

New Legal Science or International Legal Science?

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Markus D. Dubber is one of the most internationally renowned criminal law scholars of our time. In his short text 'New Legal Science in the Dual Penal State,' he systematically outlines a model of legal science that understands and controls law as an expression of state power. Dubber's draft is interesting and stimulating. However, his model of criminal law science corresponds quite closely to what has long been recognized, for example, in Germany, but also in other civil law countries, at least among lawyers who reflect on legal theory.¹ In the following, I will only formulate a few minor critical comments and suggestions for additions.

The effectiveness of law as a means of curbing state power seems to be under threat today as never before. Not only Russia's invasion of Ukraine, but also the kidnapping and arrest of Venezuelan President Maduro show that the relationship between power and law, one of the classic themes of legal philosophy, needs to be renegotiated. As Dubber points out, criminal law has a very special role to play in this context. Criminal law is a means by which the state legitimizes particularly intensive interventions in the legal sphere of its citizens. Authoritarian states like to use criminal law to implement their control over their citizens.

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1 Hilgendorf (2019a).

It is therefore of great importance that, in the form of (criminal) legal science, there is an authority that systematically records, analyzes, and controls the exercise of state power through (criminal) law. In Europe, such criticism was demanded from the second half of the 18th century onwards by Enlightenment thinkers such as Voltaire and even more by Beccaria.² They vigorously opposed judicial (and thus state) arbitrariness and demanded that the application of law be bound by the law.³ Against the backdrop of these postulates, the idea of an independent and norm-oriented science of (criminal) law emerged. Paul Johann Anselm Feuerbach (1775–1833) became particularly influential in the field of criminal law.⁴

Dubber, on the other hand, locates the origin of the ‘German’ model of (criminal) legal science in Feuerbach’s contemporary Savigny, the main representative of the Historical School of Law. This is not convincing. Savigny spoke out against legislation and believed instead that law could be derived from the ‘spirit of the people’ (‘Volksgeist’). He therefore saw the core task of legal science as analyzing ancient Roman law and its development in Central Europe. For Savigny, the science of law was therefore legal history. This model was abandoned in German civil law as early as the late 19th century; it never gained any particular influence in criminal law.

In civil law, which today includes not only Continental Europe but also Turkey, all of Latin America, and, particularly noteworthy, East Asia including Japan, South Korea, and China, legal science has the task of structuring the body of law, i.e. the entirety of all legal norms and legal decisions, analyzing its components, and systematically organizing it in such a way that the application of law becomes transparent and controllable. The scientific endeavor characterized by this and its results are referred to as ‘dogmatics’ or ‘legal doctrine’. Incidentally, the most thorough work on criminal law dogmatics in this sense today no longer comes only from Germany, but also from Spain, and Latin America. The science of law also includes subjects such as legal philosophy, which searches for standards for correct law, legal history, which traces the genesis of law and the factors that influence it, legal theory, which is dedicated to the analysis of legal concepts, and legal sociology, which examines legal reality using empirical methods. In addition, the results of all this work are disseminated in legal teaching, but also in statements to political bodies, for example in the context of expert hearings, and to the mass media. It is precisely here, incidentally, that legal scholars often show a very critical tendency towards new legislative acts.

Dubber, on the other hand, seems to operate with an understanding of (criminal) legal science that is essentially based on Savigny’s romantic doctrine of the ‘spirit of the people’ and conceptual jurisprudence (‘Begriffsjurisprudenz’). Both concepts

2 Beccaria (1764).

3 For details, see Hilgendorf (2019b).

4 Feuerbach (1799/1800); id. (1801).

have been outdated for a long time now. In the case of conceptual jurisprudence, i.e., the idea that legal questions can be solved solely through conceptual analysis, the question arises as to whether it has ever been advocated in its pure form. Already Rudolf von Jhering, who is also mentioned by Dubber, ironically pointed out the exaggerations of conceptual jurisprudence and emphasized the importance of social demands and purposes in the creation and application of law.⁵ Criminal law also serves to achieve certain social purposes. This understanding is prevalent today.

In many areas of civil law, considerable internationalization processes have taken place in legal science over the last three decades.⁶ This is particularly true of criminal law. Today, one can therefore speak of an ‘international criminal law science’, whose representatives work and teach in Argentina, Chile, and Mexico, as well as in Germany, Spain, Italy, the Scandinavian countries, Turkey, Greece, Mongolia, Japan, South Korea, and China.⁷

International criminal law scholarship shares a common approach to structuring criminal offenses according to their constituent factual elements (‘Tatbestandsmäßigkeit’), illegality (‘Rechtswidrigkeit’), and culpability (‘Schuld’), as well as a focus on certain basic concepts such as ‘action,’ ‘causality,’ ‘justification,’ and ‘culpability.’ Last but not least, it shares a style of argumentation in which conceptual precision, logical consistency, and transparency play a particularly important role. Another common feature of international criminal law scholarship is the effort to develop a set of rules (the ‘dogmatics’ mentioned above) that can be used to rein in the courts and thus, indirectly, the state’s power to punish. Legal dogmatics thus becomes an instrument for securing freedom.⁸

The idea of using criminal law, and thus also criminal law scholarship, to limit and control state power was probably most clearly expressed already by Franz von Liszt, who described criminal law as the ‘Magna Carta of the criminal.’⁹ Criminal law not only establishes criminal liability, but also limits it. Criminal law scholarship is the guardian of the application of criminal law.

This raises the question of what standards criminal law scholarship should use to measure and criticize the application of state law. Dubber is very cautious in his comments on this issue. However, international criminal law science has a whole arsenal of instruments at its disposal for reviewing the application of criminal law by the state. These include, on the one hand, reviewing court decisions against the

5 von Jhering (1877/1883).

6 Incidentally, Feuerbach originated the concept of ‘universal jurisprudence,’ a kind of global legal theory and legal history, which he unfortunately never managed to complete.

7 Hilgendorf (2021).

8 Hilgendorf (2012).

9 von Liszt (1905).

wording of the norm establishing criminal liability: any application of criminal law that goes beyond the wording of the norm is inadmissible. Furthermore, the application of criminal law must be consistent, logically sound, and transparent. In cases of uncertainty, it can be helpful to look at the intent of the criminal legislator in order to select the interpretation of the norm that most closely corresponds to the intent of the criminal legislator. Under the term ‘teleological interpretation,’ consequentialist elements also play an important role in the development of interpretative variants and the control and criticism of state law.

In addition, and surprisingly this is not addressed at all by Dubber, there is the review of criminal law norms and their application to the constitution, specifically to fundamental rights.¹⁰ Precisely because the state is able to intervene deeply in the legal sphere of those subject to the law by means of criminal law, this intervention must always be constitutionally legitimate. The principle of proportionality, which, incidentally, was also already applied by Beccaria, has proven its worth in this regard. It states that any interference with fundamental rights and thus any application of criminal law must pursue a legitimate goal. Furthermore, state intervention must be suitable and necessary to achieve this goal (i.e., it must be the mildest means available). Finally, the interference with fundamental rights must not be disproportionate to the legal system as a whole. The link between fundamental rights and the application of criminal law outlined above means that criminal law scholarship must always take fundamental and human rights into account.

Dubber is to be agreed with in his plea for more interdisciplinarity: if law, including criminal law, is intended to achieve certain social purposes, and legal science is to assist in this (and control the process), then legal science must not limit itself to the interpretation of norms, but must also be able to take empirical questions into account.¹¹ Some legal theory approaches following in Jhering’s footsteps even go one step further, viewing lawmaking and legal interpretation as ‘social technology’ that must be guided and controlled by legal science.¹² It seems to me that this model of thinking should have a future in both civil law and common law legal systems.

10 For more detail, see Schmahl (2019). With regard to the historical development, cf. Hilgendorf (2025).

11 Hilgendorf (2010).

12 Hilgendorf (2020), p. 224 ff.

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