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Introduction to Volume II

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I The Need for a Comparative Conceptual Analysis

Criminal law and criminal justice are becoming increasingly globalised. In open societies, the era in which individual jurisdictions developed their own codes, statutes and systems of justice with no regard to other systems and countries is long over. There is a growing desire to develop common approaches to common problems and to learn from the diversity of current practice in different countries. This development has been reinforced by the internationalisation of criminal justice in international and mixed criminal tribunals. However, attempts at trans-jurisdictional discourse are often hampered by mutual misunderstandings. Some problems are linguistic: although English is the new *lingua franca* of international and comparative criminal law, not all foundational concepts of criminal law and justice originate in the English-speaking world; some of them are rooted in civil law jurisdictions, such as France, Germany and Italy. The translation of these concepts into English is subject to ambiguity and potential error: the same term may assume different meanings in different legal contexts. As a consequence, critical and theoretical discussions too often take place within the different legal traditions rather than between them: Anglo-American scholars talk to one another, as do those taught in Continental European criminal law traditions; only rarely do they engage seriously with one another across these jurisdictional borders.

If we are to overcome these obstacles, we need to engage in a multi-jurisdictional and comparative conceptual analysis of a kind not provided by previous comparative projects, which typically focus on specific topics or issues.[1] Our aim is to look for a set of common foundational concepts

[1] In a similar vein, see Fissell, Book Review (2021, Advance Article), 1.

that could provide the basis for productive trans-jurisdictional exchanges. On the basis of prior comparative projects, we have good reason to believe that there exists greater unity among diverse systems of criminal law and justice than is commonly assumed. It might even be possible to (re) construct a shared grammar from the sometimes conflicting materials that comparative analysis reveals and thus discover shared concepts employed across jurisdictions and in legal discourse. Admittedly, even after our first successful attempts at collaboration, the results of which can be found in Volume I of this series, we cannot be certain that such a (re) construction of a shared grammar is possible. But it seems to be feasible at least to develop principles, doctrines and procedures for international and transnational criminal processes, albeit by achieving a set of compromises between conflicting structures of legal thought.

Our enterprise requires us to delve beneath the surface details and the linguistic variations of various criminal codes, statutes and procedures, to explore their normative foundations as well as their underlying conceptual and logical structures. On the face of it, there are striking differences in the structures of different systems. To give just two examples, German criminal procedure, like that in other civil law systems, assumes an 'inquisitorial' structure, whereas English and American criminal procedure, like that in other common law systems, is 'adversarial' in nature. However, the ways in which 'adversarial' systems are evolving in 'inquisitorial' directions, and vice versa, suggest either that there may exist certain interconnections between the systems, which after all strive towards the same ends and respect the same set of human rights; or that categories like 'adversarial' and 'inquisitorial' are unsuitable to capture the complexities of modern criminal procedure. Secondly, criminal liability under the German tripartite scheme requires a criminal act committed intentionally or negligently (*Tatbestand*), the absence of justifying circumstances (*Rechtswidrigkeit*) and the individual actor's blameworthiness (*Schuld*). By contrast, English criminal law (like other common law systems) distinguishes *actus reus* from *mens rea* as the two elements of an offence, and distinguishes no fewer than four general types of *mens rea* or 'fault' – intention (or purpose), knowledge, recklessness and negligence (although there is not even agreement about the relationship between intention and knowledge, or about the status of negligence as a species of fault). In both systems, the schemes reflect a certain understanding of the paradigm of action. To determine whether these surface differences reflect fundamental and conceptual differences in the understanding of criminal law and its proper aims and values, we must engage in a theoretical discussion that

transcends legal cultures. This may reveal deeper connections, similarities or commonalities between the different systems.

II The Aims and Scope of the Project

The aim of our ongoing, multi-year international project 'Core Concepts in Criminal Law and Criminal Justice' is to explore, along the lines described above, the foundational principles and concepts that underpin the different domestic legal systems.

1 Past: Development of the Project

The enterprise began its life at the University of Cambridge in July 2016. The General Editor's aim was to form a discussion group consisting of like-minded colleagues, who would meet to discuss their joint interests and to present papers on topics in criminal law and criminal justice. This initial scoping meeting was followed by meetings in Göttingen (March 2017), Oxford (September 2017), Frankfurt am Main (April 2018), Edinburgh (September 2018), Zurich (April 2019) and Rutgers University, USA (September 2019). In these meetings – since interrupted by the global pandemic – the participants intensely discussed draft papers, from which the chapters of the present Volume have emerged. In December 2020, we held our first virtual meeting. The project is now being co-funded by the Fritz Thyssen Foundation and the Göttingen Association for Comparative and International Criminal Law and Criminal Justice. It is co-hosted by the Universities of Göttingen and Oxford and the Rutgers Institute of Law and Philosophy at Rutgers University.

Given the group members' broad range of research interests, and the fact that topics in the criminal law and justice field tend to be closely interrelated, we decided to publish volumes which cover a panoply of themes rather than being devoted to a single area of the criminal law and justice universe. Putting discussions of general legal theory, substantive law, criminal justice and procedure together also demonstrates the richness of the comparative approach and the many ways in which the authors from different countries and different spheres of criminal law interact.

2 Present: Emergence and Structure of the Volumes

This volume (Volume II), like its predecessor, focuses on three Germanic (Germany, Austria, Switzerland) and several Anglo-

American jurisdictions (England and Wales, Scotland, the United States and Canada). The Germanic and Anglo-American systems are employed as examples of the civil law and the common law worlds. The project is thus, at this stage, not universal in scope: it leaves aside a large number of significant jurisdictions and legal traditions. But any attempt at a universal comparative study would inevitably produce a set of comparisons too superficial to reveal the deeper connections and differences in which we are interested. Further work will be needed to determine the extent to which our findings can also be applied to other jurisdictions.[2] The chapters in each volume are arranged according to the Project's main subjects: Criminal Law, Criminal Procedure and Criminal Justice.

The contributions published here represent diverse jurisdictions, disciplines, theoretical orientations and research methods. Some contributors have a more empirical focus, others are more theoretically or normatively oriented, but all are committed to methodological pluralism. At the beginning of our project, we agreed on the following principles:

(a) Chapters are comparative, comparing concepts, doctrines, principles and structures. They employ, as a rule, a 'tandem approach' (see below) and engage in a discourse bridging both legal systems.
(b) Chapters are conceptual and do not attempt a comprehensive doctrinal survey of the respective countries' laws relating to their topic. Instead, they dig beneath the superficial similarities or differences between legal rules to identify and compare the underlying concepts, values, principles and structures of thought.

As a result, the chapters are intended to serve 'as introductions to a topic as well as advanced critical engagements', as aptly observed by one reviewer in relation to Volume I.[3]

To ensure that the chapters are appropriately comparative, most are co-authored, with one author from a civil law system and one from a common law system. These 'tandem' chapters are either fully integrated comparative discussions, or assume the form of a dialogue or exchange.

[2] In a review of Volume I, Miriam Gur-Arye referred to the influence of both common law and German law on the General Part of the Israeli Penal Law and suggested that the Israeli perspective might make an important contribution to the project; see Gur-Arye, Book Review Essay (2020), 392 ff.
[3] Prendergast, Book Review (2020), 461, 463.

3 *Future: Increasing Number of Participants, Future Meetings and Volume III*

The group is constantly evolving and expanding. It currently has fifty participants from thirty-seven universities (Germany: twelve universities; the United States: nine; England: six; two each from Scotland, Ireland and Switzerland; and one each from Northern Ireland, Canada, Australia and the European University Institute in Florence).

Future meetings are scheduled to take place in Berlin, Sussex, Marburg and Belfast. At these meetings, draft chapters for Volume III will be discussed. Mirroring both the structure and the sequence of the previous volumes, chapters in Volume III will deal, inter alia, with: Negligence/Recklessness, Information Management, Victims, the Standard of Proof beyond a Reasonable Doubt/Intime Conviction, Comparative Sentencing Procedures and Wrongful Convictions.

III Contents of Volume II

Volume II contains eleven chapters, each providing an original, critical and accessible account of its topic as it is dealt with in the two traditions of criminal law thought. Each aims to uncover underlying commonalities and differences, and to explore the potential for constructive assimilation or reform. Contributions have been grouped into the domains of criminal law, criminal procedure and criminal justice.

1 *Criminal Law*

Chapter 2, 'Structures within Criminal Legal Reasoning', by Matthew Dyson and Frank Meyer, addresses a number of questions including the following: How do criminal lawyers sequence and give shape to their reasoning about criminal liability? Why do they 'structure' it as they do? The authors examine the structure within legal reasoning as a means of understanding the law in the minds of criminal lawyers. They seek to better understand how structures function and interact. One benefit of doing so is to help lawyers analyse liability in a foreign legal system as a native might. Another benefit is that, by looking at two paradigmatic orchestrations of the many substantive, organisational and practical issues within criminal legal reasoning, the interconnectedness, priority and valuing of those elements can be revealed and made comparable.

In Chapter 3, 'Causation and Responsibility for Outcomes', Alec Walen and Bettina Weisser address four key questions. First, they ask whether factual causation can be equated with causation in a scientific sense. The question is particularly relevant when criminal liability is based on the omission of certain actions. The next question explores whether the 'but for' test can and should be complemented or replaced by a different approach to assessing causation. Thirdly, the authors ask how best to use the normative concepts of 'legal causation' (US law) and 'objective imputation' (German law) to select among the outcomes caused by a person which can be fairly attributed to his or her conduct. The last question explores the effect of intervening actions: While US law deals with this question under the heading of causation, German doctrine handles it as a matter of objective imputation. The answers to these questions are structured as a dialogue not only between two different legal systems, but also between an American legal philosopher who works on the criminal law and a German criminal law scholar with a special interest in criminal law doctrine (*Dogmatik*). While they agree in the end on most questions, some disputes remain unsettled.

In Chapter 4, Sabine Gless, Neha Jain and Arlie Loughnan explore 'Imputation of Responsibility and Intoxicated Offending'. According to the authors, this is one of the most controversial aspects of the 'General Part' of the criminal law, and the criminalisation of intoxicated offending is the most perplexing doctrine of imputation within the law of crime. The concept of intoxication is both highly technical and complex; it attracts strong critique on both theoretical and practical levels. With a focus on the United States, and England and Wales as well as Germany and Switzerland, the chapter analyses the doctrine of intoxication as a means of exploring the 'General Part' of the criminal law. It argues that the case of intoxication exposes the ways in which the 'General Part' and the 'Special Part' have been in dialogue with each other over time to close a purported responsibility gap. Imputation of responsibility for intoxicated offending demonstrates the readiness of these systems to deviate from a strict principle-driven approach to standard accounts of fault and culpability, even as the nature and extent of the deviations in the respective systems reveal differences in their underlying philosophical and doctrinal orientation to the general understanding of imputation. This indicates that, in both systems, the 'Special Part' must be taken into account for a deeper understanding of the 'General Part'.

In Chapter 5, 'Crimes of Endangerment', Antony Duff and Tatjana Hörnle compare the ways in which German and English criminal law create offences that target dangerous behaviour. The chapter clarifies some distinctions that need to be drawn if we are to understand the logic of such offences, and notes some normative issues that crimes of endangerment raise. The authors first distinguish endangerment offences in a narrower sense from attempts. They then discuss the 'subjective' dimension of such offences, comparing Anglo-American concepts of recklessness and negligence with German concepts of *dolus eventualis* and *Fahrlässigkeit*. Turning then to the 'objective' dimension of endangerment offences, different types are distinguished: 'abstract' from 'con-concrete' endangerment; general from context-specific offences; direct from mediated endangerment; and, as distinct from offences of both 'abstract' and 'concrete' endangerment, offences consisting in the breach of safety regulations. This final category raises distinct normative questions about the criminalisation of regulatory breaches that might, in individual cases, not actually be dangerous.

2 *Criminal Procedure*

In Chapter 6, 'Prosecutorial Discretion', Shannon Fyfe and Alexander Heinze explore the scope and content of prosecutorial discretion in the criminal justice system from the distinctive perspectives of German and Anglo-American law. They begin by outlining the legal, philosophical and constitutional underpinnings of the concepts of official discretion and decision-making before turning to a comparative analysis of discretion in selected stages of the criminal justice process. They identify the various components (and consequences) of discretion in German and Anglo-American criminal justice. Since prosecutorial discretion in the context of an investigation cannot be separated from police discretion, this chapter covers all discretionary decisions during the proceedings by prosecutors and the police. The authors conclude that the influence of the legality principle in German criminal law pushes the system to seek substantive justice, sometimes at the cost of procedural justice, while Anglo-American criminal law aims to obtain procedural justice and focuses less on guaranteeing substantive justice. Actors who use discretionary authority to make arbitrary decisions, regardless of the role they play in the system, challenge the ability of a criminal justice system to achieve justice for victims, defendants and other participants in the process. In sum, for the authors the most influential features of

a criminal justice system on discretionary decisions are: (1) the ethical constitution; (2) the institutional framework; and (3) the established culture of the participants.

Chapter 7, 'Arrest and Coercion', by Richard Vogler and Dominik Brodowski, provides a comparative analysis of the role of arrest in the criminal justice systems of the United States, England and Wales and Germany. It develops a typology of purposes for arrest, both legitimate and illegitimate, and then applies these in a critical examination of the law and practice of the three target jurisdictions. The purposes and justifications for arrest in each case are considered, as well as the means of carrying it out, the degree of coercive force which is allowable and the rights protections available to arrestees. The chapter concludes that arrest represents a specific procedural event in the common law jurisdictions of the United States and England and Wales, with its own principles and regulations, whereas in Germany it is considerably more integrated into the procedure as a whole and is less associated with the initiation of proceedings and the interview of the arrestee. The advantages and disadvantages of both approaches are reviewed, and it is argued that arrest in each jurisdiction, to a greater or lesser degree, is resorted to more frequently than necessary. The regimes for the regulation of the use of force are determined to be profoundly unsatisfactory.

In Chapter 8, 'Witness Evidence in Pre-Trial and Trial Procedure', John D. Jackson and Thomas Weigend note that in both English and German criminal procedure, fewer cases than in the past are resolved on the basis of live witness testimony at the trial; the 'orality' principle has thus been eroded in both jurisdictions. An increased reliance on witness statements made in pre-trial procedures has, however, come into conflict with the jurisprudence of the European Court of Human Rights (ECtHR). As a consequence, greater attention is focused on the need to regulate the way in which testimony is obtained in pre-trial procedure. It is argued that the shift of emphasis towards pre-trial procedure should be accompanied by a more robust 'search for the truth' in harmony with recent human rights law. If human rights guarantees are embedded in pre-trial procedures, cases can be properly disposed of on the evidence collected in the pre-trial phase.

Chapter 9, 'Cooperation Agreements in Germany and the United States', by Kai Ambos and Stephen C. Thaman, describes the existing law on cooperation agreements in Germany and the United States and then focuses on some specific doctrinal and practical issues. In both countries, cooperation agreements offer defendants an opportunity to

substantially minimise the punishment they will get for the crime or crimes for which they have been charged by disclosing information on others that is of interest to the prosecutor. A striking difference, however, involves the active role of the prosecutor in the United States and the contractual nature of the cooperation, while in Germany crown witness regulations are codified sentencing provisions to be applied by the judge following conviction (although the cooperation is triggered by the police). From the point of view of law enforcement, cooperation agreements should help to clarify the facts, especially in serious organised crime or complicated white-collar investigations, and thus improve the effectiveness of investigations and prosecutions to enhance the truth-finding function of the trial. The chapter critically assesses the effectiveness of collaboration based on available empirical data.

3 *Criminal Justice*

Chapter 10, 'The Implementation of Sentences', by Katrin Höffler and Nicola Padfield, examines the stages of the criminal justice system after sentencing. The authors begin with a comparative overview of the constitutional context of and statistical trends in the prison systems in Germany, as well as in England and Wales. The chapter then highlights developments common to both jurisdictions, such as the privatisation of prisons. It continues by following prisoners' progress through the prison systems from the process of induction, through everyday life in prison and possible decisions about early release, to the process of release itself and the transition back into life within society. This approach leads to a discussion of several challenges faced by both systems, such as the discrepancy between sentencing and prison regimes and the role of the victim during the stages of the implementation of sentences.

Chapter 11, 'Collateral Consequences of Criminal Conviction in the United States and Germany', by Alessandro Corda and Johannes Kaspar, focuses on the 'collateral consequences' of a criminal conviction. These are usually defined as civil restrictions and disabilities flowing from a conviction burdening individuals during the re-entry process. However, the authors argue that the term should also encompass additional penalties and measures that are ancillary to the main punishment, and yet internal to the criminal law and imposed at the sentencing stage. The chapter maps the rise, development and current state of collateral consequences, focusing in particular on the United States and Germany. It begins with a systematic overview of the two legal traditions

considered, outlining the history and reality of collateral consequences and analysing their nature and functions (both stated and latent). After discussing the classification and understanding of collateral sanctions in the Anglo-American and German contexts, the chapter explores the safeguards which are applied (or neglected) in the two legal systems to prevent such penalties from having a disproportionate and cumulatively burdensome effect on ex-offenders. The authors conclude with a discussion of the theoretical justifications for collateral consequences and advance some reform proposals for a new approach.

IV Conclusion

We hope that this latest volume of the Dialogue Project, exploring various aspects of criminal law, criminal procedure and criminal justice, demonstrates the value and richness of our comparative approach. In collaborating on the contents of Volume II, the editors and authors have learned from one another – not only about foreign legal systems, but also, by responding to the view from outside, about their own systems, and the deeper connections and differences between systems. The same applies to methodology and style. We hope that the chapters whet readers' appetites for additional comparative scholarship.

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