The Methods of Legal Dogmatics of Criminal Law From a Realistic Perspective

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I. Foreword[1]

Can legal dogmatics[2] of criminal law be deemed a science? This question would most likely draw a response that naturally it is a science. And the word "science" is included in "Legal Science" which is the research of law.

How about if I ask does legal dogmatics of criminal law have objectivity? This question would probably prompt divided answers. In one country, legal dogmatics of criminal law is understood to be presentation of systematic dogmatic deemed appropriate by individual scholars of criminal law. In such a country, it would hardly be objective, because the dogmatics of criminal law cannot be established without subjective value judgment by the scholars. Perhaps some people in the same country may argue that there is objectivity. Such argument will be based on understanding that criminal law scholars will select and present objectively correct dogmatic from the legal text. Is such an understanding appropriate?

In another country, legal dogmatics of criminal law is understood to be the description of present status of effective criminal law by the scholars. In such a country, the dogmatics would be considered objective, because the scholars of criminal law only describe the facts. However, can legal dogmatics that only describe facts stand? Moreover, can description of facts always be considered objective? How can we be certain that it does not become presentation of one's opinion disguised as description of facts?

May be some countries fall between the two, by taking a method such as stating the facts and making limited presentation of personal opinions.

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1 I would like to express my deepest gratitude to Professor Thomas Elholm and Professor Petter Asp for their many discussions in the preparation of this paper.
In this paper, in light of the difficulties in accessing the Scandinavian and Japanese literature, where possible, English or German references have been cited.

2 The “legal dogmatics" here means the German word “die Rechtsdogmatik”, which means to interpret the Code in a systematic and consistent manner. In the countries of the continental legal system, the development of D is one of the most important challenges in criminal law.

However, wouldn't such a method ultimately conclude in the first method, in that the dogmatics will evolve based on personal opinions? In addition, how can the difference between descriptions of facts and opinions be established?

Various questions like these may be presented on the characteristics of legal dogmatics of criminal law. In this paper, the author will review these issues by referencing information on the author's native country Japan, as well as Germany, Denmark and Sweden.

II. What is Legal Dogmatics of Criminal Law?

1. Characteristics of Legal Dogmatics of Criminal Law in Germany

The answers to the questions, "what is legal dogmatics of criminal law?" and "what is the academic nature of legal dogmatics of criminal law?" may seem self-evident, but in reality, it is not clear at all. To begin with, the word dogmatics came from dogmatic theology. The characteristics of legal dogmatics of criminal law imagined from this is, just as dogmatic theology seeks to interpret the bible without contradiction, to interpret the criminal code within the scope of its text without contradiction.

Perhaps this approach is most thoroughly pursued in Germany. Nothing can surpass the German criminal law studies in its effort to interpret the criminal code systematically, without contradiction, and normatively through establishment of the central dogma and use of logical deduction to reach conclusion on various dogmatics of criminal law.

For example, there was the doctrine of final conduct (*finale Handlungslehre*) which dominated the German criminal jurisprudence in the mid-twentieth century. According to its proponent Hans Welzel, when human action is captured ontologically, its feature is in its purposiveness (*Finalität*), and he strongly objected to the conventional theory, calling it the causal theory (*kausale Handlungslehre*).[3] Various conceptual results introduced by his teleological theory of human action gave impact to judicial precedence and legislation. However, basically its development was based on the notion that the result produced from the central dogma using logical deduction is duly justified, rather than on the resolution of some problems that arose in society.

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3 Hans Welzel, *Das Deutsches Strafrecht* (11th edn. De Gruyter 1969) § 8.

Perhaps the readers may question my reference to the teleological theory of human action which was a theory from the mid-twentieth century. I introduced this theory because it is most typical of the German approach and would be helpful for grasping the framework; however, this style of argument is still the controlling majority in German criminal jurisprudence. For example, more recent debate between the school seeking to construct a system of criminal law based on empirical science led by Claus Roxin[4] and the school advocating a model of functionalism based on the sociological systems theory developed by Niklas Luhmann led by Günter Jakobs[5] show that both sides are utilizing the same methodology whereby the theoretical system is constructed by establishing the central dogma and applying logical deduction. In particular, a student of Jakobs has gone so far as applying logical deduction to the systems theory to assert relativization or resolution of the distinction between illegality (*Rechtswidrigkeit*) and responsibility (*Schuld*).[6]

Perhaps these forms of discussion typically witnessed in German criminal jurisprudence can be described as constructing theoretical system based on the proponent's individual value judgments, and advocating the same under the name of "science." This may be the antithesis to an approach that considers what criminal jurisprudence can do to resolve the practical issues.

2. Characteristics of legal dogmatics of criminal law in Japan

Above stated approach can be seen in the author's native country, Japan. Under the influence of German criminal theory, Japan has spent considerable energy on structuring the system of criminal theory (*Verbrechenslehre*; a theory discussing the factors constituting the act of crime). There were heated debates between the classic and modern scholars during the first half of the twentieth century. And later happened a debate between the proponents of the "negative value inherent in acts" theory (*Handlungsun-*

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4 Claus Roxin & Luís Greco, *Strafrecht Allgemeiner Teil, Band I* (5th edn. C.H.Beck 2020); Roxin, *Strafrecht Allgemeiner Teil, Band II* (C.H.Beck 2003).

5 Günther Jakobs, *Strafrecht Allgemeiner Teil* (2nd edn, De Gruyter 1991).

6 Heiko H. Lesch, *Der Verbrechensbegriff. Grundlinie einer funktionalen Revision* (Carl Heymanns Verlag 1999) 2. Kapitel, I; Michael Pawlik, 'Der wichtigste dogmatische Fortschritt der letzten Menschenalter?: Anmerkungen zur Unterscheidung von Unrecht und Schuld im Strafrecht' in *Festschrift für Harro Otto* (Carl Heymanns Verlag 2007).

wert-Theorie; a theory that places emphasis on the breach of socio-ethical norms of the "act," and considers that level of illegality differs between willful and negligent acts, so subjective aspects will affect the determination of illegality) and the "negative value inherent in results" theory (*Erfolgsunwert-Theorie*; a theory that places emphasis on the illegal "result," i.e., the occurrence or risk of violation of legal interest, and considers that illegality should be determined objectively)near the end of the century.[7]

However, these debates are also based on the views on human nature in criminal law; or the views of the proponent on the characteristics of criminal law, i.e., whether to emphasize the function of criminal law to maintain social order, or its function to resolve disputes in court. Application of various logic and creative theories will ultimately conclude in determination of philosophical or political value judgment of the proponent.

3. Appropriateness of normative construction of legal dogmatics of criminal law

Such theory of legal dogmatics mainly evolved as part of discussion on determination of characteristics of norms, based on German criminal jurisprudence. For example, during the first half of the twentieth century, Edmund Mezger's theory argued that by having the evaluation standards (*Bewertungsnorm*: a standard for evaluating an act) precede the determination standards (*Bestimmungsnorm*: a standard for prohibiting or ordering certain acts by citizens), illegality shall be determined objectively, and responsibility should be determined subjectively.[8] In mid-twentieth century Germany, Armin Kaufmann thoroughly implemented the teleological theory of human action, to conclude that standards for determination of illegality and responsibility should be based on the actor.[9] In latter half of the twentieth century Japan, there was a debate on whether to capture illegality under monism or dualism, arising from the perspective of ex ante or ex post determination of the breach of norms.

These debates take the form of "clarification of characteristics of norms," and at first may seem objective and scientific. It leaves the impres-

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7 Ryuichi Hirano, 'Deutsche Strafrechtsdogmatik aus japanischer Sicht' in Hans Joachim Hirsch and Thomas Weigend (eds) *Strafrecht und Kriminalpolitik in Japan und Deutschland* (Duncker & Humblot 1989).

8 Edmund Mezger, *Strafrecht: Ein Lehrbuch* (3rd edn. Duncker & Humblot 1949) Zweiter Hauptteil, Zweiter Abschnitt.

9 Armin Kaufmann, *Lebendiges und Totes in Bindings Normentheorie* (O. Schwartz 1954) Viertes Kapitel.

sion that by accurately recognizing the characteristics of the norms that exist objectively, truly correct answers can be obtained for various questions presented with respect to dogmatic of criminal law. However, this is not correct. To begin with, anyone who has studied law at all would know that to assume there is a truly correct answer in legal studies is incorrect. A number of conclusions can be reached on one issue. The majority view may converge on one or the other, but this is not because one is "true" or "false"; rather, it is a matter of degree of appropriateness. The difference is purely relative, and the opposite conclusion may be reached at a different time or place. Structuring a theory based on normative logic which may seem objective at a first glance will ultimately have to involve value judgment, and its appropriateness cannot avoid coming under dispute.

4. Orientation towards a more scientific dogmatic of criminal law

Is it impossible to have a scientific dogmatic of criminal law? Can criminal jurisprudence not stand as a science? Construction of scientific dogmatic of criminal law has been an issue pursued in various countries, with some indication from jurisprudence on the difficult issue of the science of legal studies. Let us review this issue in the next chapter.

III. Methodologies for Scientific Dogmatic of Criminal Law

1. Pre-War: Positivism

In fact, there was a period when scientific dogmatic of criminal law dominated the academia in Germany. This was the modernist school of criminal theory. It developed the reformatory punishment theory which argued for punishment as a means of improvement and education for the offender, based on the understanding that a crime was a product of the nature of the offender and environment, against the classic criminal theory which argued for retributive punishment as a response to crime, based on the dogmatic that a crime was a product of free will of the offender. The dicta by Franz von Liszt that "Social policy is both the best and most effective

crime policy"[10] is very well known, and is founded on positivism, i.e., criminal theory based on scientific research and studies.

Modernist school theory of criminal law was scientific to the extent that it was based on scientific knowledge, but in reality, it could not escape tendencies to consider punishment as "a good thing" for improving and educating the criminal, which resulted in subjective tendencies of criminal theory. Subjectivist criminal theory may become foundation for abuse of power by the State if used arbitrarily. In Japan and Germany where the abuse of power by the State was experienced during WWII, the modernist school declined rapidly after the war.

2. *Post-War: Empirical studies of law*

Then, was scientific dogmatic of criminal law totally lost after the war? In reality, orientation towards scientific dogmatic had continued uninterruptedly in Germany and Japan. "*Alternativ-Entwurf eines Strafgesetzbuches, Allgemeiner Teil*" (alternative proposal for the general part of the German criminal law) published in 1966 by a group of West German scholars is very well known. With the slogan "Farewell to Kant and Hegel,"[11] the proposal held "de-metaphysicalizing of criminal law" as one of its aims. It argued that based on the results of criminological research, the purpose of punishment should be focused not only on general prevention, for which the certainty of effect has not been enough proven, but also on special prevention, aimed at education and improvement of the offenders. The proposal argued that to realize the goal of prevention of crimes, criminal law founded on empirical science became necessary. This approach gave significant impact on the revision of criminal law in West Germany, and led to the preventive integration theory (*präventive Vereinigungstheorie*), which aims to integrate the reinforcement of people's trust in the law and the resocialization of offenders, and the comprehensive criminal theory (*gesamte Strafrechtwissenschaft*), which considers criminal law, criminal procedure, and criminal policy in a comprehensive manner, led by scholars such as Claus Roxin.

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10 Franz v. Liszt, *Strafrechtliche Aufsätze und Vorträge, 2. Band* (I. Guttentag 1905) 246.

11 Ulrich Klug, 'Abschied von Kant und Hegel' in Jürgen Baumann (ed), *Programm für ein neues Strafgesetzbuch: Der Alternativ-Entwurf der Strafrechtslehrer* (Fischer 1968).

In post-WWII Japan, influence from the US legal studies became more prominent, and the so-called empirical legal studies started to influence various areas of positive laws. The "debate on dogmatics" started among the civil code and legal philosophy scholars over the scientific nature of the dogmatics of civil code. Wide ranging topics were discussed in the debate on legal dogmatics, one of which was its objectivity. In legal dogmaticcs, constant blending of facts and values occur, and the issue was how to separate the two to secure objectivity. Legal philosopher Junichi Aomi separated "selection of ends and means," and citing Max Weber, argued that while there is significant room for the value judgments of the interpreter in selection of ends, selection of means can be discussed in a completely scientific and objective manner.[12] He sought the bases of objectivity in selection of means in the recognition of empirical facts. In criminal law studies, Ryuichi Hirano asserted the need for dogmatics of criminal law that emphasize the function of criminal law, in response to the empirical jurisprudence and the debate on legal dogmatics. Hirano, who thoroughly studied Anglo-American jurisprudence, criticized the traditional theory of the functions of criminal law. His reasoning is, in short, that metaphysical concepts should be removed from criminal theory, and that functions of criminal law should be reconstructed from pragmatic aspects. He argues that these functions could be confirmed by empirical facts. The normalizing function and the maintaining function cannot be confirmed by empirical facts. Therefore, he finds that the function of protecting interest and the function of guaranteeing freedom of action are the most important functions of criminal law.

The views of the alternative proposal group in Germany and Hirano in Japan are scientific in that they discuss "what effects arise from which dogmatics," based on knowledge of empirical science. These approaches realized dramatic progress from how the conventional debates in Germany and Japan involved "logical deduction from the central philosophical concept or dogma" or "commingling of personal values under the banner of objectively capturing the structure of the norm." However, how can one ensure that the "end" to which this knowledge of empirical science applied is objectively correct? This is where these theories appear incomplete. Of course, ends such as reducing crimes or securing freedom of citizens are clear and objectively correct. However, determination on what will be considered a crime, or how much of the freedom should be secured in relation

12 Jun'ichi Aomi, 'Gendai Hokaishakugaku niokeru Kyakkansei no Mondai' in Gendaihogaku no Hoho (Iwanami 1966) 3–24.

to other national and social interests (conflict of interests between citizens is also a possibility), ultimately cannot stay free from various values and politics. Rather, it can be deemed to be political. That the West Germany's alternative proposal group and Hirano sought to separate criminal law from ethics was a coincidence, and there is no self-evident relation with having their foundation on empirical science.

This is also evident from the rivalry within the German school of functionalism which emphasize functionality of criminal law caused by the difference in definition of its function, and resulted in the opposing views explained above. That is, Roxin and Jakobs both profess "functionalism," but where the former perceives the purpose of criminal law as protection of legal interests, the latter aims to stabilize the norm through criminal law, resulting in completely different theories.

The situation is the same in Japan. At present, the majority of criminal law scholars agree that the purpose of criminal law is to protect the legal interests that can be recognized with empirical science. That is to say, previously seen proponents of social / national ethics and protection of the spirit of the people as the purpose of criminal law do not exist for most part, and the "infringement of legal interests" doctrine is the overwhelming majority. If this is the case, the doctrine should converge to the negative value theory. However, the debate on whether to choose negative value inherent in acts or results still remains. This is because there are various opinions on when the optimal timing of determination of occurrence and risk of infringement of legal interest is, and intervention with criminal laws is, to achieve the goal. Although they all follow the "infringement of legal interests" doctrine, their theories on criminal law are completely different.

3. *Orientation towards science in legal philosophy (science of legal studies): Scandinavian case*

(1) Introduction

The scientific approach continues to be pursued in dogmatic of criminal law, but science in legal studies had been debated longer in areas of jurisprudence and legal philosophy. Representative texts include "Pure Theo-

ry of Law" by Hans Kelsen[13] in continental Europe, and "legal pragmatism" promoted by Oliver W. Holms, Benjamin N. Cardozo, and Roscoe Pound in the US.[14]

However, strictly in relation to dogmatic of criminal law, these theories do not seem to have had significant direct impact. For example, in Germany, while the pure theory may have had some influence, dogmatic of criminal law that fully implemented the pure theory is almost non-existent, except for some efforts made by Kelsen himself in later years. And in the US, although theories of criminology and criminal procedures that were influenced by legal pragmatism followed by legal realism do exist, they do not appear to have fully developed within the context of theory of dogmatic of criminal law.

In contrast, science in legal studies pursued in jurisprudence had broad impact on regular positive law in Denmark. The methodological theory of Alf Ross[15] is an example. Before we review his theory and how it developed in dogmatic of criminal law, let us take a look at its origin, the Scandinavian legal realism.

(2) Scandinavian legal realism

(i) Uppsala school

Scandinavian legal realism was founded by Axel Hägerström,[16] a Swedish philosopher. As Hägerström was a professor at Uppsala University and the theory was mainly constructed in this university, it is also referred to as the Uppsala school.

According to Hägerström, all concepts must correspond with reality, because concepts that do not have corresponding reality are metaphysical concepts that do not have objective substance. From this perspective, rights and obligations are metaphysical concepts that do not have corresponding reality in the real world. This leads to the argument that "rights and obligations do not exist. They are merely superstitious beliefs." How-

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13 Hans Kelsen, *Pure theory of law* (Max Knight tr, 2nd edn. University of California Press 1967).

14 Oliver W. Holmes, *The Common Law* (Little Brown 1881); Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921); Roscoe Pound, *Social Control Through Law* (Yale University Press 1942).

15 Alf Ross, Professor, Univerisity of Copenhagen. 1899–1979.

16 Axel Hägerström, Professor of Philosophy, Uppsala University, 1868–1939.

ever, the concepts of rights and obligations have psychological power in the real world, and produce certain effects. Hägerström argued that this situation is logically contradictory, and is just "magic."[17]

This argument, along with his use of rampant language, brought strong opposition. The theory was developed further by his student, Karl Olivecrona.[18] Olivecrona inherited Hägerström's theory, and constructed a grand theory by incorporating, rather than expelling, the concept of rights and obligations into legal studies. With respect to the situation referred to as "magic" by Hägerström, Olivecrona believes that while rights and obligations certainly do not have semantic reference, the word "right" serves an important function by influencing the human mind and behavior to direct them; therefore, using it as a sign has considerable significance. In general, Scandinavian legal realism is characterized by its analysis on psychological aspects of the binding forces of the law. This is clearly apparent in the way Olivecrona focused on the psychological power that rights and obligations bring to the real society, treated this as a fact, denied the aspects of law that required corresponding reality, and introduced the concept of "law as fact."[19]

Olivecrona's denial of the "ought to be" aspect of the law is crucial. Traditionally, and perhaps still today, most people would have thought the following; the law is to be obeyed because it has legitimacy, and the law is binding because it is legitimized. But, in fact, it's not. The law is binding simply because the vast majority of people feel bound by it (legal discourse or legal something) and follow it. In other words, law is not something to be considered from norms, but from facts. Such a turn in perception is what should be called an "Olivecronic turn", and this paper is based on such a "turn".

(ii) Alf Ross

Danish legal philosopher Alf Ross was influenced by Scandinavian legal realism, and developed a unique theory based on traditional issues at the center of Danish legal studies. The traditional issues refer to the theory on

17 Axel Hägerström, *Inquiries into the nature of law and morals* (Karl Olivecrona ed; C.D. Broad tr, Almqvist & Wiksell 1932).

18 Karl Olivecrona, Professor of Law, Lund University, 1897–1980.

19 Karl Olivecrona, *Law as Fact* (1st edn, OUP 1939).

sources of law. This is a theory on what constitutes source of law, which is supported by interest in where the source of "law with binding force" lies.

The theory presented by Ross[20] starts by attempting to answer this question along the lines of Scandinavian legal realism. The Scandinavian legal realists rejected concepts that did not have corresponding reality in the real world, and structured legal studies purely based on facts. Following this, Ross argued that legal studies must describe objective facts that have corresponding reality in a factual manner. He attempts to distinguish statements on law (legal statements) based on whether it is a statement of facts, or on value judgment and opinions. Ross was interested in a "law with binding force." This means that legal statements are distinguished between statements on law with binding force and statements on value judgments and opinions concerning the law with binding force. Ross classifies the former as dogmatic assertions and the latter as assertions of legal politics, and further divides the latter to proposals to legislators and proposal to judges. He states that only the former is objective and factual, and is befitting to be called science, therefore, its description should be the mission of legal studies. Legal politics which makes proposal to legislators and judges is not denied as activities for legal scholars, but it is deemed to be a supplementary.

In this way, Ross positions the theory of legal dogmatics as a study that provides descriptions of "law with binding force" in an objective and factual manner. The next question would be, what is a "law with binding force"?

4. Ross theory as applied by Waaben

(1) Ross theory: The concept of valid law and prediction theory

Ross refers to the "law with binding force" as valid law. This concept is the key to modern Danish legal studies (and broader Scandinavian legal studies). Valid law is referred to as "Gældenderet" in Danish, which corresponds to "Geltendes Recht" in German. German and Japanese scholars would probably assume that it refers to the legal texts themselves. Criminal law scholars in Germany and Japan refer to statements on current criminal laws (Geltendes Strafrecht) as dogmatic of criminal law. This

20 Alf Ross, *On Law and Justice* (Jakob v. H. Holtermann ed, Uta Bindreiter tr, OUP 2019).

means that in Germany and Japan, statements on current criminal codes will be part of legal dogmatics on criminal law, whether it be statements of fact or value judgment. As stated above, this is why arguments based on personal opinions and philosophical views are made under the name of legal dogmatic in Germany and Japan.

Ross does not take this approach. He captures valid law from a thoroughly realistic point of view. In sum, valid law is the thought process (ideology) of judges. That is to say, judges make decisions by referring to laws, precedents, practical customs, and opinions of attorneys and prosecutors, but the thought process of the judge that forms the foundation for all of this is the valid law.

The reason why Ross took this approach is self-evident when one considers his position as a realist. Decisions made by the judges have the ultimate authority in real society. Even if certain provisions existed in a legal text, it would not have real authority unless the judges agree so. Ideologies of the judges present themselves to the real society in forms of decisions, and control the real society. Ideologies of judges that are not presented in specific decisions will have controlling functions by predictions of their decisions on hypothetical cases. Describing the thought process of judges is the duty of legal dogmatics.

According to his theory, description of the judges' thought process will enable prediction of future decisions. And if the description made in legal dogmatic is consistent with the future decision, it is proven to be true, and if inconsistent, it is proven to be false. In this way, legal dogmatic can be proven to be true or false in an objective manner, according to Ross. This theory is called the "prediction theory" in Denmark.

(2) Method of conceptual structure by Waaben: Criticism of German methodology

Ross' theory is the product of his study of jurisprudence, and the conclusion that the thought process of the judges is the valid law was reached as a result of pursuit of science of legal studies and binding authority of laws. As such, it was not created with presumption to apply the theory to dogmatic of actual laws. Therefore, utilization of his theory for dogmatic of actual laws (criminal law in this paper) requires certain adjustments, and the peculiarity of criminal laws must also be taken into consideration. Knud

Waaben[21] tackled this difficult problem, and applied his theory to dogmatic of criminal law.

According to Waaben, "it is wrong to consider the decisions themselves as valid law."[22] And to describe valid law, the reference must be much wider than and include the hidden foundation of, what appears in the decisions. Valid law is the aggregate of thoughts and ideology of judges. The decisions themselves, a judge's thoughts particular to a case, and motivation for the decision, etc., are just part of the aggregate.[23]

Therefore, in describing valid law, studying the judicial precedents becomes important. Studies of judicial precedents in Japan (and perhaps in Germany) would probably emphasize extraction of the basic theory that the decision is founded on from the numerous precedents. Japanese scholars refer to this as the judicial precedents theory.

Judicial precedents theory is based on the general approach of judges, so one might assert it may be referring to the same thing as valid law. Studies of judicial precedents theory are conducted in Germany as well as Japan. What is so new about the approach taken by Ross?

Certainly, they share a lot in common. One key characteristic in common is that they both require objectivity. However, significant differences also exist. The judicial precedents theory is derived from finding shared features among the numerous decisions themselves, and is based on ex post facto inductive reasoning. On the other hand, valid law is not derived from finding shared features among the decisions. It is extracted from analyzing the psyche of the judges, and is determined not based on the decisions themselves, but from the analysis of the motivation behind the decision.

Furthermore, the structure of judicial precedents theory varies according to the theoretical structure adopted by the person performing the analysis. In other words, decisions are categorized based on the personal and philosophical positions of the author, and the objectivity is lost. The situation is probably the same in Japan.

Either way, in Germany and Japan, judicial precedents are grouped into abstract legal propositions. Waaben is also critical of this. He says "German criminal law scholars try to summarize the basic definition in short words to cover all cases presented in positive trial, and often depart from reali-

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21 Knud Waaben, Professor in Law, University of Copenhagen, 1921–2008.

22 Knud Waaben, *Det kriminelle forsæt* (Gyldendal 1957) 44.

23 Ross's theory is often referred to as a sub-genre of American behavioristic legal realism, but that seems not to hold true.

ty."[24] In short, according to Waaben, valid law is not something that can be explained completely and uniformly using abstract norm.

Then, can valid law only be described as an accumulation of cases? Should we abandon establishment of abstract normative propositions like the American fact-skeptic Jerome Frank and abandon prediction of decisions?[25] The answer is no. Although Waaben doubts abstract norms, he does not abandon them. His approach is to utilize abstract norms, without considering it to be complete. Valid law is open to future revaluation. As a principle, it expects the abstract norm presented as valid law to be incomplete. Waaben states that "the contents of concept of intent can only get close to full description,"[26] referring to the particular concept he studied.

(3) Application by the author

I basically agree with Waaben's application of Ross' theory, but with some adjustments, which can be summarized as follows: In sum, valid law is structured by verbalizing, theorizing, and systemizing the thought process of the judges who have the role of creating actual law, including their assumptions. Therefore, it is necessary to apprehend the facts inherent in the judge's thought process by contemplating the depth of the judge's psyche. Valid law can be apprehended from the judge's thought process, so to the extent it can be predicted to exist for real, it is not bound by the wordings in the decision that does not seem to directly reflect the judge's thought process; furthermore, it is not necessarily fully bound by the conclusion of the decision. Accordingly, an dogmatic of criminal law that describes valid law is not an accumulation of analysis of judicial precedents, and highly abstract theoretical structure that cannot be produced by merely analyzing judicial precedents is plausible. Of course, the judges themselves are not processing individual cases based on a perfect theoretical system, so the extracted theoretical system can also be incomplete. There may be cases where consolidation of theories is difficult, but basically, I shall continue to aim to clarify the definition of concepts to enable consistent application (furthermore, to enable the public to act freely with understanding of these concepts). Legal dogmatics of criminal law not only indicates the standard for decision making by judges; it is also a standard that sets forth

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24 Waaben (n 22) 363.
25 Jerome Frank, *Law and the modern mind* (Brentano's Inc 1930).
26 Waaben (n 22) 345.

the scope for the public to act freely. In this respect, I will not adopt the method of "listing significant items," such as listing the points for legal determination, or motivation of judges that form the grounds for legal determination.

I have organized a joint research groups based on these methodologies.[27] More specifically, the joint research was conducted among judges and scholars. Scholars presented (what was deemed to be) valid law and sought comments from judges, and also sought critical comments from peers. Through these exercises, we tried to establish a more objective valid law. However, the comments from participating judges were not deemed to be absolute. One may think the judges are best positioned to apprehend the thought process of judges; but in reality, there may be deep psyche or subconscious attitudes that the judge is not aware of, which the scholars can reveal with external observation.

IV. Criticism of the Methodology/Issues and Review

1. Introduction

Against the methodology presented above, various criticisms have been made, against Ross mainly by Danish legal philosophers, and against my opinions that applied Ross' theory, by Japanese criminal law scholars. In addition, there were issues I noticed or got pointed out in discussion with other scholars. Let me summarize and review these issues.

2. Is valid law only applicable to thought process of judges?

Frequent criticism of the methodology is that valid law is not only applicable to thought process of the judges. In particular, in countries that adopt principle of discretionary prosecution (such as the UK and US, of course, and Japan, Denmark, Sweden, etc.), thought process of prosecutors who have the authority to determine whether or not to prosecute actually has significant impact on distinction of acts that will or won't be penalized.

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27 The Research Group for Defining Valid Law in Japanese Criminal Justice. http://www.waseda.jp/prj-genkeiken/.

Furthermore, Henrik Zahle,[28] who criticizes Ross' theory from a post-modernist legal perspective, is critical of the one-sidedness of the theory. He argues that the laws that function to regulate real society are not limited to decisions by the court. There are many laws that are effectively functioning outside the courts, such as decisions and orders determined by the administration, and practical decisions made by government offices. They are valid without going through judge's ideologies. Therefore, it should be understood that the source of law has multiple centers, and there are different methods to determine the appropriateness for each.[29]

Certainly, there is some truth in this criticism. In particular, in a country with high conviction rates (Japan), the decision by the prosecutor to prosecute or not has a significant impact. If we are to simply consider what regulates the society, it would be important to consider those points to determine whether the accused is guilty or innocent. However, if we are reviewing whether or not it has the level of substance to be considered a law, decisions by judges and decisions to prosecute by prosecutors do not appear to have the same legal level of substance. In addition, study of the psyche behind the decisions of prosecutors on whether or not to prosecute would have to be conducted with virtually no precedents or evidence available, and would be extremely difficult in practice. If the psyche of the prosecutors cannot be studied, I believe it is beneficial to construct functional dogmatic of criminal law by application to thought process of judges to the extent they can be clarified.

3. Can predictions be proven true or false?

Ross argues that by reconciling the predictions and facts, dogmatic can be proven to be true or false. This is one approach, as the theory is modeled on conventional natural science. However, it is difficult to reconcile the predictions and facts. Is it sufficient for a prediction to be deemed true if it is consistent with one decision? Is a prediction never deemed to be true unless there is a decision? Many issues remain. These are issues of objectivity in science including natural sciences, and are more of an issue for philosophy of science. If we turn to debates in philosophy of science, presently the

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28 Henrik Zahle, Professor in Law, University of Copenhagen, 1943–2006.

29 Henrik Zahle, 'Retsdogmatik og retskritik' in E.M.Basse og Vibeke Jensen (eds), *Regulering og Styring I*, (Djøf 1989) 45–52.

debate over distinction between science and pseudoscience is at a stalemate.

In the 1970s Denmark, Preben Stuer Lauridsen,[30] professor of legal philosophy, a successor of Ross, criticized him starting from the point that a solitary statement consistent with the truth does not exist (multiple statements may exist), and ultimately sought to have whether or not debates and criticism among scholars can arrive at an agreement/consistency as the standard for verification. This argument appears to have certain appropriateness. It cannot be denied that whether or not there is an agreement among the peers is one of important indications in evaluation of a theory (so-called coherence theory).[31] With such adjustment, Ross' theory is considered to have appropriateness at present.

However, it would be insufficient if the agreement and consistency referred to only meant that there is a majority agreement, or that it is consistent with the greater majority view of the public. It must be performed as a review by a soundly and reasonably organized group of experts. Then, the next issue would shift to the procedural and methodological point of how to examine whether or not the group of jurists including present scholars (in various countries) is qualified as the expert group. On this issue, we can only assume that the group of jurists in each country is such a group at the moment.

4. Judges subjected to prediction react to the situation: Can there be science in such a relationship?

This is a frequently presented criticism not just as a question for the science of methodology above, but for social sciences as a whole. On this question, I believe that there is science, at least in the methodology. Judges are most likely to refer to the results of the studies based on dogmatic of criminal law as proposed by this paper; however, they are unlikely to try to outwit the prediction, or intentionally refrain from the predicted opinion due to having read such studies. This is because the results of such studies are not produced for the practical purpose of controlling the judges; rather, they derive from a purely academic interest in clarifying the valid

30 Preben Stuer Lauridsen, Professor in Law, University of Copenhagen, 1940–2013.

31 Preben Stuer Lauridsen, 'On a Fundamental Problem in the Legal Theory of Prediction', in *Scandinavian Studies in Law, vol.20* (Stockholm Inst for Scandinavian Law 1976) 203–204.

law. For a judge to try to outwit such result to avoid being controlled is meaningless in reality. If a judge who came across the result of the studies thought "if the present operation is continued, such a decision can be expected in the future; this is not desirable," and changes the present operation, it is a value judgment of the judge rather than influence from the dogmatic, and the judge is controlling his/her own conduct.

Japanese scholar of sociology of law, Takeyoshi Kawashima,[32] promoted predictive legal studies which predict future decisions by courts, based on legal realism's views on trials.[33] He stated that such prediction "is nothing more than a prediction mediated through our practical behavior of controlling future decisions through judicial precedents," and saw it as an issue of "how best to control future decisions with past judicial precedents, and how they should be controlled." This indicates an approach where the judges, who are the subject of observation, try to control decisions by observing the scholars who are conducting the observation. However, considering prediction as such practical activity would bring issues of assessment and value judgment into dogmatic which should be objective. On this point, the view taken by Ross (and this paper) does not aim at such control, and thus would not create such problems.

5. Distinction between legal dogmatics and legal politics

Legal dogmatics and legal politics handle facts and evaluation, and it is often thought that distinction between the two can be made for certain. However, in the area of legal studies where facts and values intersect, these borders may become vague. For example: (i) a judge who read a document shown as a text on legal dogmatics wrote a decision influenced by the text. Should this be considered legal politics?; (ii) or, the author meant the text to be legal politics, but a judge who had not read the piece wrote a similar decision, and it became established as an objective practice. Should this be considered legal dogmatics?

In my view, the answers to both (i) and (ii) are "no." Then, how can legal dogmatics and legal politics be separated? The difficulty is presented due to the fact that the subject of the observation is the thought process of

32 Takeyoshi Kawashima, Professor in Law, Tokyo Univerity, 1901–1992.

33 Takeyoshi Kawashima, *Horitsugaku no gendaiteki Mondaiten: Kawashima Takeyoshi Chosakushu vol.5* (Iwanami 1982) 290–291.

judges, who most certainly will be observing the results from the other side.

I personally have some remaining questions on how to structure the standard for determination, though the conclusion is clear. I would like to present the following provisional statement: Legal dogmatics and legal politics can be distinguished through methodology, i.e., the material that the decision was based on, and the analytical methods that lead to the conclusion. If the materials that the decision was based on were facts of empirical science, and the method used to reach the conclusion was the analysis of empirical facts, it would be legal dogmatics; all others are legal politics. That is to say, legal dogmatics and legal politics may be distinguished by methodology. That is why the methodology for legal dogmatics of criminal law becomes significant.

6. *Would it not be an obstacle to nurturing students and jurists capable of external criticism?*

Some point to this, from the perspective of legal education. However, to limit legal dogmatics to description of facts is not to prohibit criticism of the present status. Ross believed that proposals to judges and legislators should be made separately as part of legal politics, as a matter of judgment. The above criticism is out of place.[34]

7. *What are the features of judges' thought process?*

Some ask that if legal dogmatics practiced by scholars is description of facts, what is it that the judges do. Judges can be seen as creating laws to resolve specific cases. In other words, application of laws to specific cases is itself a process of creation of law based on certain values. However, individual judges are not free from general thought process of judges. They are not arbitrarily creating laws based on individual values.[35] The decisions are made by paying attention to the shared value judgments accumulated among the judges, and to that extent, they are objective.

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34 Those who ask these questions miss the point.

35 The distinction between the two is crucial to understanding the methodology of this paper.

8. Conclusion

As stated above, although some issues remain to be resolved, certain answers have been obtained to the criticism and inherent problems with respect to the methodology for legal dogmatics of criminal law presented in this paper.

V. Method for Dogmatic of Criminal Law: Methodology for extraction and structuring of theories

1. Methodology for extraction of theory

Dogmatic of criminal law extracts ideologies of the judges to create a theory. Let me summarize the discussions thus far, and clarify the methodology:

The first point of reference in trying to understand the ideologies of judges is judicial precedents. However, they should not be treated as the golden rule. Because judicial precedents are court decisions on a certain case at the time, and although it will be binding on future decisions, it will not have absolute authority in a country under statutory law system. In particular, the reasoning proposition is likely to be documentation of the judges' thought process, but it does not necessarily reflect all of the judges' thought process, and could be an afterthought in some cases. The reasoning proposition is not deemed to be judicial precedent itself in the study of judicial precedents. Only the conclusive proposition constitutes the judicial precedent. If the judicial precedents are mishandled, it will become case law positivism, which analyses judicial precedents as law. This is inconsistent with the methodology adopted in this paper.

The next point of reference would be literature authored by the judges. They are valuable basic materials that outline the ideologies of judges prepared by the judges themselves. However, they too, do not reflect all of the judges' ideologies. Aside from the fact they are written by the individual, it does not necessarily reflect subconscious thoughts of the writer. Valid law is the entire ideology of judges, so the deep subconscious must be extracted to determine the criteria for the decisions.

The third point of reference is the study of literature that affected the judges. As judges are jurists, they will refer to books and scholarly articles. Books and articles commonly cited can be deemed to have significant influence on the thought process of the judges. By examining such literature,

we can infer the theoretical systems and concepts in the thought process of the judges.

The fourth point of reference would be communication with the judges. Communication is essential to seek candid opinion of the judges that do not appear in judicial precedence and literature. For this purpose, as already mentioned, I have organized a research group called "the Research Group for Defining Valid Law in Japanese Criminal Justice" with like-minded scholars, and hold periodic meetings with judges. A judge's positioning varies by country.[36] For example, in Germany, Scandinavia and Japan, Supreme Court justices are neutral and independent of political ideology, but in the US, political agendas are often involved in the appointment process. We must allow for some variables for each country on this point.

2. Method of theoretical structuring

Creation of theoretical system on judges' ideologies extracted through methods described above will require certain contrivance. That is, to structure a system of criminal theory, the conventional method used in Japan is to follow a system starting from considering the relevance of the general elements of offences (*Tatbestandmässigkeit*), illegality (*Rechtswidrigkeit*), and responsibility (*Schuld*), similar to Germany. However, it appears that a criminal theory system that focuses more on criminal procedure and identification theory needs to be created. The reason being that the criminal theory system created in the judges' ideology would always focus on the resolution of the case, i.e., the procedural law. In Japan, facts that the prosecutors must prove shall be positioned general elements of offences. And in an exceptional case where an issue of law arises, the lack of justifiable cause for noncompliance with law or non-imputability that the prosecutors are liable for proving should be deemed to be justifiable noncompliance or non-imputability. In Anglo-American law, you can call them defence. Thus, as a starting point for dogmatic of criminal law, a system comprising of relevance of general elements of offences, justifiable non-compliance (defence of justification) and non-imputability (defence of excuse) seems to be the most appropriate.

Next, let us turn to the methodology for structure of concepts. I have already explained how abstract concepts may be included as part of valid

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36 See, n 27.

law. In particular, the basic approach would be to examine materials centering on judicial precedents without reserve, capture the thought process the judges are applying to resolve the issues, and reflect this on the concept as faithfully as possible. Use of such abstract concept will contribute to mutual understanding and legal discussions among jurists. That is to say, legal concepts are shared codes available for discussion among jurists. To ignore this in dogmatic of criminal law would be unproductive. Note that a perfect concept does not exist, as Waaben has pointed out, and it is unlikely to exist in the thought process of the judges who are the subject of fact finding. However, we shall not give up on creating concepts. It is important to specify and document the concept presented as the terminus of the judges' thought process, using empirical facts as well as conventional normative analysis methods used by the judges in their thought process.

In relation to the above two points, we must consider how best to capture the intricacies of fact finding and legal issues. For example, suppose several seemingly unrelated facts emerge in the process of identification of legal requisites (e.g., in Japanese practice, a party that claimed the largest share of criminal proceeds after the crime is frequently penalized as the principal offender. However, whether or not a person is the principal offender or accomplice should be determined based on their role in the criminal conduct, and should not be related to the situation after the crime.) In addition, not all of the facts need to be revealed, and there are instances when the legal requisites are identified by comprehensive consideration of the facts (e.g., using the above example, if claiming the largest share of criminal proceeds is only one of the reasons the person may be penalized as the principal offender, and such fact is not a legal requisite, but has a significance in the identification process). Such an example is likely to exist in many countries, not only in Japan. Perhaps the common procedure is to create an abstract norm in the study of jurisprudence, and leave the rest to the customary practice in fact finding. However, this does not capture the thought process of the judges. Further, mere existence of abstract norms would not serve much purpose in practice. On the other hand, mere listing of facts would not enable discussions among jurists. Abstract norms are important shared code for the jurists to have discussions and to understand each other.

The question is how to link the facts to be identified and the requisite norms, when they stand separated. I do not have a good answer to resolve this problem. Developing this method will be the key issue.

VI. Methods of Criminal Law Policies: Preliminary Observation

1. Foundation of legal politics of criminal law

According to Ross and Waaben, legal politics of criminal law, i.e., proposal to judges and legislators is a secondary duty for criminal law scholars, unlike legal dogmatics. In Denmark where Ross' theory had a strong influence, this seems to have been the conventional wisdom for a long time. Certainly, when criminal law studies are pursued as science, proposals based on personal value judgments and philosophy would not be considered scientific. But at the same time, it may be necessary to make certain proposals as an expert on valid law, on condition the value judgments are clearly stated as such.

In particular, in recent Denmark, Sweden and Japan, it has been pointed out that there are tendencies to impose unnecessarily strict penalties against the background of a type of populism, and to make legislation that only clarify the value judgments of the government and doesn't have real effects. The latter is referred to as symbolic legislation, and there is a wide debate in Germany about its problems.

Under these circumstances, it seems significant that the criminal law scholars as experts logically develop legal politics of criminal law, and examine the justification for criminalization.

For example, the Danish criminal law scholar Vagn Greve[37] asserted the propriety of practical criminal theory and criminal legislation from the viewpoint of human rights. His book related to criminal legislation regulating freedom of expression[38] are an example of this assertion. In the midst of a myriad of perspectives, Greve says that it is a necessity as a professional to explain how these can be evaluated and analyzed from the viewpoint of criminal theory.

Of course, when there is a situation where basic principles are neglected, such as nulla poena sine lege, the culpability principle, and legal benefit protectionism, it is necessary to object that there are certain questions regarding these topics from a professional viewpoint. When there is also a situation where basic values such as freedom, democracy, basic human rights, and peace are trampled on by the power of the state, it could be said that us scholars are obligated to fight against such power.

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37 Vagn Greve, Professor in Law, University of Copenhagen, 1938–2014.

38 Vagn Greve, *Bånd på hånd og mund: strafforfølgelse eller ytringsfrihed?* (Djøf 2008).

However, most legislators who are deserving of criticism craft new laws based on advice from legal professionals including jurists. In the case of judges, they are regarded as professionals in the sense that they are practitioners of the law, through amending jurisprudence, specializing in its use, and accumulating experience.

It is very important to voice your opinion, as a specialist of criminal jurisprudence, against those legislators. However, we need to prove and establish on what grounds our opinions are "professional." Are those opinions based on the scholars' self-righteousness? Are they based on political and ideological biases that largely deviate from societal values, norms, and justice? Are they just scholars' own, subjective opinions? Scholars must constantly practice rigid self-discipline and be subject to criticism set upon by the concept of freedom of speech.

Personally, I find nothing wrong with Greve's humane words; I most certainly agree with him. However, that does not mean I can assert with my utmost confidence that his opinion and method of thinking are "objectively correct" as a "professional." A situation where "all" scholars are unanimously in agreement with Greve's dogmatic will and should never exist.

In my opinion I believe that the first responsibility of a criminologist is to utilize Valid Law, and subsequently I believe that Greve's statement is more political than scholarly. If it were so, Greve's statement is not really a study of jurisprudence but an analysis of his own dogmatics from a legal point of view. This is not necessarily said to be aimed to undermine Greve's accomplishments. If anything, the author was deeply impressed by Greve's works. However, the author seems reluctant to label his work as jurisprudence or legal dogmatic studies; mainly because it is almost inevitable to separate objective theory from subjective value judgements, which will render the theory "un-scientific." Rather, it should called something along the lines of "theoretical legal analyses" or "theoretical legal consideration." It is necessary to consider such studies as something independent and completely different from legal dogmatic studies. Such differentiation enables one to clearly see where they stand within the realm of legal studies, and also assert that one's value judgement is derived from which field of study.

2. Function of creation of law by judges and legal politics of criminal law

In this methodology, proposals to judges are considered to be legal politics of criminal law, and part of political activity involving value judgment.

The activity by judges to process cases and prepare decisions is considered to be a function of creation of law, i.e., a type of legislative function. This is where the relationship with the principle of legality becomes an issue. Legalism is a significant corollary of principle of legality. It argues that criminal law must be established in the form of legislation by the parliament. If a judge is involved in the function of creation of law, would that violate the principle of legality?

Karl Larenz of Germany referred to selection of semantics within the scope of statutes as interpretation (*Auslegung*); and where it is outside the scope of statutes, the act becomes creation of law. Under this theory, principle of legality prohibits analogical interpretation in criminal law, requiring interpretation within the scope of statutes, so the judges do not engage in creation of law, and their activities would not violate the principle of legality. Many scholars in Germany and Japan seem to agree. However, if this approach is taken, interpretation within the scope of statutes would mean the act of identifying the objectively correct interpretation among the various possibilities. And notwithstanding that this act is actually based on subjective value judgment. If this is the case, subjective value judgment is being made under the disguise of objectivity, and there will be no means to control this. This is the dark side of legal positivism which assumes that a correct interpretation exists in statues. It is more realistic to think that selecting one semantic from various possibilities in the statutes involves value judgment, and that determination of the meaning of the law, i.e., creation of a law that did not exist, is being conducted.

Against these approaches, one may suggest that it may be less complicated to refer to such acts within the scope of statutes as interpretation rather than creation of law, and this would also avoid violating the principle of legality. However, hiding the activity of creation of law under the name of interpretation would lead to a bigger problem. To clarify that the act involves subjective value judgment, legal interpretation by the judges should be referred to as creation of law. According to this line of thought, principle of legality becomes a standard that indicates the limits of creation of laws in criminal trials, rather than a principle that prohibits creation of laws by judges.

3. On the definition of logic

There are many people who insist that it is acceptable to label legal analyses as a science, since they are based on meticulous theoretical construction

are further based on logic. However, as long as this is based on the speaker's own value judgement, it remains as another criminal policy.

For example, the sentencing theory proposed by Andreas von Hirsch is a theoretical framework that is shared by many scholars. Along with Andrew Ashworth and Andrew Simester, von Hirsch has published collaborative works that do not clearly indicate which portion was done by whom.[39] This is also another theory that is based upon a certain value judgement, and von Hirsch mentions so in various publications. If the pros and cons of a theory analysis are considered by people who shared the same value judgements, the theory does indeed achieve a level of objectivity with the limits of the points in common. However, it is obvious that this type of objectivity is limited to those who share the same value judgements, and consequently the said theory does not resonate to those who do not agree with those judgements.

Additionally if a theory is proven through experimental sciences, it is possible to claim that theory is scientific. However, it is impossible to establish a standard with just facts. It is inevitable to have a certain level of subjectivity to accompany such standards. For these reasons, citing experimental science is simply not enough to call a theory as something totally scientific.

Von Hirsch's sentencing theory[40] happens to cite experimental science. In other words, von Hirsch, through references from criminology, asserts that it is unnecessary to consider preventative effects in sentencing since there are no preventative measures in penalties. There is a certain level of science in this assertion.

However, those who believe that it is important to send a message to regulators of society through announcing to consider positive general prevention (i.e. Jakobs, a supporter of positive general prevention), whether or not there actually are preventative effects, do not think there is any substance in citing experimental science as von Hirsch does. On the other hand, the Luhmann's sociological system theory used by Jakobs has been established as a scientific theory in sociology, but von Hirsch barely holds any interest in it.

There are certain differences in how one normatively evaluates facts, and they are caused by the difference in which value judgement is chosen

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39 Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005); Andrew P Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the principle of criminalization* (Hart Publishing, 2011).

40 Andreas von Hirsch, *Deserved Criminal Sentences* (Hart Publishing 2017).

to be emphasized. These value judgements are about which facts are to be chosen to be evaluated, and the theorists' true intentions can be inferred from them. Facts and standards can be separated.

Some theorists say that facts and standards are interactive and are impossible to separate by principle, and therefore dogmatic theories based solely on facts is impossible. Indeed, it is possible for the line drawn between facts and standards to become unclear, and the statement that the definition of a fact can change according to standards. However, those who claim that separating the two are impossible tend to divide de lege lata and de lege feranda. They also do not deny the existence of policy-building activities. The line between facts and standards are indeed ambiguous, but there are clear differences. The same could be said for criminal jurisprudence. The border between subjectivity and objectivity is ambiguous; objectivity is influenced by subjectivity. The gravity of firing a pistol with criminal intent is objectively different from simply firing a pistol by accident, but this does not mean that subjectivity and objectivity should be discussed as a combined, single concept. Concepts that can be separated should be separated where possible. A more objective dogmatic theory should be sought after in order to avoid a Weber-like "war of the gods" situation in the field of criminal dogmatic studies.

VII. Conclusion

I have examined the features of legal dogmatics of criminal law to present answers to the various issues identified at the beginning of this paper.

I believe the most appropriate methodology is one following Ross' methodology, to separate fact finding and value judgment, and limit the duty of legal dogmatics of criminal law to the former, making the presentation of systematic and verbalized thought process of judges as primary duty of criminal law scholars. However, for determination of objectivity of legal dogmatism, rather than the simple reconciliation of theory and facts promoted by Ross, I would adopt the view taken by Stuer Lauridsen that it should be done through coordination and agreement among the peers. I also believe that limiting the subject of fact finding to the thought process of judges is a functional option at the moment.

As to the specific methods, this paper has referred to the methodology of Knud Waaben who specifically applied the view presented by Alf Ross to dogmatic of criminal law, and made certain adjustments. In sum, the code for communication among jurists involves abstract concepts and norms, and this is important to enable legal discussions. Also, as criminal

law has the function to secure freedom of activity by the public, it is important to construct and present a theoretical system using abstract norms on condition it is clarified to the point consistent judgment is possible, basically using conventional conceptual structure rather than methods such as "list of important judgment items" which tend to make the determination process vague.

Legal dogmatic studies can be said to be exceedingly academic, in the sense that it involves normative theoretical analysis unique to jurisprudence while keeping experimental science in the picture. I believe there are many legal scholars who will remain skeptical when legal dogmatic studies is deemed unscientific, and my own wish to pursue legal dogmatic studies as a science will remain unchanged. For these reasons, it is vital to remove the unscientific elements and reconstruct legal dogmatic studies that will live up to the name of science.

If, for instance, it is claimed that normative analyses are a science, the inner value judgements will achieve the name of “science” and will consequently become a very powerful influence. Of course, if those value judgements are significant and meaningful for everybody, there should not be a problem; however, needless to say, such common ideas do not exist. Some may refute that value judgements such as democracy, peace, and human rights are meaningful for anybody. Additionally, principles in criminal jurisprudence such as *nulla poena sine lege*, the culpability principle, and legal benefit protectionism may also be regarded as something of universal significance. However, value judgements of this caliber are too general and vague to become a worthy foundation for normative analyses because the value judgements themselves are open to dogmatic and there could be an infinite amount of perspectives. What if one of those perspectives were said to be the one scientific truth? The other existing perspectives will potentially be deemed unscientific and completely obliterated. Establishing just one view as the truth or the correct answer and denying all others should not be allowed in any instance.

Alternatively, what if all perspectives were considered a scientific truth? It seems plausible, but in reality there are many underlying problems. Each theory will assert its correctness and closure will be very hard to achieve. In Japan and Germany, scholars sought after their own criminal jurisprudence theory based on their own value judgements, and because of this, legal dogmatics studies became more subjective, opposition between theories became unstoppable, and discussions stalled. In countries without this sort of history, the repercussions of this stance is less visible. (In Sweden, for example, a textbook on the basic studies of criminal jurisprudence has been successfully published as an allotment-less, complete joint authorship

between Jareborg, Asp, and Ulväng, and that publication keeps a solid framework and an undeviating discussion on the system of criminal jurisprudence.[41] This is not possible to achieve in Japan and Germany, because there is always some disagreement between the authors.)

Rather, these problems should be solved by separating legal dogmatic studies from value judgments. Namely, it should be said that the theories of Sweden and Denmark (Scandinavian Legal Realism) are still large influences and retain its significance, even today.

Above attempt is literally just an attempt. I believe it is essential to conduct further examination on the issue through discussion with peers around the world. In this sense, this attempt aims to give objectivity to the dogmatic of criminal law, but it is based on the value judgment I believe to be appropriate. I would like to present these methods of study as a paradigm, but will not say that such approach is objectively and academically justifiable. My main emphasis is that it is important to plainly identify value judgments as such.

41 Petter Asp, Magnus Ulväng & Nils Jareborg, *Kriminalrättens Grunder* (2nd ed, Iustus 2018).