

Can the New Legal Science Be Truly Universal?

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1. Introduction

Markus Dubber's essay on *The New Legal Science* represents a substantial contribution to contemporary debates on comparative criminal law and the methodology of legal science. Distinguished by its intellectual ambition, the work seeks to move beyond some of the most historically persistent divides between the major legal traditions—above all, the longstanding dichotomy between civil law and common law systems. By challenging these foundational distinctions, Dubber opens a conceptual space for rethinking how legal science can be understood and practiced. Furthermore, Dubber seeks to advance a conception of a shared legal science that overcomes conventional cultural and disciplinary boundaries and establishes ties between this conceptual effort and the notion of the *Dual Penal State* largely explored in his previous publications. His endeavour is both intellectually stimulating and methodologically bold, yet it is not without opening space for a critical debate. The declared purpose of the proposal is to bridge horizontal conceptual categories going beyond doctrinal differences and cultivate a more universalised legal science capable of facilitating critical reflection on the exercise of State coercion. While this aim is admirable, a closer inspection reveals that the scope of Dubber's proposals deserves to be carefully assessed, both analysing the applicability and the novelty of the theory. The main questions to be discussed pertain not only to the comparative methodology employed but also to the theoretical framework of the suggested analysis.

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Some of these questions are addressed here, by examining the *New Legal Science* in the light of its methodological choices, theoretical assertions, and historical framing, with particular attention to the practical implications for criminal law scholarship.

2. Methodological Considerations: The Scope of Comparison

A distinctive feature of Dubber's work is his use of a comparative methodology. Ideally pursuing the studies carried on by George Fletcher in *Basic Concepts of Criminal Law*, Dubber employs comparative analysis of legal institutions and concepts as a means of identifying shared foundations within criminal law. Such an approach is broadly consonant with the work of scholars such as Ulrich Sieber (Sieber, 2006) and Mireille Delmas-Marty (Delmas-Marty, 1992), who advocate the deployment of comparative law to highlight convergences across legal systems.

The professed aim is to overcome the entrenched opposition between civil law and common law and to develop a legal science capable of mediating between these two traditions. In particular, the *New Legal Science* emerges as a scientific method aimed at identifying a common ground among diverse doctrinal approaches, promoting dialogue between scholars to overcome the provincialism that often characterises criminal law debate.

The comparative method adopted by Dubber, rather than addressing the analysis of fundamental concepts across different legal systems, concentrates on a historical and comparative examination of the underlying conceptions of legal science and institutes. Several thoughts arise when looking at the proposed approach.

First, while aiming to mediate between civil law and common law, Dubber's comparison relates to a significant but limited sample of jurisdictions, predominantly Germany and the United States. The broader implication of this methodological scope of the *New Legal Science* is that it presents itself as having the ambition to be universalistic while remaining heavily centred on two Western macro-areas. This raises questions regarding the applicability of the framework in non-Western or non-liberal legal contexts, where both legal doctrines and the relationship between law and State power may differ significantly, in light of the legal pluralism largely acknowledged in recent years, going far beyond the schematic juxtaposition of two traditional legal families.

Second, it is debatable if focussing on the legal doctrines fully accounts for the internal complexity and pluralism present within the main legal traditions the essay focuses on. For example, the German legal tradition is presented in largely Savignian terms, but it could be enriched by looking at subsequent developments—also emerging within the German debate, such as the programme of a *gesamte Strafrechtswissenschaft*, the influence of the teleological conception of punishment upon criminal law, or the impact of criminal-policy considerations upon criminal law itself (Roxin, 1973). These

trends, which integrates dogmatic analysis with other considerations, has diffused across several European and South American jurisdictions, anticipating many of the insights that the *New Legal Science* highlights. Consequently, the juxtaposition of historical approaches, in the way it is presented, does not fully capture the interplay between law, social context, and political structures.

Third, the ways in which jurisprudence shapes these issues, a topic that Dubber's paper doesn't deal with directly, could also play a crucial role in the analysis. In criminal law, particularly, the influence of constitutional courts and international human rights tribunals on the development and interpretation of key concepts is a vital dimension that the comparative framework tends to underplay.

3. The Conceptual Ambition of the New Legal Science

The methodological constraints discussed above have direct implications for the theoretical construction of the *New Legal Science*. As anticipated, Dubber's theory, though aspiring to transcend the civil law/common law divide, remains primarily applicable to liberal democracies and legal systems rooted in the rule of law. Its explicit purpose is to provide a rigorous critique of State coercion, particularly in the exercise of punitive powers.

As a matter of fact, critical reflection on the legitimacy of punitive authority is central to the analysis of criminal law itself. It is precisely the verification of the conformity of punitive acts with constitutional principles and the fundamental guarantees that distinguishes criminal law from the mere exercise of State power (Foucault, 2015). Historically, criminal law emerged as a safeguard of individual rights against the coercive power of the State, with the explicit purpose of limiting such power (Cordero, 1986).

The evaluation of the legitimacy of State coercive power is, at least since the mid-twentieth century, an increasing task performed by constitutional courts and international human rights tribunals. These judicial institutions have, over decades, developed sophisticated mechanisms for scrutinising State action, ensuring its conformity with fundamental rights and procedural guarantees (in Italy, among others, Vassalli, 2006).

Viewed through these lenses, the purported novelty of the *New Legal Science*—making recourse to 'doctrinal analysis' (*Rechtsdogmatik*) to criticise the exercise of punitive power—is, from a European perspective, far from unprecedented. For instance, within civil law traditions, the principal function of criminal scholarship and conceptual framework such as the *theory of the offence* (Bricola, 1974, p. 7) has long been to exercise critical oversight of State punitive authority, identifying potential inconsistencies with foundational principles of domestic legal systems.

4. Historical Considerations: From Police State to Rule of Law

Dubber addresses the transformation from the police State to the rule-of-law State through a commendable historical reconstruction tracing the evolution of governance from classical Greece to imperial Rome. A particularly significant theme is the transition from the identification of the subject with the object of governance to their separation. Dubber seems interpreting this moment as the genesis of policing as a mode of governance and as the point at which the legitimacy of State power must be justified before the citizens.

Nonetheless, situating this transformation within the emergence of the modern State could appear somewhat reductive. The justification of coercive power is a longstanding theme in legal history, intimately connected to the law as a source of legitimacy. Dubber seems to place this development in the eighteenth century, yet historical scholarship demonstrates that it is considerably older. Indeed, it was from the medieval period that public authority began to seek legitimisation for the exercise of its power, even as mechanisms to restrain that power simultaneously began to emerge, as exemplified by the principle of *habeas corpus* (Cavanna, 1982, pp. 66 ff.).

The exercise of State authority has always encountered legal constraints appropriate to its era. The transition from policing as an expression of sovereign power to criminal law is comprehensible only within the broader context of European states' evolution toward liberal and, subsequently, constitutional forms. In these new frameworks, policing gradually transformed into administrative law and gave rise to police contraventions, which in continental criminal systems constitute a distinct category of offences. The exploration of these historical nuances could represent an extension of Dubber's project of constructing a global legal science.

5. Beyond the Mere Penal Dimension: the New Police Science and the State and the Dual Penal State

Further elements to be scrutinised in Dubber's proposal are the ones referring to a more comprehensive approach, going beyond the mere penal dimension.

On the one hand, the *New Legal Science*, primarily oriented towards justifying State authority, is complemented by a *New Police Science*, devoted instead to critically examining State power in its policing dimension. Together, these two approaches aim to construct a comprehensive analysis of State authority, considering both policing and law as mechanisms of governance, thereby constituting what Dubber terms the *New Science of the State*.

This approach reveals a notable continuity with existing legal practice. Within rule-of-law States—and even more so in constitutional States—the police power is legitimised when conducted in accordance with public law provisions governing its scope, modalities, and limitations, as well as when adequate resources are available.

On the other hand, Dubber's conception of the *Dual Penal State* opens the door to a more comprehensive approach, where traditional criminal law (substantive, procedural, and penitentiary) is submitted to critical scrutiny together with other areas of the legal order, in particular police power and some specific features belonging to private law (civil liability regime).

In Dubber's view, this analysis overcomes the divide between public and private law, because this traditional vision is somehow a pure conceptual scheme and expresses a conservative political approach.

Dubber illustrates then the *New Legal Science* through the analysis of possession, positioned at the intersection of law and policing. Closer inspection reveals that the purported innovations in the 'renewed' theory of possession correspond primarily to the different manifestations that a civil law concept assumes when incorporated into criminal law. In the legal dimension, Dubber highlights cases where possession is criminally relevant; in the police power dimension, he emphasises its role as a factual prerequisite for identifying and incapacitating perceived threats.

The proposed framework offers numerous insights, even if one could contend that the differing criminal significance of possession largely arises from other factors, like for instance the criminological context. Hence, the criminal classification of possession depends less on the division of public power between law and policing than on the specific role possession plays in practice. The dual analysis of penal power, therefore, opens substantial theoretical space and potential for fruitful development, since—as Dubber rightly cautions—it does not legitimise the *status quo* and addresses the methodological limitations identified herein.

5. Conclusion

In sum, Markus Dubber's *New Legal Science* represents a stimulating intervention in the study of criminal law, offering a comparative and theoretically ambitious framework for understanding the exercise of State power. The work succeeds in highlighting the value of dialogue between civil law and common law traditions, promoting critical reflection on State coercion, and emphasizing the importance of doctrinal analysis in safeguarding individual rights.

The interesting outcomes of this approach open new paths for critical thinking. The comparative scope of the suggested analysis, focusing largely on Germany and the United States, could be challenged since it underplays the internal complexity and contemporary evolution of these traditions. Furthermore, the historical framing of State development, policing, and criminal law could be complemented by the long-standing discourse surrounding the legal regulation of coercive authority. Finally, the practical novelty of the *New Legal Science* could be critically discussed: scrutiny of State power is already a well-established function of constitutional courts, international tribunals, and criminal law scholarship at least in the civil law tradition, and the interdisciplinary turn has long been underway. Dubber's concept of the *Dual Penal State* shows to be theoretically promising, providing a lens through which to examine the interplay of criminal law and policing.

The ultimate value of the essay lies not in its claims of absolute novelty but in its capacity to stimulate reflection, critique, and methodological refinement, thereby contributing meaningfully to the ongoing evolution of comparative and critical legal scholarship.

References

- Bricola F** (1974) Teoria generale del reato, in *Novissimo Digesto Italiano*, Vol. XIX. UTET, 7.
- Cavanna A** (1982) *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*. Giuffrè.
- Cordero F** (1986) *Criminalia: Nascita dei sistemi penali*. Laterza.
- Delmas-Marty M** (1992) *Les grands systèmes de politique criminelle*. Presses Universitaires de France.
- Foucault M** (2015) *Théories et institutions pénales: Cours au Collège de France, 1971-1972*. École des Hautes Études en Sciences Sociales.
- Roxin C** (1973) *Kriminalpolitik und Strafrechtssystem*. De Gruyter. <https://doi.org/10.1515/9783110903577>.
- Sieber U** (2006) Strafrechtsvergleichung im Wandel – Aufgaben, Methoden und Theorieansätze der vergleichenden Strafrechtswissenschaft, in eds. H.-J. Albrecht-U. Sieber *Strafrecht und Kriminologie unter einem Dach*. Duncker & Humblot, 78.
- Vassalli G (ed.)** (2006) *Diritto penale e giurisprudenza costituzionale*. Edizioni Scientifiche Italiane.