Comparative Criminal Law

Development, Aims, Methods

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

1. Auflage 2017. Buch. XVIII, 188 S. In Leinen
ISBN 978 3 406 70277 8
Format (B x L): 16,0 x 24,0 cm
Gewicht: 573 g

Eser

Comparative Criminal Law

Comparative Criminal Law

Development – Aims – Methods

by

Albin Eser

Professor, Dr. iur. Dr. h.c. mult., M.C.J. (NYU)
Director emeritus, Max Planck Institute
for Foreign and International Criminal Law
Freiburg/Germany

translated from the German
by

Brigitte Heilmann

2017

C. H. BECK · HART · NOMOS

Published by
Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by
Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5, 76530 Baden-Baden,
Germany, eMail: nomos@nomos.de

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,
Portland, OR 97213-3786, USA, eMail: orders@isbs.com

ISBN 978 3 406 70277 8 (C.H. BECK)
ISBN 978 1 50991 943 7 (HART)
ISBN 978 3 8487 3803 8 (NOMOS)

Wilhelmstr. 9, 80801 München
Printed in Germany by
Beltz Bad Langensalza GmbH
Am Fliegerhorst 8, 99947 Bad Langensalza
Typeset by
Reemers Publishing Services GmbH, Krefeld
Cover: Druckerei C. H. Beck Nördlingen

In love and gratitude
dedicated to

Gerda

my wife and lifelong companion on comparative travels

Preface

Comparative Criminal Law seems to be on the rise, at least in terms of standing on its own feet. However, this was not always the case. When looking into traditional textbooks on "comparative law", it is amazing to see that this discipline, apparently as a matter of course, seems to have been considered a realm of private law – as if comparison of criminal law was a quantité négligeable that, for whatever reason, did not merit dealing with explicitly.

In recent years, however, this picture has changed. "Comparative criminal law" is gaining recognition as a discipline in its own right, both in research and teaching. Yet, measured by the language and number of publications in this field, one could get the impression that this development is a phenomenon of the English speaking common law world, as in its publications one will hardly find a reference to what is going on in other legal regions, for example in continental-European civil law – unless those scholars write in English. Seemingly, in order to be taken notice of, continental-European comparatists – rather than writing in their own mother tongue – have to present their thoughts and findings in English.

This language issue, however, is not the only reason for editing this originally German publication in an English version. More important is the novel concept and manner in which comparative criminal law is analysed and presented in this volume. Traditional literature on this subject focusses on specific aims or methods of comparing criminal law, or to present the law of selected jurisdictions or "legal families". In thus narrowing the field of vision, one runs the risk of prioritising a method of comparison without first having gained a full picture of perhaps better tools available. Or even worse, not only a few methodological debates are conducted without first having determined the aim for which the comparison shall be performed. As a result, this type of theoretical discourse does not offer much benefit for practical comparative work. So, one of the most important lessons learned from traditional literature on comparative law is that you cannot discuss methods without first having determined the aim. As these aims can be very different, if not even of greater variety than commonly assumed, it cannot be ignored that there is no "one-size-fits-all-method" in comparisons of criminal law, theory and practice.

It is based on these insights drawn both from long-term experience in comparative practice and theoretical studies that this publication was conceived. Being aware of the interdependence of aims and methods, the appropriate way to proceed is to first clarify and describe the various purposes and functions comparative criminal law may serve. Comparative criminal law can basically by divided into "judicative", "legislative" and purely "theoretical" fields, eventually supplemented with what may be called the "evaluative-competitive" comparison of criminal law; although the potential for a further variety of subdivisions and possible overlap exists When realising the considerable diversity of possible aims and ranges that comparisons of criminal law may be employed for, still to believe that this variety of functions could be mastered with one and the same method would be an illusion. Therefore, in a second step it is necessary to show that the variety of goals requires a variety of methods. Whereas in some cases, for instance, a "normative-institutional" approach may suffice, in others a more "functional" method may be indispensable. Alternatively, while a "cultural turn" may be needed in some situations, a "structural" analysis would be more appropriate in others.

But not only does each type of a comparative aim require its best corresponding method(s), no less important is to know in which of the various phases of comparison which method fits best. As it concerns exactly this implementation of theory into practice that is usually neglected in this field, it is one of the main aims of this book to present the methodology of comparative criminal law in a way which eases and encourages its practice.

The importance of clarifying the comparative goal before selecting the method to be applied was proven in a relatively large research project designed to find out in which – similar or different – manner various European jurisdictions would evaluate an exemplary homicide case: in what way and at which stage of the proceeding extenuating circumstances might be taken into consideration, what verdict and sentence might be expected, and finally, how the judgement would be executed and/or when and on what conditions early release might be granted [Albin Eser/Walter Perron (eds.), Strukturvergleich strafrechtlicher Verantwortlichkeit und Sanktionierung in Europa. Zugleich ein Beitrag zur Theorie der Strafrechtsvergleichung, Berlin 2015, 1144 pages]. Obviously, a comparative project as complex as this cannot be performed with only one method. While for a purely theoretical interest in the relevant crime provisions a legalistic comparison may suffice, for judicial purposes their application in practice, too, would need to be described, thus also requiring empirical comparisons. Additionally, if any possible differences are to be explained, this can hardly be done without the investigation of dissimilarities in the legal culture and tradition. Or to mention just one more legislative aspect, if one wants to explore what are more or less good stages in dividing the criminal proceeding in various phases, possibly with different options for taking aggravating or mitigating circumstances into consideration, then functionalist and structuralist methods become necessary.

Building on these and other lessons learnt from undertaking the project described before, it seemed only logical to put the illustrative material gained from it into a broader theoretical context. This is, in this volume, done in three steps: After an introductory review of the development of comparative criminal law and its general self-understanding and present status (Part I), broad attention is paid to the various aims and functions of comparative criminal law (Part II), followed by an analysis of its methodology (Part III), that is summarised in a practical guide for performing comparative work in criminal law. After a concluding outlook on what remains to be done (Part IV), finally the status of comparative criminal law is illuminated by an analysis and appraisal of current literature in this field (Epilogue).

Although developed from the aforementioned research project (and thus originally building the final part of it), this book is standing on its own as a general theory of comparative criminal law and its practice. As written by a German with a European background, the manner of argumentation, as well as examples selected, may differ from what Anglo-American or other audiences are most used to read, let alone the considerable number of references to non-english literature. However, as a specific feature of comparative criminal law is to become acquainted with other cultures and ways of thinking, it appears desirable rather than feeling frustrated to instead welcome a new foreign approach as an enrichment.

To enjoy such an enrichment from foreign countries and legal culture is a privilege. I was already granted this chance before finishing my German PhD in law (1962), thanks to a Fulbright Foundation scholarship for the Institute of Comparative Law at New York University (1960/61). This proved not only to be an eye-opener to the common law, but also a first signpost to comparative criminal law, due to a Master thesis on "The

principle of harm", supervised by the late Professor *Gerhard O.W. Mueller*. His distinct sense for everything strange and his constant encouragement never to let the legal view be restricted by national borders will always be gratefully remembered. Besides many others who deserve my special thanks for having accompanied me on my comparative way, I may in particular mention Professor *George P. Fletcher,* who already in 1981, while I was teaching as Visiting Professor at the University of California at Los Angeles, gave me the chance to participate in the genesis of his comparative "Rethinking Criminal Law" – followed by joint seminars and common publications, cemented further in long-standing ties of friendship. Still more global ways to comparative criminal law were opened by my role as Director of the Max Planck Institute for Foreign and International Criminal Law in Freiburg (1982). In this respect I am not only gratefully thinking of many enlightening conversations which I was able to have with foreign research guests at the Institute but also of numerous visits and lecture tours to other countries, resulting in fruitful comparative insights and leading to quite a lot of mutual cooperation. Above all, however, I gratefully remember my stays as visiting professor in many countries and jurisdictions, for instance in the last ten years in Kyoto in Japan, Hobart in Australia, Haifa and Jerusalem in Israel as well as Columbia and St. Louis in the United States. Teaching foreign students, directly communicating with colleagues – there is hardly a better way to gain comparative experience. Not just a little of these insights found their way into this publication.

With special regard to the genesis of this book, among the various persons who deserved thanks for having contributed to its preparation in this or that way, only these may be mentioned. First of all Professor *Walter Perron* who has borne the main burden in the conceptual design and coordination of the "structure comparison project" which this publication emerged from. Particular thanks must also be given to *Brigitte Heilmann* who translated the German manuscript into English – not an easy task particularly in so far as more than a few of the German criminal-legal concepts, terms and differentiations have no direct equivalent in Anglo-American criminal law and thus still had to be mutually developed. Particular thanks also have to go to Dr. *Wilhelm Warth* of C. H. Beck Verlag for his editorial support: not only for constructing the index but still more for already having encouraged this publication and accompanying it with constant goodwill. Complementing the index and bringing the bibliography up to date was kindly contributed by *Leonie Reichardt* as student intern. For various good advice I am grateful to the British legal academic Dr. *Sophie Eser.*

My greatest and warmest thanks go to my wife *Gerda*. Over many years and decades in which I was occupied with comparative criminal law, starting with my study year in New York up to my still active retirement, she was not only a familial and homely guarantor for preserving me free time for research and teaching but also frequent companion on my comparative travels. This book is dedicated to her in love and gratitude.

Freiburg, April 2017 *Albin Eser*

Contents

Table of Contents