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MONISM AND DUALISM ON THEORY OF PENALTY

— Punishment or Protective treatment? —

By HARUO TAKIKAWA

1. Introduction of particular preventive theory into general preventive theory.

Penal theories are into classified absolute, relative and compromised one by means of usual method. The relative theory starts from the end of punishment, ^{*Allfeld, Lehrbuch des Deutschen Strafrechts (1922) S. 7.} and the goal of which is that the penalty will be conformed to its end more or less in future. This standpoint constitutes the general and particular preventive theory. We can call it the theory of the teleological execution of sentence, because the subject relies upon the execution of punishment or protective treatment in the execution of the punishment to be condemned.

A thought of nemesis and retributive, intimidating idea concerning the penalty of Anselm Feuerbach's (1775-1883), a German thinker of legal state, governed criminal law for about a century. The retributive punishment appraised the value of an offence by its responsibility, gave the distinct measure concerning the decision of penalty. Consequently, the retributive punishment should be indicated as legal penalty. It must be far more distinct measure as compared with that an offender's personality which is more apt to get into danger of mistake should be object of the appraisal in the punishment for reform (education) or the protective punishment. In view of the theory of this punishment, moreover, conduct and responsibility are to be opposed to the first reaction of punishment, it's not recognized the selection of particular method of treatment in the punishment for reform (education). Accordingly the penal law of the retributive and intimidating penalty is useful for the preservation of legal stability against the abuse of governor's authority. ^{*Radbruch, Einführung in die Rechtswissenschaft 7. u. 8. Aufl.} The state demonstrates her authority to her nations, at the same time she settles the legal

delimitation for the profits of her nations. This is the value of the penal law by responsibility. By this we mean the victory of the general preventive theory, a duty of which is to determine the punishment in general viewpoint. By the above reasons Feuerbach's confession that the psychological enforcement operation by means of the penal entimidation would make the people at large keep a crime away has been respected for many years as what was able to solve effectively the problems which involve many objections concerning the end of penalty.

To indicate a certain punishment against a certain offense—retributive penalty—doesn't bear upon offenders' individual natures. The proportional form of penal enforcement doesn't, therefore, always complete the particular preventive effect of penalty, and is not able to solve the problem to make an offender keep a peril of crime away again in future, clearly. The criticisms against the traditional penal law system—retributive penalty—were started by the Penal Demonstrative School.

We can find the sign of an anti-social predisposition and an influence of circumstances in an offence. As for the advocates of particular preventive theory, the violation of law is an obstruction in the interior of social life. * Nagler, Verbrechensprophylaxe und Strafrecht (1911) S. 200. And yet, if such obstruction occurs in fact, the cause of which should be excluded by means of improvement. After all, the particular preventive direction requires the reform expedients and the protective treatments to which offenders' peculiarities are suited, contrary to the general prevention that I have said before. Hereupon it has gone to be insisted that the penalty by responsibility (Schuldstrafe) of old should hand its standing over the character penalty (Gesinnungsstrafe). The opinion which allows of the individual treatments of offenders takes its rise from Lombroso's theory. Lombroso and Vargha guaranteed the protective punishment, Roder and Steltzer required the punishment for reform. And they said that cruel punishment may be ineffective for the purpose of making an offender come back the world again. All such thinking methods as Lombroso stood against the retributive penal theory. They stimulated the peculiar method of punishment, which is suited to the offender's diseased disposition. The offender's credit which he bought an offense is found in himself. These theories were advocated vigor-

ously by Liszt and Ferri. Liszt was one of the advocates of the character penalty in the penal theory. He insisted that the punishment should be taken into account according to the extent of the offender's character to be expressed, *v. Liszt, *Strafrechtliche Aufsätze und Vorträge* (1905) II S. 383. that is, it's required the intimidation for the chance criminals, the return by correction to the world for ones who are able to reform and the isolation from the society for ones who are unable to reform in the habitual criminals. Ferri made efforts to let reform and peace relate mutually, and let the chastisements bear upon them. The protective treatment is significant in case of the impracticability of reform. After all, the reform treatment is to be applied to the law violators who have the social jeopardy, and when it was clear that the treatment had no capacity to make violators be correct, the protective treatment should be applied to them.

Thus, after the particular preventive tendency appeared an offender has gone to be treated in consideration of the peculiar request which was brought by the offender's individual personality. We know that a structure with two props which are the penalty system and the protection system is about to build now. *Exner, *Die Theorie der Sicherungsmittel* Vorwort (1914). The tendency of adopting the protective treatment besides the punishment has been found in the penal law draft of all countries. On the one hand, the traditional penalty and the punishment by responsibility are recognized. On the other hand, the protective and reform treatment against ones who are in danger committing the second offense are recognized besides the punishment, which are going to be thought within the category of penal code. This is what is called the Dualism of penal law today.

2. Social grounds and ideas of prevention.

As to a question concerning the two subjects which are the punishment and the protective treatment, we must examine that they should be adopted either monistically or dualistically. The expression which is Monism or Dualism is able to be replaced with that which is combination or separation. That is, we must apprehend both punishment and protective treatment either in the shape of the active combination, or in the shape of the negative separation. The criticism, comparison between the two will be unable to be comprehend without thinking of national or social agencies, direc-

tions of study, peculiar conditions of historical development. The following is what I examined concerning these problems.

Can we find the threatening penal law by the retributive intimidating idea I have said before in any state form? It is found in the state form of national freedom which is the combined state form of the bureaucratism and the legalism. The state demonstrates her authority to her nations, at the same time she settles the legal delimitation for the profits of her nations. The opinion of penalty has changed by moving the form from the liberal and national bureaucratic state to the social-national state. The thoughts of social protection, punishment for reform (education), preventive treatment have come up to the surface in place of the retributive intimidating ideas: and in the reform movement of penal code the advocates of the former were recognized widely by the ones of the latter. Accordingly, the old fighting of the reformative (educational), terrorizing purposes against the retributive, intimidating ones of old has been in the past essentially today. At present, the retribution as the unique object of punishment retreating, the retribution as the legal penalty, the retribution in the fabric of legal state, and the retribution as the penal foundation and the penal restriction lie in front of the dispute with the reformative (educational) and preventive penal law. Because the reformative (educational) and preventive penal law should necessarily allow larger discretion than the retributive and intimidating penal law does, in deciding the personal conditions or selecting the way of penal treatment. Therefore, between the guarantee of the strict legal stability in criminal justice and the criminal judge's large discretion, or between the legal state in usual sense and the wellbeing state, the cultural state, the disputations in the criminal policy are going on. ^{* Radbruch, a. a. O. SS. 104. 105.} But it is the fighting on the present social ground. The problem won't be able to be settled by only this dispute which approves of the actual state form. The fundamental rule of criminal law will be decided justly by only the solution of the social ground, the relation of which to the legal system.

The all punitive forms as the retribution against crime, from the expression of the simple "lex talionis" to the modern metaphysical expression which is accurately constituted, are the reflection of the equivalent relation in the goods exchange. Accordingly, unless we

recognize the difference of forms between punishment and retribution which is based on the production forms of each time, we shall be unable to apprehend the opposition of the fundamental rules in criminal law. From the unequal retribution in the feudalistic society to the formal equality in the modern society. And the transition from the industrial capitalism to the monopolistic capitalism resulted in the generalization of the production by the special economical supports. The transition has influence on that of the legal forms. The effort restraining from the increase in the crime by means of the conscious, systematic fighting against the crime is found in the criminal law. The proportional form of the old penal enforcement collapsing, the powers of the court are extended, and the social defensive treatment appears as the new penal enforcement. The Durlism—the punishment and the social defensive treatment (or the protective treatment)—is brought forth. Hereupon the standard of the punishment does not depend upon the gravity of the offense, but upon the offender's character and the extent of his dangerous character. This idea does not restrict to "liberty" and "equality" for the purpose of the mightiness and the defence of the legal system of the state. This is the form which "an effort for the government in stead of an effort for the liberty" reflects on the legal form. (This was found in Nazi-Germany, Fascist-Italy and our country before the defeat.)

3. Separation of punishment from protective treatment.

The punishment and the protective treatment (or the social defensive treatment) have appeared as the necessary requisition, as is stated above. So, we should examine how to apprehend and organize the two. But the natures of the two are not identical. Originally, after an illegal attitude the unlawful result responding to it is brought forth. There is the violation of the obligation which is subjective, that is the responsibility, as the premise of the unlawful result. The representatives of the general preventive thought refuse to confound the responsible punishment with the protective treatment against the dangerous character. As for them, the punishment is a moral, sensible reaction. On the one hand monism that is the harm of the pain (punishment) based on the thought of the responsibility, on the other hand monism that is the plan to be thought as the necessary result by the teleological consideration,

the reaction cannot maintain both of them at all. The punishment and the protective treatment starting from the different foundation, the two are to be separated.

On the contrary, the people that recognizes the active relation of the two maintain as follows. "Observing from the direction of the social object to defend and put down crimes, the punishment and the protective treatment are the same, and as both of them belong the category of the penal law, the two should not be separated". *cf. Dr. Yasuhira Masakichi, Theory of protective treatment. P. 423. Because this opinion may be recognized as the treatment corresponding to the necessity in fact, the direction of the penal reform in the West European countries up to date is towards such. (We can find it in the following of the 15th chap. of the our Provisional Draft.)

Indeed, we think that the dual punishment—the punishment and the protective treatment—is curious. It is contradictory that the punishments started from the different foundations are combined each other. It is to be hoped that the two should be separated, and the protective treatment should be provided by special law. It is dangerous on the protection of the human rights to recognize in the category of the penal code the punishment on the one side, and the protective treatment which is effective by allowing the wide discretion necessarily in practice on the other side. And yet, the protective treatment to be within the limitation of the principle of "Nulla poena sine lege" is impossible to be successful in the particular prevention. Does it, after all, may be impossible to attain the original purpose of that sufficiently? We must not pass over the peculiar forms of law of the day in the dualism that is organized the administrative or medical treatment in the penal code.

So we should turn our sights to the conciliatory solution of the dualism in the category of the penal code. The final direction of the solution is replacing the punishment with the reformative (educational) or protective treatment. It will be the code without penalty—the road to Monism from Dualism.

4. Criticism against present Monism and its conclusion.

In 1921 the draft of the Italian penal law (Progetto preliminare di codice penale Italiano/Libro I/) was announced as the material-

ization of the request of Monism by Ferri. It was the penal code without punishment. The substance was the mere sanctions (Le snzioni), that is, only the protective treatment. Ferri was able to give the prosperity to the result of the criminal policy which had been obtained by the new ideal, as "the fresh spirit" of the Italian penal law. He let the principle thought much of the dangerous character win a victory by means of adopting the prescript that negated the responsibility. It was "the penal code without penalty and responsibility"; in consequence, the substance was crime and criminal standard. It provided the malignancy and distinguished between habitual criminal, criminal by mental disorder and juvenile criminal. Releasing from the expiation idea against the old moral responsibility, the nature of the criminal sanctions was loaded for in the effectual means of sanctions in the viewpoint of the social prevention in it. But this draft did not come into effect, because it was overborne by the Rocco plan of 1927 which was taken effect in 1930. The plan of 1927 was based upon the theory of responsibility. Because of the changed political influences, the dictatorial system was constituted in the state of Italy. "Fascismo" insisted on the national foundation of the state. Upon which, the requisition to the penal code was brought forth. The draft of 1927 was a copy of "1921—progetto Ferri" in some portion, and though it provided for more than nine protective treatments not to be the free deprivation, it was distinctly the retributive penal law. Nay, it expressed the thought of the threat on the retributive idea in some portion with the clear coolness. The draft of 1921 that was the special penal law applied in socialistic society cannot have been applied in the state of capitalism.

The draft was not materialized, as I have said before. But it was in the Soviet Russian penal law that the same ideal as that of the draft was realized. The law-making purpose of the Soviet Russian penal law lay in the preservation of the socialistic state and protecting the state order from the dangerous offence to infringe the law in general. This law adopting so many special treatments had the inclination to realize the general or the particular preventive idea. Penal form was abolished, the social preventive treatment was adopted in it. Its object was not the retributive punishment accompanied with agony, but the prevention of a second offence

and to make a violator of the order be applicable to the community founded on labours. And the principle of "Nulla poena sine lege" was broken in application of the treatment.

Radbruch's criticism against the two law-making projects was as follows. ^{*Radbruch, a. a. O. S. 114.} These projects shown that the time was too premature to abolish punishments. Both of them removed the term of punishment, for the purpose of adopting the penal treatment again, by the name of sanction."

Setting aside the Ferri draft, at present Soviet Russia is the state of the proletarian dictatorship and is different from the usual state of capitalism. Then the legal forms are also different between them. But "the bourgeois conscious form would not be excluded by only the ideal critique because it was formed as the unique whole connected with material relations." ^{*Paschukanis, Allgemeine Rechtslehre und Marxismus S. 169.}

"On account of giving effect to the criminal policy which had a disregard for the concept of responsibility, it would not be enough only to insist on the prejudice of responsibility. As far as the forms bringing forth from which continue to have influence on the society, the following irrational idea will be leading and current in its power and in its actual bearing: the practice of justice in the viewpoint not to be legal. It is, after all, the irrational idea that the weight of each crime is to be weighed in the balance and is to be expressed by the term of imprisonment". ^{*a. a. O. SS. 167. 170.} So, "The natures of things are not changed by the change of terms." ^{*a. a. O. S. 170.} And Paschukanis insisted that the essential problem concerning penalty would not be solved by means of replacing the term of punishment with the term of the judicial—correctional social preventive treatment. It was pointed out that the social preventive treatment of Soviet Russia was not the pure treatment, but connoted the proportional form of the retributive punishment. This is the reason why the Soviet preventive treatment was "the counterfeit of the trade mark": what was stucked the different label in spite of keeping the contents of the punishment. ^{*Radbruch, a. a. O. S. 114 ff.}

Although it is now said that the protective treatment should be replaced by the punishment already, it may be in danger of applying itself penally. It is required that the distinction between the protective treatment and the punishment, for the purpose of keeping

the true meaning of the treatment, avoiding that the treatment becomes the punishment owing to the undue application.

To be brief, my conclusions of the problem concerning either combination or separation of "punishment and protective treatment" are as follows. At the present stage the true meaning of the treatment is able to be kept in only the direction of separation. But, if the separation is performed within the penal code, it will be meaningless. Because, (a) the nature of the penal means system is different from that of the protective means system, which does not belong the peculiar category of penal law; (b) we don't know if the particular prevention will take effect; (c) and yet, we shall have to allow the large discretion in the penal code for the particular preventive effect. But the indefinit goal of the development of penal law is towards the monism of the true protective treatment. In the society in which the social equality is perfectly realized, in the humanistic and the peaceful society, the monistic road towards the protective treatment to be full of the philosophic social consideration will be opened out. The penal code without punishment: it is not the improvement of penal law, but the replacement of penal law with what is better.