

The traditional Scottish criminal law model from the Far-Eastern perspective*

A. Chitov

For citation: Chitov, Alexandre. 2023. The traditional Scottish criminal law model from the Far-Eastern perspective. *Pravovedenie* 67 (1): 56–73. <https://doi.org/10.21638/spbu25.2023.103>

The traditional Scottish criminal law model was a bold attempt to build the system of criminal law on the Christian foundations combined with the universal principles of reason that go beyond the narrow national, cultural, and religious traditions of a particular country. Scottish criminal law grew out of the Enlightenment which attempted to establish criminal law on common sense, to make it intelligible and useful. The spirit of the Scottish legal philosophy is egalitarian. The knowledge of law must be accessible to everyone. These ideas challenge the practices of many countries in the East where law is perceived as a complex set of rules known only to a narrow circle of experts, whereas people have little role to play but obey those rules, often without understanding them or even knowing them. The Scottish ideas of criminal law can serve as a platform for a critical examination of the criminal law in such diverse countries like Thailand and China. The attractive feature of the Scottish Enlightenment for those countries is its pragmatism. At the same time, it resists the excessiveness of the governmental control by the means of criminal law that can threaten the wellbeing of people. The idea of crime as a moral vice that offends public sentiment effectively limits the oppressive expansion of criminal law in the Far East.

Keywords: criminal law, Scottish Enlightenment, communicative theory, Thailand, China.

1. Introduction

Scottish criminal law presents a special interest for the students of mixed jurisdictions. It is not only because it displays an openness to other systems of law since it managed to incorporate many principles of the Common law in basically a Civil law framework. It has also been shaped by a distinct Scottish spirituality and its rich moral tradition¹. It was indeed a bold attempt to build the system of criminal law on the Christian foundations combined with the universal principles of reason that go beyond the narrow national, cultural, and religious traditions of a particular country. Scottish criminal law is basically a product of the Calvinist Reformation and the Enlightenment. The Calvinist Reformation of the 16th century was a religious movement in a number of European countries that had an ambitious goal to reform all aspects of social life, including civil government, according to the Bible considered as the only written Word of God². The Enlightenment was an intellectual movement in the end of the 17th and the 18th century. It was not outwardly

Alexandre Chitov — Associate Professor, School of Law, Chiang Mai University, 239, Huay Kaew Road, Chiang Mai, 20500, Thailand; shytov@yahoo.com

* I would like to acknowledge and thank Professor Antony Duff, Professor Lindsay Farmer, Professor James Chalmers, Dr. Steven Bogle, Dr. Richard Jones, Dr. Chloë Kennedy, and Angus McKee, and the anonymous reviewers for their thoughts, corrections, and feedback on early drafts of this article. Any remaining errors are my own.

¹ Kennedy C. Criminal law and religion in Post-reformation Scotland // *Edinburgh Law Review*. 2012. Vol. 16, no. 2. P. 178–197.

² Calvin J. *Institutes of Christian religion*. Presbyterian Board of Publications, 1813. Vol. ii. P. 633.

religious, but it had not a less ambitious goal to reform all aspects of social life, including law, according to the dictates of Reason. The Enlightenment was correctly described by Louis Durpe as a critical reexamination of moral and religious foundations of the Western civilization³. It was spread across all European countries including Russia mostly in the 18th century. In Scotland, the ideas of the Enlightenment were already advanced by the Scottish lawyers at least a century before⁴.

The peculiarity of the Enlightenment approach to criminal law was the belief that law must be reasonable and intelligible to any educated person. It is not a tradition, custom, political force, human conventions that are the foundations of law, but the reason. The Christian religion itself, whose imprint is so obvious in the Scottish legal heritage, is a particular expression of this reason. The fusion of Christian ethics and the Enlightenment can be seen among many renowned Scottish jurists such as Sir George Mackenzie (1636–1691), Lord Stair (1619–1695) Alexander Bayne of Rires (d. 1737), William Forbes (d. 1745), and John Erskine of Carnock (1695–1768).

Lord Stair, in his *Institutions of the Law of Scotland* written in the 17th century and which is considered to be the key text of Scottish law⁵, wrote:

“My design being to give a description of the law and customs of Scotland, such as might not only be profitable for judges and lawyers, but might be pleasant and useful to all persons of honour and discretion; I did resolve to raise my thoughts and theirs, to a distinct consideration of the fountains and foundations of the peculiar laws of all nations, which common reason makes intelligible to the judicious, when plainly and orderly proposed: and therefore, have always in the first place set forth, that common rule of material justice, by which mankind ought to govern themselves, though they had no positive statutes or customs; and then shewing how these are thence introduced”⁶.

A similar view on law at the same time was expressed by George Mackenzie:

“The Law of Nations, is peculiar to mankind only, dictated by right Reason, and is divided into the original and primary Law of Nature, that flows from the first and purest principles of right Reason, such as reverence to GOD, respect to our Country, and parents, and the secondary and consequential Law of Nature, consisting of these general conclusions in which ordinarily all Nations agree, and which they draw by way of necessary consequence, from those first principles”⁷.

In other words, any law including criminal law must be based on common sense, be intelligible, possess usefulness, and appeal to the people from a different cultural and historical context. The tradition of the Scottish legal philosophy can serve as a platform for a critical examination of the criminal law of our time and in any jurisdiction. The philosophical principles of the Scottish law are better appreciated after taking into consideration the need of connecting various cultures and traditions in solving contemporary globalized issues. Indeed, the fundamental idea of the Scottish jurists has become indispensable in our globalized age: all nations share a common nature which is found in reason that offers plain rules of justice to be followed in diverse areas of human life.

³ Dupre L. The Enlightenment and the intellectual foundations of modern culture. Yale University Press, 2004. P. ix.

⁴ Cairns J. W. Legal theory // The Cambridge companion to the Scottish Enlightenment / ed. by A. Broadie. Cambridge University Press, 2003. P. 222–242. P. 223.

⁵ Allison S. Stair, natural law and Scotland // Law & Justice: The Christian Law Review. 2012. 169, 189–209. — For the intellectual context of Stair’s work see: Ford J. D. Law and opinion in Scotland during the seventeenth century. Hart Publishing, 2007. P. 1.

⁶ Stair J. D. The institutions of the law of Scotland. Edinburgh, 1681. P. 1. Available at: <http://quod.lib.umich.edu/e/eebo/A61249.0001.001?rgn=main;view=fulltext> (accessed: 08.05.2022).

⁷ Mackenzie G. The Institutions of the Law of Scotland. J. Reid, 1688. P. 3.

The philosophical underpinnings of Scottish law challenge the practices of many countries in the East where law is perceived as a complex set of rules known only to a narrow circle of experts, whereas people have little role to play but obey those rules, often without understanding them or even knowing them. The spirit of the Scottish legal philosophy is egalitarian (although may not necessarily liberal). The knowledge of law must be accessible to everyone and it must, in the words of Lord Stair, be profitable, pleasant, and useful. At the same time, the approach of Lord Stair points at a close connection between laws and morals. Law must advance virtue. This thought may appear alien to the modern relativistic worldview of the Western liberal democracies but it can certainly have a greater appeal for a democratic reform in the Far-East. It can also have a strong appeal to the traditional Asian cultural values.

The discussion of the legal ideas of crime found in the Scottish Enlightenment will be done at the background of the fundamental differences in the nature of political power in liberal democracies⁸ on the one hand and in the non-liberal governments in the Far East such as China and Thailand on the other. Thailand certainly cannot be called an authoritarian country in the sense in which China can, yet both of them share the same view on the nature of government. The latter is the lord over people rather than their servant. Even though the discussion of the nature of political government in the West and in the East is far beyond the scope of this paper, it is important to understand that despite apparent similarities in the structure of criminal laws there is a big difference between the laws issued in a liberal democracy and the laws dictated by a domineering state in such diverse countries as China and Thailand. It does not mean that the criminal law in a liberal democracy is intrinsically better than in non-liberal states⁹. There is, however, an urgent need in those states to identify other restraints on the political power to criminalize acts or omissions than those available in liberal democracies.

In discussing the Scottish criminal law philosophy, we must unavoidably limit ourselves only to few of its representatives. The Scottish intellectual tradition of reflecting on criminal law is enormously rich and can hardly be adequately presented within a single paper. Therefore, we choose only key representatives of this tradition: Lord Stair who was a jurist, and David Hume, who was a philosopher and a historian. The latter must not be confused with his nephew, Baron David Hume, the advocate who wrote a treatise on Scottish criminal law¹⁰. In this paper, the ideas of Adam Smith and Adam Ferguson will also be discussed. Despite some notable differences among them, their thought in many respects reflects the same idea of crime as a moral category. Indeed, the Scottish concept of criminal law is intrinsically moralistic¹¹, although this characteristic became less apparent in the following centuries¹².

The choice of Stair, who was a jurist, and the philosopher David Hume is explained by the fact that the moralistic view of criminal law was shared across the whole intellectual spectrum of the Scottish Enlightenment. In this paper, we will dwell not so much on the historical analysis of Scottish criminal law, but on a unique philosophical idea of crime developed by the Scottish jurists and philosophers which challenges the legal practices

⁸ For the meaning of liberal democracy see: *Macpherson C. B.* The life and times of liberal democracy. Oxford University Press, 1977. P. 1.

⁹ *Bell D.* Beyond Liberal Democracy: Political Thinking for an East Asian Context. Princeton University Press, 2006. P. 8.

¹⁰ *Farmer L.* Criminal law, tradition and legal order: Crime and the genius of Scots law, 1747 to the present. Cambridge University Press, 1997. P. 24.

¹¹ *Kennedy C.* Criminal law and religion in Post-reformation Scotland. P. 179.

¹² The discussion of the concept of crime by Archibald Alison (1792–1867) who was writing after the age of the Scottish Enlightenment, for example, has much less references to God's moral law. See: *Alison A.* Principles of the Criminal Law of Scotland. W. Blackwood, 1832 P. 668.

of the Asian countries. In other words, the Scottish philosophical account of ought is contrasted with the realities of criminal law in such countries as China and Thailand.

2. Lord Stair's ideas on criminal law

Scottish criminal law was shaped at the Age of the Enlightenment of the 17th and the 18th centuries before the rise of the modern liberal democracies. The Enlightenment itself did not exclusively appeal to liberal political and legal philosophers. It was equally in vogue among authoritarian rulers¹³. It is beyond doubt that Scottish criminal law has evolved since then¹⁴. In this paper, we will look at the philosophical principles of the Scottish criminal law rather than at its modern form. The authoritative exposition of those principles is found in the writings of Lord Stair (1619–1695) who is viewed by many as the most important single contributor to the expression of the Scots law¹⁵. This Scottish lawyer and statesman is rightly placed among the distinguished legal theorists of the Scottish Enlightenment¹⁶.

Certainly, nothing can present a greater contrast than the criminal laws of the Far-Eastern countries and the ideas of the great Scottish jurist. The biggest difference between them is that the Far-Eastern criminal laws are a means of political control that often lack a moral content and are largely defined by the executive rules or technical interpretations made by official organs¹⁷. Much depends on the will of the executive to apply law for political expediency. In contrast, criminal law for Lord Stair is primarily a moral category. Criminal law is considered by him as a part of distributive justice which requires to reward those who are virtuous and punish those who are vicious¹⁸. At this point, Stair follows largely Thomas Aquinas' theory of law¹⁹. Stair understands the whole positive criminal law as determined by the Law of Nature²⁰.

"This is called the Law of Nature, because it is known naturally, either immediately, like unto these instincts which are in the other creatures, whereby they know what is necessary for their preservation: so the first principles of this natural law are known to men, without reasoning or experience, without art, industry or education, and so are known to men everywhere through the world; though they keep no communion nor intercourse together, which is an unanswerable demonstration of the being of this Law of Nature. It is said to be written in the hearts of men, because law used to be written on pillars or tables, for certainty or conservation: so this law is written by the finger of God upon man's heart, there to remain for ever. Such are the common practical principles, that God is to be obeyed, Parents honoured, our selves defended, violence repulsed, children to be loved, educated and provided for"²¹.

These immutable and self-evident principles constitute the first part of the Law of Nature that defines the content of criminal law. The second part of the Law of nature is not so evident as it requires a philosophical endeavor. Stair designates it as the light, law of

¹³ *Beales B.* Enlightenment and reform in eighteenth-century Europe. IB Tauris, 2005. P. 28.

¹⁴ *Farmer L.* Criminal law, tradition and legal order...

¹⁵ *Lehmann W. C.* Henry Home, Lord Kames, and the Scottish Enlightenment: a study in national character and in the history of ideas. Springer, 1971. P. 197.

¹⁶ *Cairns J. W.* Legal theory. P. 226–227.

¹⁷ *Chen Jianfu.* Chinese law: Context and transformation. Martinus Nijhoff Publishers, 2008. P. 54, 172, 199.

¹⁸ *Stair J. D.* The institutions of the law of Scotland. P. 3.

¹⁹ *Thomas Aquinas.* Summa Theologiae. II. II. 61. Available at: <https://www.newadvent.org/summa/> (accessed: 08.05.2022).

²⁰ *Stair J. D.* The institutions of the law of Scotland. P. 88.

²¹ *Ibid.* P. 3.

reason, conscience, and equity. "This part of the Law of Nature is not equally evident to all men; but the more of Reason they have, the more clearness they have of it"²². Stair believes that all people can equally grasp those secondary principles. However, sin prevents everyone from perceiving them and applying them to a particular set of circumstances. The positive law is designed to assist them in finding the right solution. The positive or human laws "are added, not to take away the Law of Nature, and of Reason"²³. They mediate between it and the complex situations in which the dictates of Reason are not evident for everyone.

Stair describes criminal law very briefly, as his main concern is to present civil law. However, his ideas on criminal law give a completely different perspective on crime and punishment from the one found in the Far-Eastern countries. Crime, according to Lord Stair, is a wrongdoing not only against the society, but it is also a violation of God's commandment. Stair argues that the necessity of punishment arises from the violation of the "principal and direct Law of Nature to love his neighbour as himself"²⁴.

The vision of crime as a violation of the duty to love one's neighbor is not alien to the Far-Eastern ethical traditions. The concept of ethical love resonates with the Thai concept of *karuna-metta*²⁵ and the Chinese concept *ci* (慈) or *ren* (仁).²⁶ Quite contrary to the Western contemporary understanding of the incompatibility of criminal law and ethical love, Lord Stair perceived them closely connected. His appeal to the principle of neighbourly love as a justification of criminal law is not found in Thomas Aquinas' theory of law. It is possible that Lord Stair draws it from the classical work of a Dutch jurist, Hugo Grotius²⁷, who wrote in *De jure belli ac pacis*:

Thus also we are to prefer the good of the innocent to that of the guilty, and a public good before a private one, by the law of a well regulated love. Now out of love to the innocent, arise capital punishments and pious wars. Besides, we are commanded to love our enemies from the example of God himself, who makes his sun to rise upon the wicked; but the same God does even in this life punish some wicked persons, and will do it very severely in the next. For though God is called gentle, merciful, long-suffering, yet Holy Writ does everywhere declare his Wrath against obstinate sinners, that is, his design to punish them; and the magistrate is appointed to be the minister of this Wrath²⁸.

There are certainly great differences between the Christian concept of agape-love, Buddhist concept of *metta-karuna*, or traditional Chinese concepts of *ci* and *ren*. However, there is something in the logic of Lord Stair that makes the Scottish legal heritage stand closer to the great Asian ethical traditions than to the secularized individual ethics of the contemporary Western society. This logic can be reduced to the following basic propositions. The neighbour belongs to God, any evil committed against him is at the same time a wrongdoing against his Master. Punishment, therefore, is an obligation towards God. It is different from reparation which is due to the victim: "for unto God, there can properly

²² Stair J. D. The institutions of the law of Scotland.

²³ Ibid. P.9.

²⁴ Ibid.

²⁵ Hongladarom S. Love in the age of high technology: how are Metta and Karuna still possible? // Prajna Vihara. 2006. Vol. 7, no. 2. P.7. Available at: http://its-3.au.edu/open_journal/index.php/PrajnaVihara/article/view/1145 (accessed: 15.06.2018).

²⁶ Swain T. Confucianism in China: An introduction. Bloomsbury Publishing, 2017. P. 27.

²⁷ Cairns J. W. Legal theory. P. 227.

²⁸ Grotius H. De Jure Belli ac Pacis (1625) I. II. viii.3) Abridged Latin text: Sic etiam bonum innocentis bono nocentis, bonum commune privato antehabendum ordinatae dilectionis lege. Ex dilectione autem innocentium nata sunt et iudicia capitalia et pia bella. Adde quod inimicos diligere iubemur Dei exemplo qui malis Solem suum oriri facit. At idem Deus de quibusdam malis, et in hac vita poenas sumit, et olim sumet gravissimas. Adde quod inimicos diligere iubemur Dei exemplo qui malis Solem suum oriri facit. At idem Deus de quibusdam malis, et in hac vita poenas sumit, et olim sumet gravissimas.

no reparation be made by the creature, whose duty and service is due to him: so that to him the creature is obliged to underlie the punishment. For the inflicting of punishment is for God, in so far as it is authorized, or allowed by him: but it is not for, or from man of himself, Revenge is mine, and I will repay, says the Lord²⁹.

This image of divine criminal justice agrees well with the Eastern moral concepts of *dhamma* and *tiandao*. Chinese Confucianists and Legalists would certainly subscribe to the following dictum of Lord Stair, only substituting the term “God” with the one of “Heaven” (*tian* 天)³⁰:

“Punishment, is in God; and, as for him, or from him it is committed to man; it is but a ministerial power, and not dispensable at man’s pleasure, and has an obligation, whereby man stands bound to God, for doing his duty therein. Though positive law, and pactions³¹ of men, and in some things, the positive law of God itself, may constitute a penalty, and employ it for the proper use of the injured; yet it is not a proper punishment, that has its force by paction, or positive law, and nor by the Law of Nature. The obligation to punishment, arising from delinquency, and man’s power, and duty to inflict the same, is a public right; which, though naturally did concern every man, yet it is now with Divine approbation, for most part devolved upon public authority”.

It is clear, that the magistrate, as he executes revenge, does it not of, or for himself; nor for, or from the people, as their proper right or power of exaction; but therein as he is the minister of God, he does it for, and from God, even though his authority and commission, were not immediately from God, but from man; yet he stands in the place of these men to God, to execute that revenge, which they themselves are naturally obliged unto³².

Thus, despite its overtly Christian theological influence, the idea of crime in the theory of Lord Stair resonates better with the Far Eastern traditional moral philosophy than with the contemporary secular theories of punishment. Quite in accordance with the Thai concept of *dhamma* and the Chinese concept of *tiandao* (天道), Lord Stair perceives criminal law as the solemn commission to punish evildoers, and not as something agreed by the members of a Western liberal polity who would certainly object that criminal law is established by Divine approbation. On the contrary, Thai and Chinese public sentiment would definitely agree with Lord Stair’s biblical view that the public authority must be a terror to evildoers, or as a revenger, to execute wrath upon evildoers³³. In Thailand, a similar view is presented in the ideal of a righteous king³⁴. There are even more parallels in the Chinese Classical literature beginning from *Shujing* (书经)³⁵ and finds its most popular expression in the Romance of the Three Kingdoms (三国演义)³⁶.

²⁹ Stair J. D. The institutions of the law of Scotland. P. 88, 89.

³⁰ Chen I-Hsin. From God’s Chinese names to a cross-cultural universal God: James Legge’s intertextual theology in his translation of Tian, Di and Shangdi // Translation Studies. 2016. Vol. 9, no. 3. P. 268–281.

³¹ Pactions mean agreements.

³² Stair J. D. The institutions of the law of Scotland. P. 88, 89.

³³ NIV Bible. Romans, 13. 3, 4.

³⁴ See: Uwanno B. Ten principles of a righteous king and the king of Thailand. Nonthaburi: King Prajadhipok’s Institute, 2008.

³⁵ Legge J. The Chinese classics, volume III: the Shoo King or the Book of Historical Documents. Trubner, 1865.

³⁶ Luo G., Roberts M. Three kingdoms: A historical novel. University of California Press; Foreign Languages Press, 1991.

3. David Hume on obligation to punish and a moral sentiment in criminal law

What unites Lord Stair with David Hume, the greatest Scottish philosopher of the 18th century, was not the idea of God, but the idea of moral obligation³⁷. Even though David Hume did not theorize specifically on criminal law, his ideas on the fundamental principles of government bear a direct relevance to examining the nature of criminal liability as presented by Lord Stair. To a contemporary lawyer, who is a Thai Buddhist or a Chinese communist, Hume would be certainly more attractive than Lord Stair since the former did not think that theology was necessary to justify political and legal institutions³⁸. When dealing with the issue whether the political authority derives its legitimacy from the will of God or the consent of people, Hume (who was not religious by any means) argued rather pragmatically that both positions are right³⁹:

“As it is impossible for the human race to subsist, at least in any comfortable or secure state, without the protection of government, this institution must certainly have been intended by that beneficent Being, who means the good of all his creatures: And as it has universally, in fact, taken place in all countries, and all ages, we may conclude, with still greater certainty, that it was intended by that omniscient Being, who can never be deceived by any event or operation... [E]very power or force, being derived from him, may be said to act by his commission.

The same causes, which gave rise to the sovereign power in every state, established likewise every petty jurisdiction in it, and every limited authority. A constable, therefore, no less than a king, acts by a divine commission, and possesses an indefeasible right”.

At the same time, Hume also affirmed the idea that the governments are instituted by the consent of people⁴⁰. In other words, whether one holds the view that the government is acting under the divine commission or under the commission of people, all that does not make a substantial difference in relation to the issue of the nature of criminal liability. The implication is the same. The state has an obligation to punish and it does not have a right to withhold punishment of a criminal. The scope of criminal liability must be determined by the nature of a criminal act, not by an arbitrary will of the executive. The duty of the government is to punish criminals not to make people criminals according to its arbitrary choice.

David Hume did not attempt to present a list of crimes which the government has a duty to penalize in the same way as many of his contemporaries did. John Erskine of Carnock, in his *Principles of the Law of Scotland*, which was in print long after his death⁴¹, divided all crimes into the three categories: crimes against God, against state, and against other persons⁴². Alexander Bayne, who occupied the Chair of the Professor of Scots Law in Edinburgh University just before John Erskine, singled out four types of crime: against God, against the magistrate, against family, and against a fellow human being⁴³. Hume would likely agree with Bayne that “dole, or a malevolent intention, is an essential ingredient to constitute an action criminal”⁴⁴. Under dole are comprehended “the vices and errors of the will which are immediately productive of the criminal effect”⁴⁵. Negligent acts are generally excluded from criminal liability “unless negligence is so extremely supine as can

³⁷ Veitch S. The sense of obligation // Jurisprudence. 2017. Vol. 8, no. 3. P.415–434.

³⁸ For the discussion of religious beliefs of David Hume see: Gaskin J. Hume’s philosophy of religion. MacMillan Press, 1988.

³⁹ Hume D. Essays political, moral, and literary. Indianapolis, 1987. P.466.

⁴⁰ Ibid. P.467.

⁴¹ Erskine J. Principles of the law of Scotland. Bell & Brandfute, 1881.

⁴² Ibid. 630.

⁴³ Bayne A. Institutions of the criminal law of Scotland. Edinburgh, 1730. P.8.

⁴⁴ Ibid. 9, 10.

⁴⁵ Ibid.

hardly be conceived without implying dole"⁴⁶. In other words, the presence of a malevolent intention is an essential element to make an act or its omission to become a criminal wrongdoing. It is common element of Scottish heritage of criminal law to perceive crime as something which is brought about by a vice or an error of the will⁴⁷.

Accordingly, David Hume emphasized the importance of a motive that makes our actions virtuous or vicious⁴⁸. The views of Hume on virtue are complex⁴⁹, and their discussion would lead us further away from the Scottish criminal law. It is necessary, however, to realize that important link between the ideas of Lord Stair on the one hand and the problem of defining the idea of crime, which can be found in Hume's concept of virtue and vice. Hume's theory secularizes the Stair's theological ground for criminal law.

Thus, Hume reinstates basically the idea of Lord Stair in theologically neutral terms. The rules of criminal justice are not arbitrary⁵⁰. The basic perceptions of crime are not arbitrarily determined by the reason but are rooted in the instinctive part of human being which Lord Stair defines as the first part of Law of Nature. At the same time, those perceptions on what crime is and what crime is not can and are subjected to a rationalization process. It is certain that Hume would justify criminalization of acts or omissions only if they create a disturbance to peace and order including safety⁵¹, or because they violate a certain duty towards God, or neighbour, or oneself⁵². However, the most important implication of Hume's theory to criminal law is that crime has to be considered within the categories of virtue and vice.

Grounding the concept of crime in an elaborate moral philosophy was continued by a close friend of Hume, Adam Smith who was not only a famous economist but also a distinguished professor of law in Glasgow University⁵³. According to Adam Smith, the degree of punishment depends on the feelings of resentment towards the offender⁵⁴. In other words, the nature of crime is that it is an immoral act which offends against moral sense, or conscience of the public. Resentment should not be understood as an irrational emotion. According to Smith's *Theory of Moral Sentiments*⁵⁵ resentment can be even generous and noble:

"When our passive feelings are almost always so sordid and so selfish, how comes it that our active principles should often be so generous and so noble? When we are always so much more deeply affected by whatever concerns ourselves than by whatever concerns other men; what is it which prompts the generous upon all occasions, and the mean upon many, to sacrifice their own interests to the greater interests of others? It is not the soft power of humanity, it is not that feeble spark of benevolence which Nature has lighted up in the human heart, that is thus capable of counteracting the strongest impulses of self-love. It is a stronger power, a more forcible motive, which exerts itself upon such occasions. It is reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct"⁵⁶.

⁴⁶ Ibid.

⁴⁷ Forbes W. The institutes of the law of Scotland. J. Mosman, 1730. Vol. 2, iv.

⁴⁸ Hume D. A treatise of human nature. John Noon, 1739. II. I.

⁴⁹ See: Sobel J. H. Walls and Vaults: a natural science of morals (Virtue ethics according to David Hume). John Wiley & Sons, 2011.

⁵⁰ Hume D. A Treatise of human nature. II. I.

⁵¹ Hume D. Essays political, moral, and literary. P. 37.

⁵² Ibid. P. 580.

⁵³ Haakonssen K. (ed.). The Cambridge companion to Adam Smith. Cambridge University Press, 2006. P. 2–7.

⁵⁴ Smith A. Lectures on jurisprudence. Clarendon Press, 1763. I. III. 11.

⁵⁵ Smith A. Theory of moral sentiments. Henry G. Bohn, 1759 [1853]. P. 51.

⁵⁶ Ibid. P. 193–194. — It is noteworthy that Adam Smith called this enlightened reason the wisdom of God, see: Ibid. P. 127.

Adam Smith's theory of moral sentiments deserves a greater attention than can be offered within this paper. It is, nevertheless, important to emphasize its relevance to the criminal law policies in the Far East. The idea that criminal laws must reinforce a moral sentiment by describing a vice and attaching to it a measure of punishment that correlates to the sentiment of moral resentment, is alien to the criminal laws in Thailand and China. In those countries, the political and economic considerations play by far greater role in the policies of criminalization than the moral sentiments⁵⁷. Certainly, punishment for committing certain types of crimes in those countries can be influenced by the public resentment too, but it tends to take the form of an unconscious influence. For Hume and Smith, this resentment should be rationalized. According to Adam Smith, when imposing a penalty, it is necessary to take into account proximity of time, the amount of harm, and the ability of the offender to control his actions⁵⁸. The reason why the Far-Eastern law cannot accept the theory of criminal law based on moral sentiments requires some explanation.

4. Stair and Hume v. the Far-Eastern criminal law

Even though Lord Stair's and especially Hume's views can be accommodated within the Far-East ethical traditions, they are irreconcilable to the criminal law practices of the Far-Eastern nations⁵⁹. For the Scottish luminaries, crime is a moral evil which must be punished at any cost. For modern Thai and Chinese lawyers, crime is a hazard to official policies that state officials, by using their discretion, can suppress or can turn their blind eye on if an act of suppression is economically or politically inexpedient. Lord Stair's and David Hume's views require the existence of independent judiciary. A judge cannot be bound by various policies of the government since crime has certain ontological characteristics independent from the contingencies of political powers. The duty of the state to punish an offender cannot be a matter of discretion. The state must prosecute and punish an offender not because he has violated an applicable state rule per se, or because he damaged some public interest, but because the offender by his intentional and willful action rebels against the moral order of the universe. The state for Stair and Hume is not a creator of criminal law. A criminal justice official is simply an administrator. The implication of this vision is obvious: the rule of law is affirmed and judges become the servants of the law, not of the state.

Coupled together, Stair's and Hume's thought offers an alternative to the legal definitions of crime in the Far-Eastern countries such as China and Thailand which lack theoretical restraints on the arbitrary will of the state to criminalize any type of behaviour. This lack comes not only from the political realities, but also from the state of national legislation that does not define clearly the limits of criminalization. The problem becomes particularly obvious in relation to the new types of crime, for example, environmental crime⁶⁰.

⁵⁷ Chitov A. Natural Law, Criminalization and extraterritorial jurisdiction in Thailand and China: A comparative law perspective // MFU Connexion: Journal of Humanities and Social Sciences. 2018. Vol. 7, no. 1. P. 233–260.

⁵⁸ Smith A. Lectures on jurisprudence. I, III, 11.

⁵⁹ It is beyond the scope of this paper to describe those practices in detail. A general description of Chinese and Thai criminal law in this paper is based among others on the following works: *Chen Jianfu*. Chinese law...; *Zhang Jinfan*. The Tradition and Modern Transition of Chinese Law. Springer, 2014; *Ying Ji*. The Making of Chinese Criminal Law. Routledge, 2021; *Yu Mou*. The Construction of Guilt in China: An Empirical Account of Routine Chinese Injustice. Bloomsbury Publishing, 2020; *Xin Ren*. Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China. Greenwood Press, 1997; *Biddulph S*. The Stability Imperative: Human Rights and Law in China. UBC Press, 2015; *Chuan Feng, Nelson L., Simon Th. W.* China's Changing Legal System. Palgrave Macmillan, 2016; *Harding A., Pongsapan M.* (eds). Thai Legal History: From Traditional to Modern Law. Cambridge University Press, 2021.

⁶⁰ Environmental legislation in China develops much faster than in Thailand. However, the problem of its ambiguity in relation to discretionary powers of the executive persists. See: *Xiaoying Ma, Ortolano L.*

In contrast to the Scottish philosophical tradition, many crimes in China and Thailand are indistinguishable from administrative offence. They are not perceived as a vice. Its wrongfulness comes from the fact that it has violated an administrative rule⁶¹. That diminishes the legal and moral capacity of national courts and stakeholders to conduct successfully criminal law proceedings against the people who have connections within the government. The weakest point of criminal law in China and Thailand is that it is lacking that force of expression, that zeal which comes from the moral sense and which is fundamental for any struggle against crime. The importance of this zeal is expressed by Hume in the following words:

“Here, then, is a sufficient inducement to maintain, with the utmost Zeal, in every free state, those forms and institutions, by which liberty is secured, the public good consulted, and the avarice or ambition of particular men restrained and punished. Nothing does more honour to human nature, than to see it susceptible of so noble a passion; as nothing can be a greater indication of meanness of heart in any man, than to see him destitute of it. A man who loves only himself, without regard to friendship and desert, merits the severest blame; and a man, who is only susceptible of friendship, without public spirit, or a regard to the community, is deficient in the most material part of virtue”⁶².

In other words, law must communicate a forceful disapproval of crimes as “the avarice or ambition of particular men”. The implication of David Hume’s vision is obvious. Crime has to be punished as a vice not as an offence against state regulations. All offences which Thai and Chinese law treats as criminal must not be criminalized if they are not at the same time perceived as moral wrongs.

It would be a mistake to suppose that the Scottish legal philosophers would recommend Thai and Chinese governments to punish every act of vice. The idea that crime is a moral wrongdoing does not mean that all moral wrongdoings should be treated as crimes. Lord Stair writes: “But how far man’s natural duties, or the magistrate’s, in the punishment of crimes reaches, the lines of the Law of Nature, are become dark in many points”⁶³. There is a significant degree of skepticism among great Scotsmen in the ability of the governments to enact and apply laws in accordance with justice as a virtue. As David Hume put it: “It is impossible to keep men, faithfully and unerringly, in the paths of justice”⁶⁴. Another representative of the Scottish Enlightenment, Adam Ferguson wrote:

We are not to expect that the laws of any country are to be framed as so many lessons of morality, to instruct the citizens how he may act the part of the virtuous man. Laws, whether civil or political, are expedients of policy to adjust the pretensions of parties, and to secure the peace of society⁶⁵.

Both Stair and Hume would likely agree with Ferguson who recommended a middle way:

“The higher duties of morality, beneficence, and fortitude can seldom if ever be made the subject of law. The vilest of moral depravities, envy, and malice, can only be restrained from a few of their overt or most flagrant effects. The law must be contented to restrain

Environmental regulation in China: Institutions, enforcement, and compliance. Rowman & Littlefield Publishers, 2000. P.92; Werner H. K., Zhang Xia. Functions of law in the sustainable development of China and a model for environmental legislation // European Business Review, 2017. Vol. 29, no. 4. P.440–456. Available at: <https://doi.org/10.1108/EBR-05-2016-0062> (accessed: 20.09.2017).

⁶¹ For a recent discussion of the role administrative law in criminalizing crimes against wildlife in Thailand and China see: Chitov A. The legal hurdles to cooperation between Thailand and China in suppressing illegal trade in endangered species // Thammasat Law Journal, 2021, Vol. 50, no. 2. P.222–240.

⁶² Hume D. Essays political, moral, and literary. P.26–27.

⁶³ Stair J. D. The institutions of the law of Scotland. P.89.

⁶⁴ Hume D. Essays political, moral, and literary. P.38.

⁶⁵ Ferguson A. Principles of moral and political science. W Creech, 1792. Vol.II. P.145.

such open and flagrant disorders; and, where the people are prone to any particular species of irregularity, the law may be specially directed to reform it, or even with greater severity punish, the first approach to such irregularities, and treat such approaches as a greater crime than even the perpetration of greater evils, to which the people are less disposed, and from which the public therefore has less to apprehend”⁶⁶.

Chinese legal culture is certainly better predisposed than Thai culture to punish with greater severity, in the words of Ferguson, the ‘first approach’ to moral irregularities. However, criminalization of particular irregularities and a strict enforcement of law in China and less in Thailand depends more on the political discretion of the state officials than on the moral nature of the offence. In relation to environmental crime, for example, the criminal laws that penalize severely many acts motivated by selfishness and greed are insufficiently enforced⁶⁷.

Thus, the ideas of criminal law that are found among the representatives of the Scottish Enlightenment offer an alternative to the system of criminal law which exists now in the Far-Eastern countries. This alternative calls for a significant limitation on the process of criminalization. Only grossly immoral acts should be penalized. All multiple offences against state regulations, as long as they do not offend public moral sentiment, must be dealt by administrative law rather than criminal law. There is some attractiveness of the traditional Scottish model of criminal justice for applying it in such countries like China or Thailand. One does not need to wait until the time when liberal democracy prevails in those lands to make the law less oppressive. A reform of criminal law on the principles of the Enlightenment can be conducted under a non-liberal government. This is the point in which the traditional Scottish model of criminal law diverges from the contemporary communicative theory of criminal law.

5. The communicative theory of criminal law and the Scottish criminal law heritage

It is not a coincidence that the strongest expression of the contemporary communicative theory of criminal law is found not in the Far East but in Scotland⁶⁸. This theory is often associated with Antony Duff⁶⁹ who was teaching philosophy of criminal law in one of the Scottish universities. His theory can be traced to the Enlightenment which put forward the complex issues of individual autonomy and freedom⁷⁰. A fuller consideration of the communicative theory of criminal law is beyond the scope of this paper. It is important,

⁶⁶ Ferguson A. Principles of moral and political science. P. 145–146.

⁶⁷ The situation in China is changing. It will take some time to see whether the recent campaigns against environmental crime will endure. For the problems in enforcement of environmental crime legislation see: Van Rooij B. Implementation of Chinese environmental law: regular enforcement and political campaigns // Development and Change. 2006. Vol. 37, no. 1. P. 57–74; Shytov A. Environmental Crime and Communication to the Public in China // Journal of Chinese Political Science. 2016. Vol. 22, no. 1. P. 57–75; Day K. China’s environment and the challenge of sustainable development. Routledge, 2016; Tan A. K. Environmental laws and institutions in Southeast Asia: A review of recent developments // Singapore Year Book of International Law. 2004. Vol. 8. P. 179–181.

⁶⁸ Duff A. Punishment, communication, and community. Oxford University Press, 2001; Duff A., Green S. (eds). Philosophical foundations of criminal law. Oxford University Press, 2013. — The communicative theory has been significantly revised by a number of writers, whose full consideration is not possible within the limits of this paper. For the most recent works, see: Surprenant Ch. W. (ed.). Rethinking punishment in the era of mass incarceration. Routledge, 2018; Lee A. Defending a communicative theory of punishment: the relationship between hard treatment and amends // Oxford Journal of Legal Studies. 2017. Vol. 37, no. 1. P. 217–237.

⁶⁹ Duff A. Punishment, communication, and community. Oxford University Press, 2001.

⁷⁰ Carvalho H. The preventive turn in criminal law. Oxford University Press, 2017. P. 17.

however, to highlight the main propositions of the theory to see its relevance to the traditional Scottish model of criminal justice and the significance of the latter for the criminal law reform in the Far-East. According to this theory, the task of criminal law is not simply inflicting a retributive suffering on an offender or deterring him and others from committing crime again. Rather, its task is to express and communicate a public condemnation of a criminal act. Condemnation is based on the fact that crimes are specific public wrongs. Criminal law is an authoritative code of community and it is addressed to its members as reasonable beings who must understand that a particular act is a moral wrongdoing. The knowledge that this act (or omission) constitutes a crime, has to be properly communicated to the public before an offender can be called accountable: "As citizens, we are members of the normative community whose values the law purports to express: if it is to address us as citizens, and as responsible agents, it must speak to us not in the peremptory, coercive voice of a sovereign who commands our obedience, but in the rational, normative voice of values which demand our allegiance as the values of our polity"⁷¹.

Further, punishment "should aim not merely to communicate censure to the offender, but to persuade the offender to recognise and repent the wrong he has done, and so to recognise the need to reform himself and his future conduct, and to make apologetic reparation to those whom he wronged"⁷². In order to achieve this goal, criminal laws must meet several criteria. It must, first of all, indicate clearly the evil that the criminal law aims to prevent. The law must condemn precisely a certain harmful act rather than leaving this issue to administrative or judicial discretion. Secondly, punishment must be proportionate to the evil of crime.

It is obvious from a brief account given above, that the theory of Antony Duff is, to a significant extent, a reinstatement of the views of the Scottish Enlightenment on the nature of criminal law. However, there are certain difficulties in applying the contemporary communicative theory of punishment in the Far Eastern context⁷³. It has been developed for so called "liberal democracies" in which criminalization is done through a public discourse on whether a particular act violates democratic values. It requires a higher level of legal consciousness and public acceptance. Criminal law in China and in Thailand will inevitably have a more authoritative and coercive element than the one advanced by the communicative theory.

In this context, the earlier tradition of the Scottish Enlightenment briefly outlined above may offer a better working model of criminal law as an alternative to the Far Eastern systems of criminal justice that lack the communicative element within them. When compared to the communicative theory of Antony Duff, the difference of the earlier Scottish tradition is apparent. For Lord Stair, crime would be an act which is evil because of its natural consequences, while for Antony Duff, in order to criminalize an act, there must be a democratic acceptance (by the public) of the fact that the act grossly violates some values of "liberal polity". A naturalist concept of criminal law advanced by Lord Stair is certainly a more powerful alternative to the contemporary Far-Eastern criminal laws than a conventionalist concept of Antony Duff. The naturalist concept of criminal law can be

⁷¹ Duff A. Theories of criminal law // Stanford Encyclopedia of Philosophy. 2013. Available at: <https://plato.stanford.edu/entries/criminal-law/> (accessed: 15.06.2018).

⁷² Duff A. Legal punishment // Stanford Encyclopedia of Philosophy. 2017. Available at: <https://plato.stanford.edu/entries/legal-punishment/#PunCom> (accessed: 15.06.2018).

⁷³ There are also many sceptics that this theory can be efficiently applied in the Western context. See: Schinkel M. Punishment as moral communication: The experiences of long-term prisoners // Punishment & Society. 2014. Vol. 16, no. 5. P. 578–597. — For the limitations of the theory in relation to political trials see: Veitch S. Judgment and calling to account: truths, trials and reconciliations // The trial on trial. Vol. 2: Judgment and calling to account / ed. by A. Duff, L. Farmer, S. Marshall, V. Tadros. Oxford: Hart, 2006. P. 155–171.

easier accommodated to the ethical traditions of the Far East than the concept of a liberal democracy advanced by Duff⁷⁴.

The usefulness of the Enlightenment period of Scottish literature as an analytical tool for law reform in countries like China and Thailand comes not merely from the expectation that the religious overtones of the enlightenment literature would be better received into these countries than the contemporary Scottish ideals of liberal democratic society as the foundations of criminal law. What makes the Scottish Enlightenment approach more attractive than the communicative theory of Duff is the idea of crime that transcends both the conventionalism of the Western liberal democracies on the one hand and the apparent arbitrariness of the Eastern autocratic regimes in their definitions of crime.

In order to be labeled as a crime, an act or an omission, according to the Scottish luminaries, must first meet the standard of a moral wrongdoing that offends the moral sense of the community. Effectively, this Enlightenment approach limits the scope of criminal law only to serious moral offences, leaving other largely regulatory offences to be dealt with by other legal means such as an administrative fine, administrative caution, etc. In this way, the arbitrariness of the state powers in defining criminal offences is limited by the moral sense of the community. The latter represents a much stronger constraint on the use and the abuse of political powers than the existence of a legislative assembly or human rights protection mechanisms which can be manipulated in an authoritarian state.

Moreover, the Scottish Enlightenment presents something more than a species of the ethics of moral absolutism similar to Confucianism and Buddhism in affirming the objectivity and the validity of moral norms that claim their authority over individual and collective moral choices. It affirms the power of reason to critically examine and prove the correctness and genuineness of moral sentiments that call on the state power to penalize a particular type of offensive behavior.

It was already affirmed above that the Scottish enlightenment literature corresponds to many Eastern moral concepts like “ethical love”. However, it goes beyond. It neither binds the content of criminal law to an ancient tradition as the Confucianism does, nor ignores the importance of social action and reform as the mainstream of Buddhism does. In Confucianism, the concepts of crime and punishment are defined by the revered tradition of the ancient literary canon. In Buddhism, crime is perceived as a result of worldly attachment, and the best remedy against it is extinguishing any attachment whatsoever. The Scottish Enlightenment offers something more realistic and without undermining the noble goals of Buddhism and the virtues of Confucianism. If we should compare Scottish concept of crime to the Confucian and to the Buddhist one, it can be described as *pro-spective*, while the Confucian concept is *retro-spective*, and the Buddhist concept is *trans-spective*.

Another important contribution of the Scottish doctrine of criminal law is that it succeeded in a formation of secular norms of criminal law that are derived from the basic ethical and religious principles⁷⁵. In China and Thailand, Confucianism and Buddhism may influence the interpretation and application of the rules of criminal law including the policies of criminalization and decriminalization, but the contemporary Chinese and Thai criminal laws thanks to their inner logical order cannot naturally flow from these ethical traditions. The value of the Scottish moral tradition is not that it is uniquely Scottish. Rather its attractiveness and beauty come from the steadfast faith in the power of Reason to conduct the

⁷⁴ Cheng Chi-Yu. The Chinese theory of criminal law // Journal of Criminal Law & Criminology. 1948. Vol. 39. P. 461; Greer S., Lim T.P. Confucianism: natural law Chinese style? // Ratio Juris. 1998. Vol. 11, no. 1. P. 80–89; Loy D. How to reform a serial killer: the Buddhist approach to restorative justice // Journal of Buddhist Ethics. 2000. Vol. 7. P. 145–168.

⁷⁵ Kennedy C. Criminal law and religion in Post-reformation Scotland. P. 179.

affairs of this world and from the consistent application of religious and ethical concepts to define crimes and remedies against them.

6. Conclusion

The Scottish philosophical idea of criminal law offers one of the paradigms of a criminal justice that is fundamentally different from the systems of justice in the Far East. It can be used, however, in any part of the world thanks to the universal principles of reason advanced by the representatives of the Scottish Enlightenment. Unlike, the contemporary model of a communicative theory of criminal law that is also advanced in Scotland nowadays, the traditional Scottish model does not require the existence of the regime of liberal democracy. It can be applied within the political and cultural contexts of the Far East where liberal democracy does not exist or is very weak.

The Scottish Enlightenment's heritage, indeed, brings to the light fundamental defects of criminal justice in such diverse countries as China and Thailand. Despite their differences, Chinese and Thai laws possess some common features. Thai and Chinese nationals are hardly familiar with their content. They are written in a difficult language that is hardly understandable to the mass of common people, and they refer to administrative regulations that are not easily accessible to the public.⁷⁶ The application of criminal law is often perceived as being arbitrary and depending on the discretion of police and prosecutors. Judges are seen either as the executive officials whose actions are determined largely by the considerations of policy and expediency, or as machine-like beings who stamp the decisions of the prosecutors.

Perhaps, the weakest point of both Chinese and Thai criminal laws is that they lack the force of public censure in the sense as it has been advanced recently within the communicative theory.

Even though not all propositions of the Scottish Enlightenment can be accepted within the present realities of the Far East, the thought of the Scottish luminaries can provide a useful starting point for the original definitions of crimes in the Asian cultural and political contexts. The implication of the Scottish Enlightenment for the law in the Far East is certainly not that one must dispose of administrative regulations. On the contrary, administrative mechanisms are not less important than criminal laws. However, the ambit of criminal liability must be reduced and be clearly distinguished from administrative liability.

Crime must be understood not only as an economic or social phenomenon. It is also a moral wrongdoing. It is impossible to divorce a criminal act from, in Hume's words, "frailty or perverseness of our nature"⁷⁷. It is the right thing to define different crimes as a species of vice leaving outside the scope of criminal law most regulatory offences to be dealt with by the means of administrative or civil law sanctions. Similar to the contemporary communicative theory of criminal law, the Scottish Enlightenment treats crimes as moral wrongs. It supports the view that the task of criminal law is to communicate public censure. Unlike the contemporary communicative theory, it is not bound to a model of a liberal democracy and can be applied in authoritarian political models. The Scottish Enlightenment provides a useful forum not only for criticism of criminal law in such diverse countries as Thailand and China, but it also indicates the way to improve law enforcement practices. The moral resentment against criminal offences is an important engine for a more effective system of criminal justice.

The Scottish philosophical approach to crime as a social vice deserves a careful attention far beyond the borders of Scotland. The attractive feature of the Scottish Enlight-

⁷⁶ *Shytov A.* Environmental Crime and Communication to the Public in China.

⁷⁷ *Hume D.* Essays political, moral, and literary. P.38.

enment for China and Thailand is that it is pragmatic, and it reaffirms the need for economic development⁷⁸. It is the excessiveness of the governmental control by the means of criminal law that can threaten the wellbeing of people. The root of many wrongdoings lies not so much in the lack of regulation but in a lack of that moral independence and public virtue which imposes constraints on economic greed and ignorance as the causes of many crimes.

Scottish philosophers understood well the importance of moral perceptions in the course of administration of criminal justice. Both China and Thailand have many people with a strong moral perception towards social wrongs. In this context, a paradigm of law that is similar to the traditional Scottish model of criminal law presents opportunities to mobilize people for a civil action to achieve the goals of criminal justice. "When a faction is formed upon a point of right or principle, there is no occasion, where men discover a greater obstinacy, and a more determined sense of justice and equity"⁷⁹. This is the point where the pragmatism of David Hume meets the pragmatism of Confucius. Morality rooted in strongly held religious beliefs impose effective restraints on the use of political powers⁸⁰ whose ultimate object or purpose is the distribution of justice.⁸¹ Since both Scottish and Eastern moral philosophers understood justice as an ethical category, the traditional Scottish model of criminal law provides a platform where the West and the East can meet and understand each other.

References

- Alison, Archibald. 1832. *Principles of the Criminal Law of Scotland*. W. Blackwood.
- Allison, Stephen. 2012. Stair, natural law and Scotland. *Law & Justice – The Christian Law Review* 169: 189–209
- Bayne, Alexander. 1730. *Institutions of the criminal law of Scotland*. Edinburgh.
- Beales, Derek. 2005. *Enlightenment and reform in eighteenth-century Europe*. London, IB Tauris.
- Bell, Daniel A. 2006. *Beyond Liberal Democracy: Political Thinking for an East Asian Context*. Princeton University Press.
- Biddulph, Sarah. 2015. *The Stability Imperative: Human Rights and Law in China*. Vancouver, UBC Press.
- Broadie, Alexander. 2003. *The Cambridge companion to the Scottish Enlightenment*. Cambridge University Press.
- Cairns, John W. 2003. Legal theory. *The Cambridge companion to the Scottish Enlightenment*, ed. by A. Broadie: 222–242. Cambridge University Press.
- Calvin, John. 1813. *Institutes of Christian religion*. Philadelphia, Presbyterian Board of Publications.
- Carvalho, Henrique. 2017. *The preventive turn in criminal law*. Oxford University Press.
- Chen I-Hsin, 2016. From God's Chinese names to a cross-cultural universal God: James Legge's intertextual theology in his translation of Tian, Di and Shangdi. *Translation Studies* 9 (3): 268–281.
- Chen, Jianfu. 2008. *Chinese law: Context and transformation*. Leiden, Martinus Nijhoff Publishers.
- Cheng, Chi-Yu. 1948. The Chinese theory of criminal law. *Journal of Criminal Law & Criminology* 39: 461–470.

⁷⁸ In his discussion of violent crime, Smith in "Lectures on jurisprudence", II. I. wrote: "In Glasgow, where almost nobody has more than one servant, there are fewer capital crimes than in Edinburgh. In Glasgow there is not one in several years; but not a year passes in Edinburgh without some such disorders. Upon this principle, therefore, it is not so much the police that prevents the commission of crimes as the having as few persons as possible to live upon others. Nothing tends so much to corrupt mankind as dependency, while independency still increases the honesty of the people. The establishment of commerce and manufactures, which brings about this independency, is the best police for preventing crimes".

⁷⁹ *David H. Essays political, moral, and literary*. P. 37.

⁸⁰ *Ibid.* 40.

⁸¹ *Ibid.* 38.

- Chitov, Alexandre. 2018. Natural Law, criminalization and extraterritorial jurisdiction in Thailand and China: a comparative law perspective. *MFU Connexion: Journal of Humanities and Social Sciences* 7.1: 233–260.
- Chitov, Alexandre. 2021. The legal hurdles to cooperation between Thailand and China in suppressing illegal trade in endangered species. *Thammasat Law Journal*, 50.2.: 222–240.
- Chuan Feng, Nelson, Leyton, Simon, Thomas W. 2016. *China's Changing Legal System*. Basingstoke, Palgrave Macmillan.
- Day, Kristen. 2016. *China's environment and the challenge of sustainable development*. London, Routledge.
- Duff, Antony, Green, Stuart (eds). 2013. *Philosophical foundations of criminal law*. Oxford University Press.
- Duff, Antony. 2013. Theories of criminal law. *Stanford Encyclopedia of Philosophy*. Available at: <https://plato.stanford.edu/entries/criminal-law/> (accessed: 08.05.2022).
- Duff, Antony. 2017. Legal punishment. *Stanford Encyclopedia of Philosophy*. Available at: <https://plato.stanford.edu/entries/legal-punishment/#PunCom> (accessed: 08.05.2022).
- Duff, Antony. 2001. *Punishment, communication, and community*. Oxford University Press.
- Dupre, Louis. 2004. *The Enlightenment and the intellectual foundations of modern culture*. Yale University Press.
- Erskine, John. 1881. *Principles of the law of Scotland*. Edinburgh, Bell & Brandfute.
- Farmer, Lindsay. 1997. *Criminal law, tradition and legal order: Crime and the genius of Scots law, 1747 to the present*. Cambridge University Press.
- Ferguson, Adam. 1792. *Principles of moral and political science*. Edinburgh, W Creech.
- Forbes, William. 1730. *The institutes of the law of Scotland*. Edinburgh, J. Mosman.
- Ford, John D. 2007. *Law and opinion in Scotland during the seventeenth century*. Hart Publishing.
- Gaskin, John. 1988. *Hume's philosophy of religion*. Houndmills, MacMillan Press.
- Greer, Steven, Lim, Tiong Piew. 1998. Confucianism: natural law Chinese style? *Ratio Juris* 11 (1): 80–89.
- Grotius, Hugo. 1625. *De Jure Belli ac Pacis*. Available at: <https://oll.libertyfund.org/title/grotius-the-rights-of-war-and-peace-2005-ed-3-vols> (accessed on 08.05.2022).
- Harding, Andrew, Pongsapan, Munin (eds). 2021. *Thai Legal History: From Traditional to Modern Law*. Cambridge University Press.
- Haakonssen, Knud (ed.). 2006. *The Cambridge companion to Adam Smith*. Cambridge University Press.
- Hongladarom, Soraj. 2006. Love in the age of high technology: how are Metta and Karuna still possible? *Prajna Vihara* 7 (2). Available at: http://its-3.au.edu/open_journal/index.php/PrajnaVihara/article/view/1145 (accessed: 08.05.2022).
- Hume, David. 1739. *A treatise of human nature*. London, John Noon.
- Hume, David. 1987. *Essays political, moral, and literary*. Indianapolis, Liberty Classics.
- Kennedy, C. 2012. Criminal law and religion in post-reformation Scotland. *Edinburgh Law Review* 16 (2): 178–197.
- Lee, Ambrose. 2017. Defending a communicative theory of punishment: the relationship between hard treatment and amends. *Oxford Journal of Legal Studies* 37 (1): 217–237.
- Legge, James. 1865. *The Chinese Classics, volume III: the Shoo King or the Book of Historical Documents*. London: Trubner.; rpt. Hong Kong: Hong Kong University Press, 1960.
- Lehmann, William C. 1971. *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and in the History of Ideas*. Dordrecht, Springer.
- Loy, David. 2000. How to reform a serial killer: the Buddhist approach to restorative justice. *Journal of Buddhist Ethics* 7: 145–168.
- Luo, Guanzhong, Roberts, Moss. 1991. *Three kingdoms: A historical novel*. Berkeley; Beijing: University of California Press; Foreign Languages Press.
- Macpherson, Crawford B. 1977. *The life and times of liberal democracy*. Oxford University Press.
- NIV Bible. 2011. Available at: <https://www.biblegateway.com/versions/New-International-Version-NIV-Bible/> (accessed: 08.05.2022).
- Schinkel, Marguerite. (2014). Punishment as moral communication: The experiences of long-term prisoners. *Punishment & Society* 16(5): 578–597.
- Shytov, Alexander. 2016. Environmental crime and communication to the public in China. *Journal of Chinese Political Science*, 22(1): 57–75.

- Smith, Adam 1759. *Theory of moral sentiments*. London, Henry G. Bohn.
- Smith, Adam. 1763. *Lectures on jurisprudence*. Oxford, Clarendon Press.
- Sobel, Jordan Howard. 2011. *Walls and vaults: a natural science of morals (Virtue ethics according to David Hume)*. Hoboken John, Wiley & Sons.
- Stair, James Dalrymple. 1681. *The institutions of the law of Scotland*. Edinburgh. Available at: <http://quod.lib.umich.edu/e/eebo/A61249.0001.001?rgn=main;view=fulltext> (accessed: 08.05.2017).
- Surprenant, Chris W. (ed.). 2018. *Rethinking punishment in the era of mass incarceration*. New York, Routledge.
- Swain, Tony. 2017. *Confucianism in China: An introduction*. Bloomsbury Publishing.
- Tan, Alan Khee-Jin. 2004. Environmental laws and institutions in Southeast Asia: A review of recent developments. *Singapore Year Book of International Law* 8: 179–181.
- Thomas Aquinas. *Summa Theologiae*. Available at: <https://www.newadvent.org/summa/> (accessed: 08.05.2022).
- Uwanno, Borwornsak. 2008. *Ten principles of a righteous king and the king of Thailand*. Nonthaburi: King Prajadhipok's Institute.
- Van Rooij, Benjamin. 2006. Implementation of Chinese environmental law: regular enforcement and political campaigns. *Development and Change* 37 (1): 57–74.
- Veitch, Scott. 2006. Judgment and calling to account: truths, trials and reconciliations. *The Trial on Trial. Volume 2: Judgment and calling to account*, eds A. Duff, L. Farmer, S. Marshall, V. Tadros. Oxford, Hart: 155–171.
- Veitch, Scott. 2017. The sense of obligation. *Jurisprudence* 8:3, 415–434.
- Werner, Hans Keller, Zhang Xia. 2017. Functions of law in the sustainable development of China and a model for environmental legislation. *European Business Review*, 29 (4): 440–456. <https://doi.org/10.1108/EBR-05-2016-0062>
- Xiaoying, Ma, Ortolano, Leonard. 2000. *Environmental regulation in China: Institutions, enforcement, and compliance*. Oxford, Rowman & Littlefield Publishers.
- Xin, Ren. 1997. *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China*. Westport, Greenwood Press.
- Ying, Ji. 2021. *The Making of Chinese Criminal Law*. London, Routledge.
- Yu, Mou. 2020. *The Construction of Guilt in China: An Empirical Account of Routine Chinese Injustice*. Oxford, Bloomsbury Publishing.
- Zhang, Jinfan. 2014. *The Tradition and Modern Transition of Chinese Law*. Berlin, Springer.

Received: July 13, 2022

Accepted: November 21, 2022

Традиционная шотландская модель уголовного права с дальневосточной точки зрения*

А. Н. Шитов

Для цитирования: *Chitov A.* The traditional Scottish criminal law model from the Far-Eastern perspective // Правоведение. 2023. Т. 67, № 1. С. 56–73. <https://doi.org/10.21638/spbu25.2023.103>

Традиционная шотландская модель уголовного права была смелой попыткой построить систему уголовного права на христианских основах в сочетании с универсальными принципами разума, выходящими за рамки узких национальных, культурных и религиозных традиций конкретной страны. Шотландское уголовное право выросло из эпохи Просвещения, представители которой пытались попытаться основать уголовное право на здра-

* Автор выражает признательность профессору Энтони Даффу, профессору Линдси Фармер, профессору Джеймсу Чалмерсу, доктору Стивену Боглу, доктору Ричарду Джонсу, доктору Хлои Кеннеди и Ангусу Макки, а также анонимным рецензентам за их мысли, исправления и отзывы о ранних набросках этой статьи. Все оставшиеся ошибки — ошибки автора.

вом смысле, сделать его понятным и полезным. Дух шотландской правовой философии эгалитарен. Знание права должно быть доступно каждому. Эти идеи бросают вызов практике многих стран Востока, где право воспринимается как сложный набор правил, известных только узкому кругу экспертов, в то время как люди играют незначительную роль, но подчиняются этим правилам, часто не понимая их или даже не зная о них. Шотландские идеи уголовного права могут послужить платформой для критического изучения уголовного права в таких разных странах, как Таиланд и Китай. Привлекательной чертой шотландского Просвещения для этих стран является его прагматизм. В то же время она сопротивляется чрезмерности государственного контроля с помощью уголовного права, которое может угрожать благополучию людей. Представление о преступлении как о моральном пороке, оскорбляющем общественные чувства, эффективно ограничивает репрессивную экспансию уголовного права на Дальнем Востоке.

Ключевые слова: уголовное право, шотландское Просвещение, коммуникативная теория, Таиланд, Китай.

Статья поступила в редакцию 13 июля 2022 г.
Рекомендована к печати 21 ноября 2022 г.

Шитов Александр Николаевич — доц., Юридическая школа, Университет Чангмай, Таиланд, 20500, Чиангмай, Хуйа Кео Роуд, 239; shytov@yahoo.com