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BASIC PROBLEMS IN CRIMINAL THEORY AND JAPANESE CRIMINAL LAW†

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I

As any argument concerning basic problems in criminal law depends largely upon our understanding of what crime is, let us begin with a brief survey of criminality in Japan. The curve of crime seems to show a parallel line with stages of development of capitalism. During the period from the Meiji Restoration in the 1860's to the 1890's when capitalism first came into existence in Japan, there was a remarkable increase of crimes against property, counterfeiting of currency and crimes committed by those who belonged to the ex-"samurai"-class. This may be explained in terms of the social disorganization and the new unstable economic system prevailing at this time. The subsequent period, ranging approximately from the end of the 19th century to 1920, in which the wealth of the nation was gradually accumulated and the living standard of the people was raised, is characterized by a conspicuous decrease of crimes against property. At the middle of the 1920's the crime rate began to increase again, until at last it reached a tremendous peak after World War II. This is mainly ascribed to the business depression in the 1920's and 1930's and the economic catastrophe in the post-War period. From the foregoing the conclusion may be drawn that crime is to a certain extent determined by economic conditions. Influences upon crime of natural conditions such as climate were also statistically confirmed in

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The *Indiana Law Journal*, as well as the whole Indiana Law School, is deeply indebted and grateful to Mrs. India Crago Harris who upon her death in 1946, created a trust fund in memory of her late husband, Addison C. Harris (1840-1916), who was a distinguished Indiana lawyer and statesman. It was through this fund that these lectures were made possible.

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earlier times where economic conditions were less complicated. Biological factors also play a certain part in causing crime. Studies of identical twins seem noteworthy in this area. Johannes Lange, pioneer in this field, went too far when he stated that he was able to define crime as predetermined, assuming that if one of the partners of a couple of identical twins becomes a criminal the other shares the same destiny. His followers later modified this view to the effect that his theory is correct only as to an habitual or repeated crime committed before the age of twenty-five. Yoshimasu, a Japanese psychiatrist and criminologist, after examining numerous cases of identical twins, found only one case where one of the partners remained innocent while the other, brought up in quite different surroundings, became a habitual offender in his youth. Thus it is obvious that crime is influenced by both sociological and biological factors combined together in one way or other. However, it does not follow necessarily that crime is a product of these factors alone. The role played by one's will must not be overlooked. To be sure, the will as such is to a large extent subject to one's surroundings and personality, but it often directs and dominates the latter. The personality, subsequent to any congenital predisposition, is developed by the accumulation of experiences obtained in contact with the outer world during the course of one's life. Experiences usually occur in accordance with the inclinations present in one's personality, which is already formed; but there are experiences which come about through the exercise of the will despite such inclinations or sometimes even with the intention to change such inclinations. Thus, personality is formed to a certain extent spontaneously with one's own initiative, even though this will naturally be confined within certain limits by environment and predisposition. The same may be said as to the criminal act as well. In short, a crime is largely determined by the environment and personality of the actor, but at the same time there is undeniably room for free will to play a part.

As is well known, the Italian positive school, in terms of social defense and social responsibility, assumed a completely deterministic viewpoint with respect to criminal law. It went so far as to reject the humanistic theory of Beccaria as inconsistent with modern concepts of crime and criminals. But attention should be drawn to the fact that the trend is changing. Even Marc Ancel, promoter of the so-called "new social defense" theory, has recently affirmed the part played by free will and sharply opposed the positive school. The modern school of social defense emphasizes with reason a scientific approach to crime and criminals, but neglects without justification humanistic elements in criminal law. To one who views a crime as human conduct, it will be clear that both sci-

entific and humanistic approaches are imperative in the area of criminal law.

From the humanistic viewpoint, the criminal law should exercise at least two functions. One is the function of guaranteeing individuals protection from arbitrary punishment. Franz von Liszt was right when he called the criminal law a "Magna Charta of offenders." The criminal law must clearly and precisely describe the offense. Otherwise the legality principle will be meaningless. In countries like Japan which have a wholly statutory system, judicial precedents have less binding power, leaving more room for the judicial interpretation of statutes. Furthermore, the criminal law operates not only at the stage of trial but also in criminal investigations as well. Let us take an example of an arrest or search and seizure without a warrant before a formal charge. It is primarily up to the individuals making the arrest or search to decide whether or not the act allegedly done by the suspect falls within the description of any offense. In Japan, where the police incline to premature interference into labor disputes, any misinterpretation of a penal provision could prove to be a fatal disadvantage to a trade union. It is particularly in cases of this kind that the ambiguous statutory description of offenses causes a serious danger.

On the other hand, a humanistic criminal law should also function to safeguard the right of a convict to resocialization. The retributive theory is justifiable so far as it requires a just punishment proportionate to the offense. Within this limit the punishment should help the convict to adapt himself to the community so that he does not become a recidivist.

If the above statement is to be approved at all, we must face a difficult question: How are these two functions to be reconciled or combined? The goal of safeguarding individuals from being exposed to arbitrary punishments requires that the criminal law describe as clearly as possible the kinds of acts deserving punishment from the viewpoint of social ethics and provide punishments in proportion to the gravity of these acts. It presupposes the objectivity of certain factors. But the function of reforming and rehabilitating offenders requires that the criminal law take the personality of the offenders into consideration. It must rely upon subjective factors. Are these two aspects to be left separated from each other? The answer must be no. Doubtless the law of crime and the law of punishment should not be regarded as two different things. A principle dominant in the theory of crime should be perfectly consistent with that of the theory of punishment.

One of the solutions of this problem, I believe, will be found in the method of understanding criminal responsibility, which I suggested at

the outset. The formation of personality is largely a process based upon one's predispositions and surroundings, but to a certain degree it is dependent upon one's self-determining "I." Human nature is neither an abstract personality with absolute free will nor a necessary product of biological and environmental factors, but is indeed an existential entity who may steer his own conduct and further develop his own personality spontaneously, though within certain limits. The individual can do something toward developing his own personality and to that extent he is responsible for the formation of his personality. Criminal responsibility, too, is to be understood from this aspect. Even where a criminal act seems at first sight to be a necessary product of the actor's personality, he should be held responsible for it, so far as he is deemed responsible for the formation of such a personality. For example, this might apply to a certain type of habitual offender, who is psychiatrically normal but whose ability to resist the temptation to commit a crime has been extremely weakened by repeated experiences of committing offenses and possibly also of serving many sentences. His criminal responsibility may be greater than that of first offenders in the sense that he should be responsible for the formation of such a personality as will lead to the repeated commissions of crime. I would call this the "culpability of personality-formation," if such terminology is permissible. It is somewhat similar to what Mezger, a German scholar, named "culpability of conduct" (*Lebensführungsschuld*). I have chosen the term "culpability of personality-formation" because here it deals with the blameworthy formation of personality resulting in the offense in question rather than the previous conduct as such.¹

This "culpability of personality-formation" is clearly distinguishable from the "culpability of character" (*Charakterschuld*) which is emphasized by the modern school. The latter is simply based upon the dangerousness or antisocial character of the offender as understood in a sheerly deterministic aspect. According to this view a criminal act is nothing other than a mere symptom of the actor's dangerous character. The sole ground of the criminal liability in this theory rests upon the actor's anti-social character, not upon his act. It follows that in this viewpoint patterns of criminal acts have little importance. It seems quite natural that followers of this school in Japan put little emphasis on the necessity of the strict description of offenses. Rather they insist upon the free interpretation of penal statutes in order to make measures of social defense as wide and efficient as possible. However, in our view of "culpability

1. I have recently been informed that Da Silva Correia, Professor of Coimbra University, was also teaching "la doctrina de la culpabilidad en la formacion de la personalidad," presumably under Mezger's influence.

of personality-formation" a criminal act is not a mere symptom of an antisocial character but it is one form of the actualization or functioning of the personality. It is, so to speak, a piece of the actualized personality and, as such, it has a realistic, rather than a symptomatic, significance in itself. A criminal act, according to our view, is not a *ratio cognoscendi* but is indeed a *ratio essendi* of criminal responsibility. We must recognize the importance of describing criminal acts in exact terms. Thus we will be able to conform to the requirement of the legality principle.

Our theory of "culpability of personality-formation" also differs from the theory of culpability based upon will or individual act (what German scholars call *Willensschuld* or *Einzeltatschuld*). The latter takes into account only the will that is involved in the offense in question, while the former pays regard not only to the objective and subjective sides of the criminal act but also to the underlying personality which involves both the biological and environmental factors influencing personality formation. In our view primary importance also has to be attached to the individual criminal act. But the culpability as to an individual act has to be duly judged only in connection with the underlying culpability of personality-formation.² And in the reality of life both kinds of culpability will be found inseparably combined with each other. I would call this the personality theory of culpability, because, in our view, an individual act, too, is nothing other than an actualization of the actor's personality. I believe the humanistic views of the correctional function of punishment and of social defense can adequately be based upon such a personality theory.

II

In any country there are offenses of various kinds such as murder, arson, larceny, and so forth. There exists no such thing as "crime" in general. But one can, as a matter of theory, induce a concept of "crime" in general from individual offenses. "Crime" in this sense will roughly be defined as an act which is unlawful and blameworthy from the legal point of view and which, as such, has been formally proscribed by law as an offense. In other words there are three elements requisite to a criminal act: unlawfulness, blameworthiness (culpability) and conduct which

2. Japanese courts generally take the life history of a defendant into account in meting out punishment. At least in this sense personality-formation is considered as an element of culpability. The question of culpability involves not only "if" but also "how much" a defendant is culpable. And, at least as a matter of pure theory, it is also possible that culpability may be completely excluded on the basis of the defendant's personality-formation, since this is one of the factors to be taken into consideration in deciding whether or not the act in question could actually have been avoided by the defendant.

falls within a legal proscription. Unlawfulness is a negative value-judgment that the act as such is unjustifiable, while culpability is present when the act is blameworthy and inexcusable in connection with the personality of the actor. Every offense is proscribed by law as being unlawful and blameworthy. In other words, an act constitutes an offense when it falls within a description of a certain criminal pattern of unlawfulness and blameworthiness, provided that there is no special ground of justification or exculpation.

Now, what is an "act" within the meaning of the criminal law? According to my opinion it must be something that is properly capable of being subjected to value-judgments as to whether it is unlawful and blameworthy. To go one step further, it must be an action or an inaction of a person which can be considered a subjective actualization of his personality. By the word subjective here is meant that the actualization has been made more or less under his own control, either conscious or not. What cannot be so considered, such as a mere reflex action or an action made under an absolute constraint, cannot be an act. A recent German theory of "finalistic act" (*finale Handlung*), with Welzel as the chief advocate, rejecting the traditional view as a "naturalistic" or "causal" theory, argues that only an action which is steered by finality can be called an act.³ This view, I believe, is basically right. "Finality," however, requires too little in one sense, and too much in another. Too little, because "finality" or "aiming at an end" or "setting an objective" is a psychological process of one's consciousness, which is far from capable of showing how deeply an act is rooted in the actor's personality. It lacks the biological and characterological basis. Moreover, that an action or an inaction has been directed towards an end does not necessarily signify that it has been under the actor's own control, because, from a deterministic viewpoint, "aiming at an end" could also be a necessary product of environmental and biological factors. To be sure, finality is in a different domain from that of causality. But it must be borne in mind that a psychological process of "aiming at an end," which seems to be meant by finality in this theory, takes place in the domain of causality. It is good that the finalism relies upon ontology. But it must rely particularly upon *existential* ontology, in order that it may clarify the normative significance of the criminal act. On the other hand, the theory of finalism requires too much by making finality the essential element of act. It

3. A similar view has long been held by Jerome Hall. An act is defined by him as voluntary conduct, which covers an intentional or reckless overt movement or omission but not a negligent causation of harm. In contrast to the German theory of finalism, his intent is evidently to exclude negligent harms from the criminal law area.

cannot explain adequately that a negligent act is also an act. Followers of the finalistic theory are devoting every effort to this point, but none of them seems to have succeeded as yet. According to our personality theory a negligent act can clearly be said to be an act, so far as it has been controlled by the subjective side of the actor's personality.

As stated above, a criminal act is legally proscribed conduct which is both unlawful and blameworthy. Under the principle of legality any act that does not fall within the legal proscription does not constitute an offense. What kinds of acts fall within the legal proscription is a matter of interpretation of the provision defining that offense. Solution of such problems as criminal omissions, impossible delicts and the like will have to be attempted in the light of the relevant criminal descriptions, because they are problems of proscribed unlawfulness and blameworthiness. There is no difficulty as to the cases where offenses are described in the form of omission; difficulty arises as to whether offenses described in the form of commission may well be committed by omission. In order that such omission constitute an offense, it should in the first place be unlawful. Unlawfulness of an omission will be founded on the violation of a legal duty to avoid the result. But such violation alone will not suffice. Let us take an example of arson. In Japanese law under certain circumstances one has a duty to comply with a request made by an official to help him to extinguish a fire. The failure to comply with the request is unlawful. It amounts to a minor offense.⁴ But it does not constitute arson, even if that non-compliance has resulted in the destruction of the house by fire, because such omission does not come within the pattern of arson. We had a case where the defendant left his house with a burning candle inside knowing that this would possibly cause a fire and hoping that the destruction of the house would bring him a large sum of insurance money. His house was actually burnt. The Supreme Court said that such act was equivalent to arson. In other words this type of omission constitutes arson, not because it is unlawful nor because it was causative of the result, but because it comes within the criminal description found in the arson provision. The same reasoning is applicable to the so-called impossible delict as well. The criteria thus far devised, such as absolute or relative impossibility, factual or legal impossibility and so forth, are not enough to support the distinction between impossible delict and punishable attempt. Here again one must deal with criminal patterns. To attempt to kill a person by means of a curse, for example, cannot be considered a falling under the pattern of murder in modern criminal law and therefore does not constitute an attempted murder. However,

4. MINOR OFFENSES LAW (Japan), Art. 1, No. 8.

pocket-picking will constitute an attempted larceny even if the victim had nothing at all with him, because such act belongs obviously to the pattern of larceny.

Incidentally, there are controversies between subjectivism and objectivism concerning the punishment of attempt. The former argues that there should be no difference between attempted and consummated offenses, while the latter insists upon more lenient treatment of attempt because of the lack of actual harm. According to our personality theory the line should be drawn in the middle. The provisions of the Penal Code seem to be best harmonized with our view. In the first place, attempts are punishable only in respect to certain more serious offenses, because only these are considered deserving of punishment. Secondly, attempt may be or may not be punished less severely than the consummated offense, subject to the court's discretion. Any mitigation of punishment is excluded as regards certain types of cases, such as habitual larceny and robbery, because the culpability based upon the blameworthy personality-formation is predominant here.⁵

Let us return to the problems of unlawfulness and blameworthiness. Unlawfulness is a value-judgment concerning the criminal act as such. It has more to do with objective, external or sociological elements of the act than with subjective, inner, psychological or biological elements. But this does not mean that subjective elements should be entirely excluded. So far as subjective elements tend to cause a legally proscribed harm they are to be considered as elements of unlawfulness. Blameworthiness, which is a value-judgment concerning a criminal act taking in consideration the actor's personality, is related chiefly to subjective, psychological or biological elements. But here again objective or sociological elements play a part to a considerable degree, because any criminal act takes place not in a vacuum but in a concrete field. Blameworthiness can be judged only in connection with the surroundings in which the act was done and with the personality of the actor, which in turn must have been formed under interactions of surroundings and predispositions of the actor during the course of his life. One might consequently say that the value-judgment of blameworthiness or, more exactly, the fact underlying such value-judgment, is bipolar. On the one pole will be found psychological and biological elements, while on the other sociological elements. The mental capacity to commit crime is orientated on the psychological and biological pole. Intention and negligence, which will roughly correspond to *mens rea* in Anglo-American law, are the domain where the bipolarity

5. PENAL CODE (Japan), Art. 43 ff., Law Concerning Prevention and Punishment of Stealing (Japan), Art. 2 ff.

can be more clearly perceived. Needless to say, these consist of psychological elements. However, in order to evaluate an act in terms of blameworthiness, one should take into account not only the psychological elements but also the objective surroundings in which the act was done or those in which the actor's personality was formed. Suppose a defendant in extreme poverty has stolen a loaf of bread in order to save his life. Such circumstances will render his act less blameworthy. Theoretically speaking, there is no reason why the blameworthiness cannot be reduced to nil according to circumstances. If, under a particular circumstance, it is reduced to nil, that means that the culpability of the actor is excluded in spite of the existence of psychological elements of intention or negligence. German scholars have developed with reason the theory of "exigibility" (*Zumutbarkeit*), according to which an act may be ascribed to the actor's liability only when it was possible for him to avoid the act under the existing circumstances. In Japan some lower courts' decisions have based an acquittal upon this rationale, however, the Supreme Court is still hesitant in this regard. Under a humanistic criminal law a person would be held responsible only for what he could control. Under this view one might further conclude that a defendant should not be held responsible for an intentional offense if he had no possibility of being aware of the unlawfulness of his act. The former Supreme Court once adopted this view but unfortunately it changed its attitude during World War II presumably with the intention of being in a better position to enforce the regulations concerning economic control. This latter view has been inherited by the present Supreme Court.

So much for the crime. We will now go into the problems of punishment. Punishment is imposed upon the actor because of his criminal act. In this sense it must be proportionate to the gravity of the offense. However, the gravity of the offense should be understood not in its static but in its dynamic aspect. When one takes into consideration the personality which is always developing, blameworthiness of the act may not be judged *ex tunc* to the time of commission, but it must be determined *ex nunc* to the time of judicial judgment or of the administration of punishment. The same thing may be said of the unlawfulness of an act, because the influence which the offense exercised on the outer world will vary even after the completion of the offense. Thus a dynamic theory of crime will lead to a dynamic theory of punishment. Let us now show some of the applications of this viewpoint. First, capital punishment seems to be inconsistent with the dynamic nature of punishment, even apart from the irreparability in case of mistake. Attention might be called to the fact that in Japanese history there was once a period cover-

ing more than three centuries during which no execution was reported and that since the 1860's the movement to abolish capital punishment has been growing with more and more enthusiasm. Although the death penalty is still maintained, any offense committed by a juvenile under 18 years of age is not punishable by death.⁶ Second, the indeterminate sentence will be preferable especially when it deals with cases where the actor's personality plays an important part. Under the present Japanese system the indeterminate sentence is utilized only in sentencing juvenile delinquents.⁷ But the Draft Penal Codes are going to extend the scope of its application to certain types of habitual offenders. Third, a determinate sentence also may be given a dynamic nature by probation, parole and the like.⁸ As the Japanese law stands at present, the application of probation is fairly broad. It covers not only imprisonment for not more than three years so that even murder or arson, according to circumstances, may and often do come within its application, but it is applicable to fines as well, thus rendering even pecuniary punishment as a means of reforming the convict. Parole, too, is granted rather leniently. The only formal requirement is that one-third of the fixed punishment has been served. The law of probation and parole is even more favorable for juveniles.

The humanistic idea of punishment will require that the relationship between inmates and prison staff be so regulated that close personal contact between them may be established as far as possible. This in turn will require penal institutions of far smaller scale than many existing ones, where there is only impersonal treatment of the inmates.

To imitate the well known phrase of an immortal philosopher one might say that criminal policy without scientific method is blind and criminal law without humanistic aspects is empty. Humanistic and scientific methods should collaborate with each other hand in hand in furthering an efficient and humane criminal policy. This will be the way of reconciling the safeguarding of rights of individuals and the needs of social defense.

6. JUVENILE LAW (Japan), Art. 51.

7. JUVENILE LAW (Japan), Art. 52.

8. PENAL CODE (Japan), Art. 25 ff.