

The Coexistence of Parallel Worlds of Criminal Law Studies in the Face of the Development of the Dual Penal State

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‘New Legal Science’ is an ambitious project. It is to be a bridge between scholars from common law and civil law countries. This bridge is meant to be a new approach to the study of criminal law, which would enable scholars from those two systems to explore the most important problems together. I will address the questions of whether this project is based on solid assumptions and what does it propose.

The basic assumption arising from Dubber’s paper concerns the parochialism of criminal law research. One must agree that legal studies are often perceived in a negative way as developing only within national borders. Researchers in the field of law, especially criminal law, generally perform poorly in rankings based on publications in journals indexed in the Web of Science Core Collection in comparison to their colleagues from other disciplines. Regardless of whether one accepts this or that ranking of scientific journals, there is a clear gap between legal science and other sciences in terms of the ability to attract a wider audience to their research.

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One can defend the differences between common law and civil law countries and argue that, due to the different approach to the sources of law in each system, these differences will always exist between them. However, Dubber rightly responds to this argument by pointing out that the differences between the legal systems are currently blurring. He gives an example of the approach to criminal proceedings. Currently, it is not possible to draw a dividing line between the common law's 'adversarial trial' and the civil law's 'inquisitorial process'. In many other areas of criminal law the differences in the solutions adopted by legislators do not depend on common law or civil law traditions.

Therefore, the differences resulting from the nature of the sources of law, which is the essence of the difference between common law and civil law countries' systems, do not matter that much. The problem that comes to the fore in the diagnosis presented by the author is the way of studying law, expressed in the way of speaking about law, conducting discourse, which constitutes an obstacle to communication between representatives of both legal systems.

In a colorful, even satirical way, Dubber lists the flaws in the way the representatives of these two different legal traditions conduct legal discourse. He confronts the general absence of a disciplinary methodology in the common law world with the conceptualization of law studies as legal science in the civil law world. Scholars in the USA, which serves as the exemplar of a common law country, do not even attempt to define a methodology for legal research, nor do they aspire to create a doctrinal system. Instead, they focus on topics that are likely to attract the attention of student journal editors and fetishize criticism that is not constructive in nature. In turn, scholars in Germany, chosen as the exemplar of a civil law country, present blind, one-dimensional doctrinalism. They focus on abstract norms rather than consequences, and - as a result - their research is detached from practice. Dubber points to pseudo-botanical taxonomy, pseudo-logicism, and mathematicism as their fetish. The criticism presented by Dubber is justified, but somewhat exaggerated in order to convince us of the need to seek a new path.

Is the diagnosis of parochialism of criminal law studies right? Only partially, because this diagnosis does not cover all the circumstances affecting the mainly local nature of criminal law studies. The obvious fact must be added that this local character is determined by the mainly domestic nature of criminal law. While legal science in general, with the exception of international law or some kind of supranational law, e.g. European Union law, is doomed to provincialism, this is particularly true of criminal law. In the natural sciences, and even in many social sciences, researchers engage in the same subject matter. By conducting their basic research they achieve results that are important for all. Furthermore, while in other areas of law it is easier

to find common ground, as states are more willing to take steps to approximate their laws, which impacts their economic interests, in substantive criminal law these processes are the slowest. The right to punish is treated as one of the elements of state sovereignty. This is clearly evident in the process of harmonizing substantive criminal law in European Union countries, which is progressing at the slowest pace.¹

Furthermore, linguistic differences have a greater impact on the difficulties of conducting joint discourse in legal studies than in other fields of science. The reason is that language is what statutory law is made of. Even though linguistic interpretation should be contextual and the interpretation should not be restricted to linguistic analysis, those differences are more important in legal studies, especially in criminal law studies, than in other fields of research.

These circumstances, in themselves, foster provincialism in criminal law. They do not prevent researchers from reaching beyond a narrow, local perspective, but they require greater effort from criminal law scholars than from scholars in other fields. It is difficult to motivate scholars to undertake such effort when they can achieve significant local standing by addressing issues of local criminal law that are important to practitioners. As a result, the contemporary image of the academy in the field of criminal law can be characterized the way by Dubber has done - as the coexistence of parallel kingdoms of criminal law studies with local kings. However, there are more reasons for this than just the different approaches to legal research shaped by the common law and civil law traditions.

This new approach to the study of criminal law—New Legal Science—should be motivated primarily by the importance of the problems the solutions of which elude us due to our narrow focus on local research. Ensuring a stronger position for criminal law studies among other fields of study would give researchers working in criminal law a better standing in the academic community. However, I interpret the importance of the New Legal Science concept mainly as an approach that can help scholars effectively address critical issues, transcending national borders and legal traditions.

The issue which has been proposed as the subject of this new approach is the legitimacy of the state's penal authority in the dual penal state. The phenomenon of the dual penal state, which has been explored by Dubber in many of his works,² deserves broader analysis not restricted to a local perspective. Limiting criminal law studies to a local perspective could even prevent us from noticing the processes that are taking place in the contemporary world. The manifestations of the phenomenon of the dual penal state are not obvious. Although the law state emerged from a critique of the police state, it did not replace it. These two modes of governance coexist in constant tension.

1 See Colson and Field (2016).

2 See among other Dubber (2018).

The development of preventive orders, as well as administrative penal sanctions which in many European states currently constitute an alternative sanctioning system, can be regarded as examples of the development of police state.³

However, the question is what is the essence of this new approach, called New Legal Science. Bearing in mind that the author justifies the need for its emergence by criticizing the approaches to study criminal law in common law and civil law countries, one can expect a clear definition of this new approach. According to Dubber, the New Legal Science should be based on contextual, critical analysis of legal regime's norms, institutions, and practices in light of its fundamental norms. It should be interdisciplinary in nature, but it must not abandon doctrinal analysis. The novelty of this approach, justifying its designation as a 'New' Legal Science, stems from its central focus on a critical examination of the state's legitimacy to use coercion through law.

On one hand, one might get the impression that Dubber is proposing that we abandon extremes and limitations in our current approaches. Then, when we focus on this urgent issue, the new method will emerge. On the other hand, because he declares that New Legal Science is to be appropriately modest and humble, stripped of many pretensions of the previous concept of 'legal science', it should be rather considered not as a new methodology, but as a new perspective for the analysis of criminal law norms and practices. This new perspective is to be modest, but at the same time it can be described as an inclusive one, because the author recognizes the importance of, among others, historical, doctrinal, and interdisciplinary research.

New Legal Science requires constant monitoring of state legitimacy to use coercion through law. This is not the only possible or desirable perspective on analyzing law and practice. They should also be analyzed from the perspective of their effectiveness, coherence, applicability, etc. However, I share Dubber's position that the fundamental question that precedes any other should be whether legal interference by the state is justified. This position stems from the assumption of individual autonomy, so important for the Enlightenment era, in which modern criminal law was born. It is crucial to examine law, and especially criminal law, from the perspective of its legitimacy, because the protection of individual autonomy is threatened in the dual penal state. Even the very use of the term 'dual penal state' by Dubber indicates that the author is aware of these threats. This term refers to the idea of the dual state presented in *The Dual State: A Contribution to the Theory of Dictatorship* by E. Fraenkel.⁴ The dual state is a state in which the normative (legal) state remains a façade, an ornament, while the dominant character is the prerogative (police) state, in which the individual is an object of control and arbitrary state decisions.

3 See Ashworth and Zedner (2010); Franssen and Harding (2022) *passim*; Blachnio-Parzych (2020).

4 Fraenkel (1941).

The problem is how to examine the legitimization of penal law. The idea of the New Legal Science requires conceptualization of a state, its role in social life. This is all the more important because the author does not propose the abolition of penal police, but the creation of a New Police Science. Therefore, this concept should also encompass the scope of permissibility of using instruments belonging to penal police. Without this conceptualization, the fact that penal law was introduced by democratically elected representatives of society could be considered as a justification for any decision to introduce penal law. One could argue that it should be based on the constitution, and almost every constitution contains safeguards against excessive use of criminal law. However, given the broad, imprecise scope of some constitutional concepts, it is difficult to agree with this argument. Decisions regarding the introduction of criminal law are typically considered from the perspective of the principle of proportionality in limiting specific human rights or freedoms. However, the use of the principle of proportionality in the discourse on the restriction of freedoms or rights shows that it has become a universal justification for almost any restriction.⁵

Summarizing, Dubber is right that in the face of the development of the dual penal state there is an urgent need to go beyond the boundaries of parochial studies of criminal law. However, there are more obstacles to achieving this goal than the different approaches to legal research shaped by the common law and civil law traditions. Furthermore, the perspective of studying law in accordance with the New Legal Science requires conceptualization of a state in a contemporary society and the desired relationship between penal law and penal police.

5 See Young (2014).

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