GABRIEL HALLEVY

A Modern Treatise on the Principle of Legality in Criminal Law

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To my wife and daughters.

But the Lord saw that the wickedness of humankind had become great on the earth. Every inclination of the thoughts of their minds was only evil all the time. The Lord regretted that he had made humankind on the earth, and he was highly offended. So the Lord said, "I will wipe humankind, whom I have created, from the face of the earth – everything from humankind to animals, including creatures that move on the ground and birds of the air, for I regret that I have made them".

Genesis 6:5-7

Preface

The present book is based on the lectures delivered by the author in the past few years as part of the Criminal Law course of the Faculty of Law at the Ono Academic College. There has been little research on the principle of legality in modern criminal law, although this is one of the most ancient legal principles of human society. In recent generations there have been several attempts to define the principle conclusively, but only with regard to some of its aspects. No comprehensive definition of the principle of legality has been attempted to date.

A conclusive definition of the principle of legality in criminal law requires both an accurate inward-looking definition of the principle itself, and an outward-looking treatment of its relation with criminal law theory. Only a coherent theory that includes the principle of legality as an integral part of criminal law theory can do justice to the principle of legality. This view is consistent with the scientific concept of law, which regards the law as part of science.

A Modern Treatise on the Principle of Legality in Criminal Law is therefore a scientific treatise on one of the four principles of the criminal law. The present treatise is divided into six parts, according to the scientific understanding of the principle of legality in criminal law. Chapter 1 explores the relation between the principle of legality and the general theory of criminal law in the context of the structure and the development of the principle of legality in human society. This chapter outlines the four secondary principles of the principle of legality, and describes them in general terms.

Chapters 2–5 discuss in detail each of the four secondary principles of the principle of legality. Chapter 2 discusses the legitimate sources of the criminal norm, Chap. 3 discusses the applicability of the criminal norm in time, Chap. 4 discusses the applicability of the criminal norm in place and Chap. 5 discusses the interpretation of the criminal norm. Each of the four chapters concludes with a discussion of the conflict of laws issues relevant to the secondary principle under investigation. Finally, Chap. 6 addresses the problem of the conflict of laws *within* the conflicts of laws and rounds out the discussion.

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Kiryat Ono, June 2010 Gabriel Hallevy

Contents

List of Figures

List of Tables

Chapter 1
The Meaning and Structure of the Principle of Legality in Criminal Law

Contents

1.1 The Role of the Principle of Legality in the Criminal Law Theory

1.1.1 The Basic Structure of Criminal Law Theory

Criminal law is part of the scientific sphere called "law," or the legal science. Therefore, criminal law is a scientific sphere. In the past, in the Anglo-American legal systems, there was a conceptual difficulty in classifying law as a science because of its development through case-laws, which made use of the praxis of binding precedents (*stare decisis*). This attitude matched the general scientific development in Anglo-American countries, which was casuistic. By contrast, the European-Continental legal systems considered law to be a science,[1] and therefore in Europe it was necessary to study at the university to become a jurist. In the first university in Europe, the University of Bologna, law was one of the scientific

[1]For the development of the law as science in the Middle Ages and afterwards in Europe see Harold J. Berman and Charles J. Reid Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 SYRACUSE J. INT'L L. & COM. 1 (1994).

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subjects being studied.[2] The Faculty of Law of Bologna played a crucial role in the development of law in the Middle Ages (*jus commune*).[3]

In the modern era there seems to be no controversy that the law represents indeed a scientific sphere.[4] The law should therefore develop through legal research, using the relevant research methodologies, some of which are unique to this particular scientific sphere. This is also the reason for placing the legal studies in the academia.[5] If the law is as science and requires a scientific methodology, it is necessary to create a single scientific theory that governs the law. This is a fundamental endeavor in every science, including the law. Such a theory must meet two requirements: it must describe accurately all relevant events without using any random elements and it must predict accurately all relevant future events.[6]

The emergence of such a new theory is not always simple. The primary theory appears to be inconclusive after some time, and exceptions arise that the theory cannot explain. As a result, amendments or changes are introduced in the primary theory to account for the exceptions. When the theory can no longer explain the exceptions, it is replaced by a new one. The new theory may also turn out to be inconclusive, and must therefore be amended, changed, or replaced.[7]

Legal theory is developing in the same way. A single legal theory that would clarify all relevant legal issues would not be restricted to specific legal areas. In the context of this book, however, the theory is restricted to criminal law, therefore the theory under consideration is **Criminal Law Theory**. The need for such a theory in criminal law is crucial. The large number of doctrines, legal norms, exceptions, and exceptions to the exceptions muddied the waters of criminal law, which have become vague and unclear. The single theory of criminal law, which organizes all of criminal law and speaks with one coherent voice, is about **legal social control**. Society controls the individuals through criminal law, and therefore the

[2]University of Bologna was established in 1088 AD, and it is considered as the first university in Europe. For the development of the law as science in the European universities see HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 135 (1935).

[3]JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 7–14, 27–34 (1969).

[4]W. D. Lewis, *The Law of England Considered as a Science*, 10 L. REV. & Q. J. BRIT. & FOREIGN JURISPRUDENCE 23 (1849); George W. Goble, *Law as a Science*, 9 IND. L. J. 294 (1934); John D. Appel, *Law as a Social Science in the Undergraduate Curriculum*, 10 J. LEGAL EDUC. 485 (1958); John J. Bonsignore, *Law as a Hard Science: On the Madness in Method*, 2 ALSA F. 49 (1977); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980); Lynn R. Campbell, *Law as a Social Science*, 9 DALHOUSIE L. J. 404 (1984); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L. J. 1005 (1989).

[5]George L. Priest, *Social Science: Theory and Legal Education: The Law School As University*, 33 J. LEGAL EDUC. 437 (1983); Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. LEGAL EDUC. 311 (1998).

[6]STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 18 (1989).

[7]Ibid. at pp. 19–22, 147–160.

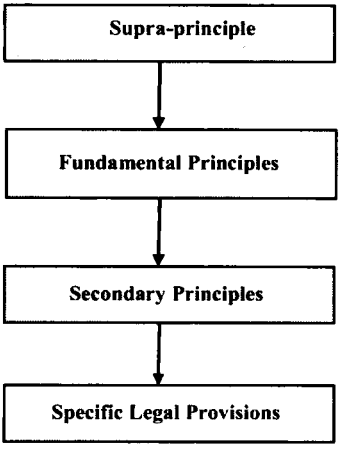

Fig. 1.1 The structure of scientific legal theory

justifications of criminal law theory must be based on social approaches and explanations.

A scientific theory has various levels of application. The levels are hierarchical, with lower levels subordinated to the higher ones. The highest level represents the essence of the theory, generalized into a supra-principle. This supra-principle is the core of the theory, and all other levels are subordinated to it. Exceptions at this level require replacing the entire theory. From the supra-principle derive the fundamental principles that break down the supra-principle into basic legal principles, which in turn guide the application of the supra-principle. From each fundamental principle derive secondary principles. It is the secondary principles that create the legal form of the concrete application of the fundamental principles. From each secondary principle derive specific legal provisions that make the secondary principles applicable to specific events.

Figure 1.1 shows a schematic description of this four-level structure.

According to this structure, specific legal provisions cannot contradict secondary principles, secondary principles cannot contradict fundamental principles, and fundamental principles cannot contradict the supra-principle. This structure functions as a template, which is then filled with content relevant to criminal law theory.

The **supra-principle** of criminal law theory is the **principle of free choice**. According to the supra-principle, no criminal liability can be imposed on an individual unless the individual has chosen to commit a criminal offense. When an individual is compelled to commit an offense, imposing criminal liability is not considered to be justified. The individual autonomy of the human being is the social concept behind the supra-principle.[8] To function as the supra-principle of criminal

[8] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 25–28 (5th ed., 2006); ANTHONY JOHN PATRICK KENNY, FREEWILL AND RESPONSIBILITY (1978); HERBERT L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW ch. 6 (1968).

law theory, the free choice must be well defined. Although free choice may seem to be related to the modern political philosophy of the eighteenth century, its origins reach back to the dawn of humanity.[9] When certain regimes rejected the free choice concept, they were considered to be illegitimate.

The principle of free choice negates determinism. The basic assumption of free choice is that free choice is possible. Deterministic concepts, which regard individual behavior to be dominated by external forces, negate the principle of free choice.[10] Determinism may be relative. Under certain circumstances, when an object falls from an individual's hand, the path of the object may not be under the individual's control, but causing the object fall may be.

From the supra-principle derive the **fundamental principles**. In criminal law theory there are four fundamental principles:

(1) The principle of legality
(2) The principle of conduct
(3) The principle of culpability
(4) The principle of personal liability

The supra-principle of free choice refers to the individual's choice between permitted and forbidden behavior. To enable free choice it is necessary to draw accurately the borderline between "permitted" and "forbidden." The rules of formation of what is "permitted" and "forbidden" are embodied in the first fundamental principle of criminal law theory, **the principle of legality**. When an individual chooses to commit a forbidden act, the act must be physically carried out to duly enable the imposition of criminal liability.

The rules of formation of the physical appearance of free choice are embodied in the second fundamental principle of criminal law theory, **the principle of conduct**, the objective expression of free choice.

Exercise of an individual's free choice requires certain mental positions in the individual's mind, including both positive and negative aspects. The positive aspects are embodied in the mental elements of the offense, the negative aspects in the general defenses.[11] Thus, an offense may require specific intent in order to impose criminal liability — a positive aspect (mental element). When the

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[9] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977); JOSEPH RAZ, THE MORALITY OF FREEDOM 425 (1986); Barbara Hudson, *Pushing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy and Practice*, PENAL THEORY AND PRACTICE 302 (Robin Antony Duff ed., 1994); RONALD DWORKIN, A MATTER OF PRINCIPLE 181–204 (1985).

[10] Paul R. Dimond and Gene Sperling, *Of Cultural Determinism and the Limits of Law*, 83 MICH. L. REV. 1065 (1985); Morris D. Forkosch, *Determinism and the Law*, 60 KY. L. J. 350 (1952); John L. Hill, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L. J. 2045 (1988); Ian Shrank, *Determinism and the Law of Consent – A Reformulation of Individual Accountability for Choices Made without Free Will*, 12 SUFFOLK U. L. REV. 796 (1978); Jos Andenaes, *Determinism and Criminal Law*, 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 406 (1957); Michele Cotton, *A Foolish Consistency: Keeping Determinism out of the Criminal Law*, 15 B. U. PUB. INT. L. J. 5 (2006).

[11] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 157–248 (5th ed., 2006).