

On Markus Dubber's New Legal Science: Promises and Limits from a Feminist Perspective

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In 'New Legal Science in the Dual State. Critical Analysis of Law and the Legitimacy of State Power', Markus Dubber proposes a dialogue between two legal systems, *common law* and *civil law*, which have traditionally been presented as divergent, if not antagonistic. Although 'legal culture' is a complex concept to define, in the debate about the similarities or differences between these legal systems the term is useful for identifying aspects that shape the functioning of legal institutions, the work of those who operate directly with the law, or the relationship between citizens and the administration of justice.

By questioning these interpretations that have fragmented and confronted these legal systems, Dubber seeks to build a new model of legal analysis that abandons both the unsystematic pragmatism of the former and the dogmatic formalism of the latter. According to Dubber, overcoming this dichotomy would make it possible to develop a methodology that facilitates ongoing critique of the legitimacy of state power, especially of criminal law, the most intense form of governmental coercion. As Dubber elaborates, the model operates on two distinct levels. The first is an internal critique, concerned with coherence and consistency within the legal system and with the forms of compliance it demands.

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The second is an external critique, which assesses state practices against constitutional norms. Taken together, these two dimensions are intended to reclaim critique as an alternative both to the self-referential technicality associated with civil law traditions and to the cynicism often attributed to common law reasoning.

For different reasons, Dubber's project is necessary, important, and appealing. First, it is necessary because it does not conceive the law as an essentially normative reality, detached from its conditions of production and application. This characteristic alone sets it apart from other analyses or practices that understand law as an ascetic technique and limit themselves to purely legal dogmatism. For Dubber, law is not a self-sufficient system, so in addition to reflecting on the internal rationality of norms, he also invites inquiry into their original aims and unintended consequences. On this view, the legitimacy of law, and in particular criminal law, cannot be taken for granted; on the contrary, it must be subject to systematic and continuous examination. To assess this legitimacy, Dubber uses a particular criterion: the extent to which the exercise of state power respects or denies the autonomy of individuals. His argument is that when the law conceives of people as 'objects of administration', it begins to operate under a police logic of management and control and loses its legitimacy, even if it retains its legal form.

Secondly, the proposal is important because it does not renounce the use of law as a tool for analysis and criticism. Although it casts suspicion on the legitimacy of state norms and practices, Dubber recognizes that law is nonetheless a conceptual instrument and an institutional space in which legal meanings are constructed and contested. In this regard, recognizing the limitations of law is an advantage because it helps to denaturalize existing legal definitions and, at the same time, contributes to the development of new categories that address hermeneutic distortions. Therefore, despite its shortcomings, through legal argumentation rules and principles can offer ways to build legitimate responses. In this sense, the commitment to a *New Legal Science* seeks to challenge and unsettle the law, but not to abandon it.

Finally, the initiative is appealing because, in order to support it, Dubber introduces a series of theoretical keys that intertwine the contributions of history and legal sociology. These disciplines allow us to understand legal problems in light of their origins, explore the interests that have shaped the creation of law, reveal the flexibility of legal categories, and, therefore, highlight their contingency. As the author argues, drawing on other disciplines serves to show that law is the result of specific struggles, compromises, and power relations. Therefore, the challenge is to reflect and investigate beyond normative sources or judicial decisions to pay attention to the impact of law on both the material realities and the subjectivities of the people involved.

So far, Dubber's proposal is promising. Indeed, for legal feminists, this formulation may be encouraging, as it helps legitimize the perspectives and methodological approaches traditionally employed within the field. Indeed, feminist criticism of the law has focused both on questioning its legitimacy in terms of its discriminatory

effects and on asserting its potential to change them. Like Dubber, this perspective argues that the law is not external to the violence or inequality it generates, rather it is deeply involved in its production and legitimization. Hence, in order to highlight the shortcomings of justice in terms of gender, feminisms also draw on other social disciplines, such as history, sociology, and anthropology, all of which are particularly fruitful for this type of analysis. Finally, in line with the text, feminism also holds that law, as it is neither fully rational, objective, nor neutral, must be subject to constant and rigorous scrutiny.

Even with all the similarities noted, however, from a feminist perspective Dubber's work could be the subject of debate in at least three distinct dimensions. First, it could be argued that Dubber's reference to the impact on autonomy is insufficient on its own to justify a critique of the legitimacy of the law; or that, given its ambiguity, the dimensions to be taken into account are not clearly specified. Indeed, by linking the legitimacy of the law to the defense of the autonomy of individuals, his work seems to be anchored in the recognition of an abstract individual, which functions as a general normative parameter. The greatest shortcoming of his proposal is that it does not analyze with sufficient care how different forms of discrimination—based on race, class, and gender—impact what is defined as autonomy. While it is true that Dubber's analysis includes the dimension of power, it is no less accurate to note that he does not identify which vectors are relevant for thinking about its unequal distribution and, therefore, for evaluating the different degrees of autonomy. By this, I do not mean to say that Dubber is unaware of the racist, classist, and sexist nature of the law, but rather to underline that this dimension, linked to the protection of equality and non-discrimination, should be given special consideration. As a result, the proposal remains excessively broad and offers little guidance on how critical analysis should be oriented when legal practices reproduce structural hierarchies and patterns of exclusion.

Nevertheless, the concept of autonomy remains central to the construction of liberal criminal law principles. A particular understanding of autonomy structures how state interference in individuals' private lives is assessed and, in the liberal tradition, informs the scope of what may count as harm warranting criminal intervention. In this respect, Dubber's work aligns with other accounts that ground criminal law primarily in individual rights, while leaving aside other decisive dimensions, most notably equality and non-discrimination. Even where his proposal entails a structural re-reading of autonomy, my claim is that the legitimacy of criminal law cannot be adequately assessed without explicitly incorporating concerns of equality and non-discrimination as independent criteria of evaluation. This is because, if one assumes that imbalances in the allocation of rights are to be resolved within the legal arena, it becomes imperative to recognize who has been denied proper legal recognition and who has historically been excluded from the political mechanisms that led to law's development.

Second, another aspect to be debated with regard to the *New Legal Science* is that the project provides certain tools for diagnosing the structural illegitimacy of law but offers few instruments for contesting penal power in the arenas where it operates. In this sense, the proposal runs the risk of becoming a sophisticated yet incomplete critique of criminal law, one that is more concerned with the architecture of power than with the concrete mechanisms through which that power can be constrained. For feminist legal theory—so keen on developing frameworks that bring theory and practice together—Dubber’s text represents an important starting point for thinking about law in relation to legal practices, but it does not make explicit how it intends to intervene in this terrain, which is, in one way or another, shaped by a particular ‘legal culture’. For this reason, the analysis should not be limited to examining how law regulates specific institutions, but should also address the institutional pathways through which these ideas are translated, contested, and incorporated into judicial decision-making and legislative processes. Without seeking to open a broader debate on legal education, this observation aims to bring into view other actors involved in the production and contestation of law: lawyers who challenge state authority, legislators who shape legal frameworks, and citizens who participate in the legal order both as voters in democratic processes and as claimants before the courts.

Finally, the third dimension to be discussed is connected to another set of experiences reflected in the development of feminist legal theory. Once again, from this vantage point, it is possible to draw attention to the difficulties inherent in pursuing a critical theory that claims universal validity. Dubber’s proposal is particularly compelling because it invites a more complex, diversified, and decentered analysis of law by linking two approaches that have traditionally been characterized as antagonistic. Dubber is aware of the hierarchies that structure academic exchanges between different legal traditions. For this reason, however, it is important to note that the exercise he proposes may eclipse certain legal systems, as well as their intellectual figures. In the academic field, such hierarchies are not accidental, but rather functional to the preservation of a legal culture that privileges certain voices, argumentative styles, and objects of study. In this sense, legal academia contributes to define what counts as legitimate legal knowledge and who is authorized to produce it. In the construction of a *New Legal Science*, thinking critically about how those ascriptions will be defined is an issue to be taken into special consideration.

In sum, Markus Dubber’s work makes a significant contribution to thinking critically about contemporary law, as it combines a rigorous inquiry into the legitimacy of state power with a methodological commitment that avoids both uncritical formalism and the abandonment of legal language. By fostering a demanding dialogue across diverse traditions and styles of thought, his proposal brings to light the tensions inherent in the production of legal knowledge and turns them productive. In this gesture, the *New Legal Science* emerges as a fertile tool for rethinking the role of criminal law across different social contexts, some of which are profoundly shaped by inequalities.