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INFLUENCE OF CRIMINOLOGY ON CRIMINAL LAW IN MODERN CHINA

Liu Jianhong

Distinguished Professor, Faculty of Law, University of Macau

Shuai Honglan,

PHD Candidate, Faculty of Social Science, University of Macau

Abstract: Criminology as a discipline originated in the West with the same origin as criminal law scholarship. During its development, it has interacted with criminal law in many aspects. To further develop criminology and criminal law scholarship, understanding their relationship and the influence of criminology on criminal law is very important. This paper reviews the the history of criminology and criminal law and examine the influence of criminology on criminal law in modern China, particularly the *influence of criminology in criminal law on discipline development, such as the thinking mode, and the influence of criminology in criminal legislation. These include the concept of "crime", the empirical facts and data, the influence of criminology theories, the criminal punishments, and crime prevention.* The paper also discusses the Influence of criminology in criminal law in the future.

Key words: Criminology; Criminal law; China; history of criminology; Chinese criminology; Chinese criminal Law.

Introduction

Criminology that originated in the West has caused a series of controversies

after its introduction into China. The relationship between criminology and criminal law has become one of the hot topics. To date, China's criminal law circle has always regarded criminology as its subordinate discipline and does not acknowledge its status as an independent discipline. However, with the rise of criminology in China, more and more scholars are beginning to realize the importance of criminology, and the influence of criminology on criminal law has become increasingly prominent.

The history of criminology and criminal law

Criminology and criminal law are distinguished but also connected with each other. In the long history of the river, the two originated from the source, then develop independently, and finally intersect again.

Starting from the same origin

Criminal law was originated from thousand years before century and has a very long history. But until 18th century when the great work "*On Crime and Punishments* (1764)" written by Cesare Beccaria was public, the modern criminal law was emerged. Beccaria called for a more humane approach to prisoners and called for reform of the law and improvement of the prison environment, and for the first time in human history, the idea of abolishing the death penalty was systematically proposed (Beccaria, 2016). Beccaria was well remembered as the "father of modern criminal law and the father of criminal justice" (John Hostettler, 2011).

However, Beccaria is not only the father of modern criminal law, but also one of the representatives of the classic school of the criminology. He suggested that people were rational, thus having the free will to choose committing a crime or not, which was well deemed as the utilitarian philosophy (Beccaria, 2016). The classical school of criminology was founded on the basis of such a thinking.

Separating and deviating

In the late 19th century, the paradigm shift in the research on the human behavior occurred, and science was applied to the study of human behavior by Mendel, Darwin and Freud, leading the development of the human genetics, neuropsychiatry, behavioral psychology and so on (Laufer, 2017). Since then, human behavior has become a part of nature that studied through scientific approaches (Degler, 1991; Kuhn, 1962; Mannheim, 1972; Wright, 2010). The modern criminology, as the scientific discipline, was emerged under this context. As the criminologist Wolfgang (1961) concluded, "in the history of criminology probably no name has been eulogized or attacked so much as that of Cesare

Lombroso... and has been called the ‘father of modern criminology’”. Lombroso has established the Italian school of positivist criminology by insisting in applying empirical research methods into criminology (Lombroso, 2006).

Since then, criminology and criminal law began to develop along different paths and more and more distinguished, though both have the same origin (Sykes, 1974). Sykes (1974) said that, in the United States, criminal law had been a subject for lawyers and law school while criminology became a creature of the social sciences, especially the sociology. Criminology concentrates on the study of individual *criminal* or offender through applying the scientific positivistic approaches, while criminal law concentrates on the legal concept of *crime* through applying the classic legal approaches (Mannheim, 1972; Laufer, 2017). In addition, criminology focuses on studying the crime nature, crime causes, crime prevention, both on individual as well as social levels while criminal law is a discipline that is based on the people’s free will and the moral responsibilities. As regarded with the procedure, the criminal justice system is passive, that is, the police can only wait for the crimes to be reported, the prosecutors can only wait for the criminals to be arrest, and the courts can only wait for the criminal charges been filed. However, criminology is an active discipline, in which researchers actively find the social problems, studying problems, obtaining results, and finally giving some suggestions and implications.

Generally, the lots of differences between criminology and criminal law lead these two fields have such little to do with each other (Sykes, 1974). The relationship of them became more confusing. The critical criminology came into being under this background. Though the scholarship has existed for more than a century, it was not flourished until 1960s and the term “critical criminology” was firstly and formally raised in 1974 by Sykes. The critical criminologists have stated that people who are in the lower classes were much more criminalized and punished than those in the upper class (Willem Bongers, 1916). It is believed that the screening process carried out in criminal investigations will have disadvantages for the lower classes due to the unequal treatment, and the power has influenced which act and which person come to be labeled as a “crime” and a “criminal” respectively (Becker, 1973; Lemert, 1951). Critical criminology even has pointed that there are more weighty crimes of the powerful and asked to change the criminal justice activities from the weak or the working class towards the “white-collar crime” (Hulsman, 1986). In the viewpoint of the critical criminologists, the current criminal law is only a bastion of social inequality and thus, there is no basis for cooperation between criminology and the current criminal law.

Disciplinary mix

However, with time flid, more and more white-collar and corporate crime

occurred and sentenced, the critical criminology scholars had a radical and fundamental change in the attitude of cooperation between criminology and criminal law. Wolfgang (1974) wrote the article "*The Social Scientist in Court*", emphasizing the intersection between criminology and criminal law or the use of "disciplinary mix" by indicating that the prosecutor or the defense attorney can use the criminologists as the expert witness and the testimony in court can help judicial personnel to decipher the controversial cases and determine the future case. Those criminologists' testimony proved to have a big impact on the development of criminal law, while in turn, the doctrine of criminal law help directs the research of criminology. Concludingly, after about a century of parting ways, criminology and criminal law have once again come together and started to cooperate with each other.

The influence of criminology on criminal law in modern China

Unlike the complicated relationship of criminology and criminal law in the west, criminology in China has been a part of the criminal law since its introduction. The development of Chinese modern criminology has gone through three different periods: the first period is 1900s-1949, which marked the emergence and the early development of Chinese social science, e.g., criminology; the next period is 1949 to 1989 and during this time, criminology existed as part of the law courses in China, and it was difficult for criminology to become an independent discipline; the third period is the post-Tiananmen period, which was a period for the rapid development of Chinese criminology (He & Zhuo, 2016; Jou, Hebenton, & Cao, 2013). For example, the Chinese Criminal Society was establishment in 1992, more and more universities have established the research centers or colleges of criminology and criminal justice, and many criminological journals have occurred. It can be said that the criminology in China is closely connected with criminal law in the beginning, and now is striving to be an independent discipline. However, the great influence of it in criminal law has obvious and can be manifested in three distinct aspects. The first is the influence of criminology in criminal law on the discipline development; the second is the influence of criminology in the criminal legislation; and the third is the influence of criminology in criminal justice.

1. The influence of criminology in criminal law on discipline development

a. The thinking mode

Criminology has been well deemed as the interdisciplinary science or an integrated discipline for long years (Jeffery, 1978; Jeffery, 1990; Wolfgang, Ferracuti, & Mannheim, 1967; Zheng & Yang, 2014). The interdisciplinary science

here means that criminology is a discipline including the scientific paradigms, the interpretation tools and the methodologies. Criminology encompasses the biology, psychology, sociology, political science, economics, and so on, and thus, all the paradigm, theories, and methods that other social science disciplines use could also be used by criminology. However, as a normative discipline, criminal law must not directly apply criminological research methods to draw conclusion on conviction and sentencing with deviating from the legal norms or statutes themselves (Zheng & Yang, 2014). The methodology and empirical training provided by criminology have enabled researchers in criminal disciplines to emerge from a purely metaphysical framework of thinking and face their own research fields with a more scientific, broader and objective perspective.

b. The empirical methods

The objective of criminology is to scientifically research and understand the criminals or offenders. The scientific nature of criminology is mainly achieved through its empirical method. The great American legal scholar Roscoe Pound first put forward that concept of “law in action” in his famous article “*Law in Books and Law in Action*”, emphasizing the importance of the social sciences and empirical methods in law (Pound, 1910). Therefore, whether criminal law is fair and reasonable requires not only the examination of the statute and cases, but also the examination of the effects the criminal law is applied and implemented in society. In China, it is obvious that the empirical methods are seriously lack in the criminal law academic circle. Although the scholars in criminal law and criminal procedural law have realized that metaphysical research methods have been outdated and have conducted a few simple statistics, the research are more like a decoration than a strict empirical research. As early as 1987, Chu (1987) raised to create a new branch of the criminal law, that is “quantitative criminal law”, which was advocated by several Chinese researchers, like Zhao (2005) and Bai (2014). However, to date, no obvious results have been seen. It is suggested that the scholars in the criminal law field in China should pay more attention to the empirical research methods, so as to promote the discipline development of the criminal law.

2. The influence of criminology in criminal legislation

a. Concept of “crime”

In addition to the discipline development, criminology has also influenced criminal law largely in its criminal legislation. As we all know, the concept “crime” is different in criminology and in criminal law (Fang, 2011; Zheng & Yang, 2014). According to the Chinese Criminal Law (CCL, newly amended in 2017)”, all acts

that endanger... and other acts that endanger society, are crimes if according to law they should be criminally punished. However, there are two exceptions: the circumstances are clearly minor; and the harm is not great". In short, behaviors that seriously danger the society, matches all the elements that provided in the criminal law and should be punished are crimes. However, crime in criminology is a much bigger concept including behaviors that cannot be regarded as crimes in accordance with the criminal law. Criminology, as a social science, studies the crime causes on the basis of the fact, and thus its crime concept includes those behaviors that yet been provided in the criminal law as well as those with clearly minor circumstances or deviance (Fang, 2011; Zheng & Yang, 2014; Yuan, 2017). For example, criminologists may research on juvenile delinquency and domestic violence. The former cannot be punished according to the CCL, while the latter is regulated by the administrative law if the circumstance is minor. The experiments that conducted by Sherman (1992) on the domestic violence has indicated that criminology can provide factual information about the criminal law and its consequences. Compare to criminal law, criminology can broadly research on those un-criminal behaviors or minor deviant behaviors, which can provide an important basis for the amendment and the enforcement of the criminal law.

b. Empirical facts and data

Moreover, the establishment of a crime is no longer a subjective definition, but the result based on empirical facts and data. The data resulted from the criminology empirical research has laid the foundation for the construction and the amendment of the criminal law, making the criminal law never lost in the real world (Jescheck, 2010). With the rapid development of modern society, more and more new types of criminal behaviors have emerged. The criminologists paid their attention on these new behaviors, conducted a lot of research on them and showed the results to the public, providing opportunities for those behaviors to be deemed as crimes and provided in criminal law. For example, the drink driving crime in China. According to the Ministry of Public Security Yearbook, the deaths and mortality rates of the road traffic accidents peaked between 2002 and 2004 (Li, Xie, Nie, & Zhang, 2012). In 2002, there were 773,137 road traffic accidents, 103,810 deaths, and the mortality rate was 8.79 per 100,000 people; then in 2009, 67,759 people died, and the mortality rate was 5.1 per 100,000 people (Li, Xie, Nie, & Zhang, 2012). Given the serious consequences of the drink driving, this behavior was formally stipulate into the CCL in May 1, 2011. It is reported that traffic accidents caused by drink driving decreased 18.8% in the first year after it being sentenced from previous year, indicating a good social response (Liu, 2018). Even the 2017 "Guiding Opinions of the Supreme People's Court on Sentencing for Common Crimes" (for Trial Implementation) issued by the Supreme People's

Court (SPC) provides quantitatively how to sentence the offenders by percentage based on the empirical results.

c. Criminological theories

Then the criminology theories have also influenced the criminal legislation greatly. As we all know, one of the fundamental doctrines in criminal law is that everyone is equal before the law, leading the first offense and recidivism, the minor and the adult not treated differently and even punished same. As suggested by criminal law scholars, once the equality adhered to in criminal law is absolute, it will evolve into inequality (Li, 2010). The theory of criminology provides a rational basis for the more scientific and equal provision of the criminal law. The victimology can be taken as an example. On the one hand, the prosperity of the victimology overcomes the role imbalance between offenders and victim to a certain extent, leading a series of victim theories valued by the legislators, and thus the criminal law legislation has transformed from the protection of legal interests to specific victim protection as well as transformed from satisfying the victim's retributive feelings to protecting the victim's substantial rights (Zhang, 2013). According to the Chinese Criminal Procedural Law (CCPL) newly amended in 2012, the rights of the victims are mainly manifested in three aspects: requesting the judicial organs to investigate a crime (Article 47); deciding whether to sue the offender for those private prosecution case (Article 112); obtaining the compensation (Article 99). On the other hand, as one part of the interaction of a crime, victims are of special significance for the comprehensive and accurate determination of criminal responsibility. Simply to say, the demographic characteristics, the identity, and the responsibilities of the victim should be considered when sentencing an offender (Zhang, 2013). For example, the CCL provides the different sentences for normal women and the women with mental or physical handicap in the rape crime and provides more severe punishments for those offenders who rape a minor or a child (Article 236). In China's current judicial practice, the condition of the victim should be considered in nearly all the case. In general, the formulation of criminal law norms cannot be divorced from the criminology and without the study of the basic theories of criminology, there will be no perfect modern criminal legal system.

3. The influences of criminology in criminal justice

Criminal justice, as one part of the criminal law, is distinguished from the criminal legislation, but affected by the criminology. The effect could be found in two aspects: the criminal punishments and the crime prevention. In a narrow sense, criminal punishment occurs when the crime has been committed while

crime prevention plays a role before the crime has been committed.

a. Criminal punishments

In the classic school of criminology, criminal punishment is those efforts that based on the thought of revenge as well as deterrence, and the justification of it is the retributive justice or retribution, which is in basis of the view of free will that people have the free will to decide whether commit a crime or not and thus should be responsible for the crime consequences and should deserve for the punishment (Koppel, Fondacaro, & Na, 2018). The view of this classic school of criminology is also the fundamental view of the modern criminal law. However, the classic school has been challenged by the criminologists who are more likely to advocate the justification of consequentialism, that is, a forward-looking rational basis based on achieving deterrence, incapacitation, or rehabilitation (Koppel, Fondacaro, & Na, 2018). Restorative justice is just the manifestation of the justification of consequentialism. It is a great contribution of criminology to modern society and was put forward by the famous Australian criminologist John Braithwaite (2001; 1989; 2002). It emphasizes to repair the relationship through the way of dispute settlement centered on the direct consultation between victims and criminals. As early as the end of 20th century, various criminal justice protection systems have been established in China to deal with juvenile delinquency, such as leniency penalties, round-table trials, and accompanying psychological counseling, which have achieved good results and laid the foundation for the introduction and development of restorative justice in China (Wang, 2016). Giving the close connection of restorative and community and to enable restorative justice to be implemented better, the community correction system was finally established on February 25, 2011 in China by the 8th Chinese Criminal Law Amendment. Simultaneously, criminal reconciliation has entered the field of criminal law and was widely applied in practice until finally been added into the CCPL in 2012 (Article 277, 278, 279) (Wang, 2016). As the core system of restorative justice, it plays an increasingly important role in reconciling the interests of offenders and victims and promoting social harmony. in summary, the introduction of restorative justice has made China's criminal law shifted from the original view of retributivism to the view of consequentialism, indicating a big step forward in the criminal law.

Another topic closely related to punishment is the lessening of punishment (not punishing and reducing punishment), which has been an international trend for the judicial reform. The view of the lessening of punishment was best reflected in criminology. According to Pi (2009), one function of the criminology is to prevent the further expansion of the mandatory penalty system, to oppose heavy punishment, to strictly limit the death penalty, and to regard non-criminal



punishment and non-custodial punishment as a supplement and amendment to the penalty of freedom. With the criminology introduced into China, the view of the lessening of punishment has been well integrated into the policies and regulations of the criminal law. For example, since the establishment of the People's Republic of China (1949), the Chinese government has laid down several distinct criminal policies, such as the policy of combining suppression with leniency, the policy of combining punishment with leniency and the policy of temper justice with mercy (Lu & Liu, 2011). The criminal policies, as the guidelines of the criminal law, no matter in which period they were formulated, a core doctrine always exists, that is, punishment accompanied by leniency. In terms of the provisions of the criminal law, the trend of lessening of punishment has become more prominent. For example, the 8th Chinese Criminal Law Amendment abolished the death penalty of 13 economic non-violent crimes and provided that the person who is seventy-five years old or above at the time of the trial does not apply the death penalty, except for the death caused by special cruel means. In recent years, the courts in China have dealt with some mass incidents triggered by the socially vulnerable groups and caused by some special factors (e.g., the passion crimes and violent crimes caused by urban renovation and demolition) based on the view of leniency (Li, 2010). All the above statutes and cases demonstrate the humanitarian spirit in the criminal law, which is practiced under the supervision and influence of lessening of punishment from the criminology (Pi, 2009).

b. Crime prevention

It is pointed that punishment is subject to the crimes but does not address the causes of crimes, that is, punishment can punish the criminals but cannot directly reduce crimes (Wang, 2004). Therefore, in order to reduce crime or prevent the crime occur, the most effective way is to find the crime causes, which is precisely what criminology researches on. Criminologists conduct studies to explore the crime causes and then take measures or raise policies to make the causes to be cut off or eliminated, so that the crime can be prevented. This process is professionally called crime prevention. Here, crime prevention refers to those efforts of preventing crime or criminal offending before the act has been committed (Laufer, 2017; Welsh, Zimmerman, & Zane, 2018). One of the crime prevention theories in criminology is the "situational crime prevention" theory, which raised three critical elements that must occur in a crime simultaneously---a motivated offender, a suitable target and the absence of a capable guardian and suggests to identify, manipulate and control the situational as well as the environmental factors that are associated with some types of crime, so as to achieve the objective of crime prevention (Clarke, 1997; Cornish & Clarke, 2003; Smith & Clarke, 2012). Situational crime prevention has attracting the Chinese government's

and law scholars' attention and is of huge importance to the crime prevention in China. Just as Li (2018) has described, a lot of measures have been taken on the favorable conditions or opportunities conducive to or susceptible to criminal motives, like criminal objectives (e.g., women, children, the elderly, the disabled, patients, financial institutions), places (e.g., public places, households, public transport,), means (e.g., the use of the internet, terrorism, extremism), tools (e.g., false identification documents), weapons (e.g., firearms, ammunition, explosives) and other facts that are prone to crime (e.g., gambling, prostitution, drug abuse).

Unlike the situational crime prevention theory, the broken window theory, another crime prevention theory in criminology, concentrates on the physical as well as social environment of the community (James & George, 1982; Kelling & Coles, 1997). Under the broken widow theory, the community with an ordered and clean environment sends the offender a signal that the area is monitored, and crimes are not tolerated here. On the contrast, the community with a disordered environment (e.g., broken window, dirty roads) sends the offender a signal that the area is not monitored, and crime can be committed here. Therefore, building an ordered and clean physical environment as well as the peaceful social environment in the community will contribute to crime prevention (Li, 2018). Given this, more and more cities and neighborhoods are required to maintain clear and ordered in China.

Influence of criminology on criminal law in the future

Seen from the historical track of the criminology and criminal law, these two disciplines started from the same origin, then separated and developed in different paths, and finally intersect again. During the process, criminology has shown a big effect on the development of criminal law. The influence continues and is predicted to spread to other broader aspects of criminal law in the future.

Firstly, just as mentioned above, both the empirical research methods and the results have influenced largely the development of criminal law. In recent years, more and more scholars in criminal law are applying the empirical methods to conduct research. The Chinese school of legal empirical, as a new concept, is put forwarded to refer to this group of scholars (Zhang, 2016). According to Zhang (2016), several provinces in China, like Zhejiang, Hebei, and Jiangsu, have successively established research centers of the Chinese school of legal empirical, and simultaneously a series of empirical and experimental research with clear problem-orientation have been carried out successively. It is foreseeable that empirical research will further develop in China in the future (Yuan, 2017).

Secondly, the comparative criminology will play a great role in the criminal law. It is well known that criminology is originated from the West and more and more researchers are questioning whether its theories universally applicable.



Given the context differences, the criminologist Liu (2016, 2017, 2018) has raised a new criminological theory called the relationism theory, which explains about the differences of criminal justice systems in different countries from the perspective of culture and personal traits. The most important contribution of this theory is that it is not only a criminological theory but also a criminal justice theory. The new raised comparative criminological theory as well as criminal justice theory is predicted to have the guiding significance on the criminal justice reform in the future.

Finally, scholars in the field of criminal law have changed their attitudes towards criminology. Some of them have acknowledged that criminal law is not independent from criminology and they are the shoulder-to-shoulder relationship (Yuan, 2017; Zhou, 2018). According to Zhou (2018), each step forward of criminal law relies on criminology which is just like a booster for the development of criminal law. Given the attitude shift, the intersection of criminal law and criminology will become inevitable.

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