


1944

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### Recommended Citation

Sebastian Soler, The Political Importance of Methodology in Criminal Law, 34 J. Crim. L. & Criminology 366 (1943-1944)

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## THE POLITICAL IMPORTANCE OF METHODOLOGY IN CRIMINAL LAW

Sebastian Soler<sup>1</sup>

I have observed many things in the United States that are worthy of admiration; but, as far as my personal preference is concerned, I do not appreciate materialistic subjects as much as spiritual qualities and virtues, which have values that are more real than those felt by the senses. Among these virtues, what has impressed me most has been the interest that is continually shown for sincere and honest criticism. Only a profoundly healthy race, that is young and free can show such signs of vitality and such confidence in the future.

My position is that I have been invited so consistently to criticize that I am almost obliged, for moral reasons, to do so. I shall not do it, in spite of everything, without first of all making it quite clear that if it is a pleasure for me to fulfill this duty on a North American platform, it is an even greater pleasure to speak on North American virtues on Argentine platforms. To address you about your own virtues does not appear to me to be so useful as to relate them to others; and to discuss your defects with other people does not appear to me to be so loyal as it would be to present them to you.

Now for the subject. Although "*nihil humani a me alienum puto*" the field, to which my observations have been principally confined, has been that of teaching and applying criminal law. I shall not concern myself now, however, with the practical aspects of the problem either in the courts of justice or in the punitive and preventive institutions. Neither do I wish to refer at this moment to the study of criminology, criminal psychology and similar matters. In the whole of this field there are in the United States excellent institutions. I intend to limit my observations strictly to the theoretical and juridical aspect of criminal law, and in particular to the manner of systematizing and teaching it in the Universities.

As I see it, if professional practice has not to be presented in a very complicated manner to the pupils, it cannot be said that the mission of the University is fulfilled merely by administering to the student some few practical disconnected principles. In reality, not even the approximate exactitude of these practical

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principles can be guaranteed if there is not behind them, however modestly hidden it may be, the theoretical, systematic and disinterested elaboration that functions not for the needs of today, but for those of the future.

For a discipline of cultural character such as law, as opposed to the natural sciences, the necessity of unity and systematic coherence stands out very clearly, because it is almost the only means of overcoming the merely empirical points of view. Natural Sciences, such as physics, biology and chemistry are always submitted to the test of experience. In them also is the necessity of systematic coherence; but facts and experiments decide their theories and systems. Law lacks this test or, at least, what can be called experience in law is something very different from physical experience.

This necessity for systematizing principles is very clear in the thought of all great jurists. This is what Carrara said: *Se il giure criminale è un' arte empirica gettiamo la penna, e cessiamo di meditare gli arcani principii che come tale non ha ma se il giure penale è una scienza, e vogliamo mantenerlo a codesta sua altezza, esso deve avere dei principii; e questi non possono riconoscersi come veri, quando non sono accettabili in tutte le loro logiche deduzioni; perchè la verità è una, e sotto ogni sua forma deve risultare verità* (Programma, 1493) (If criminal law is an empirical art let us throw the pen away, and cease meditating upon the mysterious beginnings that, as such, it does not have. If it is a science, and if we want to maintain it on that level, it must have some principles; and these can not be recognized when they are not accepted on the basis of logical deductions because truth is unitary and must appear as such in all its various forms.—Program, 1493.) It is clear that Carrara's thought is inspired in the historical rationalist conception of the rights of man; but ignoring its content, it is a formal truth. A theory of penal law that does not succeed in building a system can neither aim at the dignity of a science, nor at the modest dignity of a University discipline.

But it happens that in penal law this need of systematic construction is not a mere idle, theoretical or doctrinal aim. As in all juridical subjects within the network of the system we, as social beings, find ourselves confined: we live and suffer the consequences of these theories on our own selves. This happens in penal law in a very significant manner, because this is the law that goes so far as to exact our liberty and even life itself; in writing about it we always speak of our possible personal destiny.

Thus, we have said that in criminal law the construction on systematic and methodical bases is not solely a question of doctrinal interest. The consequences of the system rebound on the very contents of the subject. Moreover, the principles themselves

of the discipline vary according to the chosen method. With regard to this latter point there is nothing so significant as the case of Mezger. After the Nazi reform of the German criminal law, the first thing that Mezger changes is the method of studying and presenting the subject, starting from a new definition of crime. This methodical alteration is characteristic of all further developments. The great treatises of Liszt, Mayer, Koehler, Finger and the systematizations of Beling made from the point of view of a liberal concept are the very first that the Nazi Minister Friesler makes a point of sending *zum Teufel*.

What are the characteristics of that method? The actual starting point lies in the definition of crime. When crime is defined as a "punishable action", the doctrine remains on a purely empirical level. It is difficult to ascend from this idea to a structure of principles that may tell us when an action "must be" punishable.

Let it be understood that we refer to something strictly juridical and not to a political or sociological "must be." The change of focus of the problem was the immortal work of Beling. His point of view was this: to define crime as a punishable action is to give a definition that is merely nominal, is to define *idem per idem*, since what is punishable is what we call crime. The work of the theorists consists rather in verifying what the juridical circumstances are that lead to punishment. Punishment is only the result of those conditions. That idea does not form part of a definition of crime: it is the consequence of the fact that the deed should first logically be a crime. These conditions that determine a punishable act are: that the action should be typically anti-juridical, guilty and subordinated to a legal definition. The examination of each of these elements is the growth of the plan of the subject. A logical and rigorous order of ideas is constructed by this method, each one of which is based on its predecessor in order to integrate, in this way, a crime as a whole. The central nucleus of this conception is the idea that a theory that must be constructed on the basis of the principle *nullum crimen sine lege* stamps on the definition of crime a character distinct from that of the ordinary definitions, because it must be, in itself, restricting, because it must contain something like the reverse of the idea *nullum crimen sine lege: crimen a lege fit*. This idea was first expressed by Beling when he introduced in the definition the German term: *Tatbestandmässigkeit*, which means subordinated to a legal definition. This first step has been improved during the course of 30 years elaboration (since 1906), and I do not think that I am mistaken when I affirm that the growth of this system is what exactly corresponds to the structure of a purely democratic criminal law.

The first thing that must be broken by an arbitrary political

system is the restricted definition of each crime. One of the first acts of the dictators always consists in annulling legal limitations and particularly in freeing themselves from the restriction of a penal definition, in order to be able to punish action of any kind, according to what they consider necessary at the time of the judgment. What worries a dictator most is a pre-established concept of crime. This inconvenience made itself evident very early in Nazi Germany, in the reform of paragraph 2 of the Penal Code which said "an action can only be punished when the punishment is fixed by law before the action was committed." Now a criminal law, according to the reform, can be applied not only to the person who commits a previously defined punishable action, but also to a person who "deserves punishment" according to *die gesunde Volksanschauung*. The idea of restriction in the definition of crime was put an end to and, what is more serious, it happened not only in the realm of theory.

The juridical theory re-states: crime is what is punishable. But as what is to be punished is not pre-determined, to speak truthfully, it would have to be said that crime is what the judges actually punish, let it be an action or let it be a personal condition. It does not seem to be easy that, on a base so frail and empirical, it should be possible to construct anything that may reasonably aim at theoretical validity. It is not only the moral dignity of the theory but its theoretical importance, which is seriously compromised; what before could consist of a coherent body of principles must now be framed as a vague approximate mixture of opinions.

Therefore, I must express a certain measure of surprise, caused by the fact that in a country like the United States, of democratic feelings so deeply rooted, the University chair, with very few exceptions, should neither have exceeded the mere empiricism of the "case system," nor have noticed the theoretical importance of a solid structure of the general part of criminal law on the basis of a consciously applied method. The "case system" is an empiric procedure, suitable to the judge or the practical lawyer, imposed to a large extent by the Common Law; but if the chair aspires to the truly constructive disinterested and scientific function that guides and does not serve empiricism, there is no other method except the compilation of a system. It is almost inconceivable that criminal law can be discussed without having a general idea of imputability, of guilt, of *dolus*, of negligence, of justification, of impunity, and that everything must be studied with the motive of each particular crime and even of every case in every crime. I have heard a distinguished professor make considerable efforts to explain in class the difference that there is between these three forms of killing a man: the negligent, the *dolose* and the unintentional. It was very difficult for him, because the pupils did

not known what was negligent, *dolose*, unintentional. He got out of the difficulty with incidental explanations, because the object that they were studying was a case of homicide and not the theories of guilt.

I suppose the explanation must be renewed whenever they consider one of the numerous crimes, in which these three forms of perpetration are possible. It is more than this. Even granting the Common Law system, it is no obstacle that a theory be framed and developed on those bases. The principle *nullum crimen sine lege* is precisely a principle of Common Law. It causes surprise that some codes expressly contain the Hitleristic principle: e.g. P. C. of New York paragraph 21; P. C. of California paragraph 4. Even in both of these a vague reference "to the view to promoting justice and to effecting the objects of the law" is contained. It is the force of jurisprudence in the courts that has placed checks on these dispositions of the codes. Apart from the most recent Louisiana code, the total lack of system and the empirical agglomeration of paragraphs, which form the common codes, are defects that must be imputed to the chair because, although the legislatures are the originators of the codes, it can be said that the Universities are the real sources of them.

Even when the law has such a firm tradition as it has in the United States, for university teaching and research, there must be no limitation of tradition: it is not possible that the work of a Carrara and what it represents, should not be known because it is not within the fabric of Common Law, nor is it possible that the problems of criminal law should not be presented on the same level on which they are considered almost everywhere.

However bad the codes may be, Common Law is an inexhaustible source of juridical wisdom that urgently demands technical treatment and not merely practical handling. How admirable it would have been, for example, if the thought of Carrara, instead of being sometimes restrained by the errors of a code had had at its disposition the precepts of Common Law! What a system would have been handed down!

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