

CRIMINOLOGY IN CRIMINAL JUSTICE

FROM A COMPARATIVE LAW PERSPECTIVE



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FORWORD III

On behalf of Chiang Mai University Press' editorial team, I would like to thank for your interest this book, Criminology in Criminal Justice by Alexandre Chitov. In my opinion, the book comes out in the right time. In the past few years, the global communities have experienced a change in the way in which "justice" is defined. Mainly, this comes from social and cultural divides which have affected legal practices in many countries. While providing an explanation on foundational concepts and the way in which each concept derive from, the author utilizes case studies from many places which help us understand these foundational ideas in criminology in a more critical way. I hope that the endeavor in the book would benefit not only law students but also other lay people who are interested in criminology.

Pasoot Lasuka
Editor
CMU Press

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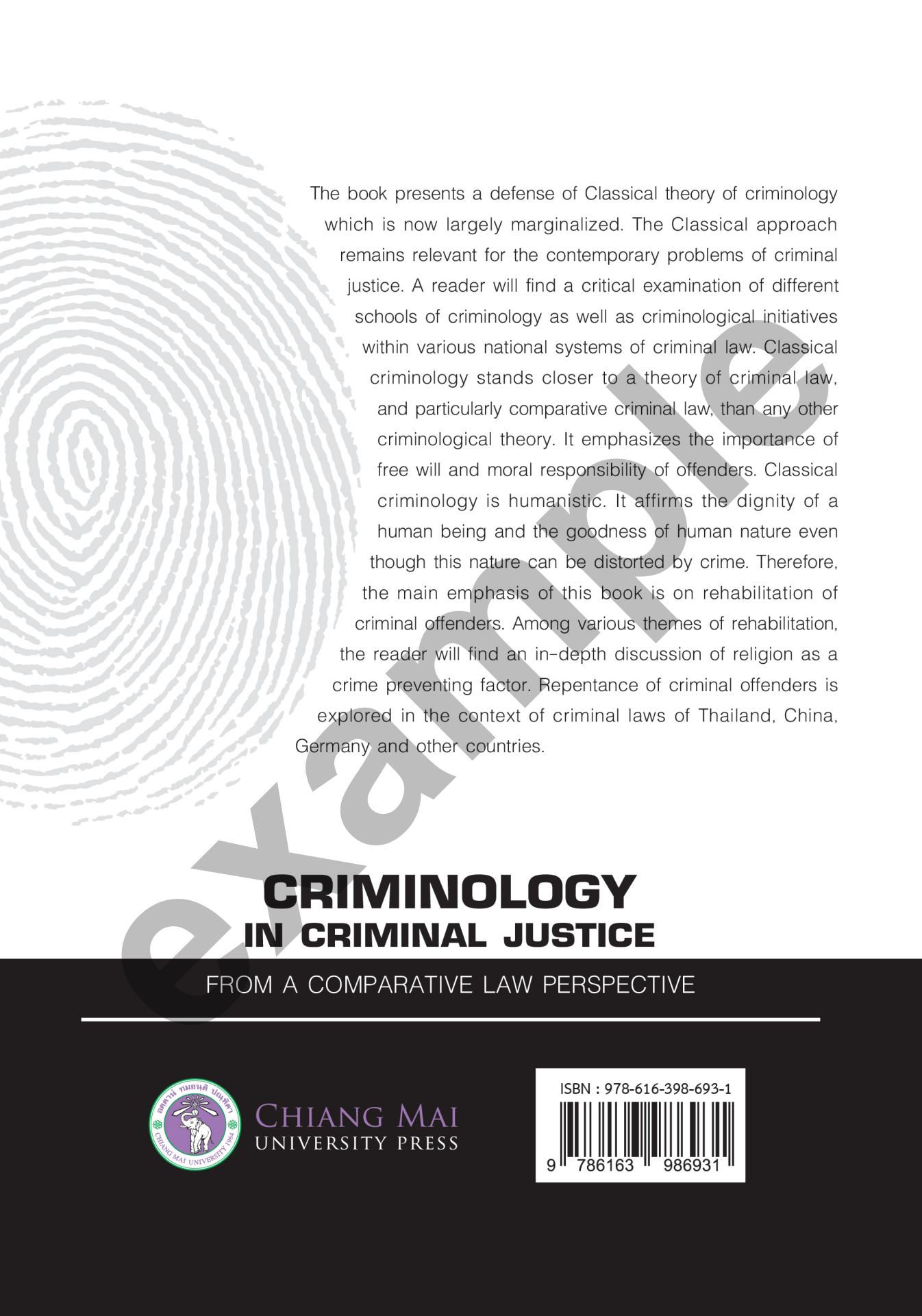
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The book presents a defense of Classical theory of criminology which is now largely marginalized. The Classical approach remains relevant for the contemporary problems of criminal justice. A reader will find a critical examination of different schools of criminology as well as criminological initiatives within various national systems of criminal law. Classical criminology stands closer to a theory of criminal law, and particularly comparative criminal law, than any other criminological theory. It emphasizes the importance of free will and moral responsibility of offenders. Classical criminology is humanistic. It affirms the dignity of a human being and the goodness of human nature even though this nature can be distorted by crime. Therefore, the main emphasis of this book is on rehabilitation of criminal offenders. Among various themes of rehabilitation, the reader will find an in-depth discussion of religion as a crime preventing factor. Repentance of criminal offenders is explored in the context of criminal laws of Thailand, China, Germany and other countries.

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INTRODUCTION :

CRIMINOLOGY AND COMPARATIVE LAW



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Criminology and Criminal Justice

This book draws three subjects together: criminology, criminal justice, and comparative law. Since all these subjects are enormously rich in their content, it is necessary from the beginning to clearly define all of them to avoid confusion. The criminal justice in the meaning of this book is the process of investigating, prosecuting, and punishing those who broke the rules of criminal law. Criminology is a discipline which investigates the nature of crime, the reasons of committing it, and the solutions to crime. The comparative criminal law is also an academic discipline, but it deals not so much with crime, its causes, and responses to it, as with the rules and institutions that define the structure and the content of criminal justice across the world. Thus, criminal justice is an object of study, which can be approached from different perspectives. Criminology and comparative criminal law are two different approaches which are combined in this work.

There are fundamental differences between criminology and criminal law in the way they study the criminal justice. Criminal law is a normative science. It looks at the content of legal rules and the correct way of applying those rules to various criminal cases. It is interested in criminal justice as a set of rules that leads to conviction and punishment of offenders. In contrast, criminology is an empirical science. Its object is crime itself. It focuses not so much on the rules of law as on the phenomena of crime, people who commit crimes and their victims. It is also interested in the way certain acts (omissions) become criminal offences (the process of criminalization) or cease to be as such (the process of decriminalization). Further, criminology examines the way criminal law rules are applied or failed to be applied. Thus, it includes the

study of the police, prosecutors, and judges. Besides, criminology looks at the impact of punishment on the offenders and the society as a whole. It is not only descriptive; it is also prescriptive. It claims the expertise and the knowledge how to make people stop committing crimes.

From this brief description of the object of criminology, it becomes evident that the scope of criminology is much wider than the scope of criminal law theory even though both deal with criminal justice. The purpose of a theory of criminal law is understanding the rules of holding people liable and subject to punishment. The purpose of criminology is to understand why people commit crimes and find out the way to make them desist from committing crimes again. Both disciplines can be descriptive and prescriptive. However, the focus of their descriptions and prescriptions is different even though they can describe and prescribe similar things. The focus of criminology is on the correct measure that will discourage reoffending. The focus of a theory of criminal law is on a correct application of legal rules as they are intended by the legislator. There are, nevertheless, the areas where both criminology and a theory of criminal law can overlap, and these areas are the subject of this book.

The Connection between Criminology and Criminal Law

There are many types of criminology as well as many theories of criminal law. Therefore, one can speak of different patterns of interaction between these two disciplines. For example, there will be a very remote connection between a criminological theory that explains all crime as the consequence of a psychological trauma received during the offender's childhood on the one hand and the dogmatic theory of criminal law that is interested in nothing else but the inner logic of legal rules on the other hand. However, some theories of criminology and criminal law can come closer to each other and even merge.

The close interaction between them occurs, for example, when both disciplines utilize a method of a critical examination of the criminal justice process for the purpose of creating a more just system of law. In the latter case, it is hardly possible to distinguish a criminological theory from a critical theory of criminal law. Here, criminology turns into a field of study that helps set legal rules and policies in crime prevention and control. Criminology becomes a force that shapes criminal law.

The need of criminal law for the expertise of criminology increases with the development of human society. Even though criminology is an applied science, and a theory of criminal law tend to be an abstract exposition of the system of rules imposed to punish offenders, they are getting increasingly connected. This increased connection is explained by the development of criminal justice. A criminal law theory does not only study legal rules, but it also gives an exposition of the reasons that underlie those rules. The reasons for infliction of punishment can be different. In one system of law, all murderers must be executed because the Law of God requires so. As for the other systems of law, the murderer must be executed but with variety of reasons: to protect society from the future threat, to execute the murderer only when there are aggravating circumstances. And finally, execution can be declared inhumane. When the law begins to discriminate concerning whether a murderer must be executed or not, it merges with criminology. Not every criminological theory can be merged with the discipline of criminal law. For example, a purely descriptive criminology can focus on every system of criminal law, since it is interested in examining the social and cultural reasons of why various systems of criminal justice favor distinct responses to crime. A theory of criminal law can find this descriptive criminology useful but not essential. The situation changes dramatically when an imposition of penalty requires a criminological

expertise. In this case, criminology merges with the theory of criminal law. That happens when punishment is imposed for the reasons of rehabilitation and prevention of crime. This central part of this book deals exactly with the criminal law and criminology that are bound together for the purpose of rehabilitation.

Criminology and Comparative Criminal Law

Even after limiting the central theme of this book to the matters of rehabilitation, the subjects of criminal justice, criminology, and criminal law remain rather wide to combine them within a single work. A more precise scope is needed. In this book, a criminological theory will be presented from a comparative law perspective. Indeed, this perspective offers certain advantages in building a stronger connection between criminology and criminal law. Comparative law approach is distinguished by three characteristics: “it is relevant in historical and philosophical legal research; it is important in order to understand better, and therefore to improve, one's own national law; and it assists in the promotion of the understanding of foreign peoples, and thereby contributes to the creation of a context favorable to the development of international relations” (David and Brierley 1985: 4). In relation to criminal justice, a comparative approach helps to perceive how criminological theories have been shared and applied by countries around the world that is traditionally divided according to various legal systems.

A discipline of comparative criminal law is less normative than a theory of domestic criminal law. It is more descriptive and analytical. A comparative criminal law needs criminology as it utilizes criminological findings to clarify the essential characteristics of each legal system, by identifying the norms and practices that unite and divide different national systems of criminal law.

From a comparative law perspective, the criminology becomes an object of academic reflection on the ways it affects the course of criminal law process in various legal systems. At the same time, criminology can also utilize the comparative law approach as the source of information on how crime evokes different legal responses across national borders and historical eras.

Comparative law theorists must accept criminology as one of the factors that define the contents of national criminal laws. It is so because criminology has become a part of the legal mechanism that determines an outcome of particular criminal law cases. There are many doors through which criminology enters criminal justice. Sometimes, legislators are guided by criminological experts to issue criminal laws. More often, legislators act according to their own fundamental criminological ideas. Those ideas also influence the way in which the criminal laws are interpreted by criminal justice officers. Criminology brings to light the reasons for applying specific measures to convicted offenders.

Different theories of criminology reflect the acceptance of different fundamental ideas across various countries of the world. Different treatment of repentance of criminal offenders can serve as an example. Some criminological theories support retributive system of justice and ignore repentance as a factor in inflicting a penalty. Other criminological theories, particularly those that advances rehabilitation, take repentance seriously as it will be discussed in Chapter VI and Chapter XII of this book. In many countries with diverse legal systems, like the U.S. and China, repentance of an offender is the ground for a more lenient measure of punishment. At the same time, remorselessness can lead to a more severe penalty. In other words, a study of criminology can be illuminating for a legal comparativist

From a comparative law point of view, for example, it is of interest to perceive that criminological knowledge has played a different role in various countries in making decision to arrest by the police and in making decision to prosecute by public prosecutors particularly when the offender makes an apology or restitution (Bibas and Bierschbach, 2004: 95-97). The role of criminology increases within a normative framework in which the police and the prosecution exercise a greater discretion not to arrest an offender or to choose not to prosecute him. Even if law does not explicitly permit a broad discretion, police officers and the prosecutors may avoid legal proceedings against an offender who apologized and made restitution, particularly when victim forgave the offender. In other words, a police officer and a prosecutor can make their decision not to arrest or not to prosecute the offender either on the basis of their own findings that the offender has made sufficient efforts to amend his wrongdoing or taking into the account the wish of the victim not to initiate legal proceedings. The unwillingness of the victim to testify against the offender is a common criminological fact that influences the decision of the police and the public prosecution not to charge the case to the judge. Thus, what becomes important is not whether a country belongs to a particular legal system, but the flexibility and discretion given to criminal justice officers to act according to their ideas of crime and punishment.

The contemporary criminological studies reflect the diversity of the criminal justice process among different countries. The existing procedural mechanisms are determined by social and cultural contexts. The analysis of those contexts is beyond the range of narrowly specialized criminological studies. In this aspect, a discipline of comparative law is better placed among other disciplines to explain and analyze, for example, the fact that in some countries each criminal act is expected to be strictly investigated, prosecuted, and condemned, while in other countries, there are alternative measures:

victim-offender mediation or so called “cooperating witness discounts” encouraging the offenders to provide evidence in exchange for a more lenient criminal sanction (Bibas 2007: 335).

Narrow criminological studies cannot fully explain why in some jurisdictions, for example, the function of defense lawyers can be limited to external legal formalities, while in others, advocates, armed by advances in criminology, attempt to induce a positive social response by advising their clients to confess, express remorse or apologize. In the latter cases, defense lawyers conceive their tasks as helpers in treating addictions and habits of their clients rather than trying to help them to deny their guilt at all costs (Bibas 2007: 335). Comparative law examines these factors which tend to produce different types of lawyers: those who care for their clients, and those who are interested in their clients mainly as the source of their own income and advancement. It is true that criminology may also examine educational, moral, and economic conditions prevailing in the society that affect different roles in a criminal law process. However, what makes an approach of comparative law distinct from criminology is its more philosophical reflection. A comparative law approach has a wider horizon that embraces sociological, psychological, and ethical dimensions in comparing different systems of law.

A legal comparatist in approaching the system of criminal justice, is different from a criminologist. He or she does not seek a sociological or psychological explanation of criminal act per se. Nor does he or she attempt to find a better solution to the problem of crime in a particular socio-political context. His or her main interest is to present criminal justice system in its contrasts, similarities, and contradictions by comparing its modus in different cultures and countries. He or she does this comparison not for the sake of knowledge of facts only, but also for his or her understanding and the moral evaluation. This approach is not so different from a painter or novelist. Certainly, novels, such as Dickens’s

Bleak House, can portray more graphically the parasitic attitude and nature of the lawyers in a particular historical situation. However, a comparative law can offer a philosophical reflection that can both combine a scientific rigor of a criminologist and a moral thrust of a novelist.

Both criminologists and novelists present the personal stories of the offenders themselves. Their accounts can serve to a legal comparativist as a primary source for studying all stages of the criminal justice process. A novelist may unfold a story of a criminal by showing the good moral potential that is overrun by the inhumanity of the machinery of criminal law. It may condemn the flaws of criminal justice in imagery unknown to a criminologist. In contrast, a criminologist looks at facts that can be verified. For him, confessing offenders often present pieces of quantified data in studying the outcomes of confessions. What is often lacking in criminological studies is a moral force of condemnation expressed by the novelist concerning the inhumanity of the contemporary system of criminal justice that tends to induce confessions without inducing repentance.

A comparative law approach can involve a variety of studies. One comparative study may simply record the differences in the practice of confessions. Another approach is more engaging. A legal comparatist, by looking at different legal ideas and practices, can morally censure the system of law in which the judge can hardly probe the sincerity of the defendant's confessions, perhaps, not so audaciously as a novelist, but also not so reticently as a criminologist can do. In a comparative study, the sacred vestiges of criminal justice process in a particular country can be stripped away to present a marketplace where confessions are sold for more lenient criminal sanctions. Such a legal comparativist can point at pernicious nature of this practice, perhaps by finding somewhere else an alternative that is morally more acceptable for the image of Themis, the impartial goddess of justice. This book is not so ambitious as to go across

all continents in searching for an appropriate offering to Themis. Instead, it aims to give a general introduction to the method of criminology and to identify important criminological issues in reaching the goals of criminal justice in few chosen countries whose criminal laws are familiar to the author. The book, therefore, has some limitations.

The Limitations and Novelty of the Book

It is unavoidable that any book bears some limitations which are determined by the author's interests and his ignorance. The effort and more study can overcome those limitations to some extent. There are, however, some subjects in which it is impossible for the author to avoid partiality. Criminology is one of them. The subject is so diverse, and it possesses so many aspects that it is unavoidable that many important, and indeed, fascinating fields of criminology are left beyond the scope of a single book. It is regrettable that not everything can be included particularly in the textbook elaborated for a course of a single semester. Several important issues have been omitted. Most of them have been deserved for the other book.

The gender criminology and feminist criminology are left outside the scope of this book since the author cannot claim expertise in this diverse and fruitful field of criminological study. In Thai literatures, a comprehensive survey of this area of criminology is given in the work of Charan Kotsananan (2015). His work also stands out for the treatment of economic crime from the perspective of critical criminology. The work of Narong Jaiharin (2010) is recommended for the issues of the special treatment afforded to female offenders in Thai procedural law through paying attention to psychology of female suspects.

Even though this book offers a comparative study of Scottish and Thai young offenders correction institutions, a systematic treatment of prisons and prisoners is outside its scope. At this time, the issue of prison reform in Thailand from a criminological view is comprehensively discussed by Jutharat Ua-amnoey (2005), and Dittita Tititampuk (2019). The police also presents a distinct subject of criminology. A criminological study of Thai police from a comparative law perspective can be found in the works of Krisanapong Poothakool (2014).

Two important fields of applied criminology, regrettably, cannot be considered within this book, since they deserve a special attention. The first field is the drug offenses. The work of Srisombat Chokprajakchat (2017) is recommended to examine the issue of criminalization and decriminalization from a comparative law perspective. The second field is governmental corruption. Thai students are directed to the work of Udom Rathamarit (1999). The same applies to the criminal acts committed by organizations. The students are directed to the works of Surasak Likasitwatanakul (2010 and 2019) who examined this issue from a comparative law approach.

The novelty of this book consists not only in a conscious attempt to explore criminology from a comparative law approach, but it also presents a defense of Classical theory of criminology. This theory of law is now largely marginalized. It is similar to some extent to the theory of natural law in jurisprudence. It is included in most textbooks but treated as an outdated or extinct criminological theory. One of the greatest criminologists of the last century, Radzinowicz (1966), considered the whole progress of the development of criminology in three distinct ages. The first one, of the Classical criminology, took place in the eighteenth century. It was the Age of Reason that claimed the political authority. The second was scientific criminology of the nineteenth century, or the Age of Science. The third is the contemporary age of administrative

criminology that emerges in the twentieth century. Unlike the preceding stages of development, the administrative criminology is not interested in political principles of crime policies or in defining scientific method of understanding crime, rather it meets the practical needs of governmental institutions. It is pragmatic. Radzinowicz was certainly right in affirming that the administrative criminology marginalizes Classical criminology. Where he was wrong is the belief that classical criminology is a past history.

This book is a defense of classical criminology. This defense is reflected in the choice of the topic to show that the approach of classical criminology remains relevant for the contemporary problems of criminal justice. The viewpoint of Classical criminology allows the readers to look differently at many criminological topics. For example, the reader will find a discussion of religion as a crime preventing factor in a very different form from the one presented in the mainstream standard criminological textbooks written in English. Classical criminology stands closer to a theory of criminal law, and particularly comparative criminal law than any other criminological theory. Up to now, there was a lack of a book which examines criminology from both a comparative law perspective and from the marginalized nowadays perspective of Classical criminology. This book is considered as an attempt to fill this gap.

The Scope and the Content of the Book

In this work, criminology is examined from a perspective of a legal comparatist rather than a criminologist himself. The relevance of criminology to the process of criminal justice stands at its center. The book is divided in three parts. The first part will describe theoretical criminology and its main characteristics. In Chapter I, a general account of criminological method and object will be given. After that, four main trends within the discipline of criminology will be considered: classical criminology (Chapter II), sociological criminology (Chapter III),

criminological psychology (Chapter IV), and, finally, cultural criminology (Chapter V). Criminology has greatly influenced the content of criminal law and various mechanisms of criminal justice system since the time of Beccaria as we will see in the Chapter II. The less known and explored subject is the influence of criminology on the scope of the evidence in proving the guilt of the accused and the process of choosing an appropriate penalty on a convicted offender.

This will be considered in the second part of the book dealing with applied criminology. Chapter VI will examine the judicial policies in meting out appropriate penalties to achieve the goals of rehabilitation. Chapter VII will describe the alternatives developed by criminologists to formal forms of criminal procedure. Restorative justice utilizes the methods and practices developed within traditional religions and families. Chapter VIII will explore further the potential of religion and family on desistance from crime. Religion, however, can sometimes be a criminogenic factor particularly in the crimes of terrorism. Chapter IX will explain the impact of terrorism on both criminology and criminal law in different national jurisdictions. The final part of the book will draw even more on comparative law materials in describing the role of criminology in a criminal justice system. Chapter X will offer a comparative study of correction institutions in Thailand and Scotland. Chapter XI will compare criminalization policies in relation to environmental offences in Germany and China. Finally, Chapter XII will examine the influence of criminology on the way how repentance and withdrawal from committing a criminal act affect liability to punishment in such diverse countries as Thailand, China, and Germany. Even though the final part of the book deals with very diverse subjects, it has a common thread connecting different ideas to show the relevance of Classical criminology to contemporary challenges faced by diverse systems of criminal justice.