

New Legal Science in the Post-Colony

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Professor Dubber's New Legal Science project seeks to offer a methodological tool to advance a truly global effort at making sense of legal systems and state power.¹ Within the realm of criminal law, it reorients the legal architecture, by installing a new twin-axis for its movement — constant interrogation of state power through external and internal critique.

This exercise of constant interrogation would help untangle many threads of state power which have slowly coalesced to make up our modern understanding of the criminal *law*; the strands of 'law' and 'police', for instance.² The hope and ambition behind the project is that gradually, it can help restore and affirm the legitimacy of state power, within the criminal law and other domains.

An exercise seeking methodological coherence across the discipline of law and its study seems to embody a curious paradox. It is undoubtedly romantic, turning the clock back to the 18th and 19th Centuries which saw a race to develop universalist theories to understand the world around us. At the same time, it seems extremely necessary and current, in a time where law's empire suffers a severe crisis of legitimacy all around.

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1 Dubber (2025).

2 Dubber (2018).

Part 1

The former British colonies are not at the forefront of the thought experiment driving Professor Dubber's essay (he sees an 'allergic' aversion to methodological speculation in these parts of the world). Yet, I think there is a lot to gain by taking his approach to these 'former lands of the British Empire' as he puts them.³ I take up the case of one specific such post-colony in this comment — India.

Before starting with 'New Legal Science – India Edition', we need a brief background into the country's legal system and its criminal process. India adopted a democratic and republican system of government after independence. It has continued to work with the Constitution which came into force in 1950.⁴

The Constitution guarantees certain fundamental rights to persons (such as rights to personal liberty, and against arbitrary arrest), including a right to seek their enforcement by moving writs before superior courts.⁵ There are also directive principles of governance and fundamental *duties* identified within the document — non-enforceable components which have historically been seen as carrying important political significance for ordering of society.⁶

In this sense, one can see that Indian law already offers us the axis for subjecting laws to an external critique — the Constitution. Norms and values deserving protection are identified, and any laws undermining these values are, naturally, illegitimate.

Problems arise when we move into the territory of ascertaining the contours of these norms and values. The first problem is straddling the two horses of enforceable versus un-enforceable values. What if there is a conflict between them? So far, the legally enforceable fundamental rights have trumped non-enforceable principles and duties in court. Successive governments, since independence, though, wish to give equal, if not greater, emphasis to the non-enforceable values in a bid to create pre-emptive restrictions to enjoyment of rights.⁷

Moving beyond the possibility of pre-emptive restrictions, we have the actual restrictions to the enjoyment of rights woven into the document itself. While outlining the fundamental rights, the Constitution identifies their limits. Thus, what

3 Dubber (2025) p. 3.

4 Khosla (2012).

5 Const. India, Art. 22.

6 Const. India, Part IV.

7 Bhatia (2016).

is proscribed is not any law or executive act contrary to fundamental rights. Only those sets of measures that are found to have no reasonable or proximate link with achieving any of the justifiable limits to the enjoyment of fundamental rights are out of bounds.⁸

The Indian model (not unique, by any means) sheds light on what I perceive as being a basic problem with the New Legal Science project and its prong of external critique. Testing state power on the anvil of legitimacy will, often, involve line-drawing exercises raising interpretive questions about the values thought to be at the core of any system and their multiple meanings. This prompts judicial intervention into the fray to clarify words and their meanings, leading to internal incoherence and inconsistencies.

Pick up any commentary on constitutional or criminal law in India and you realise the massive scale of this incoherence problem. The construction of the text (and context) has spawned contradictory decisions across the judicial system, creating doubts about the values and norms that are supposed to be the lodestars for critiquing other statutes.

Navigating these waters is, by no means, an insurmountable task. But it does suggest a greater degree of complexity than what Professor Dubber teases out in applying the New Legal Science method. With this degree of incoherence around the foundational values in a system, how do we proceed further in determining the internal coherence of specific laws and executive acts?

Part 2

While questions about *legitimacy* of state power are relatively new within the Indian context, history suggests that India might well offer one of the oldest examples in 'modern' criminal law theory of a sustained internal critique of this branch of law. I refer, of course, to the history of the codification experiment carried out in this part of the world during the 19th Century.

The disparate nature of the Indian territories brought gradually under indirect British rule in the early 19th Century at first prompted the growth of separate legal systems working in tandem. This created an incoherence problem, to resolve which the Indian Law Commissioners were appointed and tasked with formulating concise legal codes applicable across all territories. The first task was drafting a Penal Code, which was completed after some delay in 1837.⁹

8 Padmanabhan (2016).

9 Macaulay et al. (1837).

This Commission studied existing systems, compared their work with western jurisprudence, and framed a concise code with detailed notes for each clause.¹⁰ In their introduction to the Draft Code, the Commissioners placed emphasis on their use of illustrations to aid in applying the law. Adopting this technique was seen as beneficial not only to aid local officials in applying the text, but also to curb the powers of courts ‘putting their own sense on the laws’¹¹ amidst the difficulty of multiple parallel courts already functioning in the territories, without a supreme judicial arbiter to resolve conflicting opinions *inter se*. ‘Under so inconvenient a system’ they noted, ‘there will inevitably be, in the course of a few years, a large collection of decisions diametrically opposite to each other, and all of equal authority.’¹²

The labours of the Indian Law Commissioners led to the Indian Penal Code being enacted in 1860; a document which has formed a template for law-making across various colonies of the British Empire.¹³ For some time after its enactment, it seems that the idea of regular update and revision was pursued, with many amendments taking place through the 19th Century.¹⁴ After that, though, the process of revision could no longer keep pace with the rapidity and volume of litigation, which generated multiple conflicting opinions. This was not only true of the Penal Code and its interpretation, but *all* aspects of criminal law and procedure which had been codified. Fast-forward to the present, and the extreme polyvocality around the meaning of criminal laws are now a defining component of practising criminal law in independent India.¹⁵

I wonder if the tale of the Indian Penal Code can offer some insight about the second prong of the critique which the New Legal Science approach suggests, and how we can try and render it sustainable. Merely embarking on and completing a project of scientific codification with maximum internal coherence can only solve part of the problem. The real difficulties come later in time, as the capacity for human action unwinds any predictive skill that legislators may have had. If a police-state of the scale of the former British Empire could not manage to do so effectively, would cash-strapped nation states (and international organisations) of today ever be able to sufficiently deal with this problem of law playing catch-up?

10 Macaulay et al. (1837).

11 Macaulay et al. (1837) p. xvii.

12 Macaulay et al. (1837) p. xvii.

13 Chan et al. (2011).

14 Notable amendments being those in 1870 and 1898.

15 Gour (2023).

Part 3

The potential of the New Legal Science project to change law *in action* will depend on many factors tested in a real-world setting. Not so for scholarly critique of criminal law and procedure which can begin straightaway and is bound to reap rich rewards.

Let me offer an example. In 2023, the Indian government decided to repeal the 19th Century criminal codes (on both substantive and procedural laws) with new legislation as part of an ambitious reform effort to ‘decolonise’ the criminal justice system.¹⁶ The new laws came into force in July 2024. With 18 months of experience, it is clear that these laws make hardly any change to the previous regime, and have only perpetuated the incoherence problem which had gradually buried the codification exercise under its weight.¹⁷

Thus far, the criticism of this so-called law reform effort has been extremely inward-looking and narrow; either condemning the new laws only for their failure to innovate, or by way of highlighting some specific insertions (or deletions) as problematic. The New Legal Science approach would move beyond this episodic engagement and offer a robust base of critique — something that has not been tried, yet.

Adopting the New Legal Science method would offer a *systemic* basis for understanding the specific structures of power that make up Indian criminal law. It would require digging past the many layers of the ground on which the enterprise stands today and engaging with the different sets of assumptions underlying each legal project in time, and how the ideas of one era seeped into another.

For instance, rather than assume that the British efforts of the 19th and 20th Centuries formed a linear and unbroken chain of ‘colonial’ engagement, it would invite more nuance to separate the truly *colonial* project of the British Empire which began in 1858 from the pure, unregulated, police state existing under the aegis of the East India Company before that.

Taking the proclamation of the Queen in 1858 at face value,¹⁸ we see that the colonisation of India now saw the people as subjects of the Empire which brought with it certain basic rights and privileges of being such a subject. Contrast this with

16 Press Information Bureau (2023).

17 Sekhri (2025).

18 Proclamation by Queen in Council (1858).

the period which came before, when the ‘natives’ were not subjects entitled to rights, as such, but were *objects* of regulation in an extractive regime run by an enterprise justifying its administration of lands periodically to the Crown based on its healthy accounts.¹⁹

It was not the Queen’s Proclamation but the East India Company’s Regulations which formed the heart of the codification enterprise, which began decades prior to any assumption of control and recognition of rights. It may have been mediated over time by the growth of a ‘law’ state, but the brute force of police power that characterised the criminal process never went away. And, arguably, it continues even today, with the post-colony continuing with the same codes to govern its citizens.

Besides deepening our understanding of the jurisdiction in question, the New Legal Science approach also encourages comparative engagement by adopting a set of processes that will be familiar to scholars for understanding state power across jurisdictions. It may yield interesting sites of comparison and critique and force us to question commonly held assumptions, such as how to draw that line about legal systems adopting a ‘common law’ or ‘continental’ approach.

Professor Dubber classes former colonies of the British Empire as being part of the ‘common law’ world. Who can blame him, as many establishment figures in these parts actively sought to maintain that link — for instance, India’s first Attorney General delivering a Hamlyn Lecture titled ‘Common Law in India’ in 1960.²⁰ Adoption of *principles* enunciated by English courts to decide legal issues in the colony was seen as having led to a successful transplant of a broader judicial philosophy which merited continuation after independence.²¹

It might well be that the *judiciary* (or even lawyers) found links with common law desirable, but is that enough for a *legal system* to be identified with the common law at large? India poses this problem twice over. Firstly, because as we saw above, its criminal codes were formed with a clear intent to *not* replicate common law in the first place and were imagined purely as tools for regulation of non-autonomous beings. Secondly, independent India’s legislators often made choices actively *designed* to shift the new nation away from common law principles (seen, most notably, in the realm of property rights’ adjudication).²²

19 The East India Company enacted ‘Regulations’ and not ‘Laws’. See e.g., Bombay Regulations (1827).

20 Setalvad (1960).

21 Setalvad (1960).

22 Dasgupta (2024).

In Closing

There is a lot to unpack in the brief snapshot that Professor Dubber offers about the New Legal Science. In this brief comment, I have tried to show how it can help reinvigorate inquiries into legal systems and encourage new comparative connections across jurisdictions. There are many similarities across our disparate jurisdictions in the kind of problems faced by the idea of a 'rule of law' popularised over the last few centuries. A common global language for dialogue around this will form a solid foundation to begin addressing them for our present and our future.

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