

## Отражение и реконструкция теоретической системы уголовного права в эпоху глобализации (часть I) Reflection and Reconstruction of the Criminal Law Theoretical System in the Age of Globalization<sup>1</sup> (Part I)

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**Аннотация.** Современная теоретическая система уголовного права имеет ярко выраженные элементы из прошлого и исторические ограничения. Наступление эпохи глобализации влечет за собой осмысление прошлого и ожидание будущего в соответствии с историческими миссиями и духом новой эры, стремление к единству, основанному на реальности и устремлении в будущее, всестороннее реформирование и обновление уголовного права (теории) с целью установления новой системы уголовного права (теории) в эпоху глобализации.

**Ключевые слова:** глобализация, теория уголовного права, рефлексия, реконструкция

**Abstract.** The current criminal law theoretical system is the product of the modern time, with a sharp-cut mark of the past time and historical limitations. The coming of the age of globalization entails reflecting the past and expecting the future conforming to the historic missions and the spirit of new era, adhering to the unification of basing ourselves upon the reality and having future in our minds, reforming and innovating the criminal law (theory) all-side so as to establish a new system of criminal law (theory) in the age of globalization.

**Keywords:** Globalization; criminal law theory; reflection; reconstruction

### Standing at the new converging point of time and space

A new great historical age has come, which is a new start of the development of the mankind and human society and is also a new start for the development of criminal law and criminal law science. We must make reflective thinking of the past at this turning point and look forward to the future scientifically and we must restructure the criminal law (theory) and its system to boost the development of the criminal law science to the right direction.

We are making reflective thinking and reconstruction of the criminal law (theory) at a new space-time meeting point when we start a great epoch in the human history and space and where we are on the top overseeing the world for which it has three principal features: making reflective thinking of the past and looking forward to the future by taking a leading position during historical development; making synthetic study of the global criminal law theories by standing on the top overseeing the whole world; embodying the historical missions and time spirit of the globalization age.

<sup>1</sup> Эта статья опубликована в память профессора Хэ Бинсуна (род. в 1932 г.).

The present criminal law (theory) and its system are products of former ages, namely modern time, thus it has distinct historical brand or mark and limitation, and we must make reflective thinking of the past and look forward to the future in accordance with our historical missions in the globalization age, and we must reexamine the former theories, unify the reality and future and reform and innovate the criminal law (theory) comprehensively from the angle of strategic layout.

The strategic layout refers first to the global one, and as to a nation, it has a domestic meaning. Unification between the reality and future requires that we base upon the new historical context in the age of globalization and it also represents the development trend of the criminal law (theory) and combines the realistic needs with the future development. This is because that the criminal law science is an applied science serving the practice, and it must start with practice to avoid windbaggary. But as a branch of science, it must find out the development trend and laws of the criminal law in the globalization age in order to guide the practice to the correct direction, otherwise, it would be shortsighted, come to a standstill, or even lost the bearings.

Would eye embrace a thousand miles? Go up, one flight. The globalization age calls for development of criminal laws (theories) across the world in order to realize globalization of criminal law (theory) in successive steps, therefore, we must make synthetic study of criminal laws (theories) on the top enough to oversee the whole world.

The primary meaning of the criminal law (theory) globalization is the generation of global awareness of criminal law (theory). Not only the theory of criminal law, but also the criminal law itself is being globalized owing to the increasingly severe globalization of crimes. The criminal law (theory) globalization is sure to be a long process, but it should start now and actually has started, and an example is the establishment of the international criminal court. The American professor George P. Fletcher pointed out, "the internationalization of criminal law will grow along with the Internet and the consciousness of globalization. A hundred years from now, the work of the International Criminal Court, soon to be ratified by sixty countries on the basis of the Rome Statute of 1998, will be at the very center of our discipline. The drafting of the Rome Statute authorized to the International Criminal Court, approved by 120 states

in July 1998 did, however, bring together common law ideas and at least some continental principles. This practice may portend greater emphasis on comparative legal studies in the future."<sup>2</sup>

The last age saw the formation of nation-states and the uprising national spirit. V. Savagny (1779—1861), the best known ideologist in the European codification history, presented the famous "national spirit theory" that the law would not be implemented unless complying with the national spirit,<sup>3</sup> representing the trend at that time. For quite some time, the criminal law (theory) has been evolving and developing within specific nation-state and the study of the criminal law theory is based on specific country and starts from the practical situation of the country and services the actual demand there by summarizing the theories and experience. Although academic cooperation and exchange with other countries is required in order to absorb their advanced theories and experience through comparative study, it is quite limited and centered upon the nation-states and mainly reflects the situation and requirements of specific nation-states. Therefore, such study takes short and narrow views and lacks the global vision and is in short of the grand ideal of boosting the development of criminal law theories throughout the world.

In 1998, American professor George P. Fletcher briefly formulated the nationalization or even localization of legal code, "Criminal law has become a codified law. Everyplace you go in the Western world, you will find a criminal code that lays out the definitions of offenses in the code's "special part" and prescribes general principles of responsibility in the code's "general part." One consequence of codification is that every country goes its own way. Every country has adopted its own conception of punishable behavior, definitions of offenses, principles for self-defense, necessity, insanity, negligence, and complicity. Criminal law has become state law, local law. If there was much unity among the countries that succeeded to the domain of Roman law, there is none now. If there was ever a group of common vocabulary and set of principles used by common law jurists, that commonality has already disintegrated. In the United States today, it is almost impossible to find two states that have the same law of homicide. Every state following the Model Penal Code has amended and adapted the model code to meet its own local preferences."<sup>4</sup>

<sup>2</sup> George P. Fletcher. Contemporary Legal Scholarship: Achievements and Prospects (Criminal Theory in the Twentieth Century) // Harvard Law Review in Jan. 2001.

<sup>3</sup> Affected by V. Savagny, the German scholars shifts their attention to the in-depth study of legal history so that they can acquire the principles as the component part of a national law and with historical origin and as the basis of the code originated from its own culture. It is universally believed that V. Savagny had postponed the compilation of German code for a century.

<sup>4</sup> George P. Fletcher. Basic Concepts of Criminal Law. China University of Political Science and Law Press in Jan, 2004. P. 1.

Since the entry into the globalization age, the globalization of the criminal law (theory) will be a long-term or ultimate target of various countries, which requires updated ideas and research approaches. The foothold of the theoretical research on the criminal law has changed from country to the whole world gradually; the purpose of research is to boost the development of the criminal law theory in the whole world, and to serve both the domestic needs and the global development; the globally comprehensive analysis method is adopted during the research, namely making synthetic study of the criminal laws (theories) in the world and making global aggregate analysis and comparative research by bringing the domestic theories and practice into the global ones to create the criminal law theory and theoretical system that meet the requirements for development in the globalization age and conforms to domestic practice.

Now and for some time, the criminal law (theory) would be national instead of being global, although they contain global contents and represent the trend of globalization. Therefore, the study of criminal law theories now must still start from the criminal law (theory) of each nation-state, absorb the global awareness in the storm of new age and return to the start with the spirit of the new times. This is a long process that moves in cycles, but the criminal law (theory) is developing fast along with the further development of globalization and they will gradually complete the transition and be amalgamated eventually.

As early as in 1814, V. Savigny, German writer of classic jurisprudence pointed out, the jurist shall be equipped with two indispensable characteristics, namely, historical perspective which helps to be in grasp of the features of each era and each legal form, and systematic perspective which enables him to observe each concept and rule among the close links and cooperation of different matters, or among the real and natural relations of matters. Savigny named them as two scientific spirits and pointed out that legal scholar must be capable of assessing the future time within its national boundary. Otherwise, it would be very difficult to have proper understanding and estimation of the time he lives.<sup>5</sup>

We have entered an unprecedented age. Marx and Engels pointed out, "All real contents of systems in a new time are formed due to the needs of those systems of each time, and all the systems are based on the whole development of the past in that country."<sup>6</sup> So is the scientific system of criminal law. It is the product of the new age, thus we must make

reflective thinking of the criminal law (theories) of former ages and reconstruct its system and content in accordance with the historical mission and time spirit of the globalization age. It is a great turning point in history and a historical mission that carries on the past and opens a way for future, which needs the great efforts of legal experts of one generation to complete.

## Reflection of the Theoretical System of Criminal Law in the Age of Globalization

### Reflection must start with criminal law (theory) system

In Greek, system means being a combination of parts. In the abstract, it is an integrated whole formed with interconnected factors.

Any theoretical system is a system of knowledge or systematic knowledge, and the theoretical system is a whole of knowledge formed with interconnected factors. Systematization is the only way of any subject and marks the maturity of a subject. In fact, any science is organized systematic knowledge which has logical relations and forms an organic and exact logic system. Kant said, "Every doctrine, if it is to be a system, i.e., a whole of cognition ordered according to principles, is called science."<sup>7</sup> Hegel deemed that science must be systematic knowledge. The accumulation of knowledge cannot constitute science.<sup>8</sup> Criminal law, as a branch of science, is no exception and List and Schmidt once pointed out the importance of the system of science of criminal law, criminal law must be system by itself because it is impossible to guarantee a theory that can hold the ground unless the knowledge in the system is systematized. Otherwise, the application of the law can only stay at the dabbler level. It would always be controlled by contingency and arbitrariness.

Therefore, they believe the task of the criminal law is to give definitions to crimes and punishments according to the criminal legislation and to develop the specific provisions, even each basic concept and principle into an integrated system.<sup>9</sup> It should be noted that any new theoretical system is based on repudiating and inheriting the former theoretical systems, and we can control the overall situation and discover the essential problems and defects only through surveying the existing criminal law (theory) system in order to determine the reform direction and approach.

Wholly, the current criminal law (theory) has the following problems.

<sup>5</sup> Savigny V. On the Vocation of Our Age for. Legislation and Jurisprudence, China Legal System Press in Nov. 2001. P. 37.

<sup>6</sup> All Collections of Marx and Engels. People's Publishing House. Volume 3. Dec. 1960.

<sup>7</sup> Kant. Metaphysical Foundation of Natural Sciences, Shenghuo-Dushu-Xinzhi Press, 1988. P. 6.

<sup>8</sup> Hegel. Biographical History of Philosophy, Commerce Press, 1981. P. 35.

<sup>9</sup> List and Schmitt. Textbook on Criminal Law. Law Publishing House, 2000. P. 1.

*I. Deficiency of a sense of historical mission and time spirit in the new age*

A theory (system) is the product of certain age and represents the time spirit of the age. Different time spirits may lead to different standards and principles of people when treating various issues, which find expression on the structure, content, ideas and thoughts of the theoretical system.

The modern criminal law (theories) evolved and developed in the Enlightenment age and after the French Revolution. They are products of modern or modern time and the historical mission and time spirit represented are different from those in the globalization age. Such difference results in two essential drawbacks of the modern criminal law system.

(I) Society-orientation takes instead of people-orientation.

Nearly all modern criminal laws (theories) regard the "social defense" as the top value and ultimate objective, but the so-called social defense is to protect the fundamentals of the ruling class, namely the ruling and interests of special class. Although they also drum for humanism or humanity, human rights protection, etc., all theses are subject to and serve the ultimate value of defense of society, and which cannot be violated. They don't hesitate to sacrifice people in order to "defend society" which has been proved with lots of historical facts.

The age of globalization endows people-orientation with a new meaning, and it requires that everything should be people-oriented, and be favorable for human survival and development as well as the development of human enthusiasm and creativity. The former status that everything was system-oriented and people were subject to system blindly must be changed. In the globalization age, such situation that society defense is regarded as the top value and ultimate objective of the criminal law system must be completely changed to answer to the new age.

(II) Focusing on the contention for and maintenance of class ruling and class interests ((a typical Chinese expression of Class Struggle Theory) or focusing on the ruling and interest of countries (ethnic groups) while ignoring the harmonious social development.

The result is that the criminal law (theories) has long been in the contradictions and conflicts

between equity and discrimination, moderateness and extremeness, violence and neutralization, and even between protection and violation of human rights (theoretically and in practice). In 1999, Mr. Gihntner Jakobs, a famous professor of criminal law and philosophical jurisprudence in German Bonn University, suggested "Burgerstrafrecht" and "Feindstrafrecht",<sup>10</sup> which is an example of the inherent contradictions between theoretical equity and prejudice and between the protection and violation of human rights and aroused theoretic disputes. According to Jakobs, those who continuously and fundamentally threaten or destroy the social order or deviate from essential principles should be treated as enemies and be declared to be a piece of articles or a dumb thing instead of human beings. They should be repelled from the community in legal order and have their crimes pursued through war. This is a public prejudice against people and violation of human rights.

A recent notorious example is the abuse of prisoners in the USA represented by that in Guantanamo Prison. Among the 600 who had been detained or is still detained, almost no one has involved in the murdering of Americans. Evidence suggests that the detainees in Guantanamo are totally innocent.<sup>11</sup> They came in for hideous treatment. A prisoner in Guantanamo said, "When I woke up I didn't know where I was. I'd lost consciousness at the side of the container, but when I woke up I was in the container —lying on top of dead bodies, breathing the stench of their blood and urine." "They'd herded about 300 of us into each container; we were packed in so tightly and our knees were against our chests, and almost immediately we started to suffocate. We survived because someone made holes with machine guns; they shot low and more got killed. When we got out, about 20 in each container were still alive."

Another prisoner recalled, "Five ERF ran into in riot gear; they pepper-sprayed me in the face and I started vomiting; in all I must have brought up five cupfuls. They pinned me down and beat me, poking their fingers in my eyes, and forced my head into the toilet pan and flushed. They tied me up like a beast and then they were kneeling down on me, kicking and punching me violently. Finally they dragged me out of the cell in chains, into the yard, and shaved my beard, my hair, and my eyebrows."<sup>12</sup> All these were done in

<sup>10</sup> Jakobs said, as far as criminal law for citizen is concerned, the well-known function of punishment is negation. However, the function of criminal law for enemy is the exclusion of risk. The non-fundamental deviator can maintain his status as citizen (namely, the right of the offenders to return to society and their obligation to compensate for their mistakes). The fundamental deviator shall not be treated as citizens. He is the enemy who must be sanctioned. The war is to maintain the legitimate rights of citizens. It is the war waged for security. Different from punishment, the sanctioned person has no right. He is eliminated as an enemy. In substantive law, there are two opposite trends, negation and risk exclusion. It is the same in the procedural law. [See: *Criminal Law for Citizen, Criminal Law for Enemy* by Jakobs]. The paper was opposed by Claus Roxin and had generated heated arguments in the academic community.

<sup>11</sup> David Rose. [UK]. 2005. Guantanamo. P. 3. World Knowledge Press. July, P. 3.

<sup>12</sup> David Rose. Op. cit. P. 4—5.



the name of protecting human rights of Americans. Rumsfeld, the US Defense Minister, alleged that they had not treated those prisoners inhumanly though they had been involved in the killing of thousands of American civilians. It is to maintain the human rights of American people by violating the human rights of other people! The conclusion made by David Ross was that the USA had started the war against human rights. All such inner contradictions are the deep brands of former ages on criminal law (theory).

"But, different from the past, what we pursue in the globalization age is the complete emancipation of the mankind and the realization of the universal amalgamation of human Beings and the amalgamation between mankind and nature. This purpose can be obtained only through productivity development instead of through violence and war. Therefore, the new age calls for peace, alliance, cooperation and a harmonious society in an attempt to realize common development. Peace, cooperation and development are the themes and the time spirit of the globalization age. We must cultivate the awareness of harmonious society and world, and eliminate the internal conflicts and contradictions between equity and prejudice, moderateness and extremeness, violence and neutralization and the protection and violation of human rights in criminal law (theories) that roots in the incomplete humanism resulted from class limitation since the Enlightenment age.

The bourgeoisie regards the development of inherent nature as the development of humanity and the liberation of the bourgeoisie as the liberation of mankind, while the proletariat is also in self-conflict by claiming that they could be liberated only after mankind was liberated and mankind could be liberated only after the proletariat was liberated at the same time. Thus it can be seen that a harmonious society and harmonious world can be realized in deed only through establishing the ideal and pursuit of achieving the overall development and complete emancipation of the universe.

## *II. The Criminal Law Theoretical System Lacks a Key Word at the Core Position-The Power of Penalty*

The power of penalty is the authority of each country (rulers) to punish criminals and an important component of the force of state (the right to ruling) and criminal law is based on the power of punishment. In the criminal law theoretical system, the most profound and foremost concept is the power of penalty; a penal code is just an embodiment and legalization of the power of penalty; the criminal law history is the history of the power of penalty at

different countries and in different historical stages; the purpose of criminal law is to execute the power of penalty by rulers; the science of criminal law is a knowledge system on the power of penalty and its application. There is no criminal law and no theory of criminal law without the power of penalty. The power of penalty is the groundwork and the core of a criminal law (theory) system, and without it, it is impossible to construct a scientific system with rigid structure and positive internal connections and to explain the system in an in-depth and scientific way.

But the power of penalty is discussed in few textbooks on the science of criminal law in the world,<sup>13</sup> not to mention regarding it as the center of the theory of criminal law, therefore, it is impossible to construct a unified theoretical system with internal relations.

## *III. The Science-Base of Penal Law Theoretical System is Insufficient*

The system is the logic structure and theoretical form of contents. The science-base of a system finds expression in the profound, advanced and integrated contents: being profound requires revealing the crux of the matter in depth, being advanced requires reflecting the new development and being integrated requires being complete contents without missing any material contents. The present criminal law theoretical system is neither integrated nor profound owing to the lack of the power of penalty. Moreover, the present science of criminal law is arranged by penal codes and is divided into four parts, namely the preamble (or introduction), criminology, theory of penalty, sub-section of crimes and punishments, which are independent of each other and fail to form a unified system with internal relations. It is not systematic. In particular, the preamble is nearly a collection of knowledge and has not internal relations with other parts.

## *IV. Thinking and Research Methodologies are Obsolete*

In the history of human epistemology, the classic scientific thinking featured in mechanistic philosophy once had significant influence on natural and social sciences and is still positive for modern science, but its critical defects and negative functions are also being exposed along with the development of science. In late 19th century, the classic scientific thinking began to be challenged and Engels made in-depth philosophical analysis and repudiation of many concepts of the mechanistic philosophy as early as in 1880. "Since entering into the 20th century, due to the revolution of physics, the birth and development

<sup>13</sup> Tagancev, a Russian classical writer of criminal law, in his criminal law textbook of Russian Criminal Law, has a special chapter expounding the power of punishment, including the subject of the power of penalty, the historical development of the concept of the subject of the power of penalty, the rationales, legal basis, purpose and contents, the object and general characteristics of the power of penalty. It has rich contents and deep analysis and thus worthwhile for attention.

of systematic science as well as the establishment of large amount of human arts and social sciences, scientists have realized that the classical way of scientific thinking has heavily restricted and impeded people's understanding to the nature, society and man himself and thereby shall be criticized and negated."<sup>14</sup>

But the classic scientific thinking is still adopted by the modern theory of criminal law. For instance, the factors leading to a crime are separated from each other for isolated study instead of being regarded as a whole, and it is just the metaphysical thinking mentioned by Engels, "To the metaphysician, things and their mental reflexes in thinking, namely concepts, are isolated and a object of fixed, rigid, unalterable nature. to be considered one after the other and respectively."<sup>15</sup> Such thinking pattern is also adopted when analyzing the relationships between the facts and values of the elements leading to a crime.

The mechanical determinism based on causality is the core of the classic scientific thinking, and it has great influence on the present theory of criminal law. For instance, the mechanical determinism is adopted by emphasizing the inevitability of criminal law causality and denying the randomness of uncertainty when studying the causality of criminal law. The mechanical determinism is also represented during the debate between free will and determinism. But the development of modern science, such as thermomechanics, statistical physics, quantum mechanics, especially science of chaos, has changed the belief in mechanical determinism fundamentally and people have been convinced of the authority of probability theory based on randomness, therefore, it is an arduous and unavoidable task for the theory

of criminal law to get rid of the old thinking pattern in the new age.

As to the research approaches, the traditional ones, such as empirical approach, historical approach and comparative method, still hold true, but they can't meet the requirements of the globalization age and call for updated research approaches, including developing new research approaches and updating the classic methods. Any research approach has its advantages and disadvantages and should develop along with the times. Here, the comparative approach is studied, as the globalization has a higher requirement for this approach to exert its advantages and overcome the limitations.

Recently some Chinese scholars are eager for quick success and instant benefit during criminal law (theory) research and have copied the theories of other countries directly. Bernhard Grossfeld, a famous German legist pointed out in *Strength and Weakness of Comparative Law* that the comparative law was a powerful weapon as well as a risky weapon. As Koschaker once said that it was better to have no comparative method than to have an inferior one. WE should keep a clear mind of the limitation of the comparative law and combine the comparative law with the domestic law research. The study of the comparative law should never be monopolized by foreign legal experts and it should be controlled by those who are responsible for domestic legislation.

The Spanish poet Juan Ramon Jimenez from the South America defined this idea in this sentence "*Pie en la patria casual or elegida; corazon, cabeza en el aire del mundo*", which was engraved near a fountain inside Porto Rico University in San Juan,"<sup>16</sup> and we hope this epigram may awake people.

<sup>14</sup> Tao Delin and Wang Xinyan. Contemporary Theory on Marx's Philosophy, People's Publishing House in August. 2005.

<sup>15</sup> Engels. Socialism: Utopian and Scientific, Selected Works of Marx and Engels, Volume 3. P. 734.

<sup>16</sup> Bernhard Grossfeld. Strength and Weakness of Comparative Law. Qinghua University Press, in October 2002. P. 66—67.