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JUDGES AND REGULATION UNDER THE GERMAN CRIMINAL CODE PRIOR TO THE PERIOD OF ENLIGHTENMENT

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INTRODUCTION

I am expected to contribute my humble treatise entitled "Restraint of Judge for the criminal law" to the collection of treatises commemorating the sixty-first birthday of Professor Takigawa, President of Kyoto University; however, due to the limited space assigned to me, I am obliged to reluctantly give up the part pertaining to the condition of German Criminal Code prior to the Period of Enlightenment. Demand in the contemporary criminal code of the socalled "Restraint of Judge on Criminal Code" is, of course, a product of the enlightening thought and, on that interpretation, the conditions of criminal jurisdiction prior to the period of Enlightenment is not necessarily important; however, it is not without significance to glance briefly over the thought on enlightening criminal law as a means to grasp it as a historical facts. Hence, I have take up the pen to supplement the above mentioned treatise obliging a little space in the "Handai Hogaku", the periodical on jurisprudence of Osaka University. I wish to add that this article has been based chiefly on the treatise: "Die Analogie im Strafrecht in ihrer geschichtlichen Entwicklung und heutigen Bedeutung" by Joachim Schem.

TEXT

It is not exaggerating to say that the thought of restrraining judges under laws and regulations has generated from the enlightening thought. However, it does not mean that the expression of this thought was not

found in the criminal judicature prior to the period of Enlightenment. Positively, there is an evidence, as Mommsen has pointed out, to consider the principle of "Nullum crimen, mulla poena sine lege," as had existed in the Roman Laws. There was a time when the inquisitional trial veered to the accusatorial trial, the essential factors of crime were established and other than the act decreed as offense was not punished. Nevertheless, it was a phenomenon seen only at the inquisitional courts, but at the people's courts, which exists side by side with the inquisitional courts, analogy was at will; further, the restoration policy of Augustus had abolished the realization of Nullum crimen, nulla poena sine lege that once existed. In other words, even in the Roman Laws, which were highly individualistic, the principle of legalizing offenses and punishment and the principle of abolishing analogy were ignorant of the cruel antagonism between the people and the state…which was their idealogical premises…and consequently, restraint of judges by the laws and regulations, which was instinctly demanded, was in want of idealogical ground which support it. * Schem, a.a.O. S. 18–23

* Mommsen, Römisches Strafrecht in Bindings systematisches Handbuch der deutschen Rechtswissenschaft 1899. S. 57

This condition was true also in Germany. Punishment in ancient Germany was purely Privatstrafe and the initiative in punishment was taken by the victim and his kinsfolk. Influenced by the thought of Christinity, it transformed itself into the system of penalty. It was here that the concept of public punishment had taken the initial step. The development of the concept of public punishment emarged out of the one aspect of penalty and divided itself into bodily punishment and dishonoring punishment but their choice was still left in the hands of the victims. However, the concept of public punishment gave impetus to realization of sociality of crimes. At this period, crime was recognized as disturbance of peace and a system was created in which it was divided into two categories of light and heavy; and the punishment for the light category of disturbance of peace was left with the victim and of the heavy disturbance was punished by a cooperative organization itself by which the offender was expelled out of the jurisdiction. What constituted peace disturbance and on what criterion they would be classified

into light and heavy categories hinged upon the custom of the German race. The disorderly punitive measures of the German race of this time was an expression of national disunity of the race. * Schem, a.a.O. S. 23–24

The centralization of power in the Kingdon Frank gave a unification to this disorder. Offenses previously thought to be disturbance of peace were now interpreted as the disturbance of peace of the King. The power of punishment became a personal power of the King; and the strengthening of the King's power and the transformation of punishment into public punishment had resulted in the discretional disposition of the King without relying upon any punitive regulations. Consequently, abolition of analogy by judges or the principle of the statutory punishments had no room to exist in the ancient Germany and in the Kingdon Frank. * Schem. a. a. O. S. 25–26

The weakening of the Kingdom Frank gave rise to a wide application of Landesrecht which existed only as a form of common law. As the result the unification of law of German states was completely defeated. An effort to remedy this disorder in criminal jurisprudence appeared in the edition of Sachsenspiegel, Schwabenspiegel, but it failed without taking any statutory shape. Trust of the people toward the courts was completely lost and the act of self-help became the sole means of creating laws. However, the effort to remedy this condition was continued. Unification of laws and verdicts are the supreme value for the living under laws. It may well be said that it might simply be an instinctive desire rather than a rational demand. However, the effort to fulfill it finally led to the enactment of the Carolina criminal Code in 1532. The Carolina Criminal Code at that time was a very progressive stature. The criminal Code of France and of Italy were far from comparison with it. For example, it went so far as to include self-defense, attempt, complicity, capability of responsibility, and others. * Dr. Takigawa, Lectures on Criminal Law, p. 68 Especially worthy of note is the fact that in its article 104 and 105, it specified how to decide in cases for which the law had not provided. * Schem, a.a.O. S. 28 These provisons were almost literally reproduced in the article 125 and 126 of Banbergensis of 1507 which became the model of the Carolina Criminal Code. * Schem, a.a.O. S. 29 Its con-

tents regulate that, since the judges at the lower courts of that time were lagging behind the judges of the higher courts in their degree of scholaristic attainment, sentences based on common laws and analogy by the lower courts were forbidden for the purpose of preventing misjudgement and in case of necessity they were to previously obtain instructions from the Privy Council (Kaiserliche Raten) and to judge exactly as they were instructed. * Constitutio Criminalis Carolina. § 104 * Constitutio Criminalis Carolina. § 106. It's a common opinion. Bar, Handbuch des deutschen Strafrechts. Bd. I. S.123; Binding, Handbuch des Strafrects. Bd I. S. 19; Schottländer, Geschichtliche Entwicklung des Satzes nulla poena sin lege. S. 37; Schem, a.a.O.S. 27-29. This, of course, was a regulation that existed for the purpose of preventing indulgence by judges. But this cannot be constructed as abolishing punishment based on common laws and analogy. Interpreting from the conception of law in Germany at that time, these punishments were considered as a matter of course; and it was merely an instinct desire to check the abuse of them.

Progressive criminal code for that period, yet the Carclina Criminal Code was a perfect expression of punitive system of the Medieval Period. Consequently, its cruel characteristics were destined to be expelled by the desire of humanitarialism that was gradually being elevated. Judges wished for punishment which was in line with the sentiment of justice. And it was during this period that bodily punishment (Freiheitsstrafe) made appearance. However, this punishment was applied only when the crimes not specified in the Carolina Criminal Code had become an issue. It was because of the fact that the crimes stipulated in the Carolina Criminal Code had to be relied also on the punishment by the same law. To avoid cruelty of the Carolina Criminal Code, it was of necessity that a new concept of crime had to be sought out and to bring about a result of ignoring the law. And finally, the standard of punishment became lacking and the discretion of the judges dominated the criminal judicature. Furthermore, the criminology of this period had underwritten this tendency of practical procedure. Carpzow, the forerunner of this thought, contended that, even in the case for which the punitive quality of an act was not specified in the law, punishment must be inflicted if such act was considered punishable. In that event, it was not even necessary that the act considered punish-

able did not bear similarity to the conditions specified by the law. In other words, what the theory contended not only allowed the judges a room for analogous interpretations but also made it possible for an entirely new types of crime to be established. The only restraint on the part of judges was to be fair and believe in God ..." fidem, aeguitatem et religionem, "···and take into consideration the practical circumstances. The law and ordinances retrogressed and the practical procedure had severed all restraints. In case of administration of justice, a complete discretion had governed. Furthermore, with the addition of interference by the lords, it can be said that the administration of justice in Germany in the middle of the 18th Century was in the extreme disorder.

* Schem, a.a.O. S. 45-46; cf. Hippel, Deutsches Strafrecht Bd I. S. 236 Anm. 12

In Germany, where the unification of the states was delayed chiefly by the War of Thirty years, the peculialities of feudalistic cast state which reflected the medieval urban economy was remnant while in England the Industrial Revolution was already under way, and the aristocratic nation remained as the chief body of political and economic power resting upon the Medieval financial organization. Furthermore this aristocratic nation had turned into a police state that suppressed the individualism which opposed to the Mercantilism and the movement for liberalism. Consequently, the enactment of law in German states after the Carolina Criminal Code, unlike in the past, changed hands from the courts to the aristocrats and, inheriting the cruelty of the Carolina Criminal Code, it resulted in lacking the system and brightness. The Prussian Criminal Code of 1721, the Bayern Criminal Code of 1741, and the Austrian Criminal Code of 1768 are the examples of it. However, these statutes originated out of the effort to bring about an orderly judicial administration in the German states and, moreover, it was based upon the demand of that period. But its purpose was not accomplished. It was not only due to the fact that these statute lacked unified and theoretical constitution but it had the diametically opposite contents to the then gradually emerging new thought; the concept of a state and of criminal code based on the theory of natural law and the idea of enlightenment.

The influence of the theory of natural law and the enlightening thought on the criminal code prior to the French Revolution was slow. The metaphysical philosophy of enlightenment was not of the type immediately gaved a marked influence upon legislature and theory of law, nor offered the sole idiological ground. However, it can not be denied that it bore a great significance in revising the criminal codes in the latter half of the 18th Century, and "The Spirit of Law" by Montesquieu (1748) and "Crime and Punishment" by Beccaria (1764) had greatly influenced the Criminal Code of Germany which was promulgated in the yet ancient form. Allgemines Gesetz über Verbrechen und derselben Bestrafung of Austria of 1787 and Preussische allgemine Landesrecht of 1794 were laws that appeared under these circumstances. Consequently, the thought of independence of three powers of state and the thought of "Recht ist Gesetz" based on the contract theory of state were greatly reflected in these two codes; and the first article of the first section of Austrian Code regulated as "all acts of violation of law is not the so-called criminal offense but only the acts which are proclaimed as crime by the criminal code in enforcement at present, are considered criminal offenses and treated as such"; in Article 12, section 1 is regulated "Judges are held to consider the law literally where the magnitude and appropriateness of punishment are sufficiently clearly regulated concerning a crime stipulated in the code"; and the item 20 of the 2nd paragraph of Article 9 of the Prussian Code regulated as "act or omission of act but forbidden by the code, even if such has actually inflicted damage to the others, cannot be regarded as the essential offence." These regulations are the historically first proclamation of forbidding analogy which had not been purely expressed in Magna Carta nor in the declaration of human rights in America, and it can well be said that the theory of criminal code of Montesquieu had for the first time bore the fruit. The theory of forbidding analogy, especially the demand for abolishing analogy which became the basis of punishment, had rapidly spread in the cultural sphere of entire Europe. However, for this demand to become a basic human right and to be elevated to the constitutional principle as a liberal right of people which no one could derive, it had to

wait for the French Revolution. In other words, with the declaration of human rights in France in 1789, the Progress of principle of abolishing analogy had finished, the progress of liberal criminal law following the 19th Century, in fact, was the radiation of this revolutionary thought.

* Schem, a.a. O. S. 44-49; Hennings, Entstehungsgeschichte des Satzes "nulla poena sine lege." S. 81 ff.

The so-called liberal criminal law originated from the conflict between the state and the people, however, on the point of restraining judges on the criminal code, it surpassed this conflict. Then in early part of the 20th Century, the movement for liberal laws ignited by a pamphlet entitled "Battle for Jurisprudence" by Helman Kantrowitz under the influence of the new evaluation theory of the Kanto school, inflamed as the theory of "Teleologishe Begriffsbildung im Strafrecht" and the laws were pulled down from the throne of criminal jurisprudence to be replaced in its place by the purpose of law. The restraint of judges on the law had become the restraint of object of law, that is, on legal benefit (Rechtsgut), and the formal logic that controlled the criminal jurisprudence had to be replaced by the logic of evaluation. However, so long as this theory of objective conception had also sought legal benefit in the law, it had not made a problem of introducing actual legal evaluation into the constituents of the legal general conception and, within this scope, it can be said that it had not destroyed the demand for liberalism of criminal code. * H. Krüger, Rechtsgedanke und Rechtstechnik liberalen Strafrecht. Z. St. W. Bd 54 S. 640 ff Consequently, excluding one period during which the political circumstance in which monopolistic capitalism filled the stronghold of Facism cried for the liberation of judges by defeating the demand of liberalism which existed since the Enlightenment Fra, the demand for legalized punishment alone was maintained regardless of the fact that the each theories of criminal law since the Enlightenment Era varied on legal concept. It held the central position in the theory of criminal code as the natural consequence of conception of law (as the expression of legal evaluation) and in the other, as the political necessity which preceded its legal valuation.

My treatise on "Restraint of Judges on the Criminal Cod," was purported to clarify these circumstances in connection with the various legal thoughts and this article is its supplement.