



Title	Contradictitious Functions of Criminal Law
Author(s)	Ohno, Masayoshi
Citation	Osaka University Law Review. 1966, 14, p. 25-34
Version Type	VoR
URL	https://hdl.handle.net/11094/10665
rights	
Note	

The University of Osaka Institutional Knowledge Archive : OUKA

<https://ir.library.osaka-u.ac.jp/>

The University of Osaka

CONTRADICTIOUS FUNCTIONS OF CRIMINAL LAW

Masayoshi OHNO*

I

Criminal law has two purposes which are in contradiction to each other. One is the purpose of safeguarding the society against crimes by means of punishing the criminal, the other is that of the security of the fundamental human rights of criminal's. These contradictious purposes should be at the same time functions of criminal law. Strange as it may sound that the criminal law which is to be the legal source for inflicting a punishment on a criminal has played a part of the safeguard of even the human rights of criminal's, it would be true. What it means is that criminal law conservatively and passively safeguard the fundamental rights of criminal's in view of the fact that no punishment will be inflicted on him without the punishment the law prescribes.

These contradictious functions in criminal law have been in existence continuously from the very time when it was born. In other words, criminal law has been destined to have these functions. Criminal law has the oldest history of all. The origin of this law began at the very time when the association called state deprived the injured party of vengence upon an offender. Under the primitive criminal law the state not only intended to defend the society against crimes, but also would often protect the life and body of criminal's from the revenge of the injured. Criminal law in itself, in short, not only stands against criminals, but protect their life and rights of person. These immanent functions opposed each other in criminal law have been not different in its weight through all ages.

The contradictious nature as the destiny of criminal law has been influenced by the ideology and the policies of state of the times. Accordingly these immanent and opposite functios have been different in its worth with the times: on one occasion the function of social defence have been laid emphasis by the spirit of the age or the policies of state, and also on the other the function of security for the human rights

* Associate Professor of Criminal Law, Osaka University

was done so.

Making a survey of history, you can hardly find the function for human rights in the criminal law of the times before modern ages. Because the criminal law of those days, generally speaking, was a political convenience and a weapon of menace against the people. You can see the legal system of France at the time of *ancien régime* as an example of such circumstances. Under very political and legal system France of those days was more miserable than any other country in Europe. Especially the legal system was extremely disordered and confused. At the end of the 17th century, the despotic government reached the top of prosperity under the reign of Louis XIV, *Le Grand Monarque*, who himself insisted on the theory of divine right of Kings. The criminal law has become an advantageous weapon of a despot and the criminal justice was quite arbitrarily at his discretion. In Germany *Constitutio Criminalis Carolina* had put in force since 1532, but there was no such synthetical code as the above here. The substantial laws of France of those times consisted of various maxims of Roman, Germanic and Canon laws which were lacking in unity. And a large number of edicts and proclamations were issued at hazard, besides, the principles of "Leges posteriores, priores contrarias abrogant" (Subsequent laws repeal prior conflicting ones) and "Generalibus specialia derogant" (Things special lessen the effect of things general) did not carry into effect at all. For that reason many laws, edicts and proclamations were competing with one another in their validity, and the local customs peculiar to each district were standing complicated. Voltaire's satire "You must obey a new law every time of a post horse's alternation" was by no means exaggeration.

The most intensive attack, however, from the French people was made on the severity of the penal system of *ancien régime*. The thinkers of enlightenment movement led the national sentiment and also criticized intensely the cruelty and the arbitrary application of punishment. The severity of the penal system, in a sense, may have been a cause of promoting a step to the Revolution.

It is well-known that the capital punishment should have been applied to the most crimes in *ancien régime*. Showing a tendency to decrease in number in the reign of Louis XVI, the previous night of the Revolution, the number of crimes suitable for the capital punishment on criminal law was over a hundred in the golden age of the despotism by Louis XIV. And yet the methods of execution were such cruel and gruesome as burning to death, breaking on the wheel, sawing in pieces, hanging and beheading. Especially the quartering by four horses as the most

gruesome way of execution would be applied to a high traitor. The mutilation, banishment and "la peine de galères" most applied in the 17th century besides the capital punishment were also extremely severe, and imprisonment and fine were very few.

In the state of the times before modern ages, the criminal law should have made much of the function of social defence for the purpose of only repressing crimes as mentioned above. The trend of thought of the 18th century, however, was the claim for enlarging a personal freedom and the fundamental human rights. For the enlightenment thought based on the rationalism affected by the Anglo-American thought of natural law had dominated the current thoughts. Taking the moment of French Revolution, at last, the political and legal safeguard of a individual freedom and the human rights against the arbitrary trample by state was firmly established. Thus the function of security for the human rights were coming to the fore, taking that opportunity. The criminal law of modern ages, therefore, was established by means of the clarification of the function for the human rights on criminal law.

II

Viewed in the light of the science of criminal law, the two functions of criminal law contradictory to each other, are often compared to the two-faced head of Janus, a Roman god. And according to Jhering (1818-1892), one of the great German jurisprudents of the 19th the century, who is known as the author of "Geist des römischen Rechts (1852-1892)" and "Der Kampf ums Recht (1872)", these opposite functions of criminal law are also likened to each blade of a two-edged sword. He further refers to the power of punishment of the State which has just been compared to a double-edged sword, "Used wrong, the sword would direct its blades against the State itself and would never fail to hurt the State as well as the criminal." (cf. Jhering, *Der Zweck im Recht*, 4 Aufl. 1904, Bd. I. S. 292). It certainly is a suggestive expression.

In modern criminal law, these opposite functions which criminal law bears as its destiny, have formed themselves into the undercurrent running through all the notions involved within the system of criminal law, and, at the same time, maintain the unmistakably remarkable and constant effects on them all. And all this is due to the fact that we can trace back the thought foundation of modern criminal law to its origin in the co-ordinate concept between the State and the individual, an

outcome of the enlightening thoughts prevalent in the 18th century. The science of modern criminal law, in fact, has been trying to liquefy these contradictious functions into a harmonious effect just in vain. Unfortunately the perfect harmony of these has not yet been attained either theoretically or practically. The realization of some ideal welfare state, involving and keeping reign over the criminal and not merely opposing him, is indeed essential for dissolving this contradiction. In the present stage, however, we can at best get a tentative satisfaction in finding out a point of compromise between the contradictious functions in the principle of *nulla poena sine lege* since Feuerbach.

III

As you know well, Paul Johann Anselm Feuerbach established, for the first time in the academic world of the science of criminal law, the principle of legality, putting up the slogan, "*Nulla poena sine lege*" in his "*Lehrbuch*" published in 1801. (cf. Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts*, 1801, S. 20). And thereby he is today admired as "Father of the science of modern criminal law."

The proposition of "*Nulla poena sine lege*" is originally a derivation from "*psychologische Zwangstheorie*" of Feuerbach as its natural conclusion. His "*psychologische Zwangstheorie*" tries to analyses the psychological causes of occurrence of a crime, and aims at the evasion of a crime through the necessary motive against it by the warning of its corresponding punishment. If we expatiate the above, it comes to this: every crime has its cause in the psychological intuition of the offender that he can obtain profit by trespassing upon other's rights, and this pleasure of obtaining profit, tied together with some aspects of human desire, prompts an offence. Consequently, when we try to prevent an offender from practicing an offence by giving him some sensuous stimulus against it, we must also check the first psychological pleasure of obtaining profit. From the view-point of the primitive instincts of a human being, the suspension of an offence through an opposite motive is naturally to be accompanied by a greater displeasure than the execution of an act of trespass. Therefore, if we, in advnace, are able to make an offender expected realize that he shall be returned through the execution of an offence with a greater displeasure than through the evasion of it, he will be led to a rather willing suspension of the violation of law, based on his psychological intuition.

In other words, the "*psychologische Zwangstheorie*" of Feuerbach advocates

that the pleasure obtained through a crime should be conquered by the displeasure suggested by its corresponding punishment, and that this displeasure must be the natural result of the punishment expected by being warned and clarified beforehand in law. And such being the case, the penal statutes should righteously be considered as in possession of the effect of psychological compulsion for preventing a crime. According to this way of reasoning, a punishment can be actual only when the psychological compulsion of law is ineffectual upon an offender expected. Thus, importance does exist, not in the execution of punishment but in the warning of punishment in the shape of law. Hence comes the reason why the "psychologische Zwangstheorie" of Feuerbach establishes, as the premise, the proposition of "Nulla poena sine lege."

IV

In the second half of the 19th century, however, "psychologische Zwangstheorie" itself became rather a shadowy existence, mainly through the diffusion of the positive way of study of a crime and a criminal. Because the theory could not survive the critical doubt as to whether the psychological compulsion by reason should be possible in such an excited state of mind where a crime might be committed. In spite of the principle of nulla poena sine lege still today being the great principle of criminal law, "psychologische Zwangstheorie" which was the very mother of the great principle, suffered such fatal criticism and lost its value in less than half a century from its birth.

The science of modern criminal law systematized by Feuerbach was tried in every possible respect by the positive way of research and was obliged to make a methodological reform on itself. The originator of the positive way of study was an Italian medical jurisprudent Cesare Lombroso (1836-1909). Under the influence of Lombroso and the Italian school with him as leader, the academic world of criminal jurisprudence through the latter half of the 19th century into the 20th century, turned its efforts to a new theme of the positive research of the cause of a crime. Accordingly, the old theory of criminal law since Feuerbach was criticized from all angles as "klassische Schule". The criticism was remarkable especially on the penal theory. You can see it in the assertion of the principle of educational penalty by "moderne Schule" in opposition to that of the principle of retributive penalty by

“klassische Schule”.

It is widely known through “Paul Johann Anselm Feuerbach” (1934) written by Radbruch that Feuerbach who was called “Father of the science of modern criminal law” was not only a great criminal jurisprudent but also a great genius with few precedents. Lombroso, the originator of “moderne Schule” was a scholar no less superior to Feuerbach. He, retaining his office as an army surgeon, gave lectures on medical jurisprudence at Pavia University as a lecturer. He took his post as professor of the above university at the age of 28, and published his study in the original theme of “Genio e follia” (A genius and a lunatic).

Lombroso made the study of a criminal and the cause of a crime in later years, and thereby he who was originally a medical jurisprudent, came to set up a new milestone in the academic world of criminal law. What motivated him to make this study had its origin in his experience in his thirties, of having been director of a mental hospital at a certain town of Pesaro which had been noted for the existence of a big prison. There he learned to take interest in the psychological examination into criminals. When he was examining the executed corpse of a criminal of robbery, one day in December of the year of his start for the new post as director of the hospital, he chanced upon a punctum in the skull of the corpse, which was thought to be one of the diagnoses peculiar to an animal. This punctum was said not to be found in the cranium of an ordinary man but to be found only in those of animals from an ape and downward. Getting a hint from these facts, he hypothesized boldly on a criminal and then further on the cause of a crime. According to him, some criminals are born with some animal feature or other in their physical structure, and consequently a certain percent of criminals are destined to be such. He concluded that these animal features must be products of what we call atavism. Those theories which underlie his study of a criminal are “atavismo” and “tipo delinquente” (cf. Lombroso, *L'uomo delinquente in rapporto all'antropologia, alla giurisprudenza ed alle discipline carcerarie*, 1876; 5th ed. 1896-1897). The former is as I mentioned before, and the latter is a hypothesis which classifies criminals into six types with “delinquento nato” as its centre.

In short, Lombroso, under the influence of positivism of Comte and Darwin, and with his positive way of study, laid the theoretical foundation of the study of a criminal and the cause of a crime. It is quite clear that the promotion of the Industrial Revolution in the end of the 18th century by the successive invention of machinery, enabled the positive attitude in the world of natural science to be rated

all the more higher. Lombroso's achievement in social science, of establishing criminology, could be considered as one of the products of the times, though he was only a natural scientist who was under the influence of this spirit of the age. For it was owing mainly to the fact that his theory was of such a character as quite favourable to capitalism which was rapidly coming to the fore, that his theory could find so much acceptance with the society of the 19th century. It necessarily follows from his theory that even when a crime under the pressure of poverty occurred as an inevitable result of the ever-widening gulf between rich and poor in the progressive stage of capitalism, capitalism itself had to bear no responsibility for the cause of the crime. This was the very cause of his theory being so much emphasized in the 19th century. But today when, statistically speaking, it is beyond doubt that the rise in the prices of corn incurs the ascending trend of the criminal index of theft, you can not accept Lombroso's theory just as it is, without taking into consideration its background coloured by the times.

V

In the latter half of the 19th century, the State grew into the period of capitalistic prosperity, and on that account, the State which had been grasped in opposition to the individual came to be looked upon as an organism containing individuals inside. The improvement theory came into the limelight to take the place of the revolution theory. Reflecting these requirements of the times, the function of criminal law was led to regard the protection of society against criminals as most important. At that time, the most eminent disputant of "moderne Schule" next to Lombroso was Franz v. Liszt (1811-1886), a German criminal jurisprudent, who laid stress on the importance of social policy especially in the aspect of criminal policy, and he also classified criminals into three types: namely "die Unverbesserlichen", "die Besserungsbedürftigen" and "Gelegenheitsverbrecher" are those. And he proposed that "Gelegenheitsverbrecher" should be provided with a mere warning menace, and that "die Besserungsbedürftigen" or a kind of habitual criminal requiring improvement, should be provided with some proper improvement for him to be able to return to society, and then that "die Unverbesserlichen" should be excluded from society (cf. Liszt, Strafrechtliche Aufsätze und Vorträge, 1905, Bd. I, S. 167 ff). Reflecting the declining social situation through the end of the 19th century into the 20th century, there was a sudden increase in number to be seen of recidivists and crimes

caused through evils of capitalism. In coping with these crimes, Liszt, taking account of biological positivism of Lombroso, closed that penalties should be determined not so much according to the relative gravity of crimes as according to the characters of criminals and that it should be more rational than otherwise. But to follow this way of thinking will quite naturally lead you to the conclusion that a judge must determine a penalty with a sort of indeterminate substance of the character of a criminal as the only criterion, and that consequently, the discretion of a judge must be admitted very sharply. As a natural course of event, it almost goes without saying that the personal rights of a criminal may be threatened of their existence. And yet, Liszt. on the other side of such assertion, adovocated that penal code was a Magna Carta for a criminal and emphasized the protection of the fundamental human rights of a criminal. In other words, he insisted, in the category of criminal policy, on the righteousness and necessity of the correction of the inner personality of an offender, but in the theory of criminal law, he tried to construct a theoretical structure as much objectivized as possible. He equally laid stress on both sides of criminal law, that is, the function as a Magna Carta for a criminal and the function of social defense, and thus he succeeded in maintaining such apparently contradictory profiles as Liszt, a theorist of criminal law and Liszt, a criminal politician.

VI

The assertion of "moderne Schule" advocated by Lombroso and Liszt among others, brings you to the inevitable admittance of a sharp amendment on the principle of nulla poena sine lege which is devoted to the protection of human rights. Because the assertion of "moderne Schule" is mostly for making much of the function of social defense among the contradictious functions of criminal law.

The idea of the State cherished by "klassische Schule" which regards the principle of nulla poena sine lege as the fundamental principle of criminal law is as follow: namely, the State is a collective body of individuals and nothing more than a means to protect the fundamental human rights of an individual. And accordingly, the rights of an individual can secured only when the degree of the interference of the State with an individual is reduced to the minimum and the freedom of an individual is admitted to the maximum. The thought on which this point of view

is based is the theory of social contract maintained by Rousseau or Beccaria. On the other hand, in the theory of criminal law of "moderne Schule", the State is not a mere collective body of individuals but an organized unity. And therefore, the State is not for individuals but what is regarded most is the existence of the State itself and naturally the function of criminal law as well is concentrated upon social defense.

From the historical point of view, the vicissitude of criminal law was shift from the law of crime to the law of punishment. And criminal law in the future will be the law of prevention against crimes or the law of social defense. To establish the law of prevention against crimes, however, the opposite functions of criminal law must be sublated and unified through the realization of the cultural welfare-state. Any state actually existing has not yet approved of the establishment of criminal law in the character of the law of social defense. Naturally criminal law still remains in the stage of the law of punishment. Based on the principle of *nulla poena sine lege* which had been the expression in the field of criminal law, of "Rechtsstaatsgedanke" which had been one of the products of French Revolution, the function of security of human rights was established antagonistically to another function of criminal law. As I mentioned before, modern criminal law came into being through the clarification of the function of security of human rights, of criminal law. Today when no real welfare-state is yet to be seen, the significance of the existence of the principle of *nulla poena sine lege* is still great.

VII

In our country, the ex-criminal code which was proclaimed in 1880, was modeled on Code pénal of 1810 and was under the control of the thought of "klassische Schule". The ex-criminal code is said to have been brought into existence in the midst of a storm. For there were loud cries for a reform of the law already at the time of its birth. The ex-criminal code which had attached much importance to the principle of *nulla poena sine lege*, came to naught within a little more than a quarter of a century, only to be taken the place by the criminal law which is existing, on the 24th of April, 1907.

The ex-criminal code consists of 430 clauses, while the existing code consists of only 264 clauses. This smallness in the number of clause naturally allows a judge to

exercise discretion to a high degree. You can find a proper example in the clause of murder. Article 199 of criminal law provides: A person who kills another shall be punished with death or imprisonment at forced labor for life or for not less than three years. In determining a penalty a murderer, a judge can choose any piece of penalty from among all the punishments imaginable between death penalty and imprisonment for three years. And yet he can sentence three years' imprisonment with a suspended execution. That is to say, a judge has the right of discretion as to whether a murderer should be sent to the scaffold or should be immune even from imprisonment. Our existing criminal code may be thought to be making more of the function of social defense than that of any country else.

We owe the birth of the existing code largely to the representative criminal jurisprudents of the Meiji era. You can also trace the birth of the existing code up to the great influence they received through the study of "criminology" of Liszt, a German jurisprudent. There were so many prominent scholars cultivated at the seminar of Liszt, and among them were the late doctor Asataro Okada of Tokyo University and the late doctor Kanzaburo Katsumoto of Kyoto University, who were the first Japanese disciples. And after them was Dr. Eiichi Makino, emeritus professor of Tokyo University, who is too well known as a disciple of Liszt.

In Japan where we had the draft code of criminal law published already in 1961, the full-scale reformation of criminal law will be made within a few years. In view of this present situation, a study of the contradictory functions of criminal law might not necessarily be without meaning, I sincerely hope.