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Introduction to Volume III

KAI AMBOS, ANTONY DUFF, ALEXANDER HEINZE, JULIAN ROBERTS AND THOMAS WEIGEND

This is the third volume to emerge from our international project on *Core Concepts in Criminal Law and Criminal Justice*; the previous two volumes were published in 2020 and 2022. In this brief Introduction, we outline the aims and history of the project, before outlining the chapters in this volume, and commenting briefly on plans for the future.

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 each other, as do those taught in Continental European criminal law traditions; only rarely do they engage seriously with each other 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. We seek to discuss a set of common foundational concepts 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 is 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 occasionally conflicting materials that comparative analysis reveals and thus discover shared concepts employed across jurisdictions. Admittedly, even after our first successful attempts at collaboration, the results of which can be found in Volumes I and II of this series, we cannot be certain that such a (re)construction of a shared grammar is possible. But it seems feasible to develop principles, doctrines and procedures for international and transnational criminal discourse, 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, and to explore their normative foundations, as well as underlying conceptual and logical structures. On the face of it, there are striking differences between 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 particular legal cultures. This may reveal deeper connections, similarities or commonalities between the different systems.

II The Evolution of the Project

The project originated at a scoping meeting 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. The group decided that it would be useful to publish a series of volumes of papers emerging from these discussions, in order to further the analytical and comparative aims of the project, and to disseminate them to a wider audience. The initial scoping meeting was followed by meetings in Göttingen, Oxford, Frankfurt am Main, Edinburgh, Zurich, Rutgers University and again Oxford; drafts of the papers for the first two volumes were discussed at these meetings. The pandemic interrupted our in-person meetings, although we were able to hold two virtual meetings in late 2020 and early 2022; since the end of the pandemic, we have met in Brighton and in Marburg to discuss the draft chapters for this volume. Funding for these workshops has been provided by the local universities, but also and crucially by the Fritz Thyssen Foundation and the Göttingen Association for Comparative and International Criminal Law and Criminal Justice, to whom we are very grateful.

Given the broad range of research interests of the group's members, and the fact that topics in the criminal law and justice field tend to be closely interrelated, we decided that each volume should 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 manage to interact.

Two recent developments in the project have been, first, an expansion of the editorial group: the original editors (Kai Ambos, Antony Duff, Alexander Heinze, Julian Roberts and Thomas Weigend) have been joined by Stefanie Bock, Matthew Dyson, Findlay Stark, Jenia Turner and Alec Walen; Antony Duff has retired. Secondly, we now have a series

of online seminars, the *Virtual Seminar on Comparative Criminal Law, Criminal Procedure, Evidence, and Criminal Law Theory*, at which topics of comparative interest are discussed more informally, but along the lines of the project's principles; some of these discussions led to chapters for the *Core Concepts* volumes.

The group is constantly expanding. It currently has over sixty participants from universities in Australia, Canada, England, Germany, Ireland, Italy, the Netherlands, Northern Ireland, Norway, Scotland, Switzerland and the United States. Regular meetings are planned for the future; the next two will be held in New York and Berlin.[1]

III The Structure of the Volumes

The volumes of this series focus on three Germanic (Germany, Austria and Switzerland) and four 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. Although some participants come from and/or work in different jurisdictions, a large number of significant jurisdictions and legal traditions are not covered by this project. 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. The chapters in each volume are arranged according to the project's main areas: Criminal Law, Criminal Procedure and Criminal Justice.

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

(1) Chapters are comparative, comparing concepts, doctrines, principles and structures. They employ a 'tandem approach' and engage in a discourse bridging the legal systems involved.
(2) Chapters are conceptual and do not attempt a comprehensive doctrinal survey of the respective countries' laws relating to their topic.

[1] See also our website: http://uni-goettingen.de/coreconcepts.

> 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.

The chapters serve as 'introductions to a topic', as one reviewer observed in relation to Volume I.[2] Similarly, a reviewer of Volume II considered that comparative foundational bases have been created.[3]

To ensure that the chapters are appropriately comparative, they 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 take the form of a dialogue or exchange.

IV Contents of Volume III

Volume III contains ten 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 scope for constructive assimilation or reform. Contributions have been grouped into the domains of criminal law, criminal procedure and criminal justice.

1 Criminal Law

The volume opens with the 'Principles of Criminalisation' (Chapter 2) by Antony Duff and Tatjana Hörnle. What kinds of consideration should guide decisions about the scope of the criminal law? This chapter compares the ways in which German and Anglo-American theorists have tackled this question. After some comments on what it is to criminalise conduct, and on the kinds of reasons that an inquiry into principles of criminalisation should aim to identify, it offers some historical background to the contemporary debates. It then turns to a critical comparative discussion of two popular principles of criminalisation, the *Rechtsgutslehre* and the Harm Principle, in the course of which it also attends to Legal Moralism, and to the role of the Proportionality Principle – a principle explicitly central in German theorising, and at least implicitly essential to Anglo-American theories. Finally, it considers some alternative principles of criminalisation, and asks whether we

[2] Prendergast, Book Review (2020), 461, 463.
[3] Perron, Book Review (2021), 468, 471 ('leisten insoweit rechtsvergleichende Grundlagenarbeit', translation by the authors).

should look not for a systematic account of 'the principles of criminalisation', but for a messier, more pluralist account of the range of considerations (principles, reasons) that should bear on criminalisation decisions.

In Chapter 3 on 'Intention', Matthew Dyson and Thomas Weigend assess that a comparison of 'intention' and its role in criminal law is made extremely difficult by the overlaps and imperfections in terminology, both in common law and German law. There are also significant differences in how courts, academics and laypeople understand and apply the terms. The authors therefore concentrate on the substantive questions behind the legal terms: What makes 'intentional' offending more dangerous and more blameworthy than non-intentional causation of similar harm? What types or degrees of intention can be differentiated because they imply more or less intense subjective violations of legal rules? In particular, is there a normative difference between actors who wish to achieve a certain result and those who do not but are reasonably certain that they will bring about this result? How should the law deal with actors who know that they engage in risky behaviour but are unsure about its effect?

These general questions are approached using concepts and examples from English and German case law and scholarly writings.

In Chapter 4, Johannes Kaspar and Stephen J. Morse compare the German and US approaches to 'Legal Insanity and Related Doctrines'. After a brief introduction, the chapter first comprehensively describes the substance and procedure of German criminal laws that address people with mental disorders. It then turns to a similar description of US law. The final section compares the two systems and concludes that although there are substantial formal differences in substance and especially in procedure, the underlying principles and outcomes of cases are similar.

Chapter 5, 'Statutes of Limitation', by Carla Sepúlveda Penna and Samuel Beswick, explores legislative time limits on the prosecution of crime in civil and common law jurisdictions. It addresses the rationales for barring the prosecution of old crimes and undertakes a comparative analysis of three jurisdictional groupings: Continental Europe (with a focus on Germany and France), the Commonwealth (with a focus on England and Wales) and the United States (with a focus on federal law). The analysis identifies comparable features in limitation doctrine across jurisdictions while revealing how the theory and practice of statutes of limitation differ markedly in different legal systems. In broad terms, Continental systems codify general and categorical time limits on the prosecution of offences; Commonwealth systems tend not to have any

statutory time-bars on the prosecution of offences other than minor offences; and in the United States, most offences, other than the most serious, are subject to statutory limitation periods. The chapter concludes by drawing together the points of comparison between the three jurisdictional groupings, commenting on their distinctions and similarities.

In Chapter 6, 'Old and New Tracks for Corporate Criminal Liability', Mark Dsouza and Charlotte Schmitt-Leonardy critically reflect on the different paths adopted by the English and German criminal law systems in relation to corporate wrongdoing. English law (and much of the common law world along with it) readily accepts that corporations can commit crimes and be convicted for their criminality. German law (and much of the civil law world with it) has been more resistant to extending the criminal law to corporate persons. At present, both jurisdictions are in the process of re-evaluating their positions, and both seem to be moving in the direction of facilitating the application of the criminal law to corporations. The authors evaluate recent developments in both systems and offer a tentative proposal as to how the law should develop in both jurisdictions.

Chapter 7, 'Defining the Victim in the Law of Homicide', by Stefanie Bock and Stuart Green, focuses on five main issues related to the question of who or what can be a 'victim' of homicide. The authors argue as follows: First, that homicide law should protect all living members of the human species regardless of their individual characteristics, abilities, achievements or social status; although they recognise that, as technology and social norms continue to develop, this anthropocentric approach of homicide offences should potentially be supplemented by specialised norms providing for the adequate protection of animals and artificially intelligent beings. Secondly, that differentiations in grading or sentencing based on the age, gender or occupation of the victim are unwarranted. Thirdly, that homicide law should be limited to cases in which the victim has been born at the time the death-causing injury was inflicted and that other cases, involving foetuses that are injured by hostile third parties and then die (whether in utero or after birth), should be prosecuted, if at all, under the separate rubric of 'foeticide'. Fourthly, that homicide law should be concerned exclusively with the killing of 'others' as opposed to 'self', and that suicide therefore should not be a criminal offence; although Bock and Green concede that where there is a risk that a person is being pressured to commit suicide or is doing so in error, it may be appropriate to prosecute for assistance to, or incitement of, suicide or

indirect perpetration of homicide. Fifthly, that in determining whether a victim should be regarded as 'already dead' and therefore beyond the scope of homicide law, a set of criteria should be applied that is consistent with that applied in determining the beginning of life (viz. the irreversible cessation of brain stem function or the irreversible cessation of circulatory and respiratory function).

2 Criminal Procedure

In Chapter 8, Kai Ambos and Youngjae Lee deal with 'intime conviction' and 'beyond a reasonable doubt' as ways in which fact-finders (professional judges or lay juries) in criminal trials decide on the question of guilt. The 'beyond a reasonable doubt' standard is typically associated with the Anglo-American system of criminal justice, whereas 'intime conviction' is a characteristic feature of Continental procedural systems. Both standards belong to the phase of the evaluation and assessment of evidence in the criminal trial procedure. The chapter considers the way in which the two systems have converged on essentially the same standard of proof but have taken different paths towards it, with parallel discussions taking place along the way. The chapter discusses the definition of the 'beyond a reasonable doubt' standard in detail and introduces several important questions that have arisen around the two standards, such as those concerning definition and application of the standards, discusses how such issues have been resolved in the two different systems and notes a few significant remaining differences.

Chapter 9, 'Pretext, Deception and Entrapment in Criminal Investigations', by Dominik Brodowski, Brenner M. Fissell and Paul Roberts, analyses the practical and normative challenges of deceptive – and sometimes manipulative – criminal investigations in the criminal justice systems of the United States, Germany, and England and Wales. With particular emphasis on 'entrapment' by state agents and the custodial interrogation of criminal suspects, it describes how the different legal traditions conceive of these issues and considers ongoing attempts to regulate them through complex, multilevel legal frameworks. The chapter concludes with comparative reflections on domestic law experiences and their implications for procedural models, legal culture, jurisprudential principles and conceptions of legitimate political authority in criminal justice.

3 *Criminal Justice*

Chapter 10, 'Sentencing Procedure: Comparing the Adversarial and Inquisitorial Approaches', by Julian Roberts and Anneke Petzsche, explores the single most important difference between Anglo-American and German/Continental trial procedures: *bifurcation* vs. *unification*. Should a court determine sentence at the same time as it adjudicates verdict? Or should the criminal process be divided, with sentencing taking place after conviction, in a separate 'penalty phase' of the criminal process? Common law (adversarial) jurisdictions take the bifurcated approach, while in civil law (inquisitorial) systems the sentencing decision is part and parcel of the decision to convict or acquit. The chapter investigates the merits of both approaches.

Comparing the two approaches to sentencing may yield important insights. Although neither system is likely to abandon its chosen methodology in favour of the alternative, there may be elements of each which can be adopted with a view to overcoming any structural deficiencies.

Finally, in Chapter 11, Johan Boucht and Beth A. Colgan deal with 'Confiscation and Forfeiture of Property in Connection with Alleged Unlawful Conduct: A Preliminary Assessment of Risks and Process'. These authors describe and critically consider the rules on confiscation and forfeiture in some European jurisdictions and the United States. Governments in Europe and the United States are permanently transferring money or property from individuals to the state, without compensation, because of a connection between the property and alleged unlawful conduct, in proceedings known as 'confiscation' or 'forfeiture'. These practices are typically justified because they allow the government to target the proceeds of crime or to target the instrumentalities used in the commission of, or connected to, an offence (such as an automobile used to transport illicit drugs). Yet, these practices raise serious questions, including: To what extent should the government be allowed to take money or property allegedly related to criminal activity, even without convicting, or in some cases even charging, the person for a crime? What are the benefits of such schemes? What risks does such a system create? If such schemes are employed, what processes should be employed to minimise the risk of injustice?

V Conclusion

We hope that this latest volume of the *Core Concepts* 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 III, the editors and authors have learned from each other – 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 will whet readers' appetite for additional comparative scholarship. Further volumes will be edited over the next few years (the next volume is already in preparation) and they will be published by Hart Publishing. Readers are encouraged to contact the editors with any suggestions for future chapters in the series.

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