

[Kakenhi Essay]

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On an Incomplete System of Criminal Law



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Having spent the second half of my university life during a period of campus strife, I had the unpleasant feeling that my education had been one of underachievement. That perspective prompted me to enter graduate school, where I studied criminal law under the tutelage of Professor Kenichi Nakayama, my supervisor at seminar in the Faculty of Law. That was in 1970. As I wrestled with the collection of papers in *Keiho ni okeru kitai kanosei no shiso* (Thoughts on the theory of *Zumutbarkeit* in criminal law), a work by Professor Chihiro Saeki, I began reading a German text by R. Lange in the class I had with Professor Yasuharu Hiraba. Through the Criminal Law Reading Circle, I also studied together with other university professors and graduate students in the Kansai area. In addition, I heard and discussed many papers and reports, including the foreign literature on criminal law in particular.

I was naturally attracted to issues revolving around the theory of the nation-state and the substantive aspects of crime and punishment that lay partially veiled behind the theory of criminal law. I saw the points made by Professor Saeki in “*Kitai kanosei ron ni okeru kokka hyojun setsu*” (The state-decided standard model in the theory of *Zumutbarkeit*) and by Professor Nakayama in “*Jisshitsu-teki sekinin kankei*” (Material relationships of accountability) as arising from the attempt to elucidate questions regarding the expectations and demands that authorities or nation-states have toward criminals and the crimes they seek to punish, and I wanted to pursue research on these questions myself. As I explored this idea further, my interest shifted toward the problems of class stratification in criminal law. Consequently, as a concrete research theme, I decided to focus on interpretations of the Soviet system of criminal law as practiced within a socialist framework.

By that point in time, Professor Hiroshi Miyauchi, Professor Yuji Inoue, and Professor Nakayama had already published research papers on criminal law in Soviet Russia. However, for their research, they had relied entirely on the Soviet literature on criminal law available after World War II. Nonetheless, scholars in Japan had been informed about certain aspects of Soviet thought on the subject in the 1920s by the writings of Evgeniy Pashukanis in *The General Theory of Law and Marxism* and Andrey Piontkowski in *Marxism and Criminal Law*. These works incorporated an unmistakable slant toward the new school of criminal law theory that simply vanished and lay ignored thereafter, as if some sort of incomprehensible transmutation had occurred. Indeed, what had happened?

Even if one were interested in determining the facts and applying a methodology to assess those findings, gaining access to the literature on criminal law in Soviet Russia in the 1920s posed a difficult challenge in and of itself. To that end, I essentially confined myself to a basement book repository that connected Kyoto University's Hokei-kan building with a red-brick research building nearby and scavenged the collection there for anything that might seem even remotely related. At the same time, I contacted University of Tokyo Professor Isamu Fujita and Nagoya University Professor Tsuneo Inako—both renowned authorities on Soviet law—and with their help, succeeded in gaining access to journals and other relevant materials that both institutions had in their possession. However, the main body of literature had been preserved in microfilm and microfiche versions that research institutes in the Netherlands and the US had prepared and begun placing on the market at the time. No doubt, not many researchers still recall the tedium they once endured gazing at microfilm readers for hours on end in the dark recesses of a university library, taking notes, and trying to decipher illegible print.

Without going into an explanation of the reasons, I will note that at that time, many researchers and graduate students in Japan were interested not only in criminal law but in the general theory of law in Soviet Russia and had access to academic research societies funded by grants-in-aid that effectively functioned as places for collaborative research outside the university setting. At the recommendation of my academic advisor, Professor Nakayama, I myself frequently participated in these academic societies, which were largely made up of interested faculty members and graduate students from the University of Tokyo and Nagoya University. Through these gatherings, the research-related benefits I gained as well as the friendships I formed with other, likeminded researchers of my generation were major assets that I have treasured for many years thereafter.

In the 1930s, the theory of criminal law in Soviet Russia eventually mutated decisively from the unsophisticated thought of the new school that had developed out of the materialistic philosophy prevalent during the country's early revolutionary era, into a theory of crime based on objectivist principles and a theory of punishment based on liability principles. However, concurrent trends in criminology research predated this shift and also influenced certain conditions. Criminology research in Soviet Russia took off in the 1920s as if a dam of pent-up interest had suddenly burst wide open. I traced the events leading up to that development with an array of scholarly literature as well as information and research published in German criminology-related journals and gradually strengthened my conclusions about the trend that followed (as described above). Louise Shelley and Peter H. Solomon Jr. began publishing their research on early Soviet criminology around that time, and finally I found my convictions confirmed. Now I was certain that these researchers shared the same interest I had and were engaged in research on this theme. I was confident I had struck the mother lode.

Criminal law and criminology in Soviet Russia remained serious subjects of my attention even after I began working in the Faculty of Law at Ritsumeikan University. On two occasions—first in 1981 and then again in 1991—I spent productive time in Moscow as a researcher on assignment from the JSPS. While so engaged, I observed anecdotal evidence of the social realities and national policies that were relevant to my research theme and enjoyed opportunities to exchange views and opinions with several researchers affiliated with the Soviet Academy of Sciences' Institute of State and Law. However, in the process I discovered that I was apparently the one who knew more about the events of that transitional period in the 1930s. Additionally, I was unable to detect any scholarly fervor within the research institute and university settings and was left with impressions of a stagnant social atmosphere in general.

I was coincidentally in Moscow when the coup of 1991 broke out. That event triggered the collapse of the Soviet system, with the consequence that the subjects of my research—from the Soviet state that regulated criminal behavior to the social system on which the criminal phenomenon was based—all vanished like smoke into thin air. I felt as if I had just experienced some fiendish twist of history. However, that did not mean the phenomena of criminal behavior, the systems of criminal punishment, or the theories of law itself had vanished as well. If so, what had changed? From a historical perspective, identifying the nature of the Soviet system of criminal law—a system abandoned like old clothing—is a task that researchers in the fields of criminal law and criminology cannot afford to neglect. From a broader perspective, this involves the question of how criminal law adapted and changed over the course of history through the 20th century. It also involves questions about what kind of future the researchers envisaged for criminal law. In a certain respect, these subjects appeared to coincide with concerns Professor Saeki had held years back.

In the years since, I have continued with this investigative task. And with my esteemed friend, Mie University Professor Emeritus Tatsuhiko Ueno, (perhaps we are the last two academics in Japan to study the system of criminal law that existed in Soviet Russia), I made an effort to organize our perspectives on this subject and have produced a recollection of our research experiences in a monograph: *Mikan no keiho—sobieto keiho to wa nan de atta no ka*—(An uncompleted criminal law: Questions about the nature of criminal law in the Soviet Union) (Seibundo, 2008). It is meant to serve not as an epitaph but rather as a forward-looking encouragement to redefine the challenges and foster fresh research in this field.