

Towards a New Legal Science

KIMMO NUOTIO*

Markus D. Dubber summarizes his critical findings on legal science as we know it and proposes a new start. His analysis of the bankruptcy of legal science is sharp, and it is hard to disagree with much that he presents. Even though the legal scholarship in the West has grown out of the Enlightenment values and orientation which the civil law traditions still carry, and which are part of also common law traditions, it seems that we have forgotten the real issues of legitimacy of state power, the real issues of justice, and play with minor detail or are simply being lost in the jungle of myriads of choices and approaches. Some of us are just happy to fine-tune our doctrinal conceptual machinery, some again reach out to interdisciplinarity, or remain critical voices which are easily being silenced when the world is filled with injustices of grand scale. We remain all too often apologetic to the law as it stands even when we should better address the fundamental questions of legitimacy in the exercise of state power.

The idea of founding legal science is not new. Even Markus D. Dubber has proposed it already. He has worked years to set this endeavor on the agenda. In my book review of his masterly *Dual Penal State*¹ I already touched upon both his critical analysis of where we are today with our current legal science, and what the new project would mean.² My remarks here should be regarded as additional to the previous ones. His critical project is again also developing over the years.

* University of Helsinki

1 Dubber (2018).

2 Nuotio (2019).

Dubber's work on these topics has been important to me. It aims at going out-of-the box of everyday scholarly legal and scholarly work and it invites us all to reconsider what we are doing and why. And especially we should ask why things are that bad even though all the scholars that have contributed over 200 years generally have had good intentions. He forces us to look at the mirror.

The legal science of the 20th century has sought to establish itself as a science. Scientificity was informing a turn from the classics to the social engineering of the mid-20th. Since the 1970's, again, new winds have blown. The rights movement brought back the point of view of the rights of the individuals and groups as limitations of the exercise of state authority. Duncan Kennedy has described the oscillation of Western legal thought over the past 150 years around the ideas of formalism and those stressing the social functions and contents of law.³ A neo-formalism is what we have witnessed up until the turn of the millenium, and now we need once again to make a next move. Some of this we find also in the stories of how criminal law scholarship and theory have evolved.

Let me start with a few general observations. First, I find it sympathetic that new legal science would build on the Enlightenment values of democracy, rights and the rule of law. If we wish to build bridges between civil law and common law thinking, this is the ground on which the bridge has to stand. Despite many differences, both models of law epitomize a Western legal thought - a Western system of organizing the exercise of public power. In a world today, going beyond the West, we find other understandings and conceptions which build on different types of premises. The new Russian dominant ideology stresses a collective history of a thousand year's long imperial tradition. It would frame criminal justice, or law more generally, quite differently. Chinese law does not share a Western understanding of democracy either, or a constitutionalism or the idea that the rights of the individual limit the exercise of state powers over people under the regime. Civil society only has restricted opportunities to have a say in state politics, measured against European standards.⁴ The differences in state organization and law are not about to fade away even though international trade creates bonds that are leading to a greater convergence in areas such as international business regulation.

Even though Europe has fought to build up a Western constitutionalism with a functioning inclusive and equality-granting democracy, also Europe has its darker legacies, such as colonialization of the global south. The modes of governance have not only been enlightened and progressive. The United States had a progressive constitution from the very beginning, but only in 1865 was slavery prohibited, and racism and discrimination have haunted the legal and political culture even much longer.

3 Kennedy (2006).

4 Acemoglu and Robinson (2019).

The German 20th century experiment of national-socialist law ended in a total moral bankruptcy, and as a reaction we saw an imposed and rigid form of constitutionalism which was to stand for a 'never again.' The German influence in Nordic scholarly circles faded then quickly, and has never really fully recovered. Anglo-American influences grew in importance.

The turn towards human rights, building up the Council of Europe and the United Nations, were internationally part of the response of peace building under the new terms. Even though legal development itself may show stronger path dependencies than politics, the underlying tones still inform law and legal scholarship. It is rather natural that a critical legal scholarship always starts with experienced injustices and aims at imagining something better. The enlightenment inheritance continues to inspire our imagination. At the very core of it is the freedom of individual and people, and a democratic form of political life.

Second, we have witnessed a certain change in how courts decide on legal matters. One of the champions of communicative rationality, Jürgen Habermas, just passed away in a high age. He spent decades trying to grasp the links between rights and democracy, and proposed a thick version of a democratic rule of law state.⁵ Deliberative democracy was conceived as an ideal form of political decision-making, and a legal process should follow a similar pattern. The parties should present the case in an open process, and the court would in the end pass a judgment based on reasons. A belief in reason and communication has been of paramount importance, also as regards the way courts earn the respect of common people.

Human rights law has been highly important in a reconceptualization of criminal process. Parties should be understood and active players, subjects, not just objects over which the courts are judging. A modern criminal procedure with its fair trial principles and safeguards is the clearest outcome of a progress of Enlightenment thought, an outcome which to most parts has been saved from backslides in the Western legal orders. I'm not saying that the safeguards are absolute and that abuses could not happen. But as it stands, progress has been made.

Third, Dubber wishes to see a novel contextual and non-parochial legal science developing. I'm not quite convinced how radical and novel the new medicine is, even though there is much sympathetic in it. From my perspective, that is, as a Nordic legal scholar, the discussion of two models, that is the German over-doctrinal and systematizing model, and the non-theoretical common law model, as described by Dubber, seems not too productive as a dichotomy. A pragmatic Nordic law tradition sits namely nicely somewhere there in-between. The legislature has been active in

5 Habermas (1991).

reforming the domestic legal order and has introduced a policy perspective on the development of the legal system. The constitutional as well as the democratic tradition have constrained the instrumentalization of the legal order and shaped its progress. If in the U.S. critical legal studies was a critical school only, in the Nordics critical research has also come up with proposals of legal reform.

Fourth, we have many tendencies now challenging a balanced development of criminal policy and criminal justice. Simplistic punitive ideas march forward as people wish to hear simple answers to complicated problems. Politics becomes divided into blocks which no longer hear each other. International institutions seem no longer fit to keep hold on geo-political tensions and divides. If I were asked today what the future of international criminal law will be, I do not think I would have an answer: Russian aggression in Ukraine, Israeli military occupation of Gaza with a tremendous human cost, or U.S. aggression against Iran. Very few states dare to drive the Enlightenment project forward. Europe is struggling hard to find its own soul in the midst of all this.

Fifth, I agree that we have not been able to establish a truly scientific concept of legal science. I have some doubts concerning whether this is in fact our biggest problem. If we could find programs such as a micro-economic concept of law and economics to provide us with a definite model of combining justice with efficiency, maybe this would be doable. But in my understanding, such programs have introduced a scientificity which is not that realistic and which misses some of the social aspects of law. I have chosen to speak of legal scholarship instead of legal science.⁶ Law as a science borrows not only from social sciences generally, but is and should be conceived also as part of humaniora. Legal scholarship has a link to what lawyers, such as judges, do in their everyday activities. We are not primarily explaining it as a form of behavior, but we are interpreting law in a systematic fashion, in a way which makes sense also to members of our legal communities. To me, this does not mean that we could not come up with critique when needed.

Sixth, the real challenge is today the security orientation which renders itself visible in a variety of ways. Preventive detention is one such topic. Certain people are just deemed to present such risk of serious violence that they need to be imprisoned simply due to the risk of re-offending. Risk-assessment protocols have been worked out to provide a scientific smokescreen over the practices of preventive detention.

Anti-terrorist criminal law measures in a similar vein project risks to society, and interpret attitudes and sympathies as evidence of a risk to society. Combined with a preventive turn in criminal regulation, risks of selectiveness of law-enforcement grow, and the courts will struggle to provide the suspects with an impartial fair trial. A niche of police power has lived through the times in the *Rechtsstaat* setting in several, maybe all Western jurisdictions. The Enlightenment program never entirely

6 Nuotio (2021).

got a hold on it. Much of the fight against terrorism as well as organized crime has been channeled through international law. These fights concern also countries with a less significant Western Enlightenment heritage. In such countries the courts may not be able or even not have the function of protecting the individual against the use or abuse of state authority. Terrorist offences easily turn into political offences instead of being offences against the people, as they were originally grasped.

Seventh, above I already referred to the fact that Nordic criminal law scholarship sits somewhere in between the German style conceptual approach and the fully pragmatic style of common law criminal scholars. The Nordic legal scholarship has experienced very much the same contours, the ups and downs, which Western legal thought has undergone since mid-19th century (and which were presented by Duncan Kennedy). The penal state has had a dual face even in the Nordic countries. And today, the cool policy-orientation of Nordic systems of criminal law is facing a first major challenge in years when Danish and Swedish governments are programming crime policy reforms typical of a punitive turn. Thus far, Norway and Finland have not experienced a similar shift.⁷

Jørn Jacobsen has been criticizing the Nordic and the Norwegian criminal law scholarship for its too dominant pragmatism. There is a point in this criticism. He proposes a principled anchoring of the criminal law on a Kantian view of republican politics.⁸ For me, this solution may be too rigid in terms of the societal expectations our criminal law is facing today.⁹ The current crises of Nordic criminal policy raises in fact similar questions as those addressed by Dubber. How do legal scholars react? Do we continue our business as usual?

The necessity and also the difficulty of pursuing a relevant and slightly but not too idealistic legal scholarship makes itself pressing precisely when the matters we deal with are no longer business as usual. Such pressures should draw us out from our comfort zone and force us to engage with broader topics of understanding the history of law, how law relates to politics, and also how to learn from others. Amartya Sen discusses the idea of justice in relation to experiences of injustice.¹⁰ Progress does not have a definite end point. There is no perfection which could be reached. It is all about trying to learn from mistakes and being open to the future. If this is part of the new legal science, I am on board.

As a last point I would wish to mention a project which addresses justice of criminal law in a global setting with a new, lighter twist. Instead of theorizing and conceptualizing the justice perspective and global experiences of legal scholarship following the

7 Tham (2026).

8 Jacobsen (2024).

9 Nuotio (2024).

10 Sen (2011).

traditional comparative law methods, over here the idea is simply to address vignette cases and see how they would be treated in a good number of criminal jurisdictions.¹¹ When reading the case studies, we find certain similar lines of thought cross various jurisdictions, be the underlying reasons for that unexplained.

There may even be a touch of natural law in the way we think about penal liability. Self-defense, to give an example, is something that needs to be accounted for, due to general principles of justice. Or take the case of hate speech offences. We would presume that in this case certain political and other background settings will be more manifest than when discussing general doctrines of penal liability which are not that politically laden.

My answer to the problems described by Dubber is that we simply need to create a meaningful frame for our work as criminal law scholars. The various processes affecting our work need to be accounted for. The birth of international criminal law, or European criminal law, have influenced in a profound manner what judges and scholars alike need to master. Such developments are drawing us out from our traditional parochial comfort zones. Sustainability concerns have to be part of criminal law scholarship as well, to give a fresh example. At the same time, individual autonomy and liberty cannot be traded away.

Learning to see the general legal (and political) developments with a critical eye helps us to engage with a dialogue with non-Western legal scholars. Only in such dialogues we can measure the true value of Enlightenment heritage today. The West is no longer an obvious center of the world. But if we value rule of law and participatory democracy, and the ways it has shaped our criminal law thinking, we should engage in discussions about such values also with representatives of the global south. Braithwaite's approach might serve as one model.¹² We might learn from such encounters.

11 Hoven and Weigend (2026).

12 Braithwaite (2022).

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