relative incapacity to “frame general rules in advance makes it necessary and desirable to exercise choice in subsequent application of the rules” (ibid.: 121-123). The only outcome of

this conflict inherent in the law, therefore, is discretion in its application. The crimes committed by states, against this background, may find favourable conditions to develop if they are met with “favourable discretion” on the part of the authorities. They can neutralize their illegal character thanks to the “penumbra of uncertainty” surrounding all legal rules (Hart 1977). This is the same uncertainty described by Merton (1976: 6) as the “sociological ambivalence of the normative expectations assigned to a status or incorporated in a single role”.

The fight against state crimes, therefore, amounts to a struggle for legality as a way of responding to the “penumbra of uncertainty” or the “ambivalence” of roles. This solution posits that the law may be changed by obeying it, which implies that the rule of law is an unqualified human good, something that even the privileged have to respect in order to legitimize their power. By adopting agreed standards of justice, the elite is said to inhibit its dominant role or run the risk of being exposed. Some commentators, for example, may highlight the positive social benefits of the law as a form of constraint placed upon the power of dominant groups. Conflict, in this case, is understood as the contradiction between formal rules and their application by the rulers, while the ruled, in pursuing the unqualified good of the law, may perform radical political action.

The generative grammar of the state

The optimism of this strategy comes to light when the microphysics of state power is examined, namely the quotidian interactions amongst its constituents who, while blending their reciprocal interests, reenforce or create ideologies and strengthen or reinvent subcultures. There are no predefined sets of tasks the state is required to perform, nor is there any activity that states have never undertaken. Inevitably, a similar *carte blanche* of sorts would expose anyone to the temptation to contradict their own officially manifested faith in legality. This expanse of opportunities granted to states rhymes with the vastness of the material and symbolic tools they possess to justify their conduct.

State actors committing crime, as already remarked, often manage to persuade others that the goals they pursue bring advantages for all. In this way, such actors develop a high degree of self-efficacy that allows them to choose and achieve goals, but also to control the effects of that achievement, including the judgments of others.

I would describe this mechanism as a manifestation of the “generative grammar of the state”, a set of logical rules capable of generating an infinite number of possibilities. Applied to linguistics, generative grammars refer to the limitless ways in which sentences can be structured and uttered (Chomsky/Moro 2022). Of course, grammars possess the property called “structure dependence”, namely the rules presiding over verbal communication internal-

ized by those communicating. However, such rules are far from rigid, as they contain an open syntax: “Given a set of words as primitive elements, syntax is the function that generates all the possible sequences of words” (ibid.: 84). Recombining a bounded set of discrete elements, a potentially infinite set of expressions can be generated. Generative grammars referred to states hint at the potential proliferation of new forms of criminality that constantly expand the arena of state performance.

In other words, states draw from the vast array of material and symbolic resources that sustain their legitimacy. Such resources are the raw material (in linguistic terms, the *logical rules*) through which criminality can be perpetrated and justified. Coercion and persuasion are among them, as are ideological devices, including economic doctrines and religious faith. As Weber remarked, the unfriendliness of markets is accepted through the logic of material exchange, but also thanks to the religious teaching that justifies privilege as due merit and suffering as deserved condition.

Conclusion

Setting off from established definitions and their limitations, this paper has proposed a view of state crime as a range of illicit and/or harmful conducts that derive from specific understandings of state power. The state understood as *neutral instrument or benevolent agent* has been linked to systemic violence, a crime without criminals perpetrated by social arrangements and the institutions governing them. The state as *custodian of constitutional law* has been critiqued because constitutional law itself is violated and amended according to the contingent needs of the elite. This critique echoes elements found in conflict theory approaches, but also notions informing views of the state as *emergency power*. State crime, from this perspective, can be a temporary response to contingent problems or a permanent feature of systems that legitimize themselves through endless series of constructed emergencies. An understanding of the state as *organization shaped by consensus* has led to question to what degree state crime finds complicity among those who benefit very little from it.

Complicity certainly characterizes the relationships between states and corporations, as the discussion of *state-corporate crime* has attempted to prove. Responses to state crime lead to controversial notions of the law: is such crime deterred by legislative clarity and certainty or will it always find zones of legal penumbra nourishing it? Finally, an exploration inspired by linguistics has pointed to the existence of a *generative grammar of state crime* that spawns infinite deviant potentialities.

This may be a pessimistic conclusion for those who fight power crime in general and state crime in particular. Progressive optimists, prevalently formed of critical theorists, may believe that states are destined to wither away and

with them their criminal activity. Pessimists, including progressive and conservative commentators, may take heed from analyses of state and power centred on the variable “plunder”. Conservative social theorist Vilfredo Pareto (1966), for instance, intimated that those who refrain from analyzing how social systems are based on plunder act as those entomologists who catch the most beautiful butterflies and carefully avoid looking at the most repugnant insects.

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