Comparative Criminal Law

Development, Aims, Methods

Bearbeitet von
Prof. Dr. iur. Dr. h.c. mult. Albin Eser, Brigitte Heilmann

Even though this treatise turned out to be much more extensive than initially intended, by far not everything that might be said in relation to comparative criminal law could be covered. Differently from the literature usually categorized as "comparative law", neither specific criminal law families were described more closely nor individual criminal law phenomena compared with one another. **400**

The decision not to want to fulfil such perhaps extended expectations can be explained by the fact that the focus here was less on specific matters or content of legal systems to be compared and more on possible aims and methods of comparative criminal law. Even where commonalities and differences of diverse legal circles had to be mentioned repeatedly or individual criminal law regulations and legal concepts had to be compared, these only served as example-material for the illustration of specific objectives and methods of legal comparison. Thus, the principal goal was their analysis and presentation. **401**

If the underlying tendency of these reflections on possible objectives, methods and prerequisites of comparative criminal law – in search of being at the same time scientifically meaningful and to promise practically successful in presenting useful results – might frequently be felt to be sceptical, if not even overly sceptical, this would not be surprising; after all, critical question marks had to be placed behind a number of high-flying goals or superficial methods. However, such reservations and objections would be completely misunderstood if they were interpreted as destructive or even as a sweeping rejection of comparative criminal law. Quite the opposite: in order to strengthen comparative criminal law in a constructive way, it is important – right from the start – not to be tempted by expectations that are unachievable, to be armed against hasty conclusions and party-monopolization for hoped-for positions, and also methodically not to fall prey to superficiality and dilettantism. **402**

If comparative criminal law is conducted in this sense – limited to achievable goals and with appropriate methodology –, its value cannot be estimated highly enough; and this even compared with some traditionally preferred areas of comparative law.[794] This may be surprising since criminal law is considered to be by far more strikingly nationally-culturally influenced than other areas of the law, and since the assumption is that differences rather than commonalities can be expected from a comparison.[795] That, therefore, criminal law supposedly resists comparison and standardization much more than is assumed, may be correct for legislative harmonization plans. However, even at this level, comparative criminal law does not need to exhaust itself either in a fanciful "l'art pour l'art" or in biased self-affirmation. On the contrary, exactly because in the area of criminal law one is so easily exposed to the danger to isolate oneself from the outside world by idiosyncratically referring to the special quality and uniqueness of one's country, and in this way may not least of all block undesired reform efforts, it is all the more important to hold the mirror of foreign law in front of national-narcistic self-satisfaction. Looked at from the other way round, it is also good for criminal law dogmatics, which likes to see itself as universally valid, to have such claims of superiority repeatedly challenged by different concepts and models. **403**

Without wanting to repeat the diverse objectives and tasks here that might present themselves to the different types of comparative criminal law – that is theoretical, judicative, legislative and evaluative-competitive[796] –, just three problem areas are to be **404**

[794] Cf. mm. 20 ff.
[795] Cf. mn. 304 ff.
[796] For details see Part II (mn. 50–218).

mentioned with a view to the future. These have been repeatedly mentioned as examples, but since the examination of their content would have gone beyond the framework set here, their comprehensive investigation and presentation is passed on as a challenge to future work in comparative criminal law.

405 First, with respect to the traditional image of legal families that conventionally guide comparative law, comparative criminal law must remove itself from them and, instead, orientate itself on criteria that are specific to criminal law. The usual separation and categorization according to, in any case, mainly private law-oriented legal sources of Romance and Germanic civil or Anglo-American common law provenance, not only does not do justice anymore to more recent legal-political developments (such as socialist-based legal systems) or the inclusion of so far neglected legal cultures (such as those founded on Asian or Islamic legal ideas); rather, the decisive criteria for the formation of private law, public law and criminal law legal families can be quite different.[797] This is the reason why the criminal law theory of legal circles – in as far as it can be relevant to comparative criminal law at all and the choice of countries does not, anyhow, depend on the specific objective of a particular project –, has to emancipate itself from (private law-related) "civilistic" models and create itself on the basis of its own objectives and legal sources.

406 However, also within comparative criminal law itself – and this is a second desideratum – one should not readily start with the assumption of one integrated legal circle; rather, depending on the substantive or procedural law, different groupings might be in order. Accordingly, the comparison of different substantive elements of a crime or institutions in terms of procedural law cannot simply follow the same scheme, but has to take special national features as well as different overall connections and consequences into consideration. Therefore, a comparative criminal law which goes beyond the mere side-by-side presentation of certain regulations or legal figures, must be expected to comprehend the phenomena to be compared – even if only with respect to specific partial areas – in their overall area-specific context, and to choose the countries to be considered accordingly.

407 The third area that should be given increased attention is that of international criminal justice. Even though there is no lack of comparative criminal law contributions which look at this, one cannot help thinking that the comparing remains rooted too much in the investigation of the origin of particular rules in the Anglo-American common law or the continental-European traditions, and the respective preferability of one over the other. Instead, it would be time – in search of universally acceptable legal principles and the development of supranational criminal law and jurisdiction – to orientate oneself on their possible goals, and – starting from this higher vantage point – to investigate from which national legal systems one might gain guiding principles and institutions, and to what extent one might count on international acceptance for this, on as a broad a scale as possible. The findings gained therefrom could, in the form of model criminal codes, be used to serve as models for national reform projects as well, even if divergent special features of the administration of international criminal justice had to be taken into account.

408 As far as the second and, in a sense, also the third desideratum is concerned, lessons are to be learned not least of all from the "structure comparison project"[798] this treatise emerged from and which served as basis for this general study on the theory and

[797] For details see mn. 283 ff.
[798] *Eser/Perron*, Strukturvergleich (fn. 1).

practice of comparative criminal law.[799] As a project that understood itself as a new type of pilot study, the "structure comparison project" was both, in the matter it covered and in regard to the included countries, subject to limitations.[800] After the methodology used for it has proved itself, it can be transferred to further areas in two ways: firstly, by extending it to legal families and criminal law systems other than those covered so far, including namely the supranational level, and secondly, by comparing further substantive elements of criminal responsibility and its formal structure and by expanding the comparison to other groups of special crimes.[801]

409 To have highlighted this structural-comparative methodology does not mean at all that it is the only possible approach. As has to be stressed very clearly once more, the method to be used in comparative law depends decisively on the specific objective.[802] Only if this is paid attention to, can one, on the one hand, be immune to frustrating overtaxing demands and also resist, on the other hand, the temptation of taking comparative criminal law too lightly in a dilettante way, or of instrumentalising it with discrediting ulterior motives.

410 When a comparatist is successful in finding the right balance in the search for the one option out of many possibilities – a process typical for comparative law –, he or she is richly rewarded. Similar to legal philosophy and legal history which also cannot be undertaken properly without the use of comparisons, the appeal of comparative law lies exactly in the fact of finding the common, and perhaps even the universal, from within a great variety of thoughts and phenomena, without allowing the individual to get absorbed into the general. The act of reaching beyond the familiar, the opening of one's eyes to the other, the tracking down of commonalities, the respect for individual characteristics, the thus increasing scepticism towards the superstition in absolute truths, as especially in the rightness of the (usually one's own) law or particular legal convictions; both the willingness to understanding tolerance and the vigilance of unacceptable deviance, as well as, not least of all, the progress to be hoped for along the way to a less confrontational and more balanced legal world: all of this makes the commitment to a purposeful and methodically appropriate science of comparative criminal law worthwhile.

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[799] Cf. Preface and mn. 1.

[800] Cf. *Eser/Perron*, Strukturvergleich (fn. 1). pp. 14 ff, 30 ff.

[801] As was already discussed in the planning of the "structure comparison project" (cf. *Eser/Perron*, Strukturvergleich (fn. 1). pp. 19 ff.). when – looking at it from today's point of view, instead of the areas considered then – others might also have been taken into consideration.

[802] Cf. mn. 229 ff.

EPILOGUE

ON THE STATUS OF COMPARATIVE CRIMINAL LAW: AN APPRAISAL OF CURRENT LITERATURE