Eser

Comparative Criminal Law

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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

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by

Brigitte Heilmann

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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*

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List of Abbreviations

AIDP	Association Internationale der Droit Privé
BGBl.	Bundesgesetzblatt (German Federal Law Gazette)
BGE	Entscheidungen des Schweizer Bundesgerichts (Decisions of the Swiss Federal Supreme Court)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the German Federal Supreme Court in criminal matters)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the German Federal Constitutional Court)
cf.	confer (compare)
CISA	Convention on Implementing the Schengen Agreement
DStrZ	Deutsche Strafrechtszeitung
ECHR	European Convention on Human Rights
ECJ	European Court of Justice/Court of Justice of the European Union
ECtHR	European Court of Human Rights
ed.	edition, editor
eds.	editions, editors
espec.	especially
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EuCJ	European Court of Justice
EuGH	Europäischer Gerichtshof
EuGRZ	Europäische Grundrechte-Zeitschrift
f./ff.	and the following page/pages
fn.	footnote
FS	Festschrift (Liber amicorum)
GA	Goltdammer's Archiv für Strafrecht
GPC	German Penal Code
Ibid.	ibidem
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
id.	Idem/eadem
IKV	International Kriminalistische Vereinigung
IRG	Gesetz über die internationale Rechtshilfe in Strafsachen (German International Legal Assistance Act)
JICJ	Journal of International Criminal Justice
JuS	Juristische Schulung
JZ	JuristenZeitung
MJECL	Maastricht Journal of European and Comparative Law
mn.	margin number
MPI	Max Planck Institute (for Foreign and International Crimin al Law)
MPIS	Max Planck Informationssystem zur Strafrechtsvergleichung/International Max Planck Information System for Comparative Criminal Law
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
OECD	Organisation for Economic Co-operation and Development
p./pp.	page/pages
para./paras.	paragraph/paragraphs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RPE	Rules of Procedure and Evidence
RW	Rechtswissenschaft
StGB	Strafgesetzbuch (German Penal Code)
StPO	Strafprozessordnung (German Criminal Procedure Code)
StV	Der Strafverteidiger
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

UN	United Nations
UNIDROIT	International Institute for the Unification of Private Law
vol	Volume
VStGB	Völkerstrafgesetzbuch (German Code of International Criminal Law)
W.L.R.	Weekly Law Reports
ZaöRV	Zeitschrift für ausländisches öfentliches Recht und Völkerrecht
ZiS	Zeitschrift für internationale Strafrechtsdogmatik
ZSchwR	Zeitschrift für Schweizerisches Recht
ZStW	Zeitschrift für die Gesamte Strafrechtswissenschaft

PART I

DEVELOPMENT AND CONCEPTS OF COMPARATIVE CRIMINAL LAW: WHERE WE STAND

A. Setting the Scene – Objectives

As already indicated in the preface, this publication is the result of a comparative research project of the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Germany.[1] The initial intention was to have just some summarizing reflections in the final chapter of that project. However, very soon the question arose, if and to what extent one might draw more general conclusions from this project, and how these might be incorporated in the standard concepts of comparative criminal law. Such a determination of the current position was not really possible without having an initial overview of the multitude of imaginable aims and methods in the field of comparative law research. This appeared even more called for, as a considerable number of comparative law projects lack a clear description of the concrete goal and the best method to be chosen for reaching this goal. This widely observed shortcoming may well be founded in the fact that there is anything but unity in relation to the aims and methods of comparative criminal law. This starts with the different understanding of concepts and terms and goes as far as a divergent assessment of the practical importance of comparative criminal law. In order to deal with these questions, a more comprehensive examination was necessary; this was incorporated in the publication of the project as its final part[2] and is here presented in an updated English version. **1**

As this final part of the project was most of all conceived as a contribution to the theory of comparative criminal law, there was no need for me to start from a blank slate; instead, I could build on certain preliminary work done by the Max Planck Institute. Going on from the contributions my predecessor as Institute director had made,[3] I was keen to deepen and broaden the functions and methods of comparative criminal law in a more differentiated way.[4] This work has been continued – with certain differences – by my successor.[5] **2**

As primarily designed to describe what goals might be reasonably aimed at by comparative criminal law (Part II), and by which methods these goals might be best achieved (Part III), this monograph of how to understand and practise the comparison **3**

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[1] *Albin Eser/Walter Perron* (eds.), Strukturvergleich strafrechtlicher Verantwortlichkeit und Sanktionierung in Europa. Zugleich ein Beitrag zur Theorie der Strafrechtsvergleichung, Berlin 2015, 1144 pp.; as to the origin and development of this project see *Albin Eser*, Zur Genese des Projekts – Ein Werkstattbericht, pp. 3–23; to its concept and methodology see *Walter Perron*, Ziel und Methode der Untersuchung, pp. 27–45, furthermore infra mn. 59 fn. 168.

[2] *Albin Eser*, Strafrechtsvergleichung: Entwicklung – Ziele – Methoden, in: Eser/Perron, Strukturvergleich (fn. 1), pp. 929–1135.

[3] *Hans-Heinrich Jescheck*, Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung, Tübingen 1955, cf. also mn. 18, 45, 118 fn. 292.

[4] *Albin Eser*, The Importance of Comparative Legal Research for the Development of Criminal Sciences, in: Les systèmes comparés de justice pénale: De la diversité au rapprochement/Comparative Criminal Justice Systems: From Diversity to Rapprochment. Nouvelles Etudes Pénales No. 17, Toulouse 1998, pp. 77–108 =www.freidok.uni-freiburg.de/volltexte/3759; *idem* (in an updated German version), Funktionen, Methoden und Grenzen der Strafrechtsvergleichung, in: Hans-Jörg Albrecht et al. (eds.), Internationale Perspektiven in Kriminologie und Strafrecht. Festschrift für Günther Kaiser zum 70. Geburtstag, Berlin 1998, 2nd vol, pp. 1499–1530 = www.freidok.uni-freiburg.de/volltexte/3735; as to the broadening of this original approach see *Albin Eser*, Evaluativ-kompetitive Strafrechtsvergleichung. Zu "wertenden" Funktionen und Methoden der Rechtsvergleichung, in: Georg Freund et al. (eds.), Grundlagen und Dogmatik des gesamten Strafrechtssystems. Festschrift für Wolfgang Frisch zum 70. Geburtstag, Berlin 2013, pp. 1441–1466 = www.freidok.uni-freiburg.de/volltexte/9715; cf. also mn. 33, 172 ff.

[5] *Ulrich Sieber*, Strafrechtsvergleichung im Wandel – Aufgaben, Methoden und Theorieansätze der vergleichenden Strafrechtswissenschaft, in: Ulrich Sieber/Hans-Jörg Albrecht (eds.), Strafrecht und Kriminologie unter einem Dach, Berlin 2006, pp. 78–151 (126 ff., 132); cf. also mn. 22 fn. 66.

of criminal law may neither be seen as a classical "treatise" of comparative criminal law[6] nor as a "treasure trove" of foreign law or "legal families",[7] even if this were ever possible in a truly comprehensive or at least fairly representative manner.[8] This does not mean that hereafter it would not be appropriate, once in a while, to compare certain rules and regulations, theories or other factual questions concerning criminal law – regarding their content – to one another. Such sample materials, however, are only used in order to demonstrate the frequently overlooked diversity of possible goals and the correspondingly different ways on which comparative criminal law can be successfully employed.

4 For this reason it is necessary to clearly demonstrate and comprehensively capture these goals and methods, and their mutual interdependence. This, however, will not be possible without first having gained an overview of the rather different perceptions of concepts and subject matter of comparative criminal law and their development to date, accompanied by certain pre-clarifications (Part I). Only once it has been understood that the same words do not always mean the same things, or that, vice versa, the same problem may be hidden behind different terminology, is there hope to be able to filter differences and commonalities out of the various, diverse labels of functions and descriptions of approaches. Only then the ground is prepared for setting meaningful goals (Part II) and determining appropriate methods (Part III) for comparative research in criminal law.

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[6] With respect to this, for a French audience see *Jean Pradel,* Droit pénal comparé, Paris 1995, for an Italian readership see *Alberto Cadoppi,* Materiali per un 'Introduzione allo studio del diritto penale comparato, 1st ed., 2001, 2nd ed., Padova 2004, 525 pp.; *Francesco Palazzo/Michele Papa,* Lezioni di diritto penale comparato, Torino 2000, 239 pp., or for American law schools, see *Harry R. Dammer/Jay S. Albanese,* Comparative Criminal Justice Systems, 5th ed., Belmont/MA 2014, 364 pp. In contrast, this sort of literature is still missing in German, as complained about in particular by *Eric Hilgendorf*, Zur Einführung: Globalisierung und Recht. Aufgaben und Methoden der Strafrechtsvergleichung heute, in: Susanne Beck/Christoph Burchard/Bijan Fateh-Moghadam (eds.), Strafrechtsvergleichung als Problem und Lösung, Baden-Baden 2011, pp. 5–25 (14).

[7] As – is the purpose of books and collections in which various legal systems or "legal families" are individually described and juxtaposed, as done in an all-encompassing manner by *René David/Camille Jauffret-Spinosi,* Les grands systemes de droit contemporaine, 11th ed., Paris 2002, or with focus on private law by *Konrad Zweigert/Hein Kötz*, An Introduction to Comparative Law, 3rd ed., Oxford 1998, pp. 63 ss., *idem* (in the German original), Einführung in die Rechtsvergleichung, 3rd ed. Tübingen 1996, pp. 62 ff., and in particular on criminal law by *Kevin Jon Heller/Markus D. Dubber* (eds.), The Handbook of Comparative Criminal Law, Stanford 2011, pp. 12 ff., and *Richard J. Terrill,* World Criminal Justice Systems, 8th ed., Waltham/MA 2013, pp. 15 ff. As to the questionable character of this type of "Auslandsrechtskunde" as truly "comparative", cf. mn. 57 ff.

[8] Just to demonstrate these doubts merely with the aforementioned publications: In view of the certainly more than 200 different criminal laws and justice systems in the world, any comparison requires a selection. This can either be done by restricting the comparison to a manageable number of countries from the very beginning or, instead of making any pre-selection, by merely taking those laws into consideration that fit best to the special subject matter at stake. On the other hand, if a selection is made, the countries chosen are understandably small in number: Whereas *Heller/Dubber* present the considerable number of 17 different criminal jurisdictions, *Terrill* and *Dammer/Albanese* are satisfied with 7 and 6 respectively. In terms of thematic coverage, too, limitations and flaws are inavoidable: If more general overviews are given, one runs the risk of remaining superficial. If, on the other hand, more specific in-depth comparisons are wanted, this may be at the expense of a more comprehensive view of the overall justice system concerned. For more details to the extremely diverse concepts and selective approaches in the publications of comparative criminal law see *Albin Eser*, Zum Stand der Strafrechtsvergleichung: eine literarische Nachlese, in: Christoph Safferling et al. (eds.), Festschrift für Franz Streng, Heidelberg 2017, pp. 669–683, partial reprint in English infra Epilogue, mn. 411 ff.

B. History and Significance of Comparative Criminal Law

1. Developmental phases

The meaning of the term comparative criminal law appears to depend crucially on the specific objective that is being pursued.[9] Over time, the respective goals have changed again and again. More than this, well before the term comparative law – and later on that of comparative criminal law – appeared, researchers conducted what can in essence be considered comparative legal research – with varying objectives, range and methods as well as with alternately increasing or decreasing intensity.[10] 5

If one is satisfied that the term comparative law – according to the parts the word is made up of – means that several things are compared and that the subject of the comparison consists of legal matters,[11] then one can discover what one is looking for as far back as ancient Greece. However, as soon as one questions the type of law to be compared, the purpose of the comparison and the methods to be applied, considerable differences become apparent. In this way it appears that, for example, the Greek city states were already in the habit of looking around the neighbouring states when they wanted to create new law. This might also have encouraged well-known philosophers (such as *Plato* in his "nomoi" or *Aristotle* for his "politeia") to conduct comparative studies for the construction of an ideal state.[12] In contrast to this, the Romans seem to have considered their own legal and political/state order – setting aside the possible imitation of Greek legal institutions in the Law of the XII Tables – so superior that even 6

[9] To the point in this sense *David Nelken*, Comparative Law and Comparative Legal Studies, in: Esin Örücü/David Nelken (eds.), Comparative Law. A Handbook, Oxford 2007, pp. 3–42: "The aims of the subject will shape the way it is conceived. It will vary depending on whether the goal is that of finding out relevant legal rules in another jurisdiction, understanding another society (and, by contrast, one's own society) through its law, searching for commonalities, or showing the difficulty of translating the texts and experience of other people's law" (p. 12). In the same vein, *Léontin-Jean Constantinesco*, with his 3-volume "Rechtsvergleichung" (Köln 1971, 1972, 1983) the author of the at present probably most comprehensive treatise on comparative law, assumes that any historical description "reflects the opinion of the author on comparative law, thus demonstrating the great confusion in this field", in: Vol. I: Einführung in die Rechtsvergleichung, 1971, p. 70 fn. 5; cf. also pp. 206 ff.

[10] For details to the history of comparative law which hereafter will be explored and cited only inasfar as it appears relevant to illuminate the current state of art in this field, see in particular *Constantinesco* I, Einführung (fn. 9), p. 69 ff. and – inter alia, though with the focus on private law as usual up to that time – *Walther Hug*, The History of Comparative Law, in: Harvard Law Review XLV (1931/32), pp. 1027–1070; *Max Rheinstein*, Einführung in die Rechtsvergleichung, 2nd ed. München 1987, pp. 37 ff.; *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 48 ff. (though with a rather limited number of references to the early period). To condensed summaries see *Oliver Brand*, Grundfragen der Rechtsvergleichung, in: JuS 2003, pp. 1082–1091 (1085 f.); *Heinz Neumayer*, Grundriß der Rechtsvergleichung, in: René David/Günther Grasmann, Einführung in die großen Rechtssysteme der Gegenwart, 2nd ed. München 1988, pp. 1–78 (7 ff.); *Hannes Rösler*, Rechtsvergleichung als Erkenntnisinstrument in Wissenschaft, Praxis und Ausbildung, in: JuS 1999, pp. 1084–1089 and 1186–1191 (1184 f.). Whereas these historical reviews are essentially limited to the development in Europe (with particular attention to Germany), overviews beyond this can be found in the reports devoted to "The Development of Comparative Law in the World" in Part I of *Mathias Reimann/Reinhard Zimmermann* (eds.), The Oxford Handbook of Comparative Law, Oxford 2006, pp. 35–301. With special focus on comparative criminal law see. *Eser*, Comparative Legal Research (fn. 4), pp. 495 ff, *idem,* Funktionen (fn. 4), pp. 1503 ff.; *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 9 ff., *Pradel,* Droit pénal comparé (fn. 6), pp. 8 ff.

[11] Cf. also *Eser*, Comparative Legal Research (fn. 4), pp. 492 f., *idem,* Funktionen (fn. 4), pp. 1500 f., ff., *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 2, 6 ff.

[12] Cf. *Hug*, History (fn. 10), S. 110 f.; *Zweigert/Kötz*, Comparative Law (fn. 7), p. 49.

a comparative glance at what *Cicero* called the "confused and quite absurd" non-Roman law[13] was considered unnecessary.[14] This is an attitude which the Supreme Court of the United States of America believes to be able to afford even in our time.[15] Looking back at Roman law, it is even more astonishing that it itself became – via the development of *ius gentium* – an important basis for the further development of the law and, through that, also of comparative law.[16]

7 As can be gathered from the above, the underlying focus of the researcher's cognitive interest is the decisive factor in determining the direction and intensity of any comparison in law. Roughly, three things might be decisive here: firstly, a general curiosity concerning strange things including the wish to get to know the law as an expression of the specific culture of a country; secondly, the practical need to get to know foreign law, either as a deterring or an exemplary mirror of one's own law, or in order to consider it or even adapt to it; thirdly, the theoretical analysis of foreign law.

8 The first type of comparison of law(s) might be best characterized as "museum-like"; this is by no means meant to be lacking in respect but in the sense that particularly interesting aspects of a foreign law system are placed next to each other like "fossils" and then compared to one's own law, considering differences and similarities.[17] *Francis Bacon* and his paper "De dignitate et augmentis scientiarium" (1623) and *Gottfried Wilhelm Leibniz* with his "Theatrum legale" (1667) probably belong in this category: both were interested in better understanding the value of their own legal system but were also aiming – with universally historical ambition – at a comparative presentation of the law of all peoples, countries and times.[18]

9 In this ambition there is already a resonance of legislatory goals as they are also apparent in the writings of the above mentioned great minds of *Plato* and *Aristotle*. According to *Hugo Grotius* and *Samuel von Pufendorf*, in particular *Charles de Montesquieu* appears to have been guided by the same motives when he compared the legislation of different nations in his "De l'esprit des lois" (1748); there, he attributed the noted differences to natural and historical conditions such as soil, climate, customs, education and religion.[19]

10 *Lord Mansfield* felt probably compelled by very practical interests to introduce the "Law Merchant" – which was developed from a continental European base – into English Common Law.[20] For equally practical reasons people in parts of Germany under the dominance of the Napoleonic Code Civil (represented notably by the 1810 Landrecht of Baden as well as in the territories of the German Federation situated on the left bank of the Rhine in Rheinpreußen, Rheinhessen and Rheinbayern) were forced to

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[13] According to *Zweigert/Kötz*, ibidem.

[14] But see also *Hug*, History (fn. 10), pp. 111 f.

[15] For instance, not without a chauvinist undertone, by Justice *Scalia* in *Lawrence v. Texas*, 123 US Supreme Court 2472–2495 (2003): "This Court […] should not impose foreign moods, fads, or fashions on Americans." see also the references in *Mathias M. Siems*, The End of Comparative Law, in: The Journal of Comparative Law 2:2 (2007), pp. 133–149 (133 f.), cf. also mn. 119 and fn. 17

[16] Cf. *Hessel E. Yntema*, Roman Law as the Basis of Comparative Law, in: Konrad Zweigert/Hans-Jürgen Puttfarken (eds.), Rechtsvergleichung, Darmstadt 1978, pp. 162–185.

[17] This kind of interest in knowledge, though, is not to be confused with "indifference" towards foreign law as it was stated with regard to American lawyers (and as it certainly also occurs elsewhere) by *Pierre Lepaulle*, The Function of Comparative Law, in: Harvard Law Review XXXV (1921/22), pp. 838–858: "Most see in it [the science of comparative law] nothing more than an amusing puzzle, the chance to satisfy an idle curiosity" (at p. 838). Cf. also mn. 35 as to (32).

[18] Cf. *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 48 f.

[19] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 78 ff.

[20] Cf. *Hug*, History (fn. 10), pp. 121, 146 f.

engage analytically with this new code, especially as this claimed a model position for itself as "un code pour le monde civilisé".[21]

Without wanting to underestimate the importance of such an engagement with foreign law, this consisted only of individual – and so even more admirable – pioneering projects or of rather superficial imitations of foreign examples; this is the reason why one could not yet speak of comparative jurisprudence as a systematic method, to say nothing of a separate jurisprudential discipline, until toward the end of the 19th century.[22] One of the first who lamented the lack of a "comparative jurisprudence" – and with him finally a criminal jurist arrived on the scene – was *Paul Johann Anselm von Feuerbach.* For him, only a "Universal-Jurisprudenz"[…] born out of the "comparison of laws and legal customs of both the most closely related and the farthest removed nations of all times and countries [could] give any specially named legal science its true and vigorous life."[23] This provocative promise, however, does not yet appear to have reached legal circles traditionally engaged and remaining in parochial self-reflection. Even today, some law faculties believe that they can get by without a generally obligatory comparative law lecture.[24] Nevertheless, the call for the study of foreign law has become ever louder since the middle of the 19th century. **11**

Around the turn from the 18th to the 19th century impetus was certainly exerted by the great codifications of the Prussian General Code of Law (Preußisches Allgemeines Landrecht) of 1794, the (above mentioned) French Code Civil of 1804 as well as the Austrian Civil Law Code (Österreichisches Allgemeines Bürgerliches Gesetzbuch) of 1811. At the same time the need for regulations to govern conflicts grew with increased cross-border trade, and preliminary work in comparing legal systems became necessary. However, if comparative legal research is meant to be more than the mere knowledge of foreign law and the side-by-side juxtaposition of different legal systems,[25] then the beginning of any systematic comparison must be placed in the 19th century. Three developmental stages can be distinguished here:[26] **12**

First, during the period from about 1800 to 1850, practical considerations, especially with the purpose of improving national law, as well as cultural-scientific curiosity revived epistemic interest in foreign legal systems. This led, even at this time, to the first comprehensive accounts of foreign law (for example, *Eduard Gans*' four-volume "Erbrecht in weltgeschichtlicher Betrachtung" (from 1824 to 1835)); further effects were the founding of journals with a comparative legal focus (such as the "Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes" of 1829 by *Karl Salomo Zachariae* and *Carl Joseph Anton Mittermaier*) and the establishment of chairs for comparative law (such as the "Chaire d'histoire générale et philosophique des législations comparées" at the Collège de France by *Eugène Lerminier)*. In this way one reached a general and higher level of research – past personal and individual initiatives – however, without being able to achieve a categorization of the accessed materials into a systematic process of comparison, let alone the foundation of a distinct comparative legal science. **13**

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[21] Cf. *Rösler*, Erkenntnisinstrument (fn. 10), p. 1085.

[22] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 88 ff.

[23] *Paul Johann Anselm von Feuerbach*, Blick auf die teutsche Rechtswissenschaft. Vorrede zu Unterholzners juristischen Abhandlungen (1810), in: Anselms von Feuerbach kleine Schriften vermischten Inhalts, 1. Abteilung, Nürnberg 1833, pp. 152–177 (163). Based on this, *P.J.A. Feuerbach is* considered "a good place to start" by *Markus Dirk Dubber*, Comparative Criminal Law, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 1287–1325 (1292 ff.).

[24] Cf. also mn. 18, 68, 348.

[25] Cf. mn. 57 ff.

[26] As described in more detail by, in particular, *Constantinesco* I, Einführung (fn. 9), pp. 90 ff.

14 The stagnation that was linked with this situation was overcome during the second developmental stage from 1850 to 1900, at least to the extent that legal history and legal ethnology were included in the comparative research. This allowed the freeing from the illusion that one could understand all of the legal system by considering individual laws by themselves. In addition, one began to understand that the text of the law on its own does not yet reflect all of the law, but that the doctrinal interpretation by legal theorists and the practical application by the judiciary need to be incorporated. Especially the Italian *Emerico Amari* in his "Critica di una scienza delle legislazioni comparate" (1857) was less interested in the legal text itself rather than in the factors that contribute to the creation of a law; thus he wanted to find those rules which – by way of comparing them as "constants of social physics", determine the fate of laws.[27] During the same time period the German *Josef Kohler*, an extraordinarily productive researcher in the fields of civil law and legal history and legal ethnology, aimed at researching "legal cultures",[28] while *Rudolf von Jhering* laid the foundations for a teleological method and, in doing so, for the later so-called "functional legal comparison", when he worked out the instrumental character of the law.[29]

15 There was hope of gaining more widespread impact for legal comparative matters through newly founded associations (such as the French "Société de Législation Comparée" of 1869, the German "Gesellschaft für vergleichende Rechts- und Staatswissenschaft" of 1893 and the English "Society of Comparative Legislation" of 1894), as well as through journals which were published by these and other associations (for example, the Belgian "Revue de droit international et de législation comparée" – published since about 1869 – or the "Zeitschrift für vergleichende Rechts- und Staatswissenschaft" which with special consideration for the "rights of primitive and semi-civilized peoples" was published in Germany under changing names since 1896).[30] It appears that during this period more goals were set than actually reached: especially the expectations in an – in the end – homogenous legal culture for all of humanity, which had been connected particularly to legal-ethnological evolutionism, remained superficial and illusionary. In spite of this, two things are worth mentioning and should be remembered: in a practical way, these comparative law reform impulses were directed towards improving legislation (for example, the so-called "reformed criminal procedure" in Germany);[31] under scientific considerations, this development represents the opening for an understanding of the law that was deepened through theoretical thought as well as the development towards an independent comparative discipline.

16 It is not without problems to summarize the time from 1900 to 1950 as a third phase – now one can start talking about the present – as some developments started before or impacted beyond this period.[32] This applies especially to the institutionalization of comparative legal research which is emphasized as characteristic for the period. This had actually started with the above mentioned associations and journals, at least, however, in 1900 with the first "Congrès international de Droit comparé" in Paris. Here it reached a platform where important fundamental questions about the subject matter, aims and

[27] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 129 f.

[28] Cf. *Bernhard Großfeld/Ingo Theusinger*, Josef Kohler. Brückenbauer zwischen Jurisprudenz und Rechtsethnologie, in: RabelsZ 64 (2000), pp. 696–714.

[29] Cf. *Konrad Zweigert/Kurt Siehr*, Jhering's Influence on the Development of Comparative Legal Method, in: The American Journal of Comparative Law 19 (1971), pp. S. 215–231 (218 ff.), and mn. 247.

[30] For more detail concerning the various objectives of these journals, see *Constantinesco* I, Einführung (fn. 9), pp. 132 ff.

[31] Cf. mn. 19.

[32] Cf. *Brand*, Grundfragen Comparative Law (fn. 10), p. 1086.

methods of the discipline were raised. Here also the comparison of (mostly written) law – so far the dominant approach – was extended into a comparison of legal systems which had to incorporate all sources of law.[33] *Raymond Saleilles* as organiser of the congress pursued the goal of developing a "droit commun de l'humanité civilisée",[34] whilst *Ernst Zitelmann* hoped to establish a common "Lösungsvorrat" (stocks of solutions) in order to bring the different legal systems closer together.[35] All this was bought, though, at the price of accepting a certain restriction: the assumption was that only comparable – meaning similar – matters could be compared in striving for legal world unity. This meant a limitation to statute law and, within that, to the legal systems of continental Europe.[36] The First World War left clear traces for the subsequent course of comparative legal research as well, namely with respect to method and new objectives. While the previous comparative legal research was still largely determined by politically neutral, scientifically objective interest in knowledge, it had to become a weapon of advocacy in order to be able to represent respective self-interests in legal proceedings; this had to happen in reaction to the Versailles Treaty which was binding only in its French and English versions and contained terminology and styles of regulations taken from those legal systems.[37]

In this way, comparative legal research was in danger of being no more than a mere servant toward a particular purpose. One could hold against such a misperception that, while one could find interesting material in concrete matters of negotiation (such as the Versailles Treaty), the scientific task of comparative legal research was to be understood as an independent legal discipline and thus went beyond such accidental practical use.[38] The Paris Congress of 1900, though, had still been dominated by questions of the systematic place, the usefulness and the goals of comparative legal research. Now, instead of getting lost in such debates on basic principle, the individual work regarding factual questions was put in the foreground. For such "recherche concrète",[39] however, mere comparison of laws was not sufficient anymore; rather, one had to take the step towards comparing those legal solutions which "result[ed] from the entirety of all of this complete legal life in one or another state regarding the same questions of life."[40] Now, that the limitation to purely comparing statute laws had been removed, the door towards a stronger consideration of Common Law had opened.[41] **17**

With regard to organization, the institutional strengthening of comparative legal research became particularly visible through the foundation of numerous research institutions: in France the "Instituts de droit comparé" were founded in Lyon (1926) and Paris (1932). At the international level the League of Nations founded the "Institut **18**

[33] For details cf. *Constantinesco* I, Einführung (fn. 9), pp. 159, 161 ff., *Pradel,* Droit pénal comparé (fn. 6), pp. 13 ff.

[34] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 165 ff.

[35] *Ernst Zitelmann*, Aufgaben und Bedeutung der Rechtsvergleichung (1900), in: Zweigert/Puttfarken, Rechtsvergleichung (fn. 16), pp. 11–17 (13 ff.).

[36] *Zweigert/Kötz*, Comparative Law (fn. 7), p. 60; cf. also mn. 253.

[37] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 181 f.; *Hans Dölle*, Der Beitrag der Rechtsvergleichung zum deutschen Recht, in: Deutscher Juristentag (ed.), 100 Jahre deutsches Rechtsleben, Band II, München 1960, pp. 19–47 (20). Cf. also mn. 156.

[38] As particularly *Ernst Rabel*, Aufgabe und Notwendigkeit der Rechtsvergleichung (1924), in: Ernst Rabel, Gesammelte Aufsätze (ed. Hans G. Leser), Band III, Tübingen 1967, pp. 1–21 (18 ff.) is understood by *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 59 f. Cf. also *Dölle*, Rechtsvergleichung (fn. 37), p. 21.

[39] As described in particular by *Marc Ancel*, Les grandes étapes de la recherche comparative au XXe siècle (1968), in: Zweigert/Puttfarken, Rechtsvergleichung (fn. 16), pp. 350–360 (354 f.).

[40] As once more elaborated, above all, by *Ernst Rabel*, Die Fachgebiete des Kaiser-Wilhelm-Instituts für ausländisches und internationales Privatrecht (1937), in: Gesammelte Aufsätze III (fn. 38), pp. 180–234 (187).

[41] Cf. *Neumayer*, Rechtssysteme (fn. 10), p. 15; *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 61 ff.

international pour l'unification du droit privé" (UNIDROIT) in 1926; it was especially entrusted with the harmonization of private law. In Germany, the "Institut für Rechtsvergleichung" – founded during the First World War at the University of Munich – had been followed by further university institutes. Major research institutions were established, so in particular the new Kaiser Wilhelm Institutes for Foreign Public Law and International Law and for Foreign and International Private Law in Berlin (1926). They continued after the Second World War as Max Planck Institutes and were complemented by other comparative legal institutes.[42] One of this group is also the Max Planck Institute for Foreign and International Criminal Law in Freiburg. It developed from a university institute which had been founded by *Adolf Schönke* in 1938 and could be transferred into the Max Planck Society by *Hans-Heinrich Jescheck* in 1965.[43] The role of comparative legal research in legal education as a further institutional factor should also not be underestimated. Germany, however, has nothing much to boast about in this area as it remains far behind France and a number of other, smaller countries in this regard.[44]

19 From this cursory review one might get the impression that criminal law has not played much of a role in the development of comparative legal research so far, but this assumption would only be partially justified. Of course one has to acknowledge that the efforts at comparison and adaptation mainly take place in the field of private law – if one disregards the search for the ideal state in ancient times. The dominance of private law in the field of comparative law is such that some authors believe that they may equate comparative legal research in private law with that in law as a whole.[45] However, such one-sided monopolization does not reflect reality. After all, since the beginning of the 19th century comparative legal research in criminal law – the main focus here – does look quite respectable.[46] Namely, the above mentioned *Feuerbach* and *Mittermaier* achieved the introduction of procedural principles – in a field that is today called "legislative

[42] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 182 f.

[43] Cf. *Hans-Heinrich Jescheck*, Das Institut für ausländisches und internationales Strafrecht in Freiburg i.Br., Berlin 1963; *idem*, Rechtsvergleichung im Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg i.Br., in: ZStW 79 (1967), pp. 128–144; *idem*, Strafrecht und Kriminologie unter einem Dach: Schlussworte, in: Sieber/Albrecht, Unter einem Dach (fn. 5), pp. 152–160.

[44] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 162 ff., 196 and *Christian v. Bar*, Zur Situation des Lehr- und Prüfungsfaches Rechtsvergleichung in (der Bundesrepublik) Deutschland, in: The Institute of Comparative Law in Japan Chuo University (ed.), Conflict and Integration. Comparative Law in the World Today, Tokyo 1988, pp. 507–520; for information on the more recent role of comparative law in legal education see *Brand*, Grundfragen (fn. 10), pp. 1082 f.; *Abbo Junker*, Rechtsvergleichung als Grundlagenfach, JZ 1994, pp. 921–928; *Hein Kötz*, Alte und neue Aufgaben der Rechtsvergleichung, JZ 2002, pp. 257–264, *Neumayer*, Rechtssysteme (fn. 10), pp. 41 ff.; cf. also *Walter Perron*, Sind die nationalen Grenzen des Strafrechts überwindbar? Überlegungen zu den strukturellen Voraussetzungen der Angleichung und Vereinheitlichung unterschiedlicher Rechtssysteme, ZStW 109 (1997), pp. 281–301 (282 fn. 5) and from an Asian perspective *Chongko Choi*, Research and Teaching of Comparative Law in Korea, Soochow Law Journal II.1 (2005), pp. 139–152 (148 ff.).

[45] It can be observed that textbooks or compendia which, though bearing "comparative law" in the title, in fact only deal with private or commercial law and/or touch upon criminal law merely occasionally; this in particular concerns the still highly regarded textbook by *Zweigert/Kötz* on "Rechtsvergleichung" and "Comparative Law" respectively (fn. 7): While in the German editions, at least on the inside cover page, it is disclosed that the book is merely dealing with private law, this restriction and clarification is missing in the English edition. Or, to give just another prominent example: though calling itself "International Encyclopedia of Comparative Law", this series of 17 volumes (with meanwhile 99 separate parts) is merely dealing with private law and neighbouring fields without taking notice of criminal law. This biased identification of comparative law with private law – by disregarding comparative criminal law – is also complained about by *Dubber*, Comparative Criminal Law (fn. 23), pp 1288 ff. and *Elisabetta Grande*, Comparative criminal justice: a long neglected discipline on the rise, in: Mauro Bussani/Ugo Mattei (eds.), Comparative Law, Cambridge 2012, pp. 191–204 (191 f.); cf. also infra Epilogue mn. 412 ff.

[46] Further to this and the following see *Eser*, Comparative Legal Research (fn. 4), pp. 495 ff, *idem*, Funktionen (fn. 4), pp. 1503 f., and *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 10 ff.

comparative law"[47] – through looking at French and English models; these principles were destined to last as "reformed criminal procedure".[48] At the level of institutions there was also some progress in the 19th century: in particular, the establishment of a chair for comparative criminal law at the Faculty of Law in Paris in 1846 and the establishment of the first cross-border scientific organization in 1888 when the Belgian *Adolphe Prins,* the Dutchman *Gerard Anton von Hamel* and the Austrian *Franz von Liszt*, who was teaching in Germany, founded the "Internationale Kriminalistische Vereinigung" (IKV).[49] Under the decisive influence of the latter the "Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts" (Comparative Presentation of German and Foreign Criminal Law)[50] – consisting of 16 volumes, and up to that time, the most comprehensive work – was successfully published in the first decade of the 20th century. The uniqueness of this work was acknowledged even outside Germany, namely by *Leon Radzinowicz*, as "a landmark in the history of comparative penal studies".[51] Albeit on a smaller scale, preliminary comparative work for the reform of the German criminal law after the Second World War can be noted, especially that done by the Max Planck Institute in Freiburg.[52] In addition, this institute itself has increasingly become a focal point for foreign comparatists in criminal law.[53] Still strongly orientated to political reform, the "International Association of Penal Law"– founded after the First World War under French leadership as "Association Internationale de Droit Pénal" (AIDP) – comes into prominent view every five years through international conferences; apart from that, it gives also impulse for reform through its national groups.[54]

2. Increasing importance and emancipation of comparative criminal law

The existence of such institutions and activities alone is a visible sign for the increasing importance of comparative criminal law. Meanwhile there is also no lack of explicit pronouncements in this direction. Of course, there are also sceptical voices:[55] some lament the ineffectiveness in practical terms of comparative criminal law,[56] state that it is "disconnected",[57] speak of "negative comparison of law"[58] or even announce **20**

[47] Cf. Part II.C. (mn. 133 ff.).)

[48] For details see *Eberhard Schmidt*, Einführung in die Geschichte der deutschen Strafrechtspflege, 3rd ed. Göttingen 1965, pp. 288 ff.

[49] In detail to the genesis of the IKV and its later fusion with the AIDP (hereafter described), cf. *Leon Radzinowicz*, The Roots of the International Association of Criminal Law and their Significance, Freiburg 1991. To further roles of *Franz v. Liszt* cf. fn. 118, 127, 163, 183, 367 as well as mn. 191 ff.

[50] *Karl Birkmeyer* et al. (eds.), Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts. Vorarbeiten zur deutschen Strafrechtsreform, Berlin 1905–1909.

[51] *Leon Radzinowicz*, International Collaboration in Criminal Science, in: The Law Quarterly Review 58 (1942), pp. 110–139 (128).

[52] Published as "Materialien zur Strafrechtsreform", cf. *Jescheck*, Max-Planck-Institut (fn. 43), pp. 134 f.

[53] Cf. *Jescheck*, Schlussworte (fn. 43), pp. 153 f.

[54] The activities of the AIDP are reflected particularly in its journal "Revue Internationale de Droit Pénal" (Éditions Érès Paris).

[55] Especially regarding the European region cf. *Pierre Hauck*, Funktionen und Grenzen des Einflusses der Strafrechtsvergleichung auf die Strafrechtsharmonisierung in der Europäischen Union, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 255–273 (270 ff.), with further references.

[56] As to the harmonisation efforts of environmental criminal law, the sobering assessment by *Martin Heger*, Die Europäisierung des deutschen Umweltstrafrechts, Tübingen 2009, pp. 67 f.

[57] "Bodenlosigkeit": as characterised by *Hauck*, Funktionen (fn. 55), p. 271, with regard to the European Union's lack of taking into account factual legal background within the framework of its legislation.

[58] See. *Hauck*, Funktionen (fn. 55), p. 271 with regard to the phenomenon that, as stated by *Helms*, in the European context the legislator is consciously taking position against recommendations gained by legal comparison.

the "end of comparative law".[59] Yet, even if one assumes that comparative criminal law does not play a role equal to that of comparative private law[60] and even if one cannot overlook signs of "malaise",[61] this only means that imperfections are noted; it does not mean that the value and importance of comparative research in criminal law is negated in principle. On the contrary, there has probably never been a time in which the call for comparative criminal law could be heard louder than today.

21 This increase in importance and attention could hardly be better evidenced than by the fact that, through a rising number of publications, comparative criminal law is more and more understanding and establishing itself as a comparative discipline of its own: though still remaining a part of comparative law in general, the aims and methods of comparing criminal law are not necessarily the same as those in other legal fields. This emancipation of comparative criminal law – as in particular distinct from comparative private law – can be observed in two kinds of publications: One way of not disregarding comparative criminal law in compendia on "comparative law" – as it still occurs –,[62] but to recognize it as a comparative discipline of its own, is to give it separate room for being dealt with, as is increasingly done.[63] The other, and certainly more progressive, way is to present comparative criminal law – in terms of "droit pénal comparé comme une discipline propre" (*Pradel*) – in independent publications, as they can in rising numbers be found in separate text- and case books as well as other compendia and collections.[64] Although this literature is diverse in size, scope, objectives and, not the least, its addressees,[65] its sheer existence is a conspicuous sign of the growth comparative criminal law enjoys.

22 With regard to the possible reasons for this development, and setting aside the traditional tasks of comparative criminal law, which still are to be considered in detail, the current increase in importance can be summarised in the catchphrase of progressive "internationalisation of the law".[66] Economies and trade become increasingly intercon-

[59] As expressed by *Siems*, The End (fn. 15), pp. 133 ff., but cf. also *idem,* Comparative Law in the 22nd Century, in: Maastrich Journal of European and Comparative Law (MJECL) 23 (2016), pp. 359–365 (363 f.). See further. the account of shortcomings in current comparative legal resarch by *Jennifer Hendry*, "Contemporary Comparative Law: Between Theory and Practice" – Review of Esin Örücü & David Nelken's Comparative Law: A Handbook, in: German Law Journal 9 (2008), pp. 2253–2263, and the fundamental criticism by younger US private law authors, presented as well as rejected by *Kötz*, Aufgaben (fn. 44), pp. 153 f.

[60] As conceded particularly by *Hilgendorf*, Einführung (fn. 6), p 12; with special attention to legal education see also *Perron*, Nationale Grenzen (fn. 44), pp. 282 f.

[61] As stated with regard to the present situation by *Martino Mona*, Strafrechtsvergleichung und *comparative justice*: Zum Verhältnis zwischen Rechtsvergleichung, Grundlagenforschung und Rechtsphilosophie, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 103–119 (104 f.); especially to "deficits" in (the) judicial jurisprudence see *Edward Schramm*, Die Verwendung strafrechtsvergleichender Erkenntnis in der Rechtsprechung des BVerfG [Bundesverfassungsgericht] und des BGH [Federal Supreme Court], in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 155–178 (174 ff).

[62] Cf. mn. 19 fn. 45; as to more recent publications of this kind cf. mn. 416 fn. 819.

[63] Though different in extent and focus: see the survey mn. 415 fn. 817.

[64] In terms of this characterisation by *Pradel* (fn. 6, pp. 1 ff.) see the survey mn. 415 fn. 818.

[65] For a detailed analysis and grouping of the above listed contemporary literature on comparative criminal law with regards to the its character (as theoretical treatise, essay, textbook, casebook, collection of country reports etc.), the number of jurisdictions or regions taken into consideration, different subjects covered or the audience primarily addressed, see infra Epilogue (mn. 411 ff.).

[66] As already observed by *Heike Jung*, Grundfragen der Strafrechtsvergleichung, in: JuS 1998, S. 1–7 (1 f.) and more recently repeatedly described by *Ulrich Sieber*, Grenzen des Strafrechts. Strafrechtliche, kriminologische und kriminalpolitische Grundlagenfragen im Programm der Strafrechtlichen Forschungsgruppe am Freiburger Max-Planck-Institut für ausländisches und internationales Strafrecht [hereafter: Grenzen], in: Hans-Jörg Albrecht/Ulrich Sieber (eds.), Perspektiven der strafrechtlichen

nected internationally, nation states move more closely together politically and tourists cross borders in increasing numbers – all these and similar phenomena contain opportunities but also risks; these need to be legally covered, and compared with one another, and possibly also harmonised in order to avoid friction. However, even the increase in legal protection is ambivalent: the more rules, the more possible infringements; the more loop holes, the greater the danger of abuse. In this way, a wide field opens up for criminal activities and this needs appropriate prosecution.

There is a multitude of transnational phenomena in need of attention by comparative legal research; the following are to be emphasized:

(i) As far as international trade and traffic is concerned, the rapid development of the internet has brought with it a considerable increase in cross-border criminal activity: this calls for new forms of international cooperation. **23**

(ii) Insofar as this requires the mutual recognition of measures of prosecution and sanctioning, fundamental principles of procedure and respect for human rights must be guaranteed. In order to initiate and implement common minimum standards more than the mere comparison of laws and statutes is necessary; in addition, the respective judicial practice has to be investigated in the comparison. **24**

(iii) If one wants to put an end to the impunity of international crimes, irrespective of whether they were committed in the context of transnational wars or as state supported crimes against humanity committed against that state's own population, then this requires complementary cooperation between national and supranational criminal jurisdictions. If in this process the greatest possible equality is to be ensured, then the national requirements for criminal liability should ideally already be adjusted to each other.[67] Equally, the supranational criminal justice system should have a model character; this, however, is not going to be achieved without comparative consideration regarding national traditions. **25**

(iv) In particular with regards to Europe and its possible cooperation partners, comparative criminal law owes probably the greatest increase in importance to "Europeanisation".[68] Firstly, with the creation of the Single European Market and the **26**

Forschung, Berlin 2006, pp. 35–79 (52 ff.); *idem,* Strafrechtsvergleichung (fn. 5), pp. 80 ff.; *idem,* Grenzen des Strafrechts – Grundlagen und Herausforderungen des neuen strafrechtlichen Forschungsprogramms am Max-Planck-Institut für ausländisches und internationales Strafrecht [hereafter: Grundlagen], in: ZStW 119 (2007), pp. 1–68 (4 ff., 52 ff.); *idem,* Rechtliche Ordnung in einer globalen Welt (hereafter: Gobale Welt), in: Rechtstheorie 41 (2007), pp. 151–198 (182 ff.). Cf. also *Frank Meyer*, Internationalisierung und Europäisierung des Rechts als methodische Herausforderung der Rechtsvergleichung, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 87–102 (88 f.); and *Thomas Weigend*, Criminal Law and Criminal Procedure, in Jan M. Smits (ed.), Elgar Encyclopedia of Comparative Law, 2nd ed. Cheltenham/UK 2012, pp. 261–278, who, through the internationalsation of criminal law, sees a "large new market for comparative criminal law" opening up (p. 263); furthermore – though not without some scepticism – see *Michael Kubiciel*, Funktionen und Dimensionen der Strafrechtsvergleichung. Rezension von Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), in: Rechtswissenschaft (RW) 2/2012, pp. 212–222 (212, 220).

[67] However, this is not at all reflected by the current reality since so far not even the possibility of prosecuting international crimes penalized in the Rome Statute of the International Criminal Court is secured in all domestic jurisdictions – as was established by a comparative project of the Max Planck Institute: *Albin Eser/Ulrich Sieber/Helmut Kreicker* (eds.), Nationale Strafverfolgung völkerrechtlicher Verbrechen/National Prosecution of International Crimes, 7 volumes, Freiburg and Berlin 2003–2006; see the summary by *Helmut Kreicker*, National Prosecution of International Crimes from a Comparative Perspective, in: International Criminal Law Review 5 (2005), pp. 313–328.

[68] For more detail see *Klaus Tiedemann*, Der Allgemeine Teil des Strafrechts im Lichte der europäischen Rechtsvergleichung, in: Albin Eser u. a. (eds.), Festschrift für Theodor Lenckner zum 70. Geburtstag, München 1998, pp. 411–434 (412 ff.); *idem*, Vom Nutzen der Rechtsvergleichung für das

development of a European "area of freedom, security and justice" a steadily growing *acquis communautaire* of Community law emerged. This demands constant coordination with the legal systems of the individual nation states if frictions and conflicts are to be avoided in its implementation. Moreover, any further creation of European Union law requires preliminary comparative legal work. The same applies to the assimilation and harmonisation of the law of individual states and to the smooth transnational cooperation at a procedural level. The latter applies especially to the implementation of a European arrest warrant that will probably only become generally accepted – after its fought-over introduction – when equal minimum standards for human rights in all member states can be guaranteed.[69] Similarly, one cannot expect cooperation free of conflicts with the prosecuting authorities of member states from the intended introduction of a European Public Prosecutor's Office[70] unless multilateral adjustments have been made. Conflicts between jurisdictions also have to be considered; these may arise from different legal systems overlapping when national criminal law is applied extraterritorially and multiple prosecutions may come about in this way.[71] It will be difficult to remove the stress for an accused person exposed to such a situation – who is hardly helped by the traditionally limited prohibition of double jeopardy – as well as the unnecessary doubling-up of work for the various judicial systems unless the competition between different jurisdictions can be removed or at least regulated beforehand. All of this requires knowledge of and comparison between foreign legal systems.

27 Through this growth in importance of comparative legal research the trend I observed during my first consideration of this development has strongly continued. In the past, the scientific discipline of comparative law offered its findings to politics to be implemented, and comparative law researchers played – to put it in business terms – the role of supplier of a product for which there was no corresponding demand on the political side. Now, however, there has been an almost complete reversal of the situation. Politics now has to be glad when their need for comparative preliminary work can be satisfied. In this way, comparative criminal law as well has moved from a supply- to a demand market.[72]

28 Last but not least, the growing occupation with foreign law may broaden the horizon for legal methodology if one wants to regard the comparison of law – beside the classical methods of grammatical, historical, systematic and teleological interpretation –, also for criminal law, as "the fifth method of interpretation".[73] It can hardly surprise then that a "brilliant future" has been predicted for comparative criminal law.[74]

Wirtschaftsstrafrecht – Kurze Bemerkungen zum "Corpus Juris" und zu "Europa-Delikten", in: Marcel Alexander Niggli/Nicolas Queloz (eds.), Strafjustiz und Rechtsstaat/Justice pénale et État de droit. Symposium zum 60. Geburtstag von Franz Riklin und José Hurtado Pozo, Zürich 2003, pp. 69–100. See also *Frank Meyer*, Internationalisierung (fn. 66), pp. 88 f.; *Sieber*, Globale Welt (fn. 66), p. 182; *Weigend*, Criminal Law (fn. 66), pp. 264 f. and *Jaakko Husa*, The Tip of the Iceberg or What Lies Beneath the Surface of Comparative Law, MJECL 16 (2005), pp. 73–94, who sees a dramatic change in the appearance of comparative law, especially in the European *ius commune* movement.

[69] Cf. *Bernd v. Heintschel-Heinegg*, Europäischer Haftbefehl, in: Sieber/Brüner/Satzger/v. Heintschel-Heinegg (eds.), Europäisches Strafrecht, 2nd ed. Baden-Baden 2014, pp. 661–676.

[70] Cf. *Bernd-Roland Killmann/Margarete Hofmann*, Perspektiven für eine europäische Staatsanwaltschaft, in: Sieber/Brüner/Satzger/v. Heintschel-Heinegg, Europäisches Strafrecht (fn. 69), pp. 864–876.

[71] Cf. mn. 112 and *Albin Eser*, Konkurrierende nationale und transnationale Strafverfolgung – Zur Sicherung von "ne bis in idem" und zur Vermeidung von positiven Kompetenzkonflikten, in: Sieber/Brüner/Satzger/v. Heintschel-Heinegg, Europäisches Strafrecht (fn. 69), pp. 636–660.

[72] Cf. mn. 197, *Eser*, Comparative Legal Research (fn. 4), pp. 84, *idem,* Funktionen (fn. 4), pp. 1505 f.

[73] As was suggested for other legal fields (such as constitutional law) and also demanded for the interpretation of criminal law by *Schramm*, Erkenntnisse (fn. 61), p. 177. In the same sense speaking of

C. Variety of Concepts, Terms and Models

But how must comparative legal research in criminal law be conceived and shaped to fulfil the raised hopes? This is not easy to answer. As became apparent even from the cursory review above, there are manifold differences in meaning. These can easily be extended up on if one focuses not only on the historical development but, further than that, on the different subjects and levels of comparison. In addition, one may look – as far as subject matter is concerned – beyond the substantive elements of criminal liability at the procedural modalities, the structural elements of the constitution of the judiciary as well as the factual circumstance and the legal backgrounds of the criminal justice system.[75] Furthermore, the range of comparison may start at a national-internal level with a vertical-historical review,[76] and then stretch transnationally from bilateral to multilateral regional and universal coverage.[77] This can be done at the micro level of individual elements of crime or special offences as well as at the macro level of extensive areas of criminal law such as the entire system of crime or the basic concept of politics related to crime.[78] **29**

It is understood that comparative legal research with its multitude of goals, subject matter, reasons for emergence, scope and methods is hard to define in one term that is both comprehensive and meaningful.[79] For that reason, it is not surprising that some authors forego any attempt at definition,[80] or that a generally accepted definition is **30**

"comparative law as universal method of interpretation" *see Konrad Zweigert*: Rechtsvergleichung als universale Interpretationsmethode, in: RabelsZ 15 (1949/50), pp. 5–21

[74] As stated by *Thomas Weigend*, Diskussionsbemerkungen, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 131–132 (132). In the same vein *Grande* (fn. 45, p 192) describes comparative criminal justice as "a long neglected discipline on the rise". At any rate, these hopes appear more realistic than the high-flying ambitions that are being pursued – primarily with a view to comparative private law – concerning the development of "tools for global governance of the legal field in today's world", based on the vision that "Comparative Law is rising up over its old horizon: a new presence is dispelling the shadows of the past to reveal a submerged bulk of buried cultural secrets": thus the promise by *Pier Giuseppe Monateri* (ed.), Methods of Comparative Law, Cheltenham 2012, pp. 7 and 1, respectively. Cf. also infra Part IV (mn. 400 ff.).

[75] As, for instance, suggested by *Christoph Safferling*, Diskussionsbemerkungen, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 307–311 (310), for the comparison of law within the European Union.

[76] Even when just various developmental layers are compared within the same legal system, this is a kind of comparative law; cf. mn. 44.

[77] Such a transnational comparison is possible both on the horizontal level between various countries and in vertical alignment between national and supranational institutions; cf. *Jochen Vogel*, Diskussionsbemerkungen: Instrumentelle Strafrechtsvergleichung, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 205–212 (205). See also *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 29 ff.; *Safferling*, Diskussionsbemerkungen (fn. 75), pp. 307 f.; *Schramm*, Erkenntnisse (fn. 61), p. 159; cf. also mn. 164 ff.

[78] As to further differences between macro, micro- and meso-comparison – partly with a focus more on the depth and scope of the subject matter of the comparison or the territorial coverage – see *Kurt Hanns Ebert*, Rechtsvergleichung. Einführung in die Grundlagen, Bern 1978, p. 23; *Sebastian McEvoy*, Descriptive and purposive categories of comparative law, in: Monateri, Methods (fn. 74), pp. 144–162 (145 ff.); *Esin Örücü*, Developing Comparative Law, in: Örücü/Nelken, Handbook (fn. 9), pp. 43–65 (56 f.); *William Twining*, Comparative Law and Legal Theory: The Country and Western Tradition, in: Jan Edge (ed.), Comparative Law in Global Perspective, Ardsley,/NY 2001, pp. 21–76 (31 ff.); *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 4 f. Cf. also mn. 60 ff.

[79] As to some of these varying definitions see the references in *Eser*, Comparative Legal Research (fn. 4), pp. 78 ff; *idem*, Funktionen (fn. 4), p. 1501.

[80] As, e. g., done by *Großfeld* in his "Kernfragen der Rechtsvergleichung" (Tübingen 1996).

assumed to be impossible.[81] Here, too, an attempt at definition will for the moment be deferred until, first, an overview is gained of the diverse terminology which incorporates terms of comparative law in general and those of comparative criminal law in particular at this point in time.

31 Such terms as "traditional comparative law", "mainstream comparative law", "conventional comparative law" or "postmodern comparative law" can be left aside from the beginning as they express very little and lack any factual criteria.[82]

32 In order to start with the characterisation of comparative criminal law that is directed towards particular goals, a differentiation[83] into three categories – as originally suggested by myself – presents itself. These are

(1) judicative comparative law,[84]

(2) legislative comparative law[85] and

(3) theoretical comparative jurisprudence.[86]

33 This (threesome) "Trias", in the meantime approved of by others,[87] was later complemented by

(4) evaluative-competitive comparative law[88] and in this way extended into a (foursome) "Tetrade".[89]

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[81] The reason being that nobody has the right to monopolize the concept of comparative law by excluding other definitions – as stated, for instance, by *Husa*, Iceberg (fn. 68), p. 76 fn. 13 in referring (approvingly) to *Bogdan*. Nevertheless a rather comprehensive "working definition" of comparative law can be found in *Michael Bogdan*, Concise Introduction to Comparative Law, Groningen 2013, pp. 5 f.

[82] Even *Örücü*, where this list is taken from (in: Developing, fn. 78, p. 44), does not seem to gain much content from these descriptions, maybe with the exception of the term "critical comparative law" also mentioned by her.

[83] *Eser*, Comparative Legal Research (fn. 4), pp. 85 ff., *idem,* Funktionen (fn. 4), pp. 1506 ff.

[84] For details see infra Part II. B (mn. 97 ff.); cf. also mn. 50 f., 157 ff., 181, 185, 195 ff., 232 ff., 299 ff.

[85] For details see infra Part II. C (mn. 133 ff.); cf. also mn. 9 ff., 19, 50 f., 96, 97 f., 181 f., 342.

[86] For details see infra Part II. A (mn. 52 ff.); cf. also mn. 7 ff., 16 ff., 219 ff.

[87] Thus – inter alia – by *Christoph Burchard*, Die Europäische Ermittlungsanordnung ("European Investigation Order"): Exekutorische Strafrechtsvergleichung und das Prinzip der gegenseitigen Anerkennung, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 275–306 (286, 290); *Hauck*, Funktionen (fn. 55), pp. 260, 265, 270; *Ursula Nelles*, Rechtsvergleichung per Internet? Einige Aspekte zum Generalthema "Zukunft der Strafrechtsvergleichung", in: Jörg Arnold/Björn Burkhardt et al. (eds.), Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag, München 2005, pp. 1005–1018 (1009); *Walter Perron*, Operativ-funktionalistische oder kulturbezogene Strafrechtsvergleichung?, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 121–132 (123); *Mark Pieth*, "Funktionale Äquivalenz", in: ZSchwR 119 (2000), pp. 477–489 (480); *Schramm*, Erkenntnisse (fn. 61), pp. 156, 177 f.; *Vogel*, Instrumentelle Strafrechtsvergleichung (fn. 77), p. 205; *Liane Wörner*, Strafrechtsvergleichung als Problem und Lösung am Beispiel eines strafrechtsvergleichenden Projektes mit der Türkei, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 135–154 (140, 152). Though not expressly referred to, in substance this "trias" can also be found in the description of the objectives of comparative criminal law by *Sieber,* Grenzen, (fn. 66), pp. 69 f., *idem,* Strafrechtsvergleichung, supra (fn. 5), pp. 109 ff.). Cf. also *Brand*, Grundfragen (fn. 10), p. 1084, who basically comes to the same result by a three-way split of comparative law as an "instrument of the legal practice and theory – legislation – judicature – research and teaching".

[88] *Eser*, Evaluativ-kompetitive Strafrechtsvergleichung (fn. 4). As to first approaches to this fourth track of comparative (criminal) law see *Albin Eser*, Gedanken im Übergang. Amtswechsel am Freiburger Max-Planck-Institut für ausländisches und internationales Strafrecht 2004, in: Albrecht/Sieber, Perspektiven (fn. 66), pp. 22–34 (31) = www.freidok.uni-freiburg.de/volltexte/4053; *idem*, Über Grenzen – Streben nach Mitte, in: Eric Hilgendorf eds.), Die deutschsprachige Strafrechtswissenschaft in Selbstdarstellungen, Berlin 2010, pp. 75–122 (113 f.) = www.freidok.uni-freiburg.de/volltexte/9709. For details see infra Part II. D (mn. 173 ff.); cf. also mn. 56, 133.

[89] Cf. mn. 36.

Partly in the same direction, but on closer inspection supplemented by methodological varieties, a list of seven categories is presented by *Ulrich Sieber*;[90] these are **34**

(5) universal comparative criminal law,[91]

(6) functional comparative criminal law,[92]

(7) systematic comparative criminal law,[93]

(8) structure comparing criminal law,[94]

(9) comparison of values and their evaluation in comparative criminal law,[95]

(10) case-based comparative criminal law,[96]

(11) computer-assisted comparative criminal law.[97]

Beyond that one can find terms that go in the same direction as well as those that set other comparative law accents; in the German-language literature alone,[98] without claiming to be exhaustive, these include **35**

(12) legitimising function of comparative law,[99]

(13) protective function of comparative law,[100]

(14) controlling function of comparative law,[101]

(15) preparatory and initiating function of comparative law,[102]

(16) critical comparative law,[103]

(17) subversive comparative law,[104]

(18) acceptance-raising comparative law,[105]

(19) harmonising comparative law,[106]

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[90] As far as ascertainable, this list can first be found in *Sieber*, Grenzen (fn. 66), pp. 70 ff. further *idem,* Grundlagen (fn. 66), p. 57, and – in denoting his list as a continuation of *Jescheck's* considerations – in: Strafrechtsvergleichung (fn. 3), p. 79; but cf. to this also mn. 36 (with fn. 124), 50 (with fn. 146), 227.

[91] For details see mn. 72 ff., 238 ff.; cf. also mn. 65, 280.

[92] For details see mn. 232 ff., 276 ff., 296 ff.; cf. also mn. 85, 112.

[93] For details see mn. 82 ff.; cf. also 12,44, 247.

[94] For details see mn. 82 ff., 256 ff; cf. also 289, 317.

[95] "Wertend-wertvergleichende Strafrechtsvergleichung"; see also evaluative comparative law mn. 178 ff.

[96] See mn. 307 f. Cf. also mn. 271, 388.

[97] See mn. 309. Cf. also 222, 356, 388.

[98] As far as ascertainable, this list can first be found in *Sieber*, Grenzen (fn. 66), pp. 70 ff. further *idem,* Grundlagen (fn. 66), p. 57, and – in denoting his list as a continuation of *Jescheck's* considerations – in: Strafrechtsvergleichung (fn. 3), p. 79; but cf. to this also mn. 36 (with fn. 124), 50 (with fn. 146), 227.

[99] *Schramm*, Erkenntnisse (fn. 61), pp. 176 f. Cf. also mn. 204 ff.

[100] *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 287, 290, 301. Cf. also mn. 131.

[101] *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 290, 298. Cf. also mn. 95, 131 f., 200 ff., 222.

[102] *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 290, 298. Cf. also mm. 48, 95, 131, 135, 208 f.

[103] See to this (already) *Zweigert*, Universale Interpretationsmethode (fn. 73), p. 10, furthermore *Rösler*, Erkenntnisinstrument (fn. 10), p. 1087; *Ralf Michaels*, The Functional Method of Comparative Law, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 339–382 (378 ff.). Cf. also mm. 50, 68, 95, 136 ff., 208 f., 222.

[104] *Mona*, Comparative Justice (fn. 61), pp. 103, 106, 107, 108 ff.; furthermore see *George P. Fletcher*, Comparative Law as a Subversive Discipline, in: American Journal of Comparative Law 46 (1998), pp. 683–700; *Horatia Muir Watt*, Further terrains for subversive comparison: the field of global governance and the public/private-divide, in: Monateri, Methods (fn. 74), pp. 270–288. Cf. also mn. 209.

[105] *Hauck*, Funktionen (fn. 55), pp. 257 f. Cf. also mn. 50, 56, 206, 329.

[106] See *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 87 ff., *idem,* Grenzen (fn. 66), pp. 13 ff. Cf. also mn. 91 f., 146 ff., 213.

(20) conflict-avoiding comparative law,[107]
(21) discursive-conciliatory comparative law,[108]
(22) operatively-functionalist comparative law,[109]
(23) functionally structured comparative law,[110]
(24) functional equivalence,[111]
(25) executory comparative law,[112]
(26) instrumental comparative law,[113]
(27) dialectic comparative law,[114]
(28) inductive comparative law,[115]
(29) import-export oriented comparative law,[116]
(30) academic comparative law,[117]
(31) culture-related comparative law,[118]
(32) museum-like comparative law,[119]
(33) descriptive comparative law,[120] or
(34) voluntarily-discretionary or obligatory-compulsory comparative law.[121]

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[107] *Hauck*, Funktionen (fn. 55), pp. 255 f. Cf. also mn. 91 f., 111.

[108] *Boris Burghardt*, Die Rechtsvergleichung in der völkerstrafrechtlichen Rechtsprechung. Von der Rechtsvergleichung als Mittel der Rechtsfindung zur diskursiv-vermittelnden Rechtsvergleichung, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 235–254. Cf. also mn. 91 f. 206.

[109] *Bijan Fateh-Moghadam*, Operativer Funktionalismus in der Strafrechtsvergleichung, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 43–63. Cf. also mn. 241.

[110] *Perron*, Nationale Grenzen (fn. 44), pp. 289 ff. Cf. also mn. 256 ff.

[111] *Pieth*, Äquivalenz (fn. 87), pp. 477 ff. Cf. also mn. 253 ff., *Burchard*, Exekutorische Strafrechtsvergleichung (fn.87), p. 292.

[112] *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 277, 286 ff. For details see Part II. B. 3 (mn. 130 ff.). Cf. also mn. 99, 185.

[113] *Vogel*, Instrumentelle Strafrechtsvergleichung (fn. 77), pp. 207 ff. Cf. also mn. 217.

[114] *Axel Tschentscher*, Dialektische Rechtsvergleichung, in: JZ 2007, pp. 807–816.

[115] Cf. *Walter Perron*, Vorüberlegungen zu einer rechtsvergleichenden Untersuchung der Abgrenzung von Vorsatz und Fahrlässigkeit, in: Albin Eser (ed.), Festschrift für Haruo Nishihara, Baden-Baden 1998, pp. 143–154 (146 f.).

[116] See *Mordechai Kremnitzer*, Some Reflections on Comparative Criminal Law, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 29–40 (29). Cf. also *Hans Kudlich*, Exportgüter und Exportbeschränkungen. Der Strafrechtsexport aus rechtstheoretischer Perspektive, in: Streng/Kett-Straub, Kulturvergleich, pp. 169–185, and infra mn. 102 ff., 115 ff., 121 ff., 135 ff., 150 ff., 214 ff., 311 ff., 329 ff.

[117] *Vogel*, Instrumentelle Strafrechtsvergleichung (fn. 77), p. 205. Cf. also mn. 52.

[118] *Susanne Beck*, Strafrecht im interkulturellen Dialog. Zur Methode der kulturbezogenen Strafrechtsvergleichung, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 65–86; *Franz Streng/Gabriele Kett-Straub* (eds.), Strafrechtsvergleichung als Kulturvergleich. Beiträge zur Evaluation deutschen "Strafrechtsexports" als "Strafrechtsimport", Tübingen 2012, with a review by *Eser* (fn. 8) Although not yet known by the now commonly used term, criminal law played a role both as a "cultural product" and a "cultural lever" for the shaping of intellectual life already for *Franz v. Liszt*, Einheitliches mitteleuropäisches Strafrecht, in: ZStW 38 (1917), pp. 1–20) (3). Cf. also mn. 13, 55, 67, 132, 156, 241 ff., 250 ff., 304 ff.

[119] For instance, when comparative law is presented in terms of "essay-like travel reports": *Mona,* Comparative Research (fn. 61), p. 108. Cf. also *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 37, furthermore mn. 8, 47, 54, 83, 133.

[120] *Zweigert/Kötz*, Comparative Law (fn. 7), p. 6. Cf. also *McEvoy*, Categories (fn. 78), pp. 145 ff. (in contrasting it with "purposive categories" of comparative law), furthermore mn. 57.

[121] *Schramm*, Erkenntnisse (fn. 61), p. 159. Cf. mn. 101, 120, 121 f.

What in such an overview might also be expected, is the "Four step model" by *Jescheck*[122] – so called by some comparatists.[123] On closer inspection, however, this "intellectual method ('geistige Methodik') of comparative criminal law research" (*Jescheck's* own definition) does not represent a special kind of legal comparison but just the essential steps necessary for comparative law work.[124] These are definitely important but will be considered more closely later.[125] 36

D. Aims – Methods – Prerequisites: Differentiating, Defining and Integrating

The above list of various functions and modalities of comparative law and the equivalent terms could – as will become apparent below – easily be extended. However, at first glance it becomes obvious that these characterisations only indicate particular, individual facets. On closer inspection, it becomes clear that this apparent hotchpotch can essentially be put in three different categories: those of aims, methods and preconditions of comparative law. 37

Even if they express a variety of objectives, all terms defining comparative law that are meant to express a specific function or task, can be brought together as primarily goal-oriented. Out of the above list this certainly applies to judicative (1), legislative (2), scientific-theoretical (3), and probably similarly to academic (30), museum-like (32), voluntary-discretionary (34) and evaluative-competitive (4) comparative law. Similarly, the legitimising (12), protective (13), controlling (14) and initiating (15) functions as well as the so-called critical (16), subversive (17), acceptance-raising (18), harmonising (19), conflict-avoiding (20), discursive-conciliatory (21) and import-export oriented (29) types of comparative law, all pursue a particular goal. In addition, these objectives can be further differentiated when one considers additional task descriptions. 38

From this (first) group are to be distinguished those terms of comparative law that are primarily method-oriented and describe a particular type of comparative method. This applies to functional (6), operatively-functionalist (22) and functionally structured (23) comparative law as well as functional equivalence (24). It applies, furthermore, to systematic comparative law (7), structural comparative law (8), and to instrumental (26), dialectic (27), inductive (28), case-based (10), computer-assisted (11) as well as descriptive (33) comparative law. 39

The remaining variations of comparative law cannot be exclusively attributed to one or the other category. Universal comparative law (5), for example, could, on one hand, be directed toward a global research goal or, on the other hand, be used as a method toward a certain theoretical or legislative goal. Similarly, a comparison of values and their 40

[122] *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 40 ff.

[123] *Hilgendorf*, Einführung (fn. 6), p. 19; *Heike Jung*, Wertende (Straf-)Rechtsvergleichung. Betrachtungen über einen elastischen Begriff, in: GA 2005, pp. 2–10 (6); *Nelles*, Internet (fn. 87), p. 1007; *Schramm*, Erkenntnisse (fn. 61), p. 177.

[124] Thus the occasionally assumed connection of *Sieber's* 7-step-model (mn. 34) with *Jescheck's* 4-step approach can be understood as a continuation of *Jescheck's* work only in so far as his work steps – divided into working hypothesis, country reports, modelling schemes and evaluation – are supplemented by further modalities of comparative research (cf. also mn. 50 fn. 146). At any rate, different from *Jescheck's* 4 work steps, *Sieber's* model – rather than providing a working procedure – is, as described by *Hilgendorf*, Einführung (fn. 6), p. 21, merely offering different "approaches" that do not contradict but complement each other for successful comparative research in criminal law. Cf. also mn. 227 with fn. 534.

[125] For details see mn. 223 ff., 229 ff.; cf. also mn. 44.

evaluation in comparative law (9) may have its goal in finding the best possible solution for a particular legal problem, or simply represent the methodical conclusion of a comparative law investigation. In the same way, culture-related comparative law (31) may have the comparison of different procedural cultures as its focus, while in a legislatively oriented comparison the method might want to highlight those differences that are culturally based. Insofar, executory comparative law (25) has two sides as well: primarily, it may target the implementation of judicial decisions and thus come close to judicative comparative law (1), but to do this, it methodologically requires an evaluation.

41 Even though these various modalities of comparative law remain to be discussed in detail, the following observations can be made:

First: In view of the great variety of findings, a "single" type of comparative law in the sense of a homogenous and content-wise all-encompassing term cannot exist. Rather, there are different varieties both in respect to the aims as well as the methods of comparative law. As these can be subdivided further, comparative law cannot be characterised through one single factor.

42 Second: These modalities, however, are not at all equivalent to each other nor do they stand next to each other without any connection. Rather, they are interdependent and have to be connected in various ways. A macro-global comparison of various legal systems, for example, demands a method different from that applied by the micro-comparison used in search of the best-possible legislative solution to a current individual problem.

43 Third: When objectives and methods need to be integrated, the former must have priority.[126] For example, depending on whether for a judicative purpose a specific foreign criminal provision is to be identified and compared, whether legislative stockpiles of solutions are to be established, or whether the goal is a dogmatic, structural comparison of criminal justice structures, and also depending on the intra-national, transnational or universal scope of the comparison, the applicable method may be different. The same applies to the specific prerequisites and to the limits to be observed. These may vary dependent on the objective to be pursued and the method to be applied. These are the reasons why any naming of comparative law according to a particular method can only ever show a fragment which is situated between set goals and conditions of the realisation.

44 Fourth: In order to achieve comparability and to avoid distortions, the investigation must follow generally acknowledged scientific standards and, accordingly, has to be conducted in a systematic and methodically appropriate way.[127] This applies to all levels of examination: it starts with the determination and formulation of the objective to be

[126] For details see mn. 219 ff. Somehow differing from this, *Heike Jung*, Zu Theorie und Methoden der Strafrechtsvergleichung, in: Raffaele di Giorgi (ed.), Il Diritto e la Differenza. Scritti in onore di Alessandro Baratta, Lecce 2002, pp. 361–384 (362), thinks that, although in view of the "interdependency between aim and method" the latter should be orientated to the former, nevertheless methodological issues should be put first as the knowledge of the methodological basics would allow a "more realistic and at the same time more differentiated discussion of the aim". This may be understandable from a practical perspective; however, if one feels limited from the very beginning to what appears feasible, one may shy away from aiming at more challenging objectives. Needless to say, though, that overly ambitious targets may fail if obviously essential precautions and easily foreseeable methodological limits are not continuously kept in mind: cf. infra Part III. C (mn. 337 ff.).

[127] Pronouncedly in this sense already *Franz v. Liszt*, in: Karl Birkmeyer et al. (eds.), Vergleichende Darstellung des deutschen und ausländischen Strafrechts. Besonderer Teil V, Berlin 1905, p. 4: "Comparative law as a science is possible only on the basis of an established method by which the inherent laws in the order of the individual empirically gained findings are guaranteed".

pursued, continues with the choice of the countries to be looked at, and goes as far as the establishment and evaluation of the results.[128]

Fifth: If one attempts to define comparative law – without committing to one of the different aims or methods in an arbitrary and therefore prejudicial way – then it can be described as the comparison of different laws, done in a scientifically systematic way, directed towards a particular goal and, accordingly, methodically adapted. The comparison may address different fields of law inside a country, or explore, in the sense of "in-depth comparative law",[129] different historical stages of development; or, transnationally, the legal systems of different countries may be compared at a horizontal level; or, supranationally, there may be a comparison of dominant and subordinate legal systems on a vertical scale.[130] Out of these different modalities, the horizontal-transnational and the vertical-supranational types of comparison will be at the centre of attention for comparative criminal law.

E. Comparative (Criminal) Law as "Purpose-free" Science?

One fundamental question has to be clarified before the examination of individual issues can be started: it is the question how comparative law sees itself in a scientific sense. The focus is here less on the – at times heatedly discussed – question if comparative law is an autonomous science[131] or only a particular method – and if so, if it is of legal, social or another scientific character.[132] Even if the respective classification might be interesting in status-terms as well as relevant regarding a particular discipline, the function of comparative law as a vehicle to gain knowledge remains substantially untouched. What might affect its function, however, is the proposition of comparative law as research supposedly free from any purpose. In this sense, compara- 45

[128] For details to this with further specifications see infra Part III. B (mn. 229 ff.).

[129] Termed as "vertiefende Rechtsvergleichung" by *Konrad Zweigert*, Rechtsvergleichung, in: Karl Strupp/Hans-Jürgen Schlosshauer (eds.), Wörterbuch des Völkerrechts, 3. Band, 2nd ed. Berlin 1962, pp. 79–82 (80),

[130] As to further – partly divergent – refinements of horizontal and vertical or internal, external and hybrid forms of comparative law cf. *McEvoy*, Categories (fn. 78), pp. 146 ff., and *James Gordley*, Comparative Law and Legal History, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 753–773.

[131] This position was especially advocated by the historical-philosophical comparative movement in Italy and Germany at the beginning of the last century; for details cf. *Constantinesco* I, Einführung (fn. 9), pp. 159 ff. Recent efforts in a similar direction are aiming at the establishment of comparative law as a basic discipline, presented for instance as "theoretical and reflective" in *Mona*, Comparative Justice (fn. 61), pp. 104, 106 f. With even greater enthusiasm *Monateri,* Methods (fn. 74, p. 1) speaks of "the rebirth of Comparative Law as an autonomous discipline". It must be understood, however, that this general promotion of comparative law should not be confused with the special efforts of establishing comparative criminal law as an own discipline within comparative law as discussed in mn. 21 and 412 ff.

[132] Whereby some authors speak of "method" in more general terms, as *Mireille Delmas-Marty*, Comparative Law as a Necessary Tool for the Application of International Criminal Law, in: Antonio Cassese et al. (eds.), The Oxford Companion to International Criminal Justice, Oxford 2009, pp. 97–103 (97), or of "research method", as *Sieber*, Grundlagen (fn. 66), pp. 49 ff., while *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 36, sees it as a "legal" method which as a "universal method" is applicable to any field of legal science. Cf. also *Bogdan*, Introduction (fn. 81), pp. 8 ff., designating comparative law as "an independent science to the extent it concerns questions that lie on a higher level of abstraction". Critical in principle towards the understanding of comparative law as a mere method see *Simone Glanert*, Method ?, in: Monateri, Methods (fn. 74), pp. 61–81. As to all of this cf. also *Dominik Richers*, Postmoderne Theorie in der Rechtsvergleichung?, in: ZaöRV 67 (2007), pp. 509–540 (510 ff.).

tive legal jurisprudence was in particular by *Jescheck* – followed by *Kaiser* – described as "basic research without specific purpose" ["zweckfreie Grundlagenforschung"], serving the direct gaining of knowledge without any consideration of its usefulness".[133] In the same vein, characterisations of comparative law as "pure research"[134] or as guided by "pure epistemic interest"[135] give the impression of research free from any purpose.

46 However, such an understanding of comparative law appears neither really tenable nor conceptually justified. If comparative criminal law really had to be considered as not serving any special purpose, then any legal comparative research that is done on request ["Auftragsforschung"] would basically lack scientific character: and this might not only be the consequence due to a possible bias based on the instructions given for the project but rather because – this type of research – if not explicitly then at least inherently – has a (particular) purpose,[136] possibly even a hoped-for result. If, as in the latter case, a researcher really accepts instructions concerning the result to be reached,[137] then the research is surely discredited; in the case of any manipulation regarding the method, any claim to a scientific nature of the research is certainly forfeited.[138] However, research does not have to give up the claim to a scientific nature because a research project pursues a specific objective or is meant to bring some benefit – as long as it is conducted in a methodically correct way. If this were different, a not inconsiderable number of projects, which are conducted by the Max Planck Institute on behalf of government departments or courts in order to do preliminary work for new bills or to clarify transnational criminal liability, would be denied scientific character. Against this I would have to protest very strongly, considering the Institute's projects I am responsible for; I expect that other leading researchers and institute boards and committees would certainly react in the same way.

47 On closer inspection, however, one cannot talk of research completely free from any useful purpose even outside contract research. This applies even to basic research directed towards new findings which – as pure research – does not directly serve a particular purpose or want to achieve particular goals.[139] The same goes for "museum-like" comparative law where particularly interesting developments of a foreign legal system are put next to each other like "fossils" to be compared with one's own law – for their difference or similarity.[140] Even in these cases a particular goal is pursued, be it

[133] *Hans-Heinrich Jescheck*, Rechtsvergleichung als Grundlage der Strafprozessreform, in: ZStW 86 (1974), pp. 761–782 (764), and *Günther Kaiser*, Strafrechtsvergleichung und vergleichende Kriminologie, in: Günther Kaiser/Theo Vogler (eds.), Strafrecht – Strafrechtsvergleichung, Freiburg 1975, pp. 79–91 (82). Cf. also *Sieber*, Strafrechtsvergleichung (fn. 5), p. 94, who sees a central task of comparative criminal law in the area of purpose-free "basic research".

[134] For instance, *Hans Schultz*, Strafrechtsvergleichung als Grundlagenforschung, in: Hans-Heinrich Jescheck/Günther Kaiser (eds.), Die Vergleichung als Methode der Strafrechtswissenschaft und der Kriminologie, Berlin 1980, pp. 7–25 (8) sees the epistomical value of comparative law as "pure research" emphasized in *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), 1st ed. Tübingen 1971, p. 14.

[135] In this way *Peter Hünerfeld*, Diskussionsbeitrag, in: Jescheck/Kaiser, Vergleichung (fn. 134), pp. 52–57 (52) wants comparative criminal law to be understood as basic discipline with the sole focus of "pure epistemic interest".

[136] Pronouncedly in this sense *Kubiciel*, Funktionen (fn. 66), p. 217: "Any scientific comparison of laws serves a purpose. It is only the purpose that gives the research a direction and sense to the gained data".

[137] For information concerning the fact that such requests and deals are by no means unrealistic and in which way they may be countered, cf. *Eser*, Über Grenzen (fn. 88), pp. 97 f., and mn. 351 ff.

[138] In this way, *Kubiciel*, Funktionen (fn. 66), p. 217, sees comparative legal research dropping to the "status of mere service".

[139] As described by *Schultz*, Grundlagenforschung (fn. 134), p. 8, but in turn called into question by himself cf. mn. 48.

[140] Cf. *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 37.

only to satisfy scientific curiosity which in turn has its usefulness as a source of delight, or be it the expectation of inspiration.

Therefore, the freedom from being bound to a particular purpose in the context of comparative law can, at best, mean the freedom from instructions towards achieving specific outcomes or from considerations of usefulness that might distort the method. However, even if all this can be excluded, comparative legal research cannot really be understood as "pure research" – as is sometimes stated.[141] In actual fact, such ideas have been left behind for quite some time now, should they ever have influenced standard practice. *Hans Schultz* uses prominent comparative law paragons such as *Aristotle, Grotius* and *Montesquieu* to illustrate that comparative law probably worked "openly or unspoken since its first, unsystematic beginnings toward finding better law than the existing one – and in this way had a legal policy intention."[142] It is remarkable that even the defenders of 'freedom from purpose' do not usually spend a lot of time on stating their belief but start listing the tasks comparative criminal law is meant to accomplish.[143] What other than the achievement of a particular purpose is meant to be the goal of such tasks then? **48**

Nonetheless, the discussion about the position of comparative law as a purpose-free science has noteworthy aspects. These point especially in the direction that comparative law must not allow itself to be instrumentalised by pre-set interests, and not be corrupted in its independence and impartiality by considerations of usefulness. Insofar, however, the real focus here is not anymore the issue of comparative law as seemingly free from any purpose but rather the legitimacy of its goals and the correctness of its methods. Both will have to be kept in mind in the following detailed considerations. **49**

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[141] Cf. mn. 48 to fn. 133-135.

[142] *Schultz*, Grundlagenforschung (fn. 134), p. 8. See also *Rösler*, Erkenntnisinstrument (fn. 10), p. 1087,for whom comparative studies should also serve the general objectives of a legal order, such as guaranteeing justice, furthering the common good and creating legal certainty: "According to this view, comparative law is no end in itself. Rather, it serves or is, so to speak, an instrument of an ongoing critical examination and optimization of the the existing situation".

[143] See *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 25 ff., who is actually warning against the danger of "aimlessness" when "swimming without goal" in the in the vast ocean of never completely manageable material. Similar to *Jescheck's* observations, made from the perspective of criminal law (in: Strafprozessreform, fn. 133), *Kaiser* appears to state (in: Vergleichende Kriminologie, fn. 133) – and he places this well before numerous other goals and useful purposes of comparative criminology (pp. 83 f.)– that it may not be excluded even for basic research, though having been declared to be purpose-free, and in spite of the denial of considerations of usefulness, that the investigation of the law as a cultural phenomenon may lead to the exploration of "social problems" which, in the end, have to be solved by the legislature (p. 82). Even if such usefulness may not have been either explicitly aimed for or expected, it is hard to imagine that one would undertake to explore foreign law solely as a cultural phenomenon without a certain cognitive interest – and thus without any purpose.

PART II

AIMS AND FUNCTIONS OF COMPARATIVE CRIMINAL LAW: WHY EXPLORE FOREIGN LAW

As can be seen from the above, comparative law needs to establish its aims first, before the method to be used can be decided on. As stated above as well, the objectives may vary: partly – depending on the cognitive interest – individual functions, more or less randomly chosen, are referred to; or partly groupings are formed, however, without covering all conceivable objectives of comparative criminal law.[144] If, on the other hand, all tasks and expectations – which, from the great variety of terms and models referred to in the review of Part I (C), could be assigned to possible objectives of comparative criminal law – were meant to be treated as equivalents, then one can fail to recognize that some terms named above really represent only sub-functions of more general objectives. For example, comparative law for the purpose of raising public acceptance (18) serves legislative purposes rather than theoretical ones (2).[145] While the same can be assumed for the initiating function (15), the controlling function (14) may become important for judicative comparative law (1); in contrast, the critical function (16) might rather be placed within theoretical comparative jurisprudence (3) or evaluative-competitive comparative law (4). If, in this way, the attempt is made to grade the variety of possible reasons for comparison into primary aims and the functions geared towards them, then the basic division into theoretical, judicative and legislative comparative criminal law, presented above, suggests itself once more – and, does so furthermore in the way that has been recognised by others under the term "trias". In the meantime these three concepts had to be complemented by a specifically evaluative-competitive form of comparative criminal law, and in this way extended into a comparative criminal law "tetrade".[146] **50**

Digressing a bit from the previous order of these main aims where judicative and legislative comparative law were placed before the theoretical form,[147] the latter is now going to be looked at first. The reason for this is that, in the past, possible sceptics had to be convinced of the immediate, practical use of comparative criminal law, and this could be demonstrated best by using the judicative objective. Now theoretical comparative law is placed at the beginning, and its fundamental importance is demonstrated by **51**

[144] Taking the widely read "Grands systemes de droit contemporains" of *René David* (Paris 1964) as an example, in his first German co-edition with *Günther Grasmann*, Einführung in die großen Rechtssysteme der Gegenwart, Berlin 1966, merely "Rechtsvereinheitlichung, Rechtsharmonisierung, Konkretisierung allgemeiner Rechtsgrundsätze" (unification and harmonization of law and concretization of general legal principles) are named as tasks of comparative law (p. 8), without adding to this primarily legislative objectives any general-theoretical or judicative functions (similarly the English edition by *René David/ John E. C. Brierley,* Major Legal Systems in the World Today, London 1978, pp. 88 ff.). In contrast, the revised German edition by *Neymayer* (fn. 10) is offering almost a plethora of comparative goals, though without structuring them in some way. Further examples of, on the one hand, fragmentary and, on the other hand, unstructured conglomerations of comparative goals could be added, as for instance by analysing recent publications, for example by *Bogdan*, Introduction (fn. 81), pp. 15 ff., or *Monateri*, Methods (fn. 74), especially pp. 25 ff., 144 ff.

[145] These as well as the following (bracketed) numbers refer to the respective position in the list of the various concepts, terms and modes in Part I. C (mn. 32 ff.).

[146] Cf. mn. 32 f. Anyone considering to add to, or even to set against, this aim-oriented tetrade *Sieber's* 7-point list (mn. 34), would fail to understand that the variants in the latter's catalogue are less aims but rather methods which, in addition, can neither simply be aligned one after the other nor may be appropriate for every kind of comparative law. This is not to exclude the possibility that some of these variants may well be goal-relevant, as will be seen in due course. The four-part differentiation between aims and functions presented here should be even less mixed with *Jescheck's* 4-step model (cf. mn. 36 and *idem*, in: Strafprozessreform, fn. 133, pp. 771 ff.), as he is primarily concerned with dividing the process of comparison into various steps. For details to this – basically acceptable – working-procedure for comparative research see Parts III. B 1–5 (mn. 231 ff.) and III: D (mn. 359 ff.).

[147] *Eser*, Comparative Legal Research (fn. 4), pp. 85 ff., *idem,* Funktionen (fn. 4), pp. 1506 ff.

looking at it both as an independent objective and as a fundament and instrument for other functions of comparative criminal law.

A. Theoretical Comparative Criminal Law

52 First of all, some terminological clarification appears in order. If simply the term "theoretical" comparative law is used here – and neither "scientific-theoretical" comparative law or theoretical comparative "jurisprudence"[148] nor "academic"[149] or "basic research"[150] in comparative law –, this is advisable for the following reasons: to talk about "scientific" or "scientific-theoretical" comparative law, may lead to the wrong conclusion that other types of comparative legal research lack a scientific approach. In fact, its scientific nature is not a characteristic solely of theoretical comparative law but, correctly, of any type of comparative legal research if performed in due manner. Using the term "academic" may give the impression that theoretical comparative law is a prerogative of universities or similar research institutions, as if comparative legal research out of a purely theoretical interest in a subject matter might not take place elsewhere. On the other hand speaking of comparative "jurisprudence" may restrict its scope to primarily judicial objectives. It is no less difficult to limit theoretical comparative legal research to "basic research" because – as is to be demonstrated – a much broader field of investigation opens up. The characterisation as "theoretical" – for the comparative legal research in question here – is preferable to all these terms which are open to misinterpretation. The reason for this is that, in this way, the difference to the "practical" forms of comparative legal research, namely judicative and legislative, is expressed, without excluding the fact that theoretical comparative law has to do some important preliminary work for the practical research as well.

53 In this way, the two basic directions that theoretical comparative legal research may take are indicated: these are the interest in gaining knowledge without necessarily intending any practical application, and/or the preparatory work for practical application. Even though there are fluid transitions, the first mentioned interest in knowledge has particular characteristics: even if it is not completely disinterested in being useful, its purpose does not lie outside itself but is focused on the understanding of the own law and its comparison to foreign law.[151]

Roughly speaking, one can distinguish five ascending levels of theoretical investigation and reflection.

1. Broadening the horizon through foreign law – reflection on one's own law

54 Different motives may lie behind any opening up to foreign law. While some might be spurred on by sheer curiosity about everything foreign, others may be more

[148] As originally defined in German (*Eser*, Funktionen, fn. 2, p. 1515) and in English (*Eser,* Comparative Legal Research, fn. 4, p. 94) respectively. Even further reducing the term to "scientific" comparative law see, for instance, *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 286, or *Hauck*, Funktionen (fn. 55), p. 260, 270).

[149] As comparative law is understood within the framework of "self-determined research and teaching out of epistemic interest in criminal law" by *Vogel*, Instrumentelle Strafrechtsvergleichung (fn. 77), p. 205.

[150] As presented by *Sieber*, Grenzen (fn. 66), p. 69; *idem*, Strafrechtsvergleichung (fn. 5), p. 109.

[151] Cf. mn. 47.

interested in a reflection of their own legal system. If only the appearances of similar or different legal phenomena are to be examined, the investigation takes place within a framework of what might be called "museum-like comparative law" (32).[152]

55 Considerable knowledge may already be gained from such a transnational broadening of horizons: be it, that during a trip abroad one encounters legal peculiarities that – new, stimulating or repulsive as they are – arouse interest in further investigation; be it, that looking at foreign parallels during the examination of an internal legal question confirms one's own sense of justice, or, on the contrary, provokes the need for reconsideration; or be it, that – like in a picture gallery – one is impressed by the similarity of some periods of the law or by the differences between national legal constructs. Even if, at this point, the inspection may still remain superficial, a feeling for the variability of the law[153] and, with that, for its nationally and culturally based relativity may arise.[154] Not the least important aspect here is that through this process of inspection the strengths and weaknesses of a particular legal system may become apparent.[155]

56 Maybe even more enlightening than the 'getting-to-know' of foreign law are the effects of reflection on one's own law: through the consideration of foreign law the level of awareness of one's own law is increased. In the same way, a person fully recognises his/her own self in comparison to others and their otherness – the experience of foreign law helps to understand one's own law better.[156] As I personally experienced during my first period of study abroad in New York,[157] one becomes aware of the characteristics and specific features of one's own law basically only after encountering foreign phenomena: what so far has been taken for granted, can prove unusual; what one considered sacrosanct, might turn out to be ideologically based and therefore in need of explanation.[158] Or, where one's own law gave reason for doubt, the lack of better solutions elsewhere may alleviate this. These insights give cause for certain conclusions not least as far as "evaluative-competitive" comparative law is concerned.[159]

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[152] Cf. mn. 8, 35 as to (32).

[153] *Mona*, Comparative Justice (fn. 61), p. 109.

[154] For details to this role of "culture-related comparative law" see mn. 35 (as to (31)), 250 ff., 304 ff.

[155] This experience of the relativity of the law can hardly be more impressively described than was done by *Gustav Radbruch,* who had been driven out of the country by the Nazi regime, in his "First Statement after the Collapse of 1945" (in: Der Mensch im Recht, Göttingen 1957, pp. 108 f.): "What is changeable in the law, what is eternal, becomes most visible through comparison of law. […] The peculiarity of legal cultures [explicitly the European-continental and the Anglo-American], both with their defects and merits, can be understood and evaluated by way of their comparison only". Cf. also *Bernhard Großfeld*, Macht und Ohnmacht der Rechtsvergleichung, Tübingen 1984, p. 194, and to "critical comparative law" mn. 35 (as to (16)) with further references.

[156] Cf. *Hilgendorf*, Einführung (fn. 6), p. 15; *Neumayer*, Rechtssysteme (fn. 10), p. 31; *Örücü*, Developing (fn. 78), p. 54. It was in particular *Rabel*, Rechtsvergleichung (fn. 38, pp. 7 f.), who tried to illustrate this "interest in self-knowledge" with a vivid picture: "Place a small child for the first time in front of a mirror; the child grasps for the supposedly other child; the child will recognize oneself for the first time. In order to hold the mirror up to one's own law, one has to place oneself outside of it".

[157] *Eser*, Über Grenzen (fn. 88), pp. 81, 112.

[158] In this way, comparing law can help to "develop a critical approach to one's own legal system" (*Kremnitzer*, Reflections, fn. 116, p. 30), and thereby "to create a counterweight against the overestimation of the own dogmatic and their nomenclature" (*Jescheck*, Strafrechtsvergleichung, fn. 3, p. 44). Actually, this attitude should already be conveyed during legal training, as emphasized by *Nils Jensen* in his call for reform "Do not train legal theorists but advocates of the law" (in: Frankfurter Allgemeine Zeitung, 17.01.2015): "Who has been educated on the basis of a foreign legal system, knows that nothing is a matter of course in the law. Then, quite automatically, one encounters the question of the 'why' that otherwise does not matter much in the study of law".

[159] Cf. mn. 33, 195 ff., 322 ff., 396 ff.

2. Basic research in comparative criminal law

a) Foreign law presentation ("Auslandsrechtskunde") versus foreign law comparison ("Rechtsvergleichung")

57 Before one can speak of "fundamental" or "basic research" on the scale of theoretical comparative law, certain reservations have to be expressed. As long as foreign law is merely described or placed together without establishing connections, one can, strictly speaking, not yet talk of comparative law in the true sense. Of course, the intrinsic scientific value of such presentations cannot be completely denied. After all, they can be treasure troves for insights in the described legal systems, and can expect recognition at least as parts of the disciplines of legal or cultural science. To be elevated to the level of "comparative" legal jurisprudence, however, requires more than the mere imparting of knowledge of foreign law – in the sense of so-called "Auslandsrechtskunde" (in the sense of foreign law description/presentation); for any true comparison of law – the term itself expresses this – requires at least a minimum of juxtaposition and matching. This, however, had been lacking for a long time: up to the first half of the 19th century comparative law was frequently mistaken for the knowledge of foreign law; and in the second half of that century, researchers limited themselves to putting legal systems side-by-side.[160] Therefore, as far as the area of criminal law is concerned, the beginning of true comparative legal research cannot be put before the middle of the 19th century[161] – if not yet starting with *Feuerbach,* then with *Mittermaier.*[162]

58 All the same, there could be some argument whether the mere documentation of foreign law really has to be strictly separated from true comparative legal research[163], or if the former might not at least be called "descriptive comparative law".[164] In a more stringent sense, to withhold the title "comparative law" is certainly justified where foreign law is presented without at least reflecting back onto internal law, or where country reports are placed next to each other without any criteria-based structure; this can be observed time and time again. Work, on the other hand, as part of which country reports are structured according to certain criteria that make comparability easier, or at least are meant to prepare for comparison, has to be set apart. Even if a cross-sectional comparison is yet to be done in this case, or a comparative evaluation was excluded from the beginning and remains for the reader to do, the development of a catalogue of

[160] Cf. *Constantinesco* I, Einführung (fn. 9), pp. 70 f.

[161] Cf. *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 11 f.; *Günther Kaiser*, Die vergleichende Methode in der Kriminologie, in: Hans-Heinrich Jescheck, Deutsche strafrechtliche Landesreferate zum X. Internationalen Kongress für Rechtsvergleichung Budapest 1978 Sektion V (Beiheft zur ZStW), Berlin 1978, pp. 129–174 (131); *idem*, Vergleichende Kriminologie (fn. 133), p. 81.

[162] Cf. mn. 11, 13.

[163] Pointing in this direction *Constantinesco* II, Rechtsvergleichende Methode (fn. 9), pp. 140 ff. Even more strictly *Franz v. Liszt*, Zur Einführung. Rückblick und Zukunftspläne, in: Internationale Kriminalistische Vereinigung (ed.), Die Strafgesetzgebung der Gegenwart in rechtsvergleichender Darstellung. I. Band: Das Strafrecht der Staaten Europas, Berlin 1894, p. XIX; in his view neither "the juxtaposition of two or more laws" nor "the highlighting of the common or the different" can be acknowledged as scientific comparative law; instead he demands "that something new, stand-alone is to be looked for and found, something that is different from the individual compared laws". But cf. also *Schultz*, Grundlagenforschung (fn. 134), p. 20.

[164] As may at best be conceded according to *Zweigert*, Wörterbuch (fn. 129), p. 80; *Zweigert/Kötz*, Comparative Law (fn. 7), p. 6; see also *Konrad Zweigert/Hans-Jürgen Puttfarken*, Zur Vergleichbarkeit analoger Rechtsinstitute in verschiedenen Gesellschaftsordnungen (1973), in: Zweigert/Puttfarken, Rechtsvergleichung (fn. 16), pp. 395–429 (400 f.).

criteria – which gives direction or orientation to the respective country reports – may contain a piece of comparative legal research.[165]

This applies all the more when the parallel country reports are not left unused but are compared with one another according to certain criteria in order to find similarities and differences.[166] It is indeed this category in which the "structure comparison project" this publication originated from,[167] in looking at and comparing (different) structures, has to be put. Directed at describing and comparing the structure(s) in which a certain crime is dealt with both in substantive and procedural criminal law in different justice systems, right from the start considerable comparative legal research went into the preparatory work.[168] This involved the choice of a factual constellation, which – with several case variants for the criminal law systems to be investigated – could be expected to deliver sound answers. In addition, the collection criteria to be used for the country reports had

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[165] A current example of this kind of descriptive comparative law can be found in the multi-volume collection of criminal laws, as a product of the MPIS project (mn. 73, 415) published by *Ulrich Sieber/Karin Cornils* (eds.), Nationales Strafrecht in rechtsvergleichender Darstellung. Allgemeiner Teil, Teilband 1: Grundlagen, Berlin 2009; Teilband 2: Gesetzlichkeitsprinzip – Internationaler Geltungsbereich – Begriff und Systematisierung der Straftat, Berlin 2008; Teilband 3: Objektive Tatseite – Subjektive Tatseite – Strafbares Verhalten vor der Tatvollendung, Berlin 2008; Teilband 4: Tatbeteiligung – Straftaten in Unternehmen, Verbänden und anderen Kollektiven, Berlin 2010; Teilband 5: Gründe für den Ausschluss der Strafbarkeit – Aufhebung der Strafbarkeit – Verjährung, Berlin 2010; further *Ulrich Sieber/Konstanze Jarvers/Emily Silverman* (eds.), National Criminal Law in a Comparative Legal Context, Vol. 1.1–1.4: Introduction to National Systems, Berlin 2013–2014; Vol 5.1: Grounds for rejecting criminal liability, Berlin 2016; *Ulrich Sieber/Susanne Forster/Konstanze Jarvers* (eds.), Vol. 2.1: General Limitations on the application of criminal law, Berlin 2011; Vol. 3.1: Defining criminal conduct, Berlin 2011. Although an actual comparison of the criminal law of worldwide 27 countries still remains to be done, the characterisation of this voluminous collection of foreign law as "National Criminal Law in a Comparative Legal Context" – or less restrained in German as "rechtsvergleichende" Darstellung – appears justified; this applies at least insofar as – somehow forward looking – certain criteria and guidelines had to be developed in order to enable a meaningful comparison of any material to be collected. – To a certain degree this also applies to "The Handbook of Comparative Criminal Law" by *Heller/Dubber* (fn. 7): though its ambitious title would lead one to expect a comprehensive foundation of comparative criminal law, it is merely presenting reports of 16 countries (selected on the basis of loose criteria) and of the Rome Statute of the ICC whereas their juxtaposition and true comparison is left to the reader. In this respect, the collection of cases and materials by *Markus D. Dubber/Tatjana Hörnle*, Criminal Law. A Comparative Approach, Oxford 2014, is at least offering some (stronger) comparative approaches. For further "descriptive" comparative law publications cf. infra Epilogue mn. 432 ff. As to the dependence of the selection, necessary for the compilations of country reports, on certain premises and their contestability, see also *Marina Aksenova* (review of the Handbook of Heller/Dubber, fn. 7), in: JICJ 10 (2012), pp. 709–711.

[166] As an example may serve an MPI-project on abortion, covering over 60 countries and carried out in cooperation with numerous foreign researchers, in which the respective law was – first – presented in separate country reports, guided by and according to a catalogue of criteria the same for all reports, and – second – by way of a crosscut compared and finally evaluated: published in three volumes by *Albin Eser/Hans-Georg Koch* (eds), Schwangerschaftsabbruch im internationalen Vergleich. Rechtliche Regelungen – Soziale Rahmenbedingungen – Empirische Grunddaten. Teil 1: Europa, Baden-Baden 1988; Teil 2: Außereuropa, Baden-Baden 1989; Teil 3: Rechtsvergleichender Querschnitt – Rechtspolitische Schlußbetrachtungen – Dokumentation zur neueren Rechtsentwicklung, Baden-Baden 1999. In a condensed English version, the country reports and the results of the comparison with final legislative recommendations can be found in: *Albin Eser/Hans-Georg Koch*, Abortion and the Law. From International Comparison to Legal Policy, Den Haag 2005 = www.freidok.uni-freiburg.de/volltexte/9747. For more examples of completed comparative projects cf. see mn. 310 ff.

[167] Cf. Preface and mn. 1.

[168] For details to the concept and elaboration of this "structure comparison project" see *Eser/Perron*, Strukturvergleich (fn. 1), pp. 14 ff., 29 ff.; *Perron*, Strukturvergleich (fn. 212), pp. 127 ff.; *idem*, Nationale Grenzen (fn. 44), pp. 287 ff.; *idem,* Vorüberlegungen (fn. 115), pp. 145 ff.; *idem,* Überlegungen zum Verhältnis von Strafrecht und Strafprozeßrecht, in: Udo Ebert et al. (eds.), Festschrift für Ernst-Walter Hanack, Berlin 1999, pp. 473–485 (483); *idem,* Operativ-funktionalistisch (fn. 87), pp. 125 ff; as to other aspects of this project and further references cf. mn. 89 f., 258, 261, 269, 271, 289, 294, 301, 308, 309, 317, 342.

to be developed. Furthermore, in the next step, the national results gathered in the various country reports are analysed according to certain criteria, brought together and profiled. Even if only this last step can be called comparative legal research – in the stricter sense of the word[169] –, it presupposes the collection of materials related to foreign legal systems. Insofar, a kind of "functional unity" can be observed between the presentation of foreign law and the comparative legal analysis and evaluation.[170] In this sense, one may speak of "comparative criminal law in the wider sense of the word".[171] What is presupposed in particular for the individual steps of the work, and how these are best done, will be explained in detail in the methodical part below.[172]

b) Micro comparison – macro comparison – basic research

60 In the same way as the term "comparative" law, what is meant by "basic research" remains to be clarified as well. If it is supposed – as some references to it might suggest[173] – to include any research or comparison of foreign law, then this would point to an equivalent position of basic research in comparative law with theoretical comparative law. It is very questionable, if this is intended, as it would mean that basic research would degenerate into "small change". If basic research is meant to preserve its character – as is indicated in its name – of theoretical "in-depth drilling", then this qualification is to be reserved for investigations that are not content with selective surface descriptions but, either cover a wider area, or attempt to get to the bottom of a fundamental single phenomenon.

61 Comparative basic research of law in these terms may be conducted at various levels of intensity in its breadth and depth. Its intentions may be directed towards:

- conducting an initial investigation by way of reflecting on theory and method – as is done here in the sense of conducting "comparative law oriented towards goals and/or methods"; this means looking at what might sensibly be the subject matter of a comparison in criminal law, what its purpose might be, and how the envisaged goal may be best reached;[174]

62 – going further than looking at individual phenomena, such as a bilateral or small-scale "micro comparison" of self-defence or murder, showing in a multilateral or large-scale "macro comparison" the commonalities or differences of reasons for excluding criminal responsibility[175], or presenting models of the protection of life through criminal law[176];

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[169] See mn. 310 ff.

[170] As described by *Jung*, Grundfragen (fn. 66), p. 2, in deviating from earlier ideas of separating both functions.

[171] As done by *Sieber*, Strafrechtsvergleichung (fn. 5), p. 79 fn. 7.

[172] Infra Part III.B (mn. 229 ff.).

[173] As, for instance, by *Jescheck*, Strafprozessreform (fn. 133), p. 764, and *Kaiser*, Vergleichende Kriminologie (fn. 133), p. 82, when speaking of comparative criminal law as purpose-free "basic research", when *Schultz* entitles his contribution in Jescheck/Kaiser (fn. 134), p. 7, "Comparative criminal law as basic research ['Grundlagenforschung' in terms of pure research]", or when *Sieber*, Strafrechtsvergleichung (fn. 5), p. 109, denotes the creation of knowledge of the differences and commonalities of various criminal legal systems as "basic research".

[174] *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 125 ff., 132.

[175] As was intended in particular with the (original) multilateral project on "Justification and Excuse" (which had served as a sort of pilot project for the final "structure comparison project"); cf. *Eser,* Genese (fn. 1), pp. 5 ff., 14 ff.

[176] As they had been developed in an expert opinion for the 53th Deutscher Juristentag [German Lawyers' Day] of 1980 in Berlin (*Albin Eser*, Empfiehlt es sich, die Straftatbestände des Mordes, des Totschlags und der Kindestötung (§§ 211 bis 213, 217 StGB neu abzugrenzen?, München 1980, Band I, D 19–201): *Albin Eser/Hans-Georg Koch*, Die vorsätzlichen Tötungstatbestände. Eine rechtsvergleichend-reformpolitische Struktur- und Kriterienanalyse, in: ZStW 92 (1980), pp. 491–560.

- establishing a foundation of knowledge of general elements of criminal liability or of certain types of offences from different national legal systems[177]; **63**
- in the sense of an "understanding and interpreting science of humanities"[178], gaining a deeper insight for structuring criminal law systems,[179] thereby noting general regularities, influencing factors and modes of action by getting to the bottom of the things[180], and/or differentiating and coordinating models of solutions[181]; **64**
- as an even more ambitious goal in terms of "universal comparative law"[182], developing a (global) "general criminal law doctrine" through an overall presentation of the criminal law;[183] **65**
- developing a "model penal code" by uncovering universal-general principles of law[184]; **66**

[177] As had been established by the legendary 16-volume presentation of foreign international criminal law at the beginning of the 20th century (cf. mn. 19) and as is at present being pursued for certain areas of the general part of criminal law by the MPIS project (mn. 58 fn. 165 and mn. 73,). Cf. also *Sieber*, Grenzen (fn. 66), pp. 63 f.

[178] "Verstehende und auslegende Geisteswissenschaft": *Mona*, Comparative Justice (fn. 61), pp. 110, 104, 106. Cf. also mn. 91 f.

[179] Cf. *Jescheck*, Strafprozessreform (fn. 133), p. 764; *Örücü*, Developing (fn. 78), pp. 53 f. This also applies to the import of German criminal dogmatics into Spain and Latin American countries; cf. *Pablo Sánchez-Ostiz*, Strafrechtsexport nach bzw. -import in Spanien, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 105–127, and *Juan Pablo Montiel*, Kurze Geschichte der lateinamerikanischen (insbesondere argentinischen) Strafrechtswissenschaft und die Rezeption der deutschen strafrechtlichen Dogmatik, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 129–143 respectively, but cf. also *Enrique Díaz Aranda*, Ist die deutsche Strafrechtsdogmatik auf die strafrechtliche Problematik Mexikos anwendbar?, in: Manfred Heinrich et al. (eds.), Strafrecht als Scientia Universalis. Festschrift für Claus Roxin zum 80. Geburtstag, Berlin 2011, pp. 1557–1565.

[180] *Hilgendorf*, Einführung (fn. 6), p. 16; *Rösler*, Erkenntnisinstrument (fn. 10), p. 1087; *Wörner*, Strafrechtsvergleichung (fn. 87), p. 138. In this sense comparative criminal law is not to be considered as "bound to be superficial", but as "digging below the surface of things", as was rightly replied by *Gary Watt*, Comparison as deep appreciation, in: Monateri, Methods (fn. 62), pp. 82–103 to the skeptical evaluation of comparative law by *F. H. Lawson.*

[181] *Jung*, Grundfragen (fn. 66), p. 6.

[182] As in particular *Sieber* put it in top position of his 7-point list of comparative approaches (mn. 34).

[183] As already touched on by *Franz v. Liszt* and more recently hoped for in terms of an "international grammar of system building in criminal law" by *Claus Roxin* (cf. *Eser,* Genese, fn. 1, p. 17 f.), and finally even demanded as a "future task of global criminal law science" (*Roxin,* Die Strafrechtswissenschaft vor den Aufgaben der Zukunft, in: Albin Eser/Winfried Hassemer/Björn Burkhardt (eds.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, München 2000, pp. 369–395 (381). Regarding the terminology of such a general, supranational or even universal criminal law and the science dealing with it, however, the German designations are variable: While *Jescheck* (in: Strafrechtsvergleichung, fn. 3, p. 28), merely spoke of an "allgemeine Strafrechtslehre" (a general doctrine of criminal law) to be developed by comparative law, this was interpreted by *Sieber* (in: Hans-Heinrich Jescheck zum Gedächtnis, ZStW 121 (2009), pp. 813–828) as "universale Strafrechtsdogmatik" (p. 821); other terms used by *Sieber* may be "universale Strafrechtswissenschaft" (in: Strafrechtsvergleichung, fn. 5, pp. 94, 116, 129), "internationale Strafrechtsdogmatik" (in: Sieber/Cornils, fn. 165, p. V), "internationale Grammatik des Strafrechts" and "gemeineuropäisches Strafrechtssystem" (in: Forschungsbericht des Max-Planck-Instituts 2010–2011, p. 15), or "europäische Strafrechtsdogmatik" (in: Grundlagen, fn. 66, p. 51). But cf. also *Hans Joachim Hirsch*, Über die Entwicklung einer universalen Strafrechtswissenschaft, in: Wladyslaw Czaplinski (ed.), Prawo w XXI wieku, Warschau 2006, pp. 241–252, according to whom "universale Strafrechtswissenschaft" must be distinguished from "bloßer Rechtsvergleichung" (p. 252). Cf. also mn. 76 with fn. 199).

[184] *Sieber*, Grenzen (fn. 66), pp. 49 f., 63; *Örücü*, Developing (fn. 78), p. 55. For more see mn. 161 f.

67 – by applying "cultural comparative legal research",[185] revealing the cultural contingence of criminal law,[186] and vice-versa turning criminal law itself as a nationally specific, cultural phenomenon also into an object of research;[187]

68 – in the sense of "critical comparative law", sharpening the eye for the strengths and weaknesses of one's own legal system and that of other countries[188] – preferably as early as during the time of legal training;[189]

69 – investigating, with something like a "sociological function", social problems that may be relevant to criminal law[190]; and/or

70 – compiling a "stockpile of solutions" for legal and social problems in need of improvement.[191]

71 Insofar as some of these objectives are not yet to be assigned to the category of practice-oriented research and thus to be dealt with below[192], at a theoretical level, and concerning some of the comparative law functions listed in the catalogue of various terms and models,[193] the following remains to be noted.

c) Universal comparative criminal law – Claims and achievability

72 Further clarification is especially needed for the expectations raised by "universal comparative criminal law".[194] Of course, if one wants to achieve a lot, one has to set high goals – and which goal could be higher than that of a global, overall presentation of criminal law, including the development of universal criminal law dogmatics – especially in times of continuing globalisation in politics, economy and society and the accompanying trans-nationalisation of crime? However, such a claim to universality is equally tempting and prone to disappointment. If one were to take "universal" comparative criminal law at its word, it would not only have to cover all areas of criminal law thematically but also be world-encompassing territorially; and all this without even mentioning the theoretical penetration and practical reviewing of the enormous amount of material, necessary for truly universal criminal law dogmatics. Even using the most modern methods of research and documentation it appears unrealistic, if not theoretically questionable from the start, to manage all this.

73 The practical difficulties involved in the overall presentation of criminal law – on an equally global and total scale – are perhaps best demonstrated by looking at the new "Max Planck Informationssystem zur Strafrechtsvergleichung/International Max Planck Information System for Comparative Criminal Law" (MPIS)".[195] The benefits at the

[185] Fundamental to that *Beck*, Interkultureller Dialog (fn. 118), p. 65 ff.

[186] *Perron*, Operativ-funktionalistisch (fn. 87), p. 124.

[187] According to *Beck,* Interkultureller Dialog (fn. 118), this even ought to be the primary aim of culture-related comparison of law – similar to the "cultural turn" debate as it is mainly led in Anglo-American theories of comparative law (cf. mn. 250 ff.). Cf. also *Jescheck*, Strafprozessreform (fn. 133), p. 764; *Neumayer*, Rechtssysteme (fn. 10), pp. 15, 31.v

[188] See *Örücü*, Developing (fn. 78), p. 54 and the references mn. 35 fn. 103 and mn. 56 fn. 158.

[189] *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 21 f. Cf. also mn. 18, 348.

[190] Cf. *Beck*, Interkultureller Dialog (fn. 118), p. 78; *Jescheck*, Strafprozessreform (fn. 133), p. 764; *Neumayer*, Rechtssysteme (fn. 10), p. 31.

[191] *Kaiser*, Vergleichende Kriminologie (fn. 133), p. 84; *Perron*, Operativ-funktionalistisch (fn. 87), p. 122; cf. also mn. 144 f., 207.

[192] Cf. mn. 96.

[193] Part I. C (mn. 32 ff.).

[194] Particularly so if this type of comparative criminal law is put in first position as in the 7-point list by *Sieber;* see mn. 34.

[195] For details see the "interim report" by *Sieber,* Internationales Max-Planck-Informationssystem der Strafrechtsvergleichung, Ein Zwischenbericht, in: MPI-Forschungsbericht (fn. 183), pp. 90 ff.

level of information and knowledge one can expect from this so far probably most exacting overall project cannot be rated too highly; and yet, up to now only a total of 27 criminal law systems have been presented, and even within this territorial range only certain elements and aspects of the general part of criminal law are covered.[196] Even though the selection of countries is based on representative criteria and even if more countries are added, the way towards universality – should even an approximation of completeness be possible – would be a long one: This universal representation would have to include – thematically – not only the general requirements of criminal liability and the elements of the special offences but also the modes of criminal procedure, and to incorporate – territorially – all world-wide legal systems.

This is not meant to say that such paths should not be chosen in the first place, but 74
that there are definite limits along this way. This starts with language barriers. Even an extensive documentation of criminal codes remains inaccessible for comparative law, as long as it is not available in languages that facilitate comparison. The same word, after all, does not necessarily have the same meaning within the same language group – for example, in Germany, Austria and Switzerland. So, when foreign language texts are translated and a uniform terminology is used – in order to facilitate comparison – this may already contain a kind of interpretation which must be made known as such and shown openly in case of doubt.

Such difficulties tend to increase even further when the goal is the development of 75
universal criminal dogmatics. The focus then is no longer the world-wide documentation and interpretation of penal provisions by themselves, but rather their dogmatic penetration and systematisation. In this context, even inside a country, it may be difficult to find out the "dominant opinion" when arguments between different schools of thought are notorious[197] – and this prevailing opinion may not even be the "correct" one and be – conditioned by its time -quite short-lived. Comparative law work can turn into a task of Herculean dimensions, if doctrines are to be represented on a world-wide scale, a common denominator to be found, and/or their essential divergence is to be revealed; all this with the ultimate goal of designing global criminal law dogmatics on an even higher level – according to whichever ideological premises of criminal law. Such an immense claim could not possibly be satisfied by giving preference to the selective in-depth study of individual elements of criminal liability – at the expense of the global breadth of investigation –, or by sacrificing dogmatic in-depth investigation in favour of a global approach, or, worst of all, by contending oneself with a segmented superficiality at the expense of both breadth and depth. Whichever aspects one might be prepared to forfeit, one could hardly speak of truly "universal criminal law dogmatics" anymore.[198]

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[196] See the detailed references to *Sieber/Cornils* and to *Sieber/Forster/Jarvers* in mn. 59 fn. 165.

[197] Even if it appears possible to escape this difficulty by not ascribing dominant or dissenting opiions to specific authors or to content oneself with general references (such as in the MPI-country reports mentioned in fn. 166), the overall picture remains deprived of certain dimensions of the development and depth.

[198] Even if the comparative scope of investigation is limited to European countries, the expectations should not – despite all optimism – be raised too high: cf. *Kristian Kühl*, Europäisierung der Strafrechtswissenschaft, in: ZStW 109 (1997), pp. 777–807 (785 ff.); *Walter Perron*, Hat die deutsche Straftatsystematik eine europäische Zukunft?, in: Albin Eser/Ulrike Schittenhelm/Heribert Schumann (eds.), Festschrift für Theodor Lenckner zum 70. Geburtstag, München 1998, pp. 227–247 (246 f.); *Joachim Vogel*, Europäische Kriminalpolitik – europäische Strafrechtsdogmatik, in: GA 2002, pp. 517–534 (529 ff.). See also – though with regard to universal efforts in comparative private law – the scepticism of *H. M. Watt*, Subversive Comparison (fn. 104), pp. 273 f. towards the "myth of a global grammar for the purposes of global governance", and *Peer Zumbansen*, Transnational comparisons: theory and practice of comparative law as a critique of global governance, in: Maurice Adams/Jacco Bomhoff (eds.), Practice and Theory in

76 If one does not want to give up the term and claim to "universal" comparative criminal law completely – as promising far too much – its universality has to be understood in a limited sense right from the start. This means, in principle, its ambivalent nature has to be recognized. The reason for this is that comparative criminal research, on the one hand, can be neither equally global nor thematically total. On the other hand, it cannot be simply limited to either certain "legal families" (such as is done frequently with "civil law" and "common law") or regions (for example, Europe, neighbouring countries or language groups). In the same way, it must not remain fixated on specific areas of criminal law (such as general elements of criminal liability or certain procedural models), rather it must be open both in a geographical sense and in the subject matter it deals with. In this pragmatic sense, "universal" comparative criminal law research is perhaps best understood as having a tendency against isolation, and as aiming, in principle, at the greatest possible grasp of criminal law.[199]

77 How the thus inevitable selection of countries is meant to be conducted, cannot be determined in an abstract way but depends on the objectives of the specific research project.[200] However, at least certain guiding points can be indicated:

78 If, for example, "legal families" are to be investigated – in which case even marginal systems of law should not be simply overlooked –, then an overall picture requires, on the one hand, global coverage, without, on the other hand, the need to investigate the entire material and formal criminal law; the reason for this is that, as a rule, only such elements and criteria that could serve as models are to be selected and presented. A sample pilot study may already have established that not all countries need to be included; certain families of legal systems may emerge from typical groupings.[201]

79 If, however, different models of criminal liability are to be established, global coverage or the affiliation to certain groups of legal systems will be of lesser interest; rather, it will be important to describe in more detail those criminal law systems that have been recognised as significant to the model. However, for this to occur it is not sufficient just to put pertinent criminal norms next to each other, rather their substantive and procedural interlocking and the developed practice and theory thereto will have to be presented as well.

80 With regard to criminal law dogmatics, universality is probably only achievable "at half height" and with limited scope, if it is capable of development at all. If, on the one hand, the great variety of different national criminal law dogmatics is to be considered at the appropriate depth, it will be hard to get past a juxtaposition of numerous models, which is difficult to compare. If, on the other hand, this great variety is meant to be brought together in a coherent overall system, this is, at best, possible at such a high level of abstraction that, of the national models, nothing much with any validity will remain visible. Such extremes can be counteracted in three ways: most easily, by limiting the research – in a kind of "segmental criminal law dogmatics" – to the analysis and comparison of individual phenomena of criminal law. Examples here are the structure of the crime (by possibly distinguishing between unlawfulness/justification

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Comparative Law, Cambridge 2012, pp. 186– 211 with regard to the obstacles to be overcome in a "rush into the global space".

[199] Also *Sieber* (in: Grenzen, fn. 66, pp. 70 f.) may be understood in this restrictive sense when he wants the term of universal comparative law to be applied neither to the "universality of its methods" nor to the endeavour "to declare the results of comparative law universally binding" but to see all legal orders of the world encompassed "in principle" – in reality, however, this principle may rather be the exception.
For details to this working step see Part III.B.2 (mn. 276 ff.).

[200] For details to this working step see Part III.B.2 (mn. 276 ff.).

[201] Cf. also mn. 283 ff., 290 ff.

and guilt/excuse, or in some other way), the subjective elements of accountability (such as intent, negligence or error) or the different types of the perpetration of an offence or the participation in it. By far more demanding would be the development of a kind of "transnational hybrid dogmatics" of criminal law; for this, basic dogmatic elements of different legal systems would be systematized at a meta-level, without depicting the full content of specific national criminal law dogmatics but also without disowning them completely. Even the development of "international" or "supranational criminal law dogmatics" could be envisaged. The way to do this, would be to reprocess and systematize the case law of regional and supranational criminal courts, and – always taking the practice and doctrines of national criminal law into consideration – to advance it to a transnational dogmatics of criminal law.

Whichever path(s) one chooses, one will only ever be able to speak of "universal comparative criminal law" in terms of comparative criminal law tending towards being transnational although not necessarily global or thematically total. And it will never be the rule but – considering the immense effort – only ever the exception. That is why unrealizable hopes might be raised if the premise of universality is put in first position of the comparative criminal law maxims. **81**

d) "Systematic comparative criminal law" – "Structural comparison"

These terms, which can be found as special forms of comparative criminal law in some lists,[202] are in need of clarification as well, because they can be interpreted in various ways. **82**

To find "*systematic comparative criminal law*" listed as a separate category, may be surprising; after all, does not every type of comparative legal research – if it does not just want to present its subject matter museum-like in a random narrative[203] – but is to satisfy scientific expectations – have to be systematic *by definition*?[204] If one wants to allow this term to have a certain intrinsic value, then this might be found in specific features of its subject-matter or in the method. **83**

Thematically, legal systems as such can be subjects of comparative research; for example, the structure of crime, the system of specific legal interests to be protected or the structure of criminal procedure. The legal system does not even necessarily have to be the ultimate target of the comparison. Rather, its investigation may be used as the mere medium to further comprehension of the underlying cultural system.[205] That all this has to be done in a systematic way, is not a specific characteristic though. Therefore, when such objects are investigated, it would be better to speak of a "comparison of systems" rather than of "systematic" legal comparison. **84**

Methodically, "systematic" might mean that the comparison is not to be limited to one term or concept or a single legal figure but that they are, respectively, to be looked at in their overall systematic context.[206] Insofar as the focus is only on clarifying that comparative legal research must not be content with the normative comparison of terms but has to consider their role in a social context, one moves within the framework of what is also called "functional comparative law", further to be considered in Part III that **85**

[202] Cf. mn. 34 to (7) and (8).
[203] Cf. mn. 47.
[204] Cf. mn. 44.
[205] As to this "culture-related" comparative criminal law cf. also mn. 67.
[206] In this sense, in particular *Rabel's* so-called "systematische Rechtsvergleichung" (in: Rechtsvergleichung, fn. 38, pp. 3 f.) may be understood.

looks at methods.[207] If "systematic" includes, however, also the investigation of normative-structural contexts and their empirical-real foundations, then the label "structural comparison" appears more appropriate.

86 Whether one or the other is meant, is not always easily ascertained. If functional comparison of criminal law is confronted with the problem that "the mass of different, relevant rules and regulations is often only comprehensible within the overall context of a particular legal system", and that this wealth of information "has to be collected and above all – with a focus in its evaluation – be systematized",[208] then this states only a methodical precondition of comparability – albeit a weighty one. This part-requirement of any sensible comparative law does not, however, establish a distinct type of comparison. The same applies to the (goal-oriented) task of comparative criminal law – rightly considered fundamental – which is to work on a systematic overall presentation of commonalities and differences of various national criminal law systems.[209] As long as this is not done systematically, one cannot speak in any way of scientific comparative law.

87 With regard to *"structural comparison"*, there is less need for doubt in its intrinsic value, even if it appears in various distinct forms in comparative criminal law. In a more methodical variant, the focus is not to limit the comparison of criminal norm systems to the level of rules and regulations but to include the levels of real life – in order to gain a holistic understanding.[210] Insofar as such a normative-empirical extension is solely meant to record realistically the position and role of a legal term in social life, this is once more just a further development of the basic "functional" approach – even if it consists of a comparison of "structures".[211]

88 A "structural comparison" in the thematical sense is only given where integral factors do not only serve as a means of gaining knowledge but where the structures themselves become the objects of enquiry. In this context, "structure" means above all "the way in which certain individual parts are put together to form a larger unit, and how they fulfil their specific functions within this unit".[212] In this case, it cannot suffice for a structural comparison in criminal law to limit the investigation to individual elements and components of the criminal law system – in whatever normative-empirical holistic way this may be done; rather, the various structural elements of a criminal law system are to be investigated as to their overall interaction and impact, and to be compared to one another.

89 Exactly this, then, is the type of structural comparison that is pursued in the basic "structure comparison project" this publication originates from: a homicide case is in four different variants used as subject-matter of comparison. Starting at the substantive-legal level, the elements of criminal liability are established according to the letter of the

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[207] Cf. mn. 243 ff.

[208] *Sieber*, Grenzen (fn. 66), p. 72.

[209] Ibidem; cf. also *Sieber*, Strafrechtsvergleichung (fn. 5), p. 114.

[210] According to *Sieber*, Grenzen (fn. 66), p. 73, this "second code" – as he calls it – shall also comprise "propositions of justice and other values of the users of the norms, the respective cultural and historical background, the structure of the judicial institutions, economic factors, politics, philosophy and other social structural characteristics".

[211] This might explain the assumption by *Jung*, Grundfragen (fn. 66), p. 2 that "Strukturvergleich" (structural comparison) was meant when *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), p. 44, spoke of "Funktionskomplexe" (in the English edition of their Comparative Law (fn. 6, p. 45) translated as "functionally coherent" system). For details to this continuation of the "functional method" see mn. 256 ff.

[212] As suggested by *Walter Perron*, Überlegungen zum Erkenntnisziel und Untersuchungsgegenstand des Forschungsprojektes "Allgemeiner strafrechtlicher Strukturvergleich", in: Jörg Arnold et al. (eds.), Grenzüberschreitungen, Freiburg 1995, pp. 127–136 (128).

law and the interpretation by court rulings and academic jurisprudence, as well as possible grounds for excluding or mitigating criminal responsibility are inquired; then, possibly different sentencing approaches are investigated and specific procedural features considered; finally, the way the case and its different variables are handled, right up to the execution of the punishment, is followed.[213]

Depending on the research interest, structural comparison of criminal law might, of course, also be applicable to other thematic areas, and serve different purposes. Even though the "structure comparison project" in question here is first of all directed towards theoretical basic research, its findings may also benefit legislative purposes. Similarly, different research interests might be pursued in a structural comparative project on, for example, corruption: in going beyond the analysis of the statutory elements of bribery, the varying strictness of mandatory or discretionary prosecution including possible interactions between substantive and procedural criminal law might by investigated, right up to different practices of plea bargaining and the varied reality in the enforcement of the sentence. In the sense of theoretical basic research, the epistemic interest might be mainly (or even solely) directed towards gaining insights – into the existence of different models in the fight against corruption. Or there might also be more practical interest in drawing legislative conclusions out of the knowledge gained with regard to the specific efficiency of this or that model. Depending on the purpose, the method to be applied may vary as well.[214] **90**

3. Facilitating communication and promoting consensus by comparative criminal law

The aforementioned interdependence of aim and method is also characteristic for some of the types of comparative criminal law listed in the model catalogue which could be classified to serve communication or promote consensus.[215] These functions are less significant for big projects or broadly designed basic research; rather they concern – with possibly variable purposes in mind – the more specific ascertainment of commonalities worth to be furthered or the clarification of differences necessary to be resolved. **91**

Even if the approach may vary in breadth and depth, this form of comparative criminal law has more in mind than the one-sided understanding of foreign law and its reflection onto one's own law, as it was described above, as the first form of theoretical comparative criminal law.[216] In fact rather, an interactional component is added: this is the clarification of country-specific divergent positions of the law that takes place between various players – right up to the point of reaching such an understanding as may solve conflicts. **92**

This may help on a personal level, for example, when different roles and preconceived ideas are laid open when foreign law is dealt with.[217] Or it might also pave the way towards international agreements: for example, underlying premises may be **93**

[213] For details regarding objective and methodology of this "structure comparison project" see *Eser/Perron*, Strukturvergleich (fn. 1), pp. 14 ff., 29 ff., and *Perron*, Strukturvergleich (fn. 212), pp. 127 ff.; *idem*, Nationale Grenzen (fn. 44), pp. 287 ff.; *idem,* Vorüberlegungen (fn. 115), pp. 145 ff.; *idem,* Verhältnis (fn. 168), S. 483; *idem,* Operativ-funktionalistisch (fn. 87), pp. 125 ff; to other details cf. mn. 59, 64, 88, 262, 271, 289, 294, 301, 308, 309, 343.

[214] For details see mn. 229 ff.

[215] Cf. mn. 35, in particular to the comparative law functions addressed in (18), (19), (20), (21).

[216] See mn. 54 ff.

[217] As emphasized by *Kaiser*, Vergleichende Kriminologie (fn. 133), p. 89, in particular regarding misunderstandings and barriers to communication between lawyers and sociologists.

uncovered in a situation where there appear to be almost insurmountable differences, in order to approach them from a common core of interests.[218]

94 In the sense of "acceptance raising",[219] this function of comparative criminal law may also have – on a broader platform – "discursively conciliatory" and "harmonising" roles. The first aspect happens at a supranational level; while the establishment of unified national principles cannot be seen as an immediate legal source of international law, this one may nonetheless gain "discursive legitimation" from relevant findings.[220] One can do even less without comparative law when the criminal law or systems of different countries or regions are to be assimilated, harmonised or even unified transnationally across borders.[221]

4. Critical control and innovation function of comparative criminal law

95 In order to deal effectively with the above mentioned tasks, theoretical comparative law cannot be content with a mere description of the discovered material, but rather has to evaluate it. To designate comparative legal research – looking at these equally critical as well as innovatory functions – even as "the critical method of legal science"[222] and, in doing so, give it a status of unique character, may, on the one hand, not do justice to other legal science methods; however, on the other hand, such functions are not just methods anymore but represent aims that can be understood as an independent form of evaluative-competent comparative criminal law, and as a result are to be considered separately.[223]

5. Preparatory function of comparative criminal law for practical purposes

96 It is unmistakable that the last-mentioned forms of comparative criminal law point well beyond the limits of purely theoretical comparison because their findings can be of use for the practical application of law, or because this is (co-)intended right from the start. This applies to both "judicative" and "legislative" comparative criminal law: The

[218] E. g., it may be remembered that the path to a German-American extradition treaty was blocked for quite some time by the fact that one was unaware of the fundamental divergence between the traditional continental-European extension of substantive domestic criminal law to extraterritorial crimes – to be seen in connection with the principle of non-extradition of own citizens – and the US-American priority of the principle of territoriality, combined with greater readiness to extradite own citizens to the place where the crime had been committed. In overcoming this mutual lack of knowledge, a comparative law conference at Harvard Law School turned out to be helpful: cf. *Albin Eser*, Common Goals and Different Ways in International Criminal Law: Reflections from a European Perspective, in: Harvard International Law Journal 31 (1/1990), pp. 117–127. As to similar divergences of perception in the area of procedural law see *Lars Büngener*, Die Entwicklung der Disclosure of Evidence in internationalen Strafverfahren – Annäherung der Traditionen?, in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6), pp. 215–233.

[219] *Hauck*, Funktionen (fn. 55), pp. 257 f. Cf. also *Frank Meyer*, Internationalisierung (fn. 66), p. 89, to the confidence-building function of comparative law.

[220] For fundamental detail and elaboration see *Burghardt*, Völkerrechtliche Rechtsprechung (fn. 108), pp. 235 ff.

[221] Cf. *Sieber*, Grenzen (fn. 66), pp. 49 f., and for further details of the various modalities for the adjustment of law mn. 109 ff.

[222] Thus *Örücü*, Developing (fn. 78), p. 44.

[223] See Part II. D (mn. 173 ff.).

work in both areas – as will be shown below over and over again – is dependent on the preliminary and supportive ongoing work done by researchers in comparative criminal law. For this reason, this was in particular considered a task of comparative law institutes by people as far back as *Rabel*.[224]

B. Judicative Comparative Criminal law

When moving from the theoretical to the practical variants of comparative criminal law, there might certainly be discussion about which of the practical types should be looked at first. That it was probably the historically older type, might speak in favour of "legislative" comparative law. When *Plato* and *Aristotle* in their search for the building blocks of an ideal state chose to be inspired by foreign ideas about law, then legislative guiding motives are obvious; in the same way, legislative objectives are obvious considering the Roman Law of the XII Tables.[225] **97**

If, in this case, the presentation of legislative comparative criminal law is nonetheless deferred, then the reason for this is that today it has gained even greater practical importance than in earlier times. In addition, through judicative comparative law the practical functions of comparative criminal law can be demonstrated in a much more immediate way. This may sound surprising; after all, what is called "judicative" comparative criminal law here – and played a rather marginal role for a long time[226] – had to emancipate itself from other forms of comparative law first, before becoming an independent category. Although not yet labelled as judicative, as to its substance, however, it was in particular *Zitelmann* who, as far back as the beginning of the 20th century, accentuated this type of comparative law as a specific way of reflecting on foreign law.[227] And though, without using particular terminology, described by others as well,[228] its comprehensive naming as "judicative" comparative law seems to be difficult. While the field of comparative criminal law in question finds itself simply called "application of law" ("Rechtsanwendung") even today,[229] the label of comparative law as a "tool in the administration of justice"[230] comes somewhat closer to the core of things. From here, it takes only a small step to bring together all forms of judiciary-related consideration of foreign criminal law – in striking analogy to the separation of powers in the state – in the term of "judicative" comparative criminal law; and today this indeed finds growing acceptance.[231] **98**

It cannot be overlooked, however, that – as a consequence of novel types of transnational enforcement proceedings, going beyond "adjudicating" in a narrow sense – a new **99**

[224] *Rabel*, Rechtsvergleichung (fn. 38), p. 21. With regard to that and the requisite framework conditions see Part III. C (mn. 337 ff.).

[225] Cf. mn. 6.

[226] Cf. *Jung*, Grundfragen (fn. 66), JuS 1998, p. 6.

[227] *Zitelmann*, Rechtsvergleichung (fn. 35), p. 11.

[228] Cf. *Hugo Uyterhoeven*, Richterliche Rechtsfindung und Rechtsvergleichung, Bern 1959, pp. 48 ff., 67 ff.; *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), pp. 16 ff.

[229] As named by *Sieber*, Strafrechtsvergleichung (fn. 5), p. 99, though perhaps in broader terms than understood by *Zitelmann*, Rechtsvergleichung (fn. 35), who spoke of the application of law (merely) in its "direct practical significance".

[230] As described by *Ebert*, Rechtsvergleichung (fn. 78), p. 176.

[231] Thus in particular by *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 286; *Hauck*, Funktionen (fn. 55), pp. 255, 270; *Kubiciel*, Funktionen (fn. 66), p. 220; *Schramm*, Erkenntnisse (fn. 61), p. 156; *Vogel*, Instrumentelle (fn. 77), p. 205; *Wörner*, Strafrechtsvergleichung (fn. 87), p. 140.

area of "executory" comparative criminal law is developing.[232]. This type, however, can still be understood as a sub-category of "judicative" comparative criminal law,[233] and thus does not have to be placed alongside it as an independent category.[234]

100 Looking at the content of judicative considerations of foreign criminal law, essentially three different areas and degrees – with fluid transitions[235] – can be distinguished: going furthest, when foreign law is directly applied and taken into account in different ways (1); then indirectly, when comparative law is used as a source for the judicial findings of justice ("Rechtsfindung") and the further development of law ("Rechtsfortbildung") (2); and finally, with certain special aspects regarding procedural investigation and enforcement proceedings (3).

1. Direct consideration of foreign law in the application of law

101 All cases where – when in applying criminal law – the incorporation of foreign law is intended in some way, belong in this category. Insofar as this is actually proscribed, one can speak of more or less "compulsory-obligatory" criminal law comparison.[236] This is different from a "voluntary-discretionary" consideration of foreign law as perhaps "at will" or as one likes is characteristic for category (2) below. If the compulsion to apply foreign law is such that it enforces its application without (real) prior reflection, then the question arises whether this does not go beyond mere comparative criminal law. However, even in such cases, the relevant legal systems will have to be considered in a comparative way, before the foreign law is adopted. In the same way, adaptations – based on the comparison – may become necessary; for example, when a foreign rule in criminal law is to be applied in principle, but needs to be integrated properly into the internal structure of sanctions because it is overall somewhat more lenient.[237] In this case, comparative law is essentially necessary for both, the identification of the more lenient law as well as the appropriate implementation of the punishment given according to foreign law.

a) Foreign law import

102 As indicated above, the direct adoption of foreign law into one's own criminal law system represents, without any doubt, the most intensive type of any importation of foreign law. But even here, gradual differences may be noted.

(i) "Authentic" – "Implementing" application of foreign law

103 One can speak of "authentic" application of foreign law when there are not – as in the subsequent variants – just simple or complementing references to foreign law involved, but rather when the domestic judiciary has to apply a foreign legal norm as

[232] For further detail and elaboration see *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 277, 286 ff.; cf.also *Kubiciel*, Funktionen (fn. 66), p. 218 fn. 27; *Vogel*, Instrumentelle (fn. 77), p. 206.

[233] For details see Part II. B. 3 (mn. 130 ff.):

[234] As proposed by *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 286.

[235] Whereby in particular the transition from application of law ("Rechtsanwendung") and judicial findings of justice ("Rechtsfindung") may be questioned; cf. *Burghardt*, Völkerrechtliche Rechtsprechung (fn. 108), pp. 235 ff., and to the whole concept also *Jan M. Smits*, Comparative Law and its Influence on National Legal Systems, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 514–538 (518 ff.).

[236] Cf. *Schramm*, Erkenntnisse (fn. 61), p. 159.

[237] As required by Art. 6 of the Swiss Penal Code of 1937 referred to hereafter; cf. BGE (Entscheidungen des Schweizerischen Bundesgerichts) 118 IV 305 (1992).

such – in other words directly. A classic and frequently cited example could be found in the Swiss Penal Code of 1937; according to its Art. 6 para. 1 sentence. 2, if a Swiss citizen committed an offence outside Switzerland, then "the law of the place where the crime had been committed, was to be applied if it was the more lenient one".[238] Even in view of this explicit obligation to implement foreign law, there was argument as to whether the judge was applying the more lenient foreign law as such[239], or whether the foreign law was turned into domestic law as "remitted" federal criminal law (verwiesenes Bundesstrafrecht).[240] In the latter case, one could speak of the "implementing" application of foreign law.

(ii) "Limiting" application of foreign law

104 The "limiting" application of foreign law, as can be found in the reformed Art. 6 para. 2 of the Swiss Penal Code of 2007, goes further in the direction of adaptation: according to this, in the case of a crime committed abroad and prosecuted in the context of "representative" administration of justice, "the court has to decide on sanctions that, overall, do not weigh more heavily on the perpetrator than those that would be applied according to the law of the place where the crime was committed". According to this rule, which is known in similar forms as transnational *lex mitior* from other legal systems as well,[241] neither the foreign offence definition ("Straftatbestand")[242]– to be established as more lenient by way of comparative law – nor its threat of punishment as such are applied domestically; rather, the foreign law is to be considered only on the sentencing level, and even there it can only develop a limiting effect. That is certainly not of little consequence though, as the domestic criminal jurisdiction has, after all, to submit to foreign rules.[243] Nonetheless, both the comparison of alleviating factors and the power of determining the sentence remain in the hands of the domestic judiciary.[244]

(iii) "Blanket–type" application of foreign law

105 An ever increasing gateway for the import of foreign law opens through the application of "blanket-type" foreign law. This can be observed especially at the European level.[245] As is characteristic for criminal laws of the blanket-type, the national criminal norm only establishes the sanctions and connects these to the elements of an offence, which is defined further by another act of law – usually called the "completing norm".[246] If this

[238] As correspondingly introduced later by Art. 6[bis] para. 1 s. 2 Swiss Penal Code for the case of "representative administration of justice".

[239] As assunmed by the Swiss Federal Court: cf. BGE 104 IV 77, 87 (1978), 118 IV 305, 308 (1992).

[240] Thus the prevailing opinion in the literature: cf. *Peter Popp*, in: Marcel Alexander Niggli/Hans Wiprächtiger (eds.), Basler Kommentar, StGB I, Basel 2003, Vor Art. 3 mn. 31.

[241] See – inter alia – § 10 para. 2 Danish Penal Code of 1930, Art. 19 para. 1 Turkish Penal Code of 2004, and with regard to similar reform efforts in Germany *Karin Cornils*, Leges in ossibus? Überlegungen zur doppelten Strafbarkeit einer Auslandstat, in: Arnold et al., Grenzüberschreitungen (fn. 212), pp. 211–228 (222 ff.).

[242] As to this term cf. mn. 111 fn. 265.

[243] This at least by the fact that, as explained by *Peter Popp/Patrizia Levante*, in: Basler Kommentar (fn. 240), 2nd ed. Basel 2007, Vor Art. 3 mn. 30, the domestic judge has "to comply with an effect-oriented maximum of sanctioning not stemming from the own law".

[244] The practical implications of this legal amendment should not be rated too highly. Although, as stated by. *Hans Vest*, in: Stefan Trechsel et al. (eds.), Schweizerisches Strafgesetzbuch, Zürich,/St. Gallen 2008, Art. 6 mn. 4, "the domestic court can avoid the effort of applying foreign law and then examining whether the Swiss law would have led to a more favourable result", there is still no relief of identifying the milder sanction.

[245] With examples thereto cf. *Sieber*, Strafrechtsvergleichung (fn. 5), p. 101.

[246] So-called "Ausfüllungsnorm": cf. *Albin Eser/Bernd Hecker*, in: Schönke/Schröder, StGB. Kommentar, 29th ed., München 2014, Vorbemerkungen 3 vor § 1 with further references.

legal act is issued by an extra- or supranational authority, its consequence for the performance of domestic criminal justice is that foreign law has to be applied – unless the supranational completing norm is to be understood as nationally incorporated law.[247] However, even in this case the offence definition has its origin in non-national, foreign law that still needs to be imported.[248]

(iv) Application of foreign law by "completing the offence definition"[249]

106 In other than the explicitly shown ways one might also imagine an import variant for which the key words foreign law application by "*completing the* definitional elements of the offence" or "*limiting criminal liability*" might be used. This concerns instances in which the application of the offence description – or possible grounds for exemption from prosecution respectively – may depend on so-called "incidental questions" of private or administrative law as, for instance, in the case of theft where the question of ownership of the chattel taken away from another has to be decided according to private (and not criminal) law.[250] When offences of this sort have been committed abroad but are to be prosecuted domestically, the question may arise whether and to what extent open elements of wrong-doing (such as the duty of care in the case of negligence or the obligation to avert a prohibited result in the case of an omission) or extra-criminal elements of the offence description (such as rules of proper accounting in insolvency crimes) should be determined according to the law of the domestic place of jurisdiction or the foreign place where the crime was committed.[251] Even this decision requires a

[247] Similar to the "incorporated" international criminal law to be dealt with hereafter.

[248] For further details regarding the partly multi-stage references to blanket norms within the European criminal law – both for EU law from the top down and for national laws from the bootom up – and to the implicit constitutional problems of "nullum crimen sine lege" see *Kai Ambos*, Internationales Strafrecht, 4th ed. München 2011, pp. 552 ff., 566 ff.

[249] "Offence definition" shall stand for the German "(Straf)Tatbestand" which has no equivalent in English, neither in terms of language nor of criminal doctrine. As once in a while it will have to be referred to, a short explanation appears appropriate: In a tripartite structure of the offence (i) the "Tatbestand" is to comprise all definitional elements of the offence (comparable to actus reus and mens rea); if all of them are fulfilled ("Tatbestandsmäßigkeit"), this leads (ii) to the unlawfulness (wrongfulness) of the act ("Rechtswidrigkeit") which can be negated by grounds of justification; if there is none given and thus the act remains unlawful, (iii) culpability (blameworthiness, guilt) of the actor ("Schuld") is required as further element that can be negated by insanity or other excuses; for more details to this tripartite – or an alternative two-stage – structure of the offence see *Albin Eser*, Justification and Excuse: A Key Issue in the Concept of Crime, in: Albin Eser/George P. Fletcher (eds.), Rechtfertigung und Entschuldigung. Rechtsvergleichende Perspektiven/Justication and Excuse. Comparative Perspectives, Vol. I; Freiburg 1987, pp. 17–65 (61 ff.) = www.freidok.uni-freiburg.de/volltexte/3906, and *Johannes Keiler*, Actus Reus and Mens Rea: The Elements of Crime and the Framework of Criminal Liability, in: Johannes Keiler/David Roef (eds.), Comparative Concepts of Criminal Law, Cambridge/Antwerp/Portland, 2nd ed. 2106. pp. 57–70. When translating "Tatbestand" as "offence definition", one must be aware, however, that this is only one of many attempts to catch its meaning: by similarly brief terms, such as "offence description", "crime provision", "definition/elements of the offence", or by more meaningful ones, such as "statutory elements of the offence", "statutory definition of an offence", "constituent elements of a crime" or "statutorily defined constituent elements of a crime"; cf. *Michael Bohlander,* The German Criminal Code. A Modern English Translation, Oxford/Portland 2008, pp. 40 ff.; *idem,* Principles of German Criminal Law, Oxford/Portland 2009, pp. 16 f., *Joseph D. Darby,* The Penal Code of the Federal Republic of Germany, Littelton/London 1987, pp. 53 ff., *Thomas Weigend,* Germany, in: Kevin Jon Heller/Markus D, Dubber (eds.), The Handbook of Comparative Criminal Law, Stanford 2011, pp. 252–287 (259). At any rate, as long as there is no commonly accepted English term for "(Straf)Tatbestand", the use of this or that term may depend on the specific context.

[250] Or regarding the criminal "abuse of trust" (§ 266 GPC), the required duty to safeguard the property interests of another cannot be found in the Penal Code itself but must be determined according to company law; for more to such "incidental questions" cf. *Albin Eser*, in: Schönke/Schröder (fn. 246), Vorbemerkungen 41 vor § 3.

[251] For details see *Eser*, ibidem, and fundamentally to such accessorial issues *Karin Cornils*, Die Fremdrechtsanwendung im Strafrecht, Berlin/New York 1978, espec. pp. 16 ff.

comparative look beyond national borders, and this even more, when the elements of an offence description are to be complemented according to foreign law. This applies respectively in the case where foreign grounds for excluding criminal responsibility are to be considered, or when for determining the punishment cultural differences are to be taken into account. This has recently been the subject of intense discussion – especially under the key word of "cultural defence".[252]

(v) "Incorporated international crimes"

Due to the rapid development of supranational criminal jurisdiction, there is a totally new channel for the importation of foreign law – in the form of "incorporated international crimes" – into national law. This may happen, as has been shown by a comparative project concerning the national criminal prosecution of violations of international law conducted by the Max Planck Institute, in two ways:[253] firstly, in a direct but so to say "static" manner, by referring – as in England and Wales – in a blanket-way to the offence definitions of the Rome Statute of the International Criminal Court and, in this way, bringing them into the domestic law.[254] Secondly, in a more dynamic manner – particularly in Canada – by declaring through a national criminal provision all those behaviours which constitute a crime according to current (customary) international law or by which current international law is violated as criminal under domestic law.[255] In addition, even in the much more numerous countries where international crimes are formulated autonomously in the own criminal code[256], or even, as in Germany, are promulgated in a separate "Code of International Crimes",[257] the respective model of the Rome Statute is obvious.[258] Therefore, any national judges may be well advised – particularly in cases of doubtful interpretation – to orientate themselves in a comparative way at the original supranational offence description.[259] **107**

(vi) "Subsidiary" application of foreign law

Going in the opposite direction, national law may find entry into supranational criminal law in the form of "subsidiary" application of foreign law. Contingent upon its development, especially the international criminal jurisdiction especially is dependent upon such auxiliary loans. The Rome Statute of the International Criminal Court has gone furthest so far with its step-by-step approach to "applicable law" in Art. 21 para 1: **108**

[252] Since this issue was considered particularly contentious in Germany, the 70th Deutsche Juristentag (German Lawyers Day) of 2014 put it on the agenda of its Penal Section under the heading of "Kultur, Religion, Strafrecht – Neue Herausforderungen in einer pluralistischen Gesellschaft (with a memorandum under this title by *Tatjana Hörnle*, München 2014), resulting in debates and resolutions which indicate a rather defensive attitude and restrictive tendencies towards taking deviating cultural traditions into consideration, both in adjudicative and legislative respect. Cf. also *Eric Hilgendorf*, Das Eigene und das Fremde I: Die deutsche Strafgesetzgebung und Strafrechtspraxis vor den Herausforderungen kultureller Pluralisierung, in: Strafverteidiger (StV) 2014, pp. 555–563; *idem,* Das Eigene und das Fremde II: Die deutsche Strafrechtswissenschaft vor den Herausforderungen kultureller Polarisierung, oder: Was ist "Religion"?, in: JZ 2014, pp. 821–829.

[253] For a summing-up see *Helmut Kreicker*, Völkerstrafrecht im Ländervergleich, Teilband 7 (ed. by *Eser/Sieber/Kreicker*, fn. 67), Berlin 2006, pp. 24 ff., 28 f.

[254] Cf. *Kreicker*, Völkerstrafrecht (fn. 253), pp. 28 ff.

[255] Cf. *Kreicker*, Völkerstrafrecht (fn. 253), pp. 27 f., with references to other countries proceeding in a similar manner, such as Belarus, Finland, Poland, Russia, Sweden and the USA.

[256] Though this often happens in a rather selective manner: cf. *Kreicker*, Völkerstrafrecht (fn. 253), pp. 30 ff.

[257] Like in Sweden and the Netherlands: cf. *Kreicker*, Völkerstrafrecht (fn. 253), pp. 32 f.

[258] To such transformations see also *Olympia Bekou*, Crimes at Crossroads. Incorporating International Crimes at the National Level, Journal of International Criminal Justice 10/3 (2012), pp. 677–691.

[259] Cf. also mn. 118.

this states that, according to (a), in the first place, the Statute with its accompanying elements and rules, and, according to (b), in the second place, the appropriate treaties and principles and rules of international common law, are to be applied; if, however, failing both of these, then, according to (c), "general principles of law" are to be applied "which the Court has derived from the national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime." Although national law is thus not first in line but to be considered only after the law of prime rank provides no solution, the criminal law of certain individual countries (that would normally have jurisdiction) may come into play as part of the principles of law that are to be established by way of comparative law. However, only established principles of law have any direct "application" here, not the national norms that acted as sources of law – as had been discussed at the Rome conference.[260] Nonetheless, for certain national legal systems a gateway for importation of law is opened up, and in a way that goes beyond judges' discretionary powers,[261] since it is at least envisaged as a subsidiary point of reference. In a similar way, in Art. 24 para. 1 s. 2 Statute of the International Criminal Tribunal for the former Yugoslavia it is envisaged that the Trial Chamber "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia". This does not mean that the national statutory provisions would be declared to be directly applicable. At least, however, through this reference to the legal practice, there is the expectation that the court should give more intensive attention to the national law.[262]

b) Dependence of punitive power on foreign law

109 For this group of cases it is characteristic that, while foreign law is not applied as such domestically, the execution of the domestic punitive power may well be dependent on foreign law, and, therefore, that the foreign law needs to be taken into consideration.

(i) Relevance for mistake of law

110 The latter may already be necessary in a minor form when the pronouncement of guilt and penalty (Schuld- und Strafausspruch) depends on whether and to what extent the accused was, for example, aware that sexual intercourse with his step-daughter was domestically considered criminal incest while this is not the case in his country of origin; if due to this transnational mistake of foreign law he lacked consciousness of unlawfulness, the question is whether he may be excused or, at least, conceded mitigating circumstances.[263]

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[260] Cf. *Margaret McAuliffe deGuzman*, Art. 21: Applicable Law, in: Otto Triffterer/Kai Ambos (eds.), The Rome Statute of the International Criminal Court. A Commentary, 3rd ed. München 2016, Art. 21 (pp. 932–948), mn. 34, 39.

[261] As is the case of other forms of comparative criminal law as a source of judicial finding of justice; cf. mn. 125 ff.

[262] Another question is to what degree these demands are in fact made use of; this seems to be scarcely done, as may be concluded from a thorough case analysis by *Silvia D'Ascoli*, Sentencing in International Criminal Law. The UN ad hoc Tribunals and Future Perspectives for the ICC, Oxford 2011, espec. pp. 111 ff. As a particular exeption may be mentioned the expert report on the range of sentences submitted by the Max Planck Institute Freiburg (cf. mn. 358) on request of the ICTY-Trial Chamber, in: *Prosecutor v. Dragan Nicolič*, IT-94-2, Sentencing Judgement of 18 December 2003. Cf. also *Sieber*, Strafrechtsvergleichung (fn. 5), p. 102.

[263] To such a case underlying the decision in BGHSt 10 (1956), p. 35 cf. *Eser*, Comparative Legal Research (fn. 4), p. 86 and *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 27.

(ii) Dual criminality

The classical main field for dependence on foreign law, however, is the requirement of usually so-called "dual criminality" when domestic criminal law is to be applied to offences committed abroad. According to this, the alleged offence must be criminally prohibited both at the domestic place where it is prosecuted and at the place of its commission,[264] thus requiring an identical norm at the place of crime ("identische Tatortnorm")[265]. This means that, instead of extending one's own criminal law, as was thought possible for a long time on the European continent, without reservation to extraterritorial crimes – at the risk of transnational overlapping and international conflicts over interference –, one now tries to respect the sovereignty of the foreign country where the criminal offence took place, by taking into consideration that the offence is liable to punishment in this country as well.[266] Such criminality at the place of the offence is, for example, required for the application of German criminal law to offences committed abroad under § 7 GPC (StGB) for cases of the principles of "active" and "passive personality" (by which the extraterritorial application of domestic criminal law is based on the citizenship of the perpetrator or victim respectively, also known as "active" and "passive nationality principles) as well as of the principle of "representative administration of criminal justice" (by acting on behalf of the jurisdiction of the place of commission, also known as "principle of complementary jurisdiction").[267] Regarding the latter principle, one can even speak of indirect "application" of the foreign place of crime norm, insofar as a constitutive effect for the application of German criminal law is attached to it, while, regarding the principles of "active" and "passive personality", it only has a limiting function,[268] But even in the last cases, the foreign law of the place of crime has to be considered as a proviso for the application of the own criminal law and thus to be investigated by way of comparison.[269] 111

(iii) Mutual criminality

The procedural counterpart to the substantive-legal requirement of "dual criminality" at the place of crime and the place of court is – at the level of international legal 112

[264] Whereas in the German doctrine this requirement of "Doppelte Strafbarkeit" is commonly considered an element of substantive law (cf. *Cornils*, Fremdrechtsanwendung,fn. 251, p. 213), in other countries it seems to be – at least allusively – understood as a procedural issue of jurisdiction: cf. *Christine Van den Wyngaert*, Double Criminality as a Requirement to Jurisdiction, in: Nils Jareborg (ed.), Double Criminality. Studies in International Criminal Law, Uppsala 1989, pp. 43–56. In any case, instead of considering it – as traditionally done – as a rule of "internationales Strafrecht" (that is easily confused with "international criminal law" in terms of crimes penalized by public international law), it should be more correctly understood and named as "transnationales Strafanwendungsrecht" (law of covering the transnational application of criminal law); cf. *Eser, in:* Schönke/Schröder (fn. 246), Vorbem. § 3, mn. 1, 5 ff. and *Hans-Joseph Scholten*, Das Erfordernis der Tatortstrafbarkeit in § 7 StGB, Freiburg 1995, pp. 7 ff.

[265] For an in-depth analysis of this requirement of an "identische Tatortnorm" see *Scholten*, Tatortstrafbarkeit (fn. 264), pp. 27 ff.; cf. (also in a comparative manner) *Cornils*, Fremdrechtsanwendung (fn. 251), pp. 212 ff.

[266] For more to these and further reasons for requiring dual criminality both at the place of commission and of jurisdiction cf. *Scholten*, Tatortstrafbarkeit (fn. 264), pp. 56 ff., and *Albin Eser*, Grundlagen und Grenzen "stellvertretender Strafrechtspflege" (§ 7 Abs. 2 Nr. 2 StGB). Zur Problematik der "identischen Tatortnorm" bei Auslandstaten, in: JZ 1993, pp. 875–884 (875 ff.) = www.freidok.uni-freiburg.de/volltexte/3960.

[267] For details to these links – with partly different requirements regarding the "identical norm at the place of crime"; see *Eser*, Strafrechtspflege (fn. 266), pp. 878 ff., *idem.*, in: Schönke/Schröder (fn. 246), § 7 mn. 7 ff., 17, 23, *Cornils*, Fremdrechtsanwendung (fn. 251), pp. 217 ff.; *Scholten*, Tatortstrafbarkeit (fn. 264), pp. 125 ff., and from a more general European perspective *André Klip,* European Criminal Law. An integative Approach, Cambridge/Antwerp/Portland, 3rd ed. 2016, pp. 175 ff.

[268] To this distinction see *Eser*, Stellvertretende Strafrechtspflege (fn. 266), p. 882, and in agreement *Cornils*, Fremdrechtsanwendung (fn. 251), p. 213.

[269] As to the method to be used for the comparison see infra mn. 295 ff.

assistance[270] – the principle of "mutual criminality".[271] According to this principle which plays a large practical role, above all in the context of extradition, the conduct of the person concerned must be criminal under both the law of the country requesting extradition and the law of the country requested.[272] The reason for this is that the requested state should be burdened with providing legal assistance only if the behaviour in question was criminal also under its own law. Vice versa, the requesting state should not expect support without reason, that is only if the conduct concerned constitutes a criminal offence under that state's law as well.[273] Whether this requirement is satisfied in an individual case, is – in a two-phase procedure of legal assistance that is subdivided into a judicial admissibility and an executive approval procedure – usually examined by the requested state during the first phase.[274] The comparison of norms which thus has to be made for the determination of "mutual criminality", however, is not exactly the same as that necessary for "dual criminality" considered above: While for the latter the greatest possible "identity" of the norm of the place of crime is important, for the extradition out of Germany, for example, the focus in the relevant § 3 para.1 IRG is in principle merely on the fulfilment of the definitional elements of the offence (Tatbestandsmäßigkeit)[275] according to German law; for that, however, if need be, a mere "adjustment in the general sense of the facts" is sufficient.[276] If one does not want to recognize this as legal proof of the "functional" method of comparison,[277] or in whichever way the criminal liability on both sides would have to be investigated, this requirement constitutes a clear case of dependence of the punitive power on foreign law – thus its application requiring judicative comparative criminal law.

(iv) Transantional prohibition of multiple prosecutions

113 The principle of "*ne bis in idem*" (in terms of the prohibition of double jeopardy) may also result – if it is extended to a transnational prohibition of multiple prosecu-

[270] For more detail concerning this level of *inter*national cooperation in criminal matters, to be placed between the transnational application of domestic law on extraterritorial crimes (dealt with above) and *supra*national criminal justice (to be dealt with below) see, *Albin Eser/Otto Lagodny* (eds.), Principles and Procedures for a New Transnational Criminal Law, Freiburg 1992, documenting an international workshop on transnational criminal law where this three-stage set-up was already reflected; cf. furthermore *Albin Eser*, Basic Issues of Transnational Cooperation in Criminal Cases, in: Eser, Transnationales Strafrecht (fn. 71), pp. 305-325 (307 ff.) = www.freidok.uni-freiburg.de/volltexte/3454, and more recently *idem*, Transnational Measures against the Impunity of International Crimes, in: Journal of International Criminal Justice (JICJ) 10/3 (2012), pp. 621-634 (623 fn. 3).

[271] For an in-depth analysis of this principle see *Arne Zeidler*, Der Grundsatz der beiderseitigen Strafbarkeit im Auslieferungsrecht, Hamburg 2008.

[272] As, for instance, regarding the German extradition law, cf. § 3 Gesetz über die Internationale Rechtshilfe in Strafsachen (IRG: International Legal Assistance Act); as to other proceedings of international legal assistance, in which mutual criminality can play a role, cf. the numerous references in: *Wolfgang Schomburg/Otto Lagodny* et al. (eds.), Internationale Rechtshilfe in Strafsachen, 5th ed. München 2012, p. 3205 , and with special regard to the European region *Bernd Hecker*, Europäisches Strafrecht, 4th. ed., Heidelberg 2012, pp. 406 ff.

[273] As to further reasons – partly based on sovereignty and directed towards reciprocity, partly in favor of individual protection – see *Otto Lagodny*, in: Schomburg/Lagodny, Internationale Rechtshilfe (fn. 272), § 3 mn. 2 f.; *Thomas Weigend*, Grundsätze und Probleme des deutschen Auslieferungsrechts, in: Juristsiche Schulung (JuS) 2000, pp. 105-111 (107); *Zeidler*, Beiderseitige Strafbarkeit (fn. 271), pp. 65 ff.

[274] For details see *Thomas Hackner*, in: Schomburg/Lagodny, Internationale Rechtshilfe (fn. 272), Einleitung, mn. 58 ff.

[275] Cf. mn. 106 fn. 249.

[276] The only really important aspect is that the conduct as such is punishable according to German law without necessarily requiring full punitive power of the German authorities. For details see *Lagodny*, in: Schomburg/Lagodny, Internationale Rechtshilfe (fn. 272), § 3 mn. 3, 5 ff.; Zeidler, Beiderseitige Strafbarkeit (fn. 271), pp. 121 ff.

[277] To be described in the methodological Part III. B. 1 (mn. 243 ff.).

tion(s)[278] – in dependence on the foreign law of a national jurisdiction. This, however, is expressed less in the form of a precondition for the exercise of national criminal jurisdiction – as would be required for "dual" or "mutual" criminality – rather, the foreign law has the role of limiting, if not even blocking, national punitive power. The merely limiting function is currently still the usual form; the reason for this is that, while domestically the prohibition against further prosecution after a – guilty or not guilty – adjudication of the case has generally found acceptance as a constitutional standard in terms of "rule of law"[279], on the transnational level countries could so far mostly only bring themselves to agree on a "principle of accounting" ("Anrechnungsprinzip"): according to this – as, for example, according to § 51 para 3 GPC – further prosecution and punishment domestically is not totally blocked by the prior trial of an offence abroad, but rather the punishment imposed abroad must be credited against the new domestic punishment. Because the national jurisdiction is only limited in this way, and not totally excluded, the domestic justice system is not spared further efforts of investigation and trial, nor is the already sentenced person – be he or she convicted or even acquitted – spared from further proceedings. One tries to fend off such disadvantages with the "principle of recognition" ("Erledigungsprinzip") by which a sentence abroad is meant to stand in the way of a further domestic prosecution right from the start.[280] Even if the future lies with this principle – with the hoped-for increase in interstate trust in the rule of law within foreign criminal justice systems –,[281] so far it has only been able to prevail as transnational *ne bis in idem* in regions that are politically on an equal wave length, particularly in the European Union.[282] However, whichever principle and procedure one may follow, without judicative criminal law one cannot get by: be it, to find out if, and to what extent, an offence tried abroad is identical to the offence under suspicion domestically, or be it, that – in the case of a simple crediting – the type and extent of the foreign sentence has to be balanced out against the domestic law.

(v) Principle of complementarity

In yet another form, criminal jurisdiction at *supranational* level may be dependent on foreign law as well, especially based on the "principle of complementarity". According to this principle – first introduced by the Rome Statute in Art. 17 para 1 (a) and (b) **114**

[278] Further to the reasons why overlappings of various national criminal juirsdictions can occur at all, and why they should be avoided as much as possible cf. *Eser*, Transnationale Strafverfolgung (fn. 71), pp. 636–660. For a comparative survey and analysis, see *Martin Böse* et al. (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Baden-Baden, 2012, and *Walter Gropp*, Kollision nationaler Strafgewalten – nulla prosecutio sine lege, in: Arndt Sinn (ed.), Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität. Ein Rechtsvergleich zum Internationalen Strafrecht, Osnabrück 2012, pp. 41–63 (45 ff.).

[279] Cf. *Albin Eser*, Human Rights Guarantees for Criminal Law and Procedure in the EU Charter of Fundamental Rights, in: Ritsumeikan Law Review- International Edition No 26 (March 2009), pp. 163–190 (188 f.) = www.freidok.uni-freiburg.de/volltexte/9800.

[280] For details to these principles and their respective advantages and disadvantages see *Eser*, Transnationale Strafverfolgung (fn. 71), pp. 643 ff.

[281] As to some further-reaching and some less far-reaching model drafts of a mechanism to avoid conflicts between criminal jurisdictions see *Anke Biehler* et al. (eds.), Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union, in: Revue Internationale de Droit Pénal (RIDP) 73/3-4 (2002), pp. 1195–1225, and *Sinn*, Jurisdiktionskonflikte (fn. 278), pp. 575–595 ff., furthermore to my own position *Eser*, Transnationale Strafverfolgung (fn. 71), pp. 577 ff.

[282] See *Albin Eser,* Justizielle Rechte, in: Jürgen Meyer (ed.), Charta der Grundrechte der Europäischen Union, 4th ed. Baden-Baden 2014, pp. 652–717 (714 f.) = www.freidok.uni-freiburg.de/volltexte/9723, and *Jörg Eisele*, Jurisdiktionskonflikte in der Europäischen Union: Vom nationalen Strafanwendungsrecht zum Europäischen Kollisionsrecht?, in: ZStW 125 (2013),pp. 1–33.

regarding the relationship between national and supranational jurisdictions[283] – the International Criminal Court is, amongst other things, authorized to prosecute when the primarily responsible national criminal justice system is either "unwilling or unable genuinely to carry out the investigation or prosecution". For comparative criminal law this is important in two ways: on the one hand, for the ICC which could take on a suspected international crime because the primarily responsible national justice system cannot prosecute because there are – domestically – no corresponding crime descriptions; this requires the ICC both to determine the primarily responsible national jurisdictions and the examination of the relevant elements constituting an offence. On the other hand, a state affected by this – if it wants to ward off the politically embarrassing finding of its incompetence – would be well advised to incorporate international crimes into its national criminal law system[284] – by way of the above mentioned "import of foreign law".[285]

2. Judicial finding of justice and further development of the law through comparative criminal law

115 Even without importing foreign law as such or making the exercise of punitive power dependent on it, it can influence – as a comparative law medium – one's own criminal law; vice versa, one's own law may also influence foreign criminal law. This can happen in three directions: horizontally, vertically from the top down and vertically from the bottom up. Expressing it in the language of skating, a "free program" may develop more and more into a "compulsory program".[286]

a) Horizontal-transnational broadening of the field of vision

116 Differently from civil justice where a comparative-law look across the borders has not been anything unusual for quite some time,[287] the criminal justice system has yet to overcome – even today – some fears of contact: this may be on a purely practical level, as in cases of private law the judge has to apply foreign law much more readily, or on a more ideological level, because the criminal judge sees the state's punitive power as more nationally determined and directed towards preserving the state's (own) sovereignty.[288] With such a nationally introverted narrow view it will become more and more difficult to recognize the challenges of a legal world networked ever more closely – and to adapt to them. Therefore, the recognition that one can learn from good as well as bad experiences of other criminal jurisdictions has to grow: be it, to take them on, or in order to consciously make another decision; because to perceive the pros and cons of

[283] Cf. *Albin Eser*, Towards an International Criminal Court: Genesis and Main Features of the Rome Statute, in; University of Tasmania Law Review 20 (2001), pp. 1–28 (16 ff.) = www.freidok.uni-freiburg.de/volltexte/3671, for further details see *William A. Schabas/Mohamd M. El Zeidy,* Art. 17: Issues of admissibility, in: Triffterer/Ambos, Rome Statute (fn. 260), pp. 781–831.

[284] As to an international obligation to that effect see *Albin Eser*, Das Rom-Statut des Internationalen Strafgerichtshofs als Herausforderung für die nationale Strafrechtspflege, in: Christian Grafl/Ursula Medigovic (eds.), Festschrift für Manfred Burgstaller, Wien 2004, pp. 355–373 (365 ff.) = www.freidok.uni-freiburg.de/volltexte/3675.

[285] Cf. mn. 102 ff.

[286] As – in contrasting "Kürprogramm" and "Pflichtprogramm" – described by *Kötz*, Aufgaben (fn. 44), pp. 140 f., *idem*, in: Bundesgerichtshof (fn. 291), pp. 832 ff.,

[287] Concerning this cf. *Zweigert*, Universale Interpretationsmethode (fn. 73), pp. 8 ff.

[288] Cf. *Jung*, Grundfragen (fn. 66), p. 6; *Vogel*, Instrumentelle (fn. 77), p. 206; *Weigend*, Criminal law (fn. 66), pp. 261 f.

foreign criminal law and its jurisprudence, and to consider this in a self-critical way, does not have to mean that such paths have to be followed in the end.[289]

(i) Comparative criminal law as an "interpretation aid"

Still very much in the form of "free skating" or a "voluntary exercise", foreign ideas about law can influence one's own law through comparative criminal law as a "tool of interpretation". Even if it might be over the top – for the field of criminal law because of its especially distinct national character – to speak of comparative law as the "fifth" or even a "universal method of interpretation"[290], one cannot deny comparative criminal law any kind of "interpretative function". How much judges can learn a better understanding of their own law when they consult and take into account the jurisdiction and doctrine of another legal system – particularly within the same language and legal family – is demonstrated by a Swiss criminal law professor in an exemplary way.[291] To make use of such experience or alternative considerations of another criminal legal system is particularly obvious where the interpretation of the same word is at issue, as, for example, the word "false key" in the case of aggravated theft, or the word "disposal" ("Absetzen") in the case of handling stolen goods received from the thief. Also when considering terms or elements of similar meaning, such as intent or negligence, or commission of the offence and participation in it, a judge can hope to gain insights for the interpretation from their meaning in a related foreign legal system. **117**

(ii) Recourse to foreign "parent law"

This is even more obvious when – for the interpretation of one's own law – one can go back to its roots in a foreign "parent law".[292] This can be the case when prohibitions or the rights of the accused are at issue in a type of criminal procedure that was taken over from another legal system – as, for example, the Turkish procedure was adopted from the German Code of Criminal Procedure. In such a case, the judge, when in doubt about the interpretation of taken-over law, may be well-advised to get clarification from **118**

[289] As correctly stated by *Arthur Meier-Hayoz*, Der Richter als Gesetzgeber, Zürich 1951, pp. 198 f.: "Whether a foreign solution is adopted or for some reason rejected, the critical analysis of foreign law appears highly fruitful in both cases. Through the comparison the substance of the compared becomes more visible. The value of this procedure of legal comparison lies either in the formal stimulation thus conveyed or in the confirmation to be gained for a result which was reached independently of this process". Cf. also *Ebert*, Rechtsvergleichung (fn. 78), pp. 176 f.; *Kötz*, Aufgaben (fn. 44), p. 141, and infra to "evaluative" comparative law Part II. D (mn. 173 ff.).

[290] As postulated by *Schramm* with reference to *Häberle* and – focusing on private law – made explicit by *Zweigert* in the title of his "Universale Interpretationsmethode" (universal method of interpretation), but scrutinized with regard to criminal law by *Vogel*, Instrumentelle (fn. 77), p. 206.

[291] *Robert Hauser*, Die Rechtsvergleichung als Auslegungshilfe in der höchstrichterlichen Rechtsprechung im materiellen Strafrecht, in: Theo Vogler (ed.), Festschrift für Hans-Heinrich Jescheck, Berlin 1985, Band II, pp. 1215–1232. Cf. also the comparative case material collected from the jurisprudence of the German Federal Constitutional Court and the Federal Supreme Court by *Schramm*, Erkenntnisse (fn. 61), pp. 160 ff. and 169 ff. respectively; especially to public law see *Aura María Cárdenas Paulsen*, Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts, Hamburg 2009, and with regard to comparative jurisprudence in the area of private law see *Hein Kötz*, Der Bundesgerichtshof und die Rechtsvergleichung, in: Claus-Wilhelm Canaris et al. (eds.), 50 Jahre Bundesgerichtshof. Festgabe aus der Wissenschaft, vol. II, München 2000, pp. 824–843. With regard to the similar reference to foreign decisions by supreme courts in common law environments see *Mads Andenas/Duncan Fairgrieve*, Intent on making mischief: seven ways of using comparative law, in: Monateri, Methods (fn. 74), pp. 25–60 (31 ff.).

[292] Cf. *Eser*, Comparative Legal Research (fn. 4), pp. 87 f.; *Jescheck*, Strafprozessreform (fn. 133), p. 765, and – from a mainly legal-political point of view – *idem*, Die Bedeutung der Rechtsvergleichung für die Strafrechtsreform, in: Arthur Kaufmann et al. (eds.), Festschrift für Paul Bockelmann, München 1979, pp. 133–154 (147 f.).

the criminal jurisprudence of the country from which the rule in question originates.[293] Even where only specific procedural maxims have been adopted from a foreign criminal procedure, such as, in the 19th century, the trial principles of orality and immediacy from the English and French legal systems by the German law, it may be useful to go back to the reasons for these principles in the "parent law" when one needs to clarify whether and to what extent these may still be relevant under the present circumstances.[294]

(iii) Filling gaps – further development of the law

119 More than mere interpretation is asked for when comparative criminal law is meant to be used to fill gaps and add to legal development as well. Even insofar as comparative law only serves as a "tool of interpretation" for a judge,[295] something new – which goes beyond the mere interpretation of what is currently the existing – develops in the domestic law from this consideration of foreign law. This might not yet have been the case, when the German Federal Supreme Court – in the context of narrowing the meaning of the homosexual "committing an act of indecency" (according to the former § 175 GPC) – found support in the foreign development of law.[296] Even where the look at foreign criminal law only serves the purpose of securing the traditional prohibition against a constitutional challenge for annulment,[297] as in the case of sibling incest, this is still a matter of preserving law. In contrast, the step towards filling the gaps in the context of further development of the law ("rechtsfortbildende Lückenfüllung") is certainly done when – by taking foreign legal development into account – the violation of a police duty to inform the suspect about his or her right of silence, is developed further to an exclusionary rule with regard to the evidence illegally obtained.[298] In the same sense, it meant more than mere interpretation when the US Supreme Court excluded juvenile offenders from the death penalty – in a controversial majority decision[299] – and, thus, brought domestic backward law closer to more humane developments in foreign legal systems.[300]

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[293] This is not even necessarily to be done through direct reference in a decision to the foreign law, but may also be conveyed by comparative references in the literature; cf. *Eser*, Comparative Criminal Law Research (fn. 4), p. 87 fn. 27.

[294] See *Albin Eser*, Funktionswandel strafrechtlicher Prozessmaximen: Auf dem Weg zur "Reprivatisierung" des Strafverfahrens?, in: ZStW 104 (1992), pp. 361–396 = www.freidok.uni-freiburg.de/volltexte/3389.

[295] Cf. *Örücü*, Developing (fn. 78), p. 55.

[296] BGHSt 1 (1951), pp. 293 (297). For further references to foreign criminal law see BGHSt 9 (1956), pp. 385, 387 regarding the genesis of the current crime description of "murder" (§ 211 GPC), further BGHSt 32 (1984), pp. 345, 352 as to the consequences of policemen provoking an offence by acting as agent provocateur, BGHSt 38 (1992), pp. 214, 217, 228 ff. as to the inadmissibility of evidence after police neglected their duty of caution, and BGHSt 44 (1998), pp. 308, 312 as to the conditions of employing a lie detector as evidence. Some of the case examples presented by *Hauser*, Auslegungshilfe (fn. 291), pp. 1216 ff., may also be mentioned here.

[297] As decided by the German Federal Constitutional Court, based on a comparative memorandum both to criminal law and criminology of the Freiburg Max Planck Institute, in BVerfGE 120 (2008), p. 224), With regard to this and other constitutional court decisions that have been supported by comparative law see, for instance, BVerfGE 45 (1978), p. 187 concerning lifelong imprisonment or BVerfGE 88 (1993), p. 203 concerning the second reform of the abortion law, cf. *Schramm*, Erkenntnisse (fn. 61), pp. 160 ff.

[298] Cf. BGHSt 38 (1992), pp. 214, 228 ff.; *Schramm*, Erkenntnisse (fn. 61), pp. 169 ff.

[299] Cf. *Roper v. Simons*, 543 U.S. 551 (2005), and *Sieber*, Strafrechtsvergleichung (fn. 5), p. 104. Further to this cf. *Andenas/Fairgrieve*, Seven ways (fn. 291), pp. 38 ff.

[300] As to the ensuing controversy see the statement by *Ruth Bader Ginsburg*, "Gebührender Respekt vor den Meinungen der Menschheit": Der Wert einer vergleichenden Perspektive in der Verfassungsrechtsprechung, in: EuGRZ 2005, pp. 341–346.

Up to now, such processes of adaptation – guided and supported by comparative law usually remain within judicial discretion; this is why they are to be assigned to the "voluntary", if not even "at will" comparative law area.[301] This may, however, also turn into a "compulsory" comparison of law if, in the case of a legislative gap, the judge has to decide according to the rule he would establish as a legislator, and is therewith advised to fall back onto the findings of comparative law – as is particularly provided for in Art 1 para. 2 of the Swiss Civil Code.[302] This applies even more to the vertical ways of reference to be examined in the following. 120

b) Supranational influences on national criminal law

Vertical influences from the top down may result from the fact that "comparative law (delivers) valuable indications for the interpretation of laws which are around in ever increasing numbers, have grown on supranational legal soil and rise above the doctrinal structures of individual legal systems."[303] It will become the more compelling for judges to open themselves – in one way or another – to transnational models and influences, the more concrete and binding the supranational prescriptions are. These are of growing importance, especially in the European area. 121

(i) Priority of European Union Law

National criminal law is most influenced by primary and secondary Union Law of the EU: primarily, by the fact that there might be upper and lower limits concerning the offence descriptions, or that sanctions that are adverse to Union Law may even be forbidden;[304] and secondarily, by the way that certain preconditions are set for the national criminal law, as particularly through directives according to Art. 83 of the Treaty on the Functioning of the European Union (TFEU).[305] Insofar as Union Law is integrated into national law, one could even speak of the "foreign law import" in the sense described above. The same would have to apply to the guidelines set for criminal and procedural law by the European Convention on Human Rights (ECHR)[306] and the Charter of Fundamental Rights of the European Union (EUCFR)[307] as well as the related rulings by the European Court of Human Rights (ECtHR) and the European Court of Justice (EuCJ).[308] Here the influence by the ECHR and the ECtHR may even apply in two ways, that is through their direct binding force over the member jurisdictions of the Council of Europe, and indirectly through binding the EU to the Charter of Fundamental Rights of the ECHR, based on Art. 6 para 2 of the Treaty on European Union (TEU).[309] 122

[301] Concerning the kinds of comparative law described in these terms cf. mn. 35 to (34).

[302] Cf. *Ebert*, Rechtsvergleichung (fn. 78), p. 178.

[303] As stated by *Neumayer*, Rechtssysteme (fn. 10), p. 31, as one of the "tasks of comparative law".

[304] For details to the case law of the various European courts see the reports in: *Hecker*, Europäisches Strafrecht (fn. 272), pp. 289 ff., *Helmut Satzger*, Internationales und europäisches Strafrecht, 6th ed. Baden-Baden 2013, pp. 112 ff., and *André Klip* (ed.). Materials on European Criminal Law, 2nd ed., Cambridge/Antwerp/Portland, 2014.

[305] Thoroughly thereto see *Ambos*, Internationales Strafrecht (fn. 248), pp. 566 ff.

[306] For details cf. *Ambos*, Internationales Strafrecht (fn. 248), pp. 456 ff.

[307] As in particular required by the Arts. 47–50 in the Chapter VI on "Justice" (in German more correctly designated as "Justizielle Rechte") of the Charter of Fundamental Rights of the European Union (CFR)); cf. *Eser*, Human Rights Guarantees (fn. 279).

[308] In relation to this the German Federal Constitutional Court, with particular respect of the ECtHR in BVerfGE 111 (2005), pp. 307 (331) postulated that, "when interpreting basic rights and constitutional tenets of the rule of law, all state authorities – and thus also the courts – have to take into consideration the guarantees of the ECHR and the jurisprudence of the ECtHR".

[309] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), p. 103.

123 Even where there are no binding directives of the above-mentioned kind, the supranational influence on national criminal law – because of the rule of interpretation compliant with Union Law ("unionsrechtskonforme Auslegung") – should not be underestimated. According to this, the judge – similar to domestic interpretation in conformity with the constitution ("verfassungskonforme Auslegung") – has to favour, out of a group of several variants of interpretation of a criminal norm all tenable according to national understanding, the one that best complies with Union law, or at least does not contradict it.[310] In doing this, not only directives[311] but also decrees and framework decisions of European institutions and bodies are to be taken into account.[312]

(ii) Interpretation favourable to international law

124 Going further than this, corresponding ideas apply in general to the area of interpretation favourable to international law ("völkerrechtsfreundliche Auslegung"). According to this rule, international criminal law might find entry into national criminal law not only by incorporating international crimes via the importation of foreign law,[313] but also, for example, through the demand that the borderline of the wording of the (former) § 220 a German Penal Code for genocide is to "be determined in the light of the international normative directive".[314] In the sense of the idea of interpretation so conforming to international law, even solely national crime definitions are to be interpreted in accord with the development of international criminal law and the judicature of supranational courts, and so applied.[315]

c) Influences of national law on supranational criminal law

125 Influence may also be exerted from the bottom up; in this case it is not the national judge who is expected to engage in comparative law but the supranational criminal judiciary. This may be called for in two ways: by consulting national criminal law for the interpretation of international norms and by referring back to general legal principles.[316]

(i) Interpretation of international criminal law through reference to national law

126 When the interpretation of words and terms of international conventions and other norms relevant to international criminal law is asked for, the issue may be to gain answers about conceivable and common meanings from the development and under-

[310] Cf. *Klaus Gärditz*, Europäisierung des Strafrechts und nationales Verfassungsrecht, in: Martin Böse (ed.) Europäisches Strafrecht, Baden-Baden 2013, pp. 227-268 (258 f.).

[311] As may be suggested by references which frequently are too narrowly limited to the – though practically most important – interpretation compliant with directives ("richtlinienkonforme Auslegung"): cf. e. g. BGHSt 37 (1991), pp. 333 (336) as to the definition of "waste".

[312] For further details and references to court decisions see *Ambos*, Internationales Strafrecht (fn. 248), pp. 582 ff.; *Hecker*, Europäisches Strafrecht (fn. 272), pp. 329 ff.

[313] As described in mn. 102 ff.

[314] In this way, according to the German Federal Constitutional Court, the former § 220 a GPC had to be interpreted on the basis of relevant international prohibitions covering genocide (NJW 2001, pp. 1848, 1850).

[315] However, interpretations and applications of this kind may also entail problems concerning legal certainty; cf. *Helmut Gropengießer/Helmut Kreicker*, Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen: Deutschland, in: Albin Eser/Helmut Kreicker (eds.), Nationale Strafverfolgung völkerrechtlicher Verbrechen, Band 1, Freiburg 2003, pp. 21–452 (79 f.). Regarding such repercussions of international criminal law on, for instance, the German criminal law cf. also *Thomas Weigend*, Deutsches Völkerstrafrecht? Reflexionen internationalen Strafrechts in Deutschland – und umgekehrt, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 213–232 (214 ff., 232).

[316] As to this subdivision as well as further references concerning the following see *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 105 ff.

standing of comparable legal constructs in national criminal legal systems, and to include them in the interpretation. Apart from terms such as "criminal charge" or "inhuman or degrading treatment or punishment" – as have already been interpreted by the ECtHR using the help of national law[317]–, for the transnational prohibition of double jeopardy essential terms of "the same act/offence" and of having been "finally acquitted or convicted" repeatedly give the ECJ the opportunity to engage with national legal systems that, for their part, may differ from one another.[318]

(ii) Recourse to general principles of law

Supranational criminal law can also be influenced by national law by recourse to general legal principles. As far as one does not yet see an application of foreign law here, as especially in the derivation of legal principles from domestic legal provisions according to Art. 21 para 1 (c) of the Rome Statute, or when referring back to the national sentencing practice according to Art 24 para. 1 sentence 2 of the ICTY Statute,[319] national law – even as a mere tool of interpretation – can already contribute immensely towards the development and growth of supranational criminal law. Within the scope of the ECHR – in which one finds the reference to national commonalities, based on a "deep belief in the fundamental liberties", considered a part of the ECHR – there is particular reference to the ECtHR rulings regarding the age limit in relation to jail terms and regarding the minimum age of criminal responsibility of children.[320] And through the fact that both the fundamental rights of the ECHR and the related rulings by the ECtHR regarding Art. 6 para. 3, are implanted – via Art. 52 para. 3 of the EU Charter of Fundamental Rights – as general principles into the law of the European Union,[321] national ideas about law can influence the development of European Union Law in this indirect way as well.[322] **127**

Of course, all this can only be expected if the judges of supranational jurisdictions – in their legal findings in new fields – neither remain prejudiced within the legal ideas of their own national background nor, on the other hand, literally overlook all other national legal experience in an arrogant manner, but rather open up to these in a comparative manner, and search for the best possible solution.[323] In this way, international criminal courts can become a kind of "laboratory for transnational discourse in criminal law".[324] **128**

(iii) Development of a supranational criminal law dogmatics

This also applies to the – so far probably underrated – role of judicative comparative criminal law in the development of a supranational criminal law dogmatics. Even if this remains, in the end, in the hand of scientific comparative criminal law, through comparative legal reasoning and supporting of decisions – such as, for example, in **129**

[317] Cf: ECtHR of 8 June 1976 mn. 82 (*Engel v. The Netherlands*) and ECtHR of 25 April 1978 mn. 31 (*Tyrer v. UK*); for further references cf. *Sieber*, Strafrechtsvergleichung (fn. 5), p. 106

[318] Cf. – inter alia – EuCJ C-187/01 and C-385/01 *(Gözütok and Brügge)* 11 February2003, C-436/04 *(Van Esbroeck)* of 9 March 2006, C-297/07 *(Bourquain)* of 11 December 2008 (using a comparative law memorandum by the Max Planck Institute, at para. 26).

[319] Cf. mn. 108.

[320] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 106 f. with reference to *W.J.Ganshof van der Meersch*, Die Bezugnahme auf das innerstaatliche Recht der Vertragsstaaten in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, in: EuGRZ 1981, pp. 481–489.

[321] Cf. *Martin Borowsky*, Vor Titel I: Würde des Menschen, mn. 5 ff., and to Art. 52 mn. 29 ff., in: Meyer, Grundrechte-Charta (fn. 282), pp. 99 f. and 792 ff. respectively.

[322] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), p. 107.

[323] Cf. mn. 347 ff.

[324] *Joachim Vogel*, Transkulturelles Strafrecht, in: GA 2010, pp. 1–14 (12).

relation to grounds of excluding criminal responsibility[325] or forms of participation in the offence[326] – important building stones for a theory-based criminal justice system can be delivered.[327] To what extent "evaluative comparative law" is necessary for this and the preceding ways of finding and developing law through legal comparison, will have to be considered in a separate part.[328]

3. Executory comparative criminal law

130 Even if this type of comparative criminal law, as explained at the beginning, is to be understood only as a subordinate part of judicative comparative criminal law and thus not to be put side-by-side as an independent category,[329] it deserves, nonetheless, to be considered specially as "executory".

131 As first worked out by *Christoph Burchard*, its special name-giving character lies in the fact that its field of application is not so much to be found in judicial decision-making processes but rather in the enforcement procedures as they have developed through the cooperation of the EU member states – coordinated by European instruments and occasionally also centralised-institutionalised – especially in the domestic criminal prosecution of border-crossing criminality. That is the reason why, interchangeably, the term "executory comparative criminal *procedure* law" is used as well.[330] Apart from the "European Investigation Order (on criminal matters)" together with the "Framework decision (re:) European Evidence Warrant"[331] – one may include measures here which can be taken to protect the European community's financial interests in a particular member state.[332] Concerning procedure, the focus here is particularly on the gathering and use of evidence as well as relevant exclusionary rules in one or the other of the affected jurisdictions. The necessary investigation and evaluation of the different jurisdictions in question may aim at three functions: firstly, a controlling function to check the appropriateness of foreign criminal procedure codes, and in particular, the functional equivalence of member states' evidence laws;[333] secondly, an individual protective function for the affected citizen; and thirdly, an initiating function for measures of European harmonization and convergence of law.[334]

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[325] Cf., e. g., to "duress" the Dissenting Opinion of Judge *Antonio Cassese* to the Appeal Judgement in ICTY-IT-96-22-A *(Erdemovic)* of 7.10.2007, paras. 11 ff.

[326] Cf., e. g., ICTY-IT-97-34-T *(Stakic)* Trial Judgment, 31.7.2003, paras. 438 ff., ICC-01/04-01/06 *(Lubanga)* Decision on the confirmation of charges, 29.1.2007, paras. 317 ff., and – especially concerning the reasoning -supported by comparative law – of indirect perpetration by virtue of an organisational power apparatus – ICC-01/04-01/07 *(Katanga & Chui)* Decision, 30.9.2008, paras. 480 ff., with a critical review by *Burghardt*, Völkerrechtliche Rechtsprechung (fn. 108), pp. 245 ff.; furthermore *Kai Ambos*, Treatise on International Criminal Law, Volume I: Foundations and General Part, Oxford 2013, pp. 154 ff.

[327] Cf. *Paul Roberts*, Comparative Law for International Criminal Justice, in: Örücü/Nelken, Handbook (fn. 9), pp. 329–370 (356 ff.); *Yuval Shany*, Seeking Domestic Help. The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals, in: JICJ 11 (2013), pp. 5–26, and especially concerning the influence of the German criminal law doctrine on the case law of the ICC *Weigend*, Deutsches Völkerstrafrecht (fn. 315), pp. 230 ff.

[328] Part II. D (mn. 173 ff.).

[329] Cf. mn. 99.

[330] *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275 f., 286 ff.

[331] More closely discussed in *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 278 ff.

[332] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), p. 102. Cf. also mn. 167 f.

[333] To that extent, this function can indeed also be seen as a case of "evaluative-competitive comparative criminal law", as described in mn. 200 ff. and observed by, *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 290.

[334] Cf. *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 287, 290, 298.

Insofar as executory comparative criminal procedure law is thought to have the special feature that through it – in contrast to judicative comparative criminal law which is directed towards "examination of one's own law" – real "evaluation of foreign law" is to take place,[335] this can actually only be given moderate importance. Not only that, on the one hand, court authorities – side-by-side with police- and other administrative authorities – may be involved in an "observation and evaluation of foreign law" during executory investigation-, recognition- and enforcement procedures;[336] on the other hand, other forms of judicative comparative criminal law usually cannot be content with an "examination of own law" either, but will have to engage with the investigation and interpretation of foreign law – as, for example, in cases of "dual" or "mutual criminality".[337] Still, executory comparative criminal law – even if once more only to a degree – may stand out from this, insofar as the comparison of the legal culture of the "executorial actors" involved may play a greater role.[338] 132

C. Legislative Comparative Criminal law

As soon as judges not only interpret law but, by taking foreign law into account, begin to reformulate, convert and adapt in order to modernize, optimize and harmonize existing law, they have really stepped over the boundary towards the creation of law, and, in this way, entered the area that basically already belongs in the domain of the legislator – and, accordingly, could be called "legislative comparative law".[339] Occasionally, this legal-political orientation is actually considered to be the most important function of comparative law.[340] Even when it is not explicitly labelled as such, the collection of laws – in what appears to be a purely museum-like way – right up to apparently pure, basic research may be based, in the end, on a reform-political motivation – similar to what may be assumed as far back as the comparative legal studies by *Plato* and *Aristotle*.[341] This legislative function is not to be outdone in clarity and binding character where legislative authorities are formally compelled to engage in comparative law investigations, such as happened in England through a general mandate which is, in its way, probably unique.[342] 133

[335] *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 287, 288.

[336] As also conceded by *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 287. In the same differentiating way, "courts, prosecutors or other authorities engaged in [border crossing] cooperation" find themselves in *Vogel*, Instrumentelle Strafrechtsvergleichung (fn. 77, at p. 206 fn. 4) as part of a possible "executory" comparative criminal law.

[337] Cf. supra mn. 111 ff.

[338] Cf. *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 301 ff., and infra mn. 305.

[339] As already submitted in *Eser*, Comparative Legal Research (fn. 4), pp. 89, and in particular adopted by *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 286; *Hauck*, Funktionen (fn. 55), pp. 260, 270; *Perron*, Operativ-funktionalistisch (fn. 87), p. 123 and *Wörner*, Strafrechtsvergleichung (fn. 87), p. 140,

[340] Cf., e. g., *Jescheck*, Strafprozessreform (fn. 133), p. 765, and fundamentally *Ulrich Drobnig/Peter Dopffel*, Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber, in: RabelsZ 46 (1982), pp. 253–299. *Sieber* als refers to comparative law as a "central instrument of legal policy" (in: Grundlagen; fn. 66, p. 13), while under the category "legal policy" the development and reform of criminal law is – subsequent to "basic research" dealt with before – categorized as "the second basic task of comparative criminal law" only (in: Strafrechtsvergleichung, fn. 5, p. 95).

[341] Cf. mn. 6, 97.

[342] Thus stated in Section 3 (1) des Law Commissions Act von 1965,: "It shall be the duty of each of the commissioners […] to obtain such information as to the legal system of other countries as appears to the commissioners likely to facilitate the performance of any of their duties", cited by *Jescheck*, Strafrechtsreform (fn. 292), p. 148. To an earlier forerunner of this legislative task cf. – according to *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 16 – the self-imposed obligation in the British "Fourth Report of Her

134 In order to establish a certain structure for the variety of legislative comparative law, it is advisable to scrutinize the different objectives (1) and different levels and scopes (2) each specially. Just by doing this, it will become apparent that the field of application may vary depending on the legislative motive.

1. Aims and tasks

a) Optimization and modernization of one's own national criminal law

135 At first glance, one might think that legislative comparative law could not (possibly) be directed towards anything but the optimization and modernization of the existing law. Why otherwise would one want to change criminal law, if not to achieve an improvement? However, not only does the question about better or worse depend on the respective legal-political perspective, it can also not be excluded that even another country's questionable legal deficits might be cited in order to be able to better justify deficits in one's own law. One only needs to consider the death penalty; some countries, backward in their criminal law, believe that they can hold onto this – in spite of all international attempts to abolish it – not least because they can refer to the practice of a country like the United States of America which is judged to be very progressive. Such a *reformatio in peius* can definitely not be the motto of legislative comparative criminal law. Even if some law reforms are only meant well, but are not really good, the comparative law used for this – if it wants to satisfy its ethical research responsibility[343] – has to be guided at least in its tendency towards intentions for improvement, and not change for the worse.

(i) Optimization

136 Comparative criminal law may contribute to optimization through encouraging the critical examination of domestic law, drawing attention to possibly better rules in foreign legal systems and, thus, setting reform processes in motion.[344] This may be prompted by an internal realization of domestic deficits, and, from the outside, by legal improvements of model character in the foreign environment, right up to the ambitious effort to be presented in the best light with respect to the search for the best possible standard of law in international "benchmarking".[345]

137 Of course, this pressure shows itself more strongly and is more difficult for countries, that have remained backward in relation to the rule of law; it is then difficult for them to stand up for themselves in the face of higher international standards – and the foreign criticism that goes hand-in-hand with that.[346] The focus here may, but does not necessarily have to be, on an extensive redesigning or fundamental change in direction – concerning, for example, the strengthened position of the accused in the investigative proceedings – following the American model.[347] Rather, an optimization can merely

Majesty's Commissioners of Criminal Law 1839", Another question – not answerable here – is, of course, to what degree this task is in fact put into practice.

[343] Cf. mn. 351 ff.

[344] Cf. *Hilgendorf*, Einführung (fn. 6), p. 18; *Neumayer*, Rechtssysteme (fn. 10), p. 31; *Rösler*, Erkenntnisinstrument (fn. 10), p. 1087, and concerning similar reasons for the import of foreign law *Karl-Ludwig Kunz*, Die Kulturgebundenheit des Strafrechts und seine Übertragbarkeit in fremde Rechtskreise, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 145–167 (146 ff.).

[345] Cf. *Sieber*, Strafrechtsvergleichung (fn.5), pp. 93, 99, 110.

[346] Cf. J*escheck*, Strafrechtsreform (fn. 292), p. 137.

[347] See *Albin Eser*, Aussagefreiheit und Beistand des Verteidigers im Ermittlungsverfahren. Rechtsvergleichende Beobachtungen zur Rechtsstellung des Beschuldigten, in: ZStW 79 (1967), pp. 565–623 = www.freidok.uni-freiburg.de/volltexte/3700.

consist of legal-technical improvements or selective corrections, such as, for example, of a more effective protection against child pornography and stronger provider responsibility in the internet.[348]

(ii) Modernization

Reaching further than such accidental and selective improvements, the focus of modernization of domestic criminal law lies mostly on reforms which might be initiated by a more fundamental political reorientation, such as the development of a regional or universal criminal policy[349], and where one hopes for insights and inspiration from good foreign examples – but also looks at deterrent experiences. When "law develops mainly by borrowing", as is claimed in a frequently quoted dictum by *Alan Watson* looking at the development of civil law,[350] then this applies probably to all more extended phases of reform in criminal law – whether they have been politically caused, or inspired by a new "Zeitgeist". **138**

An example in support of this is – looking at Germany – the reform of criminal procedure which was started more than 150 years ago; without English and French models, the 19th century "liberal criminal procedure" is not imaginable.[351] While, during this phase, Germany was mainly an importer of foreign law, it, in turn, also became an exporting country; especially Japan after the opening to the West during the Meiji reform in the middle of the 19th century, as well as Turkey after the post-Ottoman, Kemalist reforms of the early 20th century, borrowed extensively from German criminal law and procedure.[352] **139**

It was characteristic for these modernizations that the adoption of foreign law was reform-politically intended because it promised contact with – in terms of civilization – more progressive countries. This does not need to be the case, though. Even if the European criminal law that was introduced into African colonies might have been in many aspects superior to the less developed traditional tribal law, it was not necessarily therefore welcomed by the indigenous populations, as it was usually forced on them against their will.[353] **140**

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[348] Regarding a comparative experts' report obtained for this purpose by the German Federal Ministry of Justice cf. *Ulrich Sieber*, Kinderpornographie, Jugendschutz und Providerverantwortlichkeit im Internet: Eine strafrechtsvergleichende Untersuchung, Bonn 1999.

[349] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), p. 90.

[350] *Alan Watson*, The Making of the Civil Law, Cambridge/Mass. 1981, p. 181.

[351] For details see *Jescheck*, Strafprozessreform (fn. 133), pp. 765 ff., and *Franz Streng*, Strafrechtsexport als Strafrechtsimport, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 1–22 (2 ff.). Cf. also the references in mn. 35 to (29).

[352] As to these transfer processes cf. – inter alia – *Karl-Friedrich Lenz/Robert Heuser*, Strafrechtsentwicklung in Japan und der Volksrepublik China, Freiburg 1995, pp. 4 ff., and *Ayhan Önder*, Die Entwicklung und Rezeption des Straf- und Strafverfahrensrechts in der Türkei, in: ZStW 70 (1958), pp. 31–322, respectively; concerning subsequent difficulties in the implementation process in Turkey see *Wörner*, Strafrechtsvergleichung (fn. 87), p. 138 as well as recent reforms see *Adem Sözüer*, 10 Jahre Türkische Strafrechtsreform – Hoffnungen und Enttäuschungen, in: Björn Burkhardt et al. (eds.), Scripta amicitiae. Freundschaftsgabe für Albin Eser zum 80. Geburtstag, Berlin 2015, pp. 143–157; *Silvia Tellenbach* (ed.), Das neue türkische Straf- und Strafprozessrecht, Berlin 2008; informative also *Leonidas Kotsalis*, Die Einführung des deutschen Strafrechts in Griechenland, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 93–103.

[353] Cf. *Upendra Baxi*, The colonialist heritage, in: Pierre Legrand/Roderick Munday (eds.), Comparative Legal Traditions and Transitions, Cambridge 2003, pp. 46–75. As to the different legal traditions of the various colonial powers, espcially concerning the indigenous peoples of Latin America, see *Emiliano Borja Jiménez*, Annäherung an das interkulturelle Fundament des Strafrechts, in: Manfred Heinrich et al. (eds.), Strafrecht als Scientia Universalis. Festschrift für Claus Roxin zum 80. Geburtstag, Berlin 2011, pp. 55–70. The transfer of German criminal law by Japan to Korea, too, was felt to be an "indirect reception imposed

141 In the context of the criminal law reforms motivated by the idea of the rule of law, as became necessary after regime changes in formerly socialist countries,[354] western European criminal codes and criminal procedural codes could be used as models.[355] However, even in these reform processes not every comparative law offer was necessarily welcome, especially in situations, when a country in need of reform was put under pressure from the outside to accept the seemingly better law of another country. This could be observed during the problematic introduction of the adversarial procedural system of Anglo-American origin into the different continental-European procedural structure.[356]

142 Yet another course may be taken in transfer processes due to migration, as it may happen when large groups of immigrants from the same country bring their native criminal law in a kind of "piggyback" with them and, even when reforming their law, continue to orientate themselves on their "parent law" (in terms of the country they emigrated from) – as is probably the case for the development in Latin America.[357]

143 Therefore, one can probably not speak of comparative criminal law orientated towards modernization, without being conscious of possible differences between voluntarily imported, brought along, and forcibly introduced foreign law.[358]

(iii) Stockpile of solutions – (no) self-service shop

144 In addition, an important goal has been set for legislative comparative criminal law in the idea of the creation of a "stockpile of solutions" – as frequently demanded.[359] In this case, the focus may be on both the satisfaction of a current legislative demand as well as

from the outside" there: *Young-Whan Kim*, Rezeption des deutschen Strafrechts in Korea, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 59–74 (63); cf. also *Byung-Sun Cho*, Konkretisierungen der deutschen Strafrechtsdogmatik in Korea. Grenzen und Fortentwicklungen der Rezeption, in: Streng/Kett-Straub, Kulturvergleich (fn. 112), pp. 75–92 (77).

[354] What is to be taken into consideration in this context, though, is the fact that these countries already had to follow certain political demands – by way of comparison – when they introduced the socialist criminal justice system, cf. *Jescheck*, Strafrechtsreform (fn. 292), p. 135.

[355] Cf. the various country reports in *Albin Eser/Günther Kaiser/Ewa Weigend* (eds.), Von totalitärem zu rechtsstaatlichem Strafrecht. Kriminalpolitische Reformtendenzen im Strafrecht osteuropäischer Länder, Freiburg 1993; informative regarding potential internal disputes during reform processes *Ewa Weigend*, Das neue polnische Strafgesetzbuch von 1997, in: ZStW 110 (1998), pp. 114–142. Regarding China see *Zuo Weimin/Fu Xin*, Legal Transplant in the Criminal Procedure Law of China. Experiences and Reflections, in: Bruce Ackerman et al. (eds.), Visions of Justice. Liber Amicorum Mirjan Damaška, Berlin 2016, pp. 437–455.

[356] *Axel Schwarz/Sarah Degen*, Zwischen angloamerikanischem Sendungsbewusstsein und kontinentaleuropäischer Tradition: Das neue Strafprozessrecht in Bosnien und Herzegowina, in: ZStW 117 (2005), pp. 458–474.

[357] Cf. *Jescheck*, Strafrechtsreform (fn. 292), pp. 159 f. Cf. also *Borja Jiménez*, Interkulturelles (fn. 353); *Montiel*, Lateinamerikanische Strafrechtswissenschaft (fn. 179).

[358] In this respect, it is regrettable that a comparative analysis of the various modes of import of foreign law, as once envisaged, is still missing; at any rate, first approaches to such a comparison can be found in *Michele Graziadei*, Comparative Law and the Study of Transplants and Receptions, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 441–475 (455 ff.); cf. also *Heike Jung*, Recht und kulturelle Identität – Anmerkungen zur Rezeption, Transplantation und Diffusion von Recht, in: ZStW 121 (2009), pp. 467–500 (471) and the references in mn. 35 to (29).

[359] As probably first indicated with regard to the area of private law by *Zitelmann*, Rechtsvergleichung (1900, fn. 35), p. 13, beyond that vividly described by *Rabel*, Rechtsvergleichung (1924, fn. 38), p. 9, and finally also emphasized for comparative criminal law especially by *Jescheck*, Strafrechtsvergleichung (fn. 3), 351 p. 42. Cf. also *Kaiser*, Vergleichende Kriminologie (fn. 133), p. 84, and recently *Wolfgang Frisch*, Strafrechtsvergleichung und nationales Recht. Zur Bedeutung der Strafrechtsvergleichung für Gesetzgebung und Rechtsanwendung, in: Thomas Elholm (ed.), Ikke kun straf: Festskrift til Vagn Greve, Kopenhagen 2008, pp. 139–156 (139); *Perron*, Operativ-funktionalistisch (fn. 87), p. 122. Cf. also mn. 70, 207.

the anticipation – *eventualiter* – of possible future reform plans. So that the legislators will not be left empty-handed in such cases, they are meant to be able to fall back onto a selection of alternative solutions which comparative law puts at their disposition after already having "ordered [the alternatives] systematically, assessed practically and evaluated critically"[360] – while the final decision remains, of course, with the legislators.[361]

This freedom of choice given to the legislator may, however, tempt into abuse, sort of like a "*self-serve shop*", where the legislator picks out of rich offerings of different models the one that appears to fit best into the legal-political program. In doing so it is easy to overlook – or perhaps consciously to ignore – that one might find even better alternatives or, additionally, necessary building blocks amongst the apparent "rejects". Like the choice from a "buffet dinner"[362] where one person enjoys food that does not agree with another, but where neither the one nor the other can be picked out with any certainty without unprejudiced tasting, the legislative choice of a foreign model also requires that its compatibility with one's own legal system is tested – by way of consideration of political, cultural and other social commonalities or differences.[363] **145**

b) Transnational adaptations of criminal law

While the preceding objectives of legislative comparative law have in common that the comparative work is predominantly undertaken voluntarily with the goal of improving or modernizing the domestic criminal law, the focus in the following is on cases where transnational instructions are the reason for legislation that bases itself on comparative law. Certainly, the national legislators still remain autonomous even when they have to implement a supranational guideline into national law. However, they are subject to certain conditions, which may also prescribe a certain direction for comparative law – be it even just insofar as it has to be discovered how any directives might be best transposed into national law – or, depending on the legal-political position – whether this is done to a maximum or only to a minimum extent. How extensive the investigation is meant to be, may vary considerably, thus one has to distinguish – with fluid transitions – between adaptation, harmonization or unification of law.[364] **146**

(i) Assimilation

The focus of assimilation based on comparing law involves that – in order to take into account an international obligation of joint criminal prosecution – the member states **147**

[360] *Jescheck*, Strafprozessreform (fn. 133), p. 765; cf. also *Örücü*, Developing (fn. 78), p. 55: With regard to thus opened options to experiment with new alternatives and solutions concerning the development of building blocks for supranational criminal law see *Ulrich Sieber*, Die Zukunft des europäischen Strafrechts, in: ZStW 121 (2009), pp. 1–67 (15).

[361] Cf. also mn. 322 ff., 338 ff.

[362] To use this image of *Weigend*, Criminal Law (fn. 66), p. 262,

[363] Cf. also mn. 304 ff., 329 ff., 333 ff.

[364] As to my understanding of these occasionally differently-defined terms see *Albin Eser*, Current Perspectives of Transnational Criminal Law, in: Bundesministerium der Justiz (ed.), Rechtsraum Europa. Perspektiven für die Harmonisierung/The European Area of Justice. Perspectives for Harmonisation, Berlin 2002, pp. 53–94 = www.freidok.uni-freiburg.de/volltexte/4758; *idem*, Von der Konkurrenz zur Kongruenz nationaler Strafrechtsordnungen. Wege zur Rechtsannäherung in Europa, in: Poinikos Logos 5/2002, pp. 2157–2170 = www.freidok.unifreiburg.de/volltexte/4248; as to differing terms and their use in European law see *Hecker*, Europäisches Strafrecht (fn. 272), pp. 219 ff., 257 ff.; *idem*, Harmonisierung, in: Sieber/Brüner/Satzger/v. Heintschel-Heinegg, Europäisches Strafrecht (fn. 69), pp. 272–293; cf. also *André Klip*, Harmonisierung des Strafrechts – eine fixe Idee?, in: NStZ 2000, pp. 626–630; *Kunz*, Kulturgebundenheit (fn. 344), pp. 146, 150 ff.; *Klaus Tiedemann*, Gegenwart un d Zukunft des europäischen Strafrechts, in: ZStW 116 (2004), pp. 945–958 (949 ff.).

bring the respective elements of an offence and the legal consequences as closely together as possible. Such a directive can, for example, be found in Art. 325 of the Treaty on the Functioning of the European Union (TFEU) regarding the protection of EU financial interests against fraudulent violation. If such a parallel reconciliation of national criminal provisions is meant to be both without loopholes and as integrated as possible, and if one has to take into account that the offence definition constituting fraud may be of different breadth or assume diverse elements in different legal systems, then comparative law has to clarify the respective differences and coordinate their redressal in a reciprocal way.[365]

(ii) Harmonization

148 One can speak of harmonization when the criminal legal systems of different countries – going beyond individual areas of prosecution – are meant to be made compatible with one another as far as possible, or, if an optimization is aimed at being as uniform as possible. Of interest here is less the homogeneity, but rather the functional equivalence, in view of the intended goal.[366]

(iii) Unification

149 Beyond those steps of adaptation where the legal systems in question maintain their national independence, unification goes further insofar as different national laws would be either completely standardized in a uniform manner, or may even be absorbed into a higher legal system. Even if this may be desirable as a long-term objective for specific, traditionally similarly formed regions – as was, by the way, suggested by *Graf Gleispach* and *Franz v. Liszt* as long as about 100 years ago[367] –, the time is probably not ripe for this now, even in the European legal sphere.[368]

c) The development of universal and supranational criminal law

150 The preceding forms of legislative comparative law are already transnational in the sense that foreign legislation is influenced across borders – even if mostly from the top down. While this is primarily concerned with national law, the focus here is on the creation and design of supranational law.[369] This, again, is possible in different ways, with the following gaining in importance:

(i) Identification of the highest legal principles

151 First steps can be made through the identification of topmost legal principles through comparative law, that is to say, principles which have found extensive acceptance on a

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[365] Cf. mn. 311 ff.

[366] In the sense of such a minimum harmonization ("Mindestangleichung") cf. *Hecker*, Europäisches Strafrecht (fn. 272), pp. 273 f. Thoroughly the possible development of "cooperation models" in the European area see *Sieber*, Zukunft (fn. 360), pp. 17 ff.; *Thomas Weigend*, Zur Frage eines "internationalen" allgemeinen Teils, in: Bernd Schünemann et al. (eds.), Festschrift für Claus Roxin zum 70. Geburtstag, Berlin 2001, pp. 1375–1399.

[367] *Graf Gleispach*, Strafrechtsvereinheitlichung in Deutschland und Österreich-Ungarn, in: DStrZ 1916, Sp. 107–117; *Franz v. Liszt*, Einheitliches mitteleuropäisches Strafrecht (fn. 118). For a critical reminder of this euphoric "Up to the unification of criminal law" by *Gleispach* (p. 117) – that appears to have been not completely free of chauvinist second thoughts – see *Michael Kubiciel*, Einheitliches europäisches Strafrecht und vergleichende Darstellung seiner Grundlagen, in: JZ 2015, pp. 64–70.

[368] Cf. *Eser*, Perspectives (fn. 364), pp. 33 ff.; *Kubiciel*, Europäisches Strafrecht (fn. 367), pp. 67 ff.; *Pieth*, Äquivalenz (fn. 87), p. 478, and *Walter Perron*, Strafrechtsvereinheitlichung in Europa, in: Dieter Dörr/Meinrad Dreher (eds.), Europa als Rechtsgemeinschaft, Baden-Baden 1997, pp. 135–154 (152 ff.); a bit more confident *Perron,* Perspektiven der europäischen Strafrechtsintegration, in: Michael Hettinger et al. (eds.), Festschrift für Wilfried Küper zum 70. Geburtstag, Heidelberg 2007, pp. 429–441 (439 ff.).

[369] As to the different levels and forms of transnational law cf. mn. 112 fn. 270. For details to "supranational models" in the European area cf. *Sieber*, Zukunft (fn. 360), pp. 22 ff.

national level and thus can deliver national as well as transnational standards for further legal development.[370] This model function is of importance both on the substantive-legal level – for example, for the recognition of the principles of legality and personal guilt – and in the procedural area – for instance, for the development of the rules of fairness established in general declarations of human rights.[371]

(ii) Preparation of international conventions

Tough initially perhaps only considered selective, as dealt with before, the establishment of topmost principles of law can at the same time serve as important preliminary work for the expansion and strengthening of international conventions and agreements. Renowned examples for this are the prohibition of genocide[372] and the prohibition of cruel, inhumane and degrading punishment – work still needs to be done to put this into more concrete terms.[373] Not only do such world-wide elevations of more humane criminal justice need concrete comparative law based coordination with respect to the already achieved legal level, as well as some encouragement to progress together, but there is also the need to find – with regard to terminology and legal-technical matters – a transnationally operational set of instruments.[374] In this sense, although not without pathos, the special responsibility of comparative law has been particularly invoked the development of international criminal law.[375] **152**

(iii) Optimizing international criminal justice

Such efforts may find their crowning conclusion in the establishment and promotion of international criminal justice. After this had happened initially in the form of geographically limited, temporary international Ad hoc-tribunals for the prosecution and sentencing of crimes against international law in the former Yugoslavia (ICTY) and Rwanda (ICTR), to which were added other similarly limited, nationally-internationally mixed courts for other regions also marked by the most horrendous violations of international law, the establishment of a permanent international criminal court, as was achieved by the Rome Statute for the ICC, was basically only a question of time.[376] **153**

What important role comparative law can play here, could hardly be demonstrated better than by having a look at the different conditions of emergence of the Ad hoc **154**

[370] This supply of components, emphasized by *Neumayer*, Rechtssysteme (fn. 10), p. 31 as essential for the development of public international law, is no less significant for criminal law. Cf. also mn. 152.

[371] Cf. *Jescheck*, Strafrechtsreform (fn. 292), pp. 137 f.

[372] Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

[373] As worldwide proclaimed in the prohibition of torture in Art. 5 of the Universal Declaration of Human Rights of 1948 and expanded by Art. 7 of the International Covenant on Civil and Political Rights of 1966 and supplemented in Arts. 3 and 5 of the European Convention on Human Rights of 1950 for the European area. With regard to these and other international agreements, designed to provide both improved legal protection and humanization of those inhumane punishments still existing in some places, cf. the comprehensive documentation by *Christine Van den Wyngaert* (ed.), International Criminal Law. A Collection of International and European Instruments, 3rd ed. Leiden/Boston 2005, and the overview by *Jescheck*, Strafrechtsreform (fn. 292), pp. 141 ff.

[374] Cf. *Örücü*, Developing (fn. 78), p. 55 f.

[375] Thus *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 31, when possibly remembering the outrageous abuses of criminal law in war time Germany, sees comparative law "as the objective conscience of mankind, called upon to secure justice through its great postulates of impartiality of the courts, equality of perpetrators before the law and proportionality of guilt and punishment, against the repercussions of "unconditional hatred" [with reference to *Russell Grenfell*] during the time of war: partisanship, unilateralism and excessiveness".

[376] Cf. *Roberts*, International Criminal Justice (fn. 327), pp. 340 ff., 354 ff. For details with regard to this development, that had already started with the Versailles Peace Treaty, and in some respect before that, see *Ambos*, Treatise I, (fn. 326), pp. 1 ff.

ICTY and ICTR compared with the ICC. While the urgency with which the Yugoslavia and Rwanda Tribunals had to be established left little time for sound preparation, the permanent International Criminal Court could afford a longer lead-in time. Accordingly, the Statute that is authoritative for the work of the ICTY – and is almost the same in content for the ICTR – is, with 34 articles, extremely short; it contains – over and above jurisdictional provisions – very little in regard to the general requirements of criminal liability, and not much more in regard to procedure. In contrast, the Rome Statute with its 129 articles has a lot more to say, both substantive-legally and procedurally. In this context, the comparative law coaching would have to be pointed out; without it, Part 3 of the Rome Statute, which is devoted to the "General Principles of Criminal Law", would probably have remained even more rudimentary. Because, after the ICC-draft by the International Law Commission had essentially been limited to more formal aspects of jurisdiction, and was – in this context – very restrained as far as procedural rules were concerned, the preparation of essential elements of criminal liability – for example, as related to intent and error, attempt and participation, self-defence and other grounds for excluding criminal responsibility – only got underway when scientific circles took the initiative and put forward alternative drafts.[377]

155 These different starting conditions became apparent in the content of the procedural rules. While the predominantly, if not even one-sidedly common-law origin is widely assumed in the articles for the ICTY and ICTR, few as there are, stronger influences from the continental-European criminal law tradition become apparent in the Rome Statute. Similar shifts of emphasis can also be observed in the Rules of Procedure and Evidence (RPE) that complement the Statute. This can already be seen in the different role of the judiciary. After the ICTY and the ICTR had to get to work virtually without procedural directives, the judges were obliged to establish the necessary procedural rules for themselves. In this law-creating task and opportunity, which had to be undertaken in regular plenary sessions, it was inevitable that the rules were initially dominated by the legal ideas of that group of judges which, in using this opportunity, could put the most complete and quickly usable compendium on the negotiating table: and that was, after all, achieved by the then mainly common law-based group of judges – above all in the person of the later ICTY president *Gabrielle Kirk McDonald*.[378] However, later on things changed: The more unsuitable the adversarial procedural structure of the common law turned out to be in its practical application in the ICTY – at least for complex international criminal procedures –, the more instructional elements from modern continental-European procedural law – often polemically discredited as "inquisitorial" – gained entry into the judicial-legal Rules of Procedure and Evidence.[379]

156 The RPE for the ICC did not have to go through such a process of change. On the one hand, not in a formal sense, because they did not come about through judicial plenary decisions, but were created by the competent bodies of the Rome Statute in a procedure

[377] In view of my own involvement in these endeavours, reference may be made to the so-called Siracusa-Freiburg-Chicago-Draft: cf. *Albin Eser*, Individual Criminal Responsibility, in: Antonio Cassese et al. (eds.), The Rome Statute of the International Criminal Court: A Commentary, vol. I, Oxford 2002, pp. 767–822 (767 f.) = www.freidok.uni-freiburg.de/volltexte/3909.

[378] Cf. *Albin Eser*, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in: Bert Swart/Alexander Zahar/Göran Sluiter (eds.), The Legacy of the International Criminal Tribunal for the former Yugoslavia, Oxford 2011, pp. 108–148 (119) = www.freidok.uni-freiburg.de/volltexte/9713.

[379] For details see *Albin Eser*, Changing Structures: From the ICTY to the ICC, in: Ackerman (fn. 355), pp. 213–234 (216 ff.); cf. also *Vladimir Tochilovsky*, The Nature and Evolution of the Rules of Procedure and Evidence, in: Karim A. A. Khan/Caroline Buisman/Christopher Gosnell (eds.), Principles of Evidence in International Criminal Justice, Oxford 2010, pp. 157–184 (159 ff.).

resembling a legislative process, and on the other hand, because the experiences gained from ICTY practice could be taken into consideration when the ICC-RPE were drawn up. This happened on a comparative law basis and with the participation of commission members from different legal circles.[380] In doing so, the participants had to familiarize themselves with the possibly divergent legal ideas and different styles of thinking of the respective negotiation partners – and put themselves in the others' position as well, because "only the person who knows the cultural preconditions of the other side can negotiate sensibly".[381] This sensitivity, however, cannot be reached without comparative law.

2. Levels and ranges of regulations

As can be seen merely from the list of possible objectives of legislative comparative law, they have different scope. This in turn may depend on the level of regulations on which a legal reform is to take place. Even if certain repetitions cannot be avoided, it appears advisable that an initial overview of the variety of different levels and scopes be obtained. In doing this, it will become apparent that legislative comparative law has in common with theoretical and judicative comparative law that it is in demand on all levels – be they national or transnational in nature. With regard to the respective scope, however, there are certain differences: while judicative comparative criminal law deals exclusively with individual questions, legislative comparative criminal law may extend from selective to global fields of comparison – similar to what was noted in relation to theoretical micro- up to macro-research.[382] The following comments present firstly the differences in scope as they may play a role at all levels of regulation. **157**

a) Differences in scope

(i) Selective changes of law

In ascending order from small- to large-scale, even selective changes in criminal law may be influenced by a comparison with foreign criminal law or international discussions about reform. An example, that was once at the centre of heated discussion in Germany, is § 177 GPC which – after cutting out the former extramarital requirement – was extended to contain rape within marriage.[383] That such individual changes may occur not only by deleting or adding a word concerning the elements of an offence definition, is demonstrated by the equal treatment of foreign and domestic office bearers in cases of bribery – this goes back to international agreements.[384] The above mentioned fight against child pornography and the increase in provider responsibility in the internet have to be put in the same category.[385] **158**

(ii) Structural changes

One can probably start to speak of *partial* structural changes when, for example, the criminal-procedural duties on cautioning are extended according to the American **159**

[380] Cf. *Eser,* Changing Structures (fn. 379), pp. 225 ff, *Tochilovsky* (fn. 379), p. 158.

[381] As correctly stated by *Hilgendorf*, Einführung (fn. 6), p. 18, Cf. also mn. 301, 304 ff., 347 f.

[382] Cf. mn. 60 ff.

[383] By the 33. Strafrechtsänderungsgesetz (Criminal Law Amendment Act) of 1 January 1997 (BGBl. I 1607); cf. Bundestags-Drucksache VI/3521 p. 39 and *Barbara Paetow*, Vergewaltigung in der Ehe. Eine rechtsvergleichende Untersuchung unter besonderer Berücksichtigung des Rechts der Vereinigten Staaten von Amerika, Freiburg 1986.

[384] By Art. 2 § 1 Gesetz zur Bekämpfung internationaler Bestechung (Law on Combating International Corruption) of 10 September.1998 (BGBl. II 2327, III 450-28.); cf. *Günter Heine*, Straftaten im Amt, in: Schönke/Schröder (fn. 246), 27th ed. München 2006, Vorbem § 331, mn. 1 c, 1 d.

[385] Cf. mn. 136 to fn. 348.

model,[386] or when fining is switched to the Scandinavian day fine system (by which, after a fictive time of imprisonment is fixed, the fine is calculated according to a daily rate).[387] The adjustments in the right to abortion – influenced by comparative law – away from an "indication model" (requiring third-party approval based on certain grounds for terminating the pregnancy) – to a "time limit model" (allowing termination in the first period of pregnancy), or an in-between "consultation model"[388] – can also be counted among such "software-like" changes.

160 Going even further, one can speak of *"hardware – like" structural changes* when, for example, the system of criminal proceedings is converted from a traditionally "inquisitorial" to an Anglo-American "adversarial" one, as happened for example in Italy.[389] In addition, different measures – based on foreign models – to speed up German criminal proceedings,[390] are to be included here.

161 Such extensions may, in the end, lead to a *large-scale* system *replacement* of the traditional criminal legal system, or of essential parts of it. In the form of such "legal transplants"[391], Japan's substantive criminal law, for example, is modelled on German law; in the same way, Turkey adopted the German Code of Criminal Procedure.[392] Legislative drawing on a single foreign source is typical for this type of reform.

(iii) Model Penal Codes

162 Instead of following such a bilateral single-track process, fundamentally new codifications are also conceivable on a multilateral basis: this can be achieved particularly through the adoption of model criminal law codes that have been developed by comparative law; an example is the American "Model Penal Code" for the area of common law.[393] There are also certain models for Latin America for this, such as the General Part (presented in 1971) of a "Código Penal Tipo para Latinoamérica", which – through its preparatory work -served as the basis for the criminal law reforms in Costa Rica (1970), Bolivia (1972) and El Salvador (1971),[394] or the "Proyecto de Código Procesal Modelo para Ibéroamerica" of 1988.[395] In addition, from more recent times, the "Corpus Juris" introducing penal provisions for the protection of the financial interests of the European Union[396] as well as the "Model Codes for Post-Conflict Criminal Justice"[397] ought to be mentioned.

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[386] Cf. mn. 136 to fn. 347.

[387] As to the rather variable history of this new model in different countries cf. *Gerhardt Grebing*, Probleme der Tagessatz-Geldstrafe, in: ZStW 88 (1976), pp. 1049–1115 (1049 ff.). As to further comparative law reform endeavours in the area of sentencing cf. *Jescheck*, Strafrechtsreform (fn. 292), pp. 150 ff.

[388] More closely see *Eser/Koch,* Abortion (fn. 166). pp. 29 ff., 244 ff., 295 ff.; cf. also mn. 59 to fn. 166 and mn. 119 to fn. 297.

[389] *Elisabetta Grande*, Italian Criminal Justice: Borrowing and Resistance, in: American Journal of Comparative Law 48 (2000), p. 227.

[390] Cf. *Jescheck*, Strafprozessreform (fn. 133), pp. 777 ff.

[391] This terminology probably first used by *Alain Watson;* further thereto and to alternative terms such as "reception" or "transposition" cf. *Heike Jung*, Kulturelle Identität (fn. 358), pp. 467–500 (471 ff.). Cf. also the references in mn. 35 to (29).

[392] Cf. mn. 139.

[393] Cf. *Jescheck*, Strafrechtsreform (fn. 292), p. 148.

[394] Cf. also *Jescheck*, Strafrechtsreform (fn. 292), pp. 149 f.

[395] Cf. *Javier Llobet Rodríguez*, Die Unschuldsvermutung und die materiellen Voraussetzungen der Untersuchungshaft. Ein Beitrag zur Strafprozessreform in Lateinamerika, Freiburg 1995, pp. 5 f.

[396] Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européene, directed and edited by *Mireille Delmas-Marty*, Paris 1997; cf. also Barbara Huber (ed.), Das Corpus Juris als Grundlage eines Europðischen Strafrechts, Freiburg 2000.

[397] Edited by *Vivienne O'Connor/Colette Rausch*, Washington, D.C. 2007.

(iv) New transnational judiciaries

On a vertically large-scale, the establishment of new jurisdictions, such as recently the different inter- and supranational courts of criminal justice, can be considered.[398] 163

b) Different levels of regulation

As started to become apparent above, the scope of legislative comparative criminal law is not, from the start, fixed at a particular level of regulation – so that, for example, "the higher the level" on which it was to be done meant "the larger the scale". Rather, comparative law, directed towards legislation, may be in demand on totally different levels. The scope may be even greater, the lower the level of regulation which is in need of reforms underpinned by comparative law, and vice versa. Even when there are fluid transitions, four levels of legislative-oriented comparative criminal law can be distinguished. If one proceeds in an evolutionarily natural way from the bottom to the top – thus in reverse order to the procedure that can be observed elsewhere[399] –, then one has to ascend from the national, past the regional and universal, up to the supranational level.[400] 164

(i) National level

As far as is apparent, an orientation towards foreign models and experiences – when legislative reforms were considered – existed first at national level. In relation to this, one can make – in remembering *Plato* and *Aristotle* – a sweeping connection from ancient Greece and Rome past the English "Law Merchant" up to the presentation – reform-politically motivated – of foreign criminal law in Germany at the beginning of the 20th century.[401] In addition, at this level the spectrum of changes to the national law that are supported by comparative law – or rejected, as may be – is broadest: starting with individual criminal offences, concerning, for example, rape in marriage; going beyond structural changes, as, for example, of the modus of fines or the procedural system, right up to the import in total – more or less modified – of a foreign legal system, as occurred with, for example, the German Penal Code into Japan or the German Criminal Procedure Code into Turkey.[402] 165

Even when there are parallel reforms in several countries – as, for example, when a model criminal code is adopted – this remains on a national level as long as there are no prescriptive guidelines of any kind. 166

(ii) Regional level

Legislative comparative criminal law on a regional level is set apart from the national one, as it gains growing importance through different cooperative agreements and unions of countries. This suggests itself especially among neighbouring countries, as in the case of the European Union[403] where particularly the European Arrest Warrant[404] and the above mentioned "Corpus Juris" regarding the protection of financial interests 167

[398] Cf. *Ambos*, Treatise I (fn.326), pp. 40 ff.

[399] As can be found in, *Jescheck*, Strafrechtsreform (fn. 292), pp. 137 ff.

[400] Further in more detail to the various levels of such "interlegality" see *Vogel*, Europäische Kriminalpolitik (fn. 198), pp. 520 ff.

[401] Cf. mn, 6 ff.

[402] Cf. the references and examples in mn. 158 ff.

[403] For more detail to the various levels, areas of competence and sources of regulations in the European area see *Christoph Safferling*, Strafrechtsentwicklung in der EU – Konglomerat oder Synthese?, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 187–211 (198 ff.).

[404] Cf. mn. 26.

come to mind;[405] in this context, not least, the adaptation of grounds excluding criminal responsibility should be mentioned.[406] As a further regional area of regulation the "Schengen Zone" is of interest, where initially a border-crossing "prohibition of multiple prosecution", only applicable to this area, was introduced,[407] which was ultimately extended – based on experiences gained – to the whole of the European Union.[408]

168 In order to speak of "regional" on this level, the covered area does not necessarily have to be completely joined up; rather, one may also think of an association of states which – as within the framework of the Council of Europe – have committed themselves, or at least declared their willingness, under the European Convention on Human Rights to work towards the protection of certain rights and freedoms,[409] or – as within the framework of the OECD – to coordinate their approach in relation to the fight against corruption.[410] Insofar as this necessitates a transnational adaptation of law – as described regarding the different ways of assimilation and harmonization[411] –, this can hardly be achieved without cross-border comparative law.[412]

(iii) Universal level

169 The more legislative plans go beyond national and regional areas, the more one reaches the universal level. This level cannot, however, be equated to the supranational level (to be reflected upon below) just like that; the reason for this is that, while regarding the supranational level the focus is on law that is above national law, universal means, on the one hand, more than national and regional but, on the other hand, less than supranational; thus, legal developments are to be considered here that aim for global validity and compliance, however, without being imposed as binding from above.[413]

170 The identification of supreme legal principles through comparative law has to be especially mentioned here. The autonomous incorporation of international criminal prosecution programmes in national law has to be included as well as.[414] In particular, the design of the German Code of international criminal law (Völkerstrafgesetzbuch – VStGB) of 2002, which leaned heavily on the Rome Statute, would have to be regarded as belonging in the group of such "reflexions" of international on national criminal law.[415]

(iv) Supranational level

171 For this level, two aspects are characteristic: Firstly, according to the characteristic of obligation, the focus is on the development of law which is created or imposed by a higher

[405] Cf. mn. 162 and concerning problems connected thereto in the member states M. Delmas-Marty/J.A. E. Vervaele (eds.)., The Implementation of the Corpus Juris in the Member States, Vols. I-III, Antwerpen 2000–2001.

[406] Cf. *Gerhard Dannecker*, Der Allgemeine Teil eines europäischen Strafrechts als Herausforderung für die Strafrechtswissenschaft – Zur Ausgestaltung der Rechtfertigungs- und Entschuldigungsgründe, in: Thomas Weigend/Georg Küpper (eds.), Festschrift für Hans Joachim Hirsch, Berlin 1999, pp. 141–173.

[407] In Art. 54 Convention on Implementing the Schengen Agreement (CISA) of 19 July 1990; cf. mn. 111 ff.

[408] Through the application of Art. 50 EU Charter of Fundamental Rights; cf. *Eser*, Human Rights Guarantees (fn. 279), pp. 187 ff.

[409] For details to the legal-political activities of the Council of Europe and preparatory comparative work rendered towards that see early on *Jescheck*, Strafrechtsreform (fn. 292), pp. 146 f.; cf. also *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 96 ff.

[410] Cf. *Günter Heine/Jörg Eisele*, Straftaten im Amt, in: Schönke/Schröder (fn. 246), § 331 mn. 3 ff.

[411] Cf. mn. 146 ff.

[412] To this level of regulation see also *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 90 ff.

[413] Accordingly, some of the conventions ascribed by *Jescheck*, Strafrechtsreform (fn. 292), pp. 137 ff. to the universal area might rather be allocated to the supranational level.

[414] Cf. mn. 150 ff.

[415] Cf. *Weigend*, Deutsches Völkerstrafrecht (fn. 315), pp. 216 ff.

authority, or which is to be applied by virtue of a binding international agreement; and a second aspect is that the law does not necessarily have to be universal in its territorial range of application but may display its effect on a bi- or multilateral regional level as well. Among the latter, one may include especially the criminal law and criminal procedural law binding for the member states of the European Union; in the substantive-legal sense, the protection of EU financial interests[416] has to be considered here; as well as, in the legal-procedural sense, the Justice guarantees of the EU Charter of Fundamental Rights.[417] As an eminent signpost of supranational legislation with a universal claim, one has to mention the Rome Statute for the International Criminal Court – though it may not (yet) be so universal in fact but certainly it is in its objective.[418]

172 As can be seen from merely this limited number of examples, with continuing globalisation where criminal activity also knows fewer and fewer borders, a wide field opens up for legislative comparative criminal law.

D. Evaluative-Competitive Comparative Criminal Law

173 As a further dimension of comparative criminal law those phenomena remain to be covered that – in one way or another way – were touched on several times before, but have so far not received any independent consideration. What is meant here is the "evaluative" functions and methods of comparative criminal law which are alluded to more or less in various forms, in other comparative law literature. Not only can such evaluative aspects play a role in each of the three traditional types of theoretical, judicative and legislative comparative criminal law, but rather there might be a competitive factor involved as well. For this reason it appears advisable to establish these tasks – which run throughout the three "classical" types of comparative law, and go beyond them – as the independent category of "evaluative-competitive comparative criminal law"[419] – and, in this way, to extend the previous "trias" into a "tetrade".[420] After this was recently developed in a contribution of my own,[421] the following can fall back on this – partly summarizing, partly adopting it.

1. History of concepts

174 Being a relatively new – or, at any rate, only recently acknowledged as independent – task of comparative law, the evaluative function is controversial both as to its origin and its conceptual recording.

175 *Konrad Zweigert* tends to be named as the "inventor" of the term "evaluative comparative law".[422] This attribution is only correct in a factual sense, that is only

[416] Cf. mn. 131, 147, 157.

[417] Cf. *Eser*, Human Rights Guarantees (fn. 279), pp. 161 ff., and as to further ways in which European law may influence German criminal law see *Kühl*, Europäisierung (fn. 198), pp. 780 ff.

[418] Cf. mn. 163.

[419] For initial approaches in this direction see *Eser*, Gedanken (fn. 88), and *idem*, Über Grenzen (fn. 88).

[420] Cf. mn. 33, 50, 194.

[421] *Eser*, Evaluativ-kompetitive Strafrechtsvergleichung (fn. 4, 88).

[422] Thus in particular by *Jung*, Wertende Rechtsvergleichung (fn. 123), p. 4; in the same vein *Henning Rosenau*, Plea bargaining in deutschen Strafgerichtssälen: Die Rechtsvergleichung als Auslegungshilfe am Beispiel der Absprachen im Strafverfahren betrachtet, in: Hans-Ullrich Paeffgen et al. (eds.), Strafrechts-

insofar as *Zweigert* was probably indeed the first among other contemporary progressive thinkers who spoke of "critical comparative law" and "better law" as early as the 1950s. In this way, he gave comparative law – even if not explicitly – an evaluative function that went beyond the mere description of foreign law,[423] and finally – over a decade later – counted the "critical evaluation" of the compared solutions as one of the tasks of comparative law.[424]

176 However, even if the honour to being an early discoverer and supporter of evaluative comparative law goes to *Zweigert*, it was probably *Ernst Werner Fuß* who finally created the term "evaluative comparative law".[425] Soon *Zweigert* used the same term for it, and gave it an elevated importance so far not reached, by stating – concerning the determining of the content of general legal principles – that these were to be extracted "only according to the contemporary method of legal comparison, and that this method was that of *evaluative comparative law*".[426]

177 As can be seen from these few references alone, the origin of evaluative comparative law is found in private law, and also increasingly in European Community and other international law, bordering on public law.[427] In contrast, this concept appears in criminal law jurisprudence – if one omits postulates by *v. Liszt* going in the same direction[428] – only in the sense that something is lacking, or is at best hinted at: by stressing the important role of evaluative comparative law in other areas of law, and by giving consideration to a corresponding approach in the criminal law field.[429] This does not mean that evaluation in the context of comparative law has not been mentioned before also in criminal law. However, initially this happened in a rather reserved way. This is demonstrated by *Jescheck* who stated in relation to the collaboration of comparative criminal law in legislative projects, on the one hand, that this involved "not only the presentation of positive foreign legal materials but the comparative

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wissenschaft als Analyse und Konstruktion. Festschrift für Ingeborg Puppe, Berlin 2011, pp. 1597–1628 (1610).

[423] *Zweigert*, Universale Interpretationsmethode (fn. 73), p. 10.

[424] *Zweigert*, Wörterbuch (fn. 129), pp. 80 f., adding that for such an "evaluating treatment", according to the same criteria used everyday in jurisprudence worldwide, one should consider which among several possible solutions may be "more appropriate" or "more just".

[425] "Wertende Rechtsvergleichung": *Ernst-Werner Fuß*, Rechtssatz und Einzelakt im Europäischen Gemeinschaftsrecht, in: NJW 1964, pp. 945–951 (946 fn. 11); *Fuß* refers to similar creative-law additions to the European Community Law by way of comparative methods (as in particular by *Andreas Heldrich*). For details to this – as well as to the following – see *Eser*, Evaluativ-kompetitive Strafrechtsvergleichung (fn. 4), pp. 1444 f.

[426] *Konrad Zweigert*, Der Einfluss des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten, in: RabelsZ 28 (1964), pp. 601–643 (610 f.; emphasis in original); regarding his further consideration of this "method" (as presented initially in *Zweigert/Kötz*, Rechtsvergleichung [fn. 7], 1st ed. Tübingen 1971, pp. 44 ff., and lastly in the 3rd English ed. (fn. 7), Oxford 1998, pp. 46 f., supervised alone by *Kötz*), it is interesting to note that he emphasized "evaluation as a constituent part of comparative law" (in: Die kritische Bewertung in der Rechtsvergleichung, in: Fritz Fabricius (ed.), Law and International Trade, Frankfurt 1973, pp. 403–420 (404), however, without designating it as "evaluative comparative law". For further aspects of evaluation by *Zweigert* cf. *Zweigert/Puttfarken*, Analoge Rechtsinstitute (fn. 164), pp. 400 ff., and infra. Part III. B. 5 (mn. 322 ff.).

[427] This is not just about the recognition of this concept in theory; rather, this term is also taken up in practice as, for instance, by the Advocate General at the European Court of Justice *Roemer* in the case of *Stauder* (12.11.1969 – 29/69; EuGH, Sammlung 1969), pp. 427, 428.

[428] Cf. mn. 191.

[429] As in particular by *Kai Ambos*, Der Allgemeine Teil des Völkerstrafrechts, 2nd ed. Berlin 2004, pp. 44 f.; *Schramm*, Erkenntnisse (fn. 61), p. 155, and *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 107, 119 ff.; cf. also *Tiedemann*, Wirtschaftsstrafrecht (fn. 68), p. 69, and *Helmut Satzger*, Die Europäisierung des Strafrechts, Köln 2002, p. 30, who, however, does not yet consider the exact method for gaining general principles in the European Community law as finally resolved.

connection of results, even their legal-political evaluation".[430] However, as emerges in his presentation of methods, the legal-political evaluation of the discovered solutions is apparently not even meant to be part of comparative law anymore, because it might, in the end, not be able to give the direction to be taken for this task.[431] Two decades later, though, he concludes a contribution on "Comparative law as the basis for a reform of criminal procedure" a bit more optimistically by saying, that comparative law is "a necessary and productive method of reform";[432] however, the legal-political momentum implied by this statement is qualified in the same breath, by his warning that one had "to be aware", when using this type of comparative law, "also of its limitations". In addition to this, he seems to understand comparative law once again only as a "method", and not really as a critical-evaluative function.

2. Different aspects of evaluation

178 Although, in the meantime, there is less and less reluctance in the area of comparative criminal law to introduce aspects of evaluation into legal comparison, one cannot yet speak of unity and conceptual consistency. On the one hand, one can find the opinion, even more decided than before, that – with reference to *Feuerbach* – the legitimate goal of comparative law could only be "to present the material and the different points of view" and to operate with instruments "by which the compared legal systems could be *described* in as neutral a way as possible", while the evaluation was to be integrated in a comprehensive "theory of justice".[433] Even insofar as such purism – excluding evaluation – is not otherwise advocated, evaluation is found to be understood in different ways and/or connected to different roles. Without claiming to be comprehensive, this is to be demonstrated through some examples.

179 As can be noted in the civil law and European law areas, the scope of tasks for comparative law has grown. While initially only the search for the "better solution" was in question,[434] there is now the need to find an acceptable provision for creative gap-filling or the clearing-up of frictions between legal systems in need of harmonizing; this cannot happen without a certain degree of evaluation. This probably explains why there is also talk in the area of criminal law – as particularly by *Sieber* – of comparative criminal law being "evaluative", "value-comparing" and "value-based" as well as of "cross-sectional references in need of evaluation".[435] Even where there is no explicit differentiation between evaluations referring to functions and orientated on methods,[436] closer inspection may contribute to the shedding of more light on the matter.

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[430] *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 29. In the same sense, considerations, such as the closing statement by *Hirsch*, Universale Rechtswissenschaft (fn. 183, p. 153) that "mere comparative law" is to be distinguished from a universal criminal science, may lead to the conclusion that comparative law as a mere "method" should limit itself to the exploration and description of different legal systems while everything going beyond that would be – though to be dogmatically founded – policy of criminal law.

[431] *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 43.

[432] *Jescheck*, Strafprozessreform (fn. 133), p. 782.

[433] *Mona*, Comparative Justice (fn. 61), pp. 103–119 (113, 115). Cf. also the references in mn. 208.

[434] Cf. *Zweigert*, Kritische Bewertung (fn. 426), p. 404. For further nuances see *Eser*, Evaluativ-kompetitive Strafrechtsvergleichung (fn. 4), pp. 1446 f.

[435] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 103 ff., 119 ff., and in: Grenzen (fn. 66), p. 53.

[436] Unless *Sieber's* referral to "cross-sectional references in need of evaluation" and "evaluative comparative law" (in: Strafrechtsvergleichung, fn. 5, pp. 94 ff.), when describing the tasks of comparative criminal law (pp. 94 ff.), is to be understood as *function*-related and the differentiation – in his methodolgical part (pp. 111, 119 ff.) – between "value comparing" and "evaluative" comparative criminal law is to be allocated thereto.

180 If, for example, "evaluative comparative criminal law" – to start with the most commonly used term – was to be understood as the generic term for just about every kind of comparative law that incorporated any evaluation, then it might easily lose its own intrinsic meaning, for the reason that even a simple formation of types needs differentiating criteria which cannot be established without normative prior knowledge. Even if these appear to be purely apolitical-dogmatic typifications, one is not immune to hidden pre-assessments. When, for example, in a comparison of the participation in an offence, one differentiates between perpetratorship and complicity, or, in a comparison of attempt, one establishes a separate group of so-called impossible or imaginary attempts, one may be guided by the assumption – in the first example – that the commission of an offence in the form of perpetration represents a more weighty type of participation in an offence; similarly, in the second example, the specification of attempts that under no circumstances could have led to success may suggest the renunciation of punishment, or at least, the possibility of less severe legal sanctions in the case of such attempts. If the pre-assessments contained therein are not to turn the comparison of law into an "evaluative" form right from the start, then one has to demand an increase in evaluation.

181 Such an "added value" may already result from the function of the legal comparison – and here the range of possible objectives may be far greater than could be anticipated during a hasty fixing on judicative legal application and legislative legal policy.

182 Already at the level of theoretical comparative criminal law it might be of interest to put certain criminal legal systems or individual areas of regulation not only side-by-side – in a comparative way – but to compare them with one another regarding their higher degree of internal consistency, better structural effectiveness or higher sense of justice, and to categorize them according to their specific value. All of this, though, will not be achieved without pre-specified or self-chosen criteria of evaluation.

183 This requirement becomes all the more essential, the more one enters the area of judicative and legislative comparative law. However, a certain shift in importance of evaluative specifications is to be noted here: While comparatists in the field of theoretical comparative law usually choose and set their criteria of comparison and typification themselves – even if they, in turn, may be dependent on further pre-assessments –, judges who have to interpret a norm falling back on a foreign law must be guided less by their own value ideas and more by the respective purpose of the law. Similarly, in legislative comparative law the search for "better solutions" may be pre-determined by political objectives. Independently of how much room may remain for one's own assessment to fix the area to be comparatively investigated and to determine the objective, without any criteria of evaluation – be they self-chosen or pre-specified – "better solutions" cannot be presented. The same applies to the concluding evaluation of the established results. Even during the mere search for possible alternative rules, a value judgement based on normative preconceptions may be involved in the choice of criteria of alternative aspects, not to speak of the case where the "best solution" is to be explored by way of legal comparison.

184 Of course, the requirement for evaluation is even more obvious where cross references "in need of evaluation" are explicitly talked about.[437] Such references, mainly found at the supranational level, are characterized by the fact that – differently from references to individual norms – they refer to a large number of legal systems from which general legal principles are to be derived.[438] However, such cross references are

[437] *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 103, 109.

[438] For the European area, this aspect is exemplified in particular by Art. 6 section 2 EUV in which the fundamental rights derived from the general principles, that are guaranteed by the ECHR and arising

different from other types of "evaluating" judicative and legislative comparative criminal law – though probably only in a formal sense insofar as the need for supplementation is legally imposed by the reference norm and certain reference points are stipulated for the necessary evaluation. At least, both the objective and the proceedings of the evaluation, however, do not remain at the (possibly otherwise free) evaluating discretion of the legal comparatist.

Yet another variant of "evaluating" comparative law can be found at the level of executory comparative criminal law. Even though this represents only a new field of application of judicative comparative criminal law,[439] "executory comparative research of criminal procedural law"[440] is considered to be distinguished from this insofar as, within the framework of recognition and execution of foreign judicial decisions, the examination of one's own law is not at the forefront, rather the foreign law has to be assessed in the sense, whether and to what extent a judicial decision based on it can be recognized and executed domestically; this has to be done by the judiciary – and not even necessarily by a judicial decision but possibly in a purely administrative act. Therefore, this is only a kind of evaluation of foreign law – and is different from "evaluative" comparative criminal law in search of the specifically "best solution". **185**

Looking at what is to be compared to each other and in which way this is to be assessed, different levels and approaches also become evident. This can, for example, be seen in *Sieber's* analysis of "value comparative" ("wertvergleichende") and "evaluating comparative criminal law" ("wertende Strafrechtsvergleichung").[441] When he proposes to distinguish four questions here – which concern "(1) the comparability of the object of the regulation, (2) the comparability of the standards of evaluation, (3) the comparison of the regulations and their standards of evaluation, and (4) the value judgement concerning the regulations"[442] –, this differentiation is certainly correct and important. On closer inspection, however, these questions concern not so much the objectives of evaluative comparative criminal law that are to be determined, but rather just the steps of evaluation which are necessary to achieve the set objectives. It is necessary to come back to this in the methodology part below.[443] **186**

3. Evaluation as part of comparative law

Before one might be able to establish possible objectives of evaluation, it is necessary to address the key question which so far remains unanswered, namely whether and to what extent evaluation is allowed to be a legitimate part of comparative law at all. Even today, there is not yet agreement on this. The debate often suffers from the problem that the difference between the possibility of comparative law evaluation at all and the allocation of evaluations – terminological, discipline-related – is not yet sufficiently taken into account. **187**

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from the common constitutional traditions of the EU member states, are referred to. Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 103, 107, where Art. 21 section 1 (c) of the Rome Statute of the ICC is given as a further example, according to which, if primary rules in the statute or other international law are missing, "general principles of law derived by the Court from national laws of legal systems of the world" are to be applied.

[439] Cf. mn. 130 ff.

[440] As in particular developed by *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 286 f.

[441] See *Sieber,* in: Strafrechtsvergleichung (fn. 5), p. 119, while in: Grenzen (fn. 66), p. 74, *Sieber* speaks of "comparison of evaluations and evaluative comparative criminal law". Cf. to this also mn. 333 ff.

[442] *Sieber*, Strafrechtsvergleichung (fn. 5), p. 119.

[443] Part III. B. 5 (mn. 322 ff.).

188 For *Gustav Radbruch,* the path to comparative legal evaluation appears to be closed as a matter of principle, because "that which should be ["Sein-Sollende"] can never be deduced from the being ["Seiende"], the consideration of however many existing laws is not able to teach us about the right law, it does not follow empirically but apriori."[444] This clear rejection, however, is relativized by *Radbruch* himself[445] – consciously or unconsciously – when he praises the value of comparative law in the same breath: comparative law might not be able to direct – with any logical necessity – the choice toward one of the legislative possibilities, but some things, which were only imparted through the use of comparative law, were gratefully accepted in the sense that they reflected a legal reality of greatest possible comprehensiveness.[446]

189 When, in contrast, – according to a frequently quoted statement by *Ernst Rabel* – the evaluation of different solutions is – as a "different activity" – to be distinguished from comparative law as such,[447] this has to be understood less as distancing in principle, but rather can be explained more by looking at practical and subject-disciplinary reasons: because, even if – no matter what the subjectivity – "pure comparative law" may claim "a higher degree of general validity" than may be the case for value judgements and conclusions in relation to practical legislative questions, this is apparently not to be understood in the sense of a renunciation of the comparatists' right to legal criticism; rather they thereby entered the level of legal policy.[448] Similarly, as far as *Jescheck* is concerned and as mentioned above,[449] legal-political evaluation goes beyond true comparative law; however, he does not – on principle – want to exclude such value judgements.

190 At first, *Sieber* endorsed that view insofar as he argued that one had to distinguish between the "comparison of evaluations" and the "evaluation of solutions", and that the latter were not to be included in "comparative law in the stricter sense".[450] This question of allocation, however, as later conceded by him,[451] does not play a substantial role in the matter, because comparative criminal law – apart from its descriptive role – was gaining in importance with its increasing function as a decision-guiding instrument of "good governance", when evaluative decisions about different regulations had to be made.[452] In the same way as value judgements are, with this approach, still not acknowledged as an integrative part of comparative law, *Constantinesco* also, in the end, shies away – for various reasons – from regarding the concluding evaluation of solutions gained by legal comparison as part of comparative law.[453]

191 The radically opposing position to such excluding voices was – before a criminal law background – formulated by *Franz v. Liszt* as early as the end of the 19th century. Since, he argued, "the side-by-side presentation of two or several laws" does not count as comparative law and neither even "the emphasis of the commonalities nor the differ-

[444] *Gustav Radbruch*, Über die Methode der Rechtsvergleichung, in; Monatsschrift für Kriminalpsychologie und Strafrechtsreform 2 (1905/06), pp. 422–425 (423).
[445] As already critically noted by *Zweigert*, Kritische Bewertung (fn. 426), p. 405.
[446] *Radbruch*, Methode (fn. 444), p. 424.
[447] *Rabel*, Fachgebiete (fn. 40), p. 186.
[448] *Rabel*, Rechtsvergleichung (fn. 38), p. 3.
[449] Cf. supra II.D.1. zu fn. 422 f.
[450] *Sieber*, Grenzen (fn. 66), pp. 74 f.
[451] *Sieber*, Strafrechtsvergleichung (fn. 5), p. 120.
[452] Also with regard to different evaluations which, according to *Sieber*, Zukunft (fn. 360), pp. 28 ff., are to be made between various models for the development of the European Union Law, it remains an open question to what degree this can still be considered as comparative law or whether it already belongs to legal policy that has to be distinguished therefrom.
[453] *Constantinesco* II, Rechtsvergleichende Methode (fn. 9), pp. 323 f.

ences" constitute comparative law, for him comparative law really only "starts" when "the author, based on […] his careful investigation and starting with a certain and clear criminal-political basic notion, tells us: in this way, and no other, you should do this."[454] However, many decades had to pass, until there was a similarly firm argument in other legal fields for the inclusion of evaluation in comparative law. As can be seen from the preceding history of terminology, evaluative assessment really only gained entry into comparative law as such with *Zweigert*: initially this happened only in the sense of "critical comparative law",[455] then, however, all the more explicitly with the statement that "in truth […], evaluative assessment" was "a necessary part of comparative law work."[456] Moreover, in a similar way to *von Liszt*,[457] for *Zweigert/Kötz* "merely to juxtapose without comment the law of the various jurisdictions is not comparative law: it is just a preliminary step".[458]

192 However, insofar as evaluative assessment is considered a "necessary part" of comparative law work, one has to state a proviso straight away. For my part, I also decidedly advocate that evaluative assessment is not to be excluded either on principle or totally from the understanding of comparative law, and thus evaluation should not be assigned to a political field that would go beyond comparative law; rather, evaluative assessment can – at any rate – be an essential function of comparative law. Conversely, however, this does not have to mean – and this stands contrary to *von Liszt* and *Zweigert/Kötz* – that comparative law is not even imaginable without evaluative assessment. The reason for this is because, if the view does not remain fixed on legislative or judicative law-creating objectives, but envisages the broad spectrum of comparative law functions,[459] then there are definitely fields of research – above all in the area of purely theoretical comparative criminal law – in which only the presentation of different laws – highlighting their commonalities and differences – is important. For this type of comparative law it would be difficult to describe evaluative assessment as a "part", and especially not as a "necessary" one. Insofar, however, as one is to search for "better" or even "the best" solutions using comparative law, it would not make much sense to exclude from the idea of comparative law exactly the establishment of the – in the end – essential goals, and the phase of evaluation necessary for this, and to assign this to some kind of research critique or legal policy, however this was meant to be understood.

193 The result of this is that, on the one hand, evaluation and comparative law do not exclude one another on principle but, on the other, that they do not necessarily belong together all the time either; rather, evaluation may be essential for some forms of comparative law while this does not have to be the case for other areas. Even if the need of evaluation may apply mainly to judicative and legislative comparative law, to dispense

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[454] *Franz v. Liszt*, Strafgesetzgebung (fn. 163), Zur Einführung, p. XIX respectively. p. XXII.

[455] Cf. mn. 175.

[456] Thus *Zweigert*, Kritische Bewertung (1973; fn. 426), p. 404, after he had – at first more reservedly – described "a critical evaluation of the solutions found by comparison" merely as "belonging to the tasks of comparative law" (in: Wörterbuch des Völkerrecht, fn. 129, p. 81 sp. 81; similar *Zweigert/Siehr*, Jhering's Influence, fn. 29, p. 220), but then – more resolutely – declared "the critical evaluation" of the results gained by comparative law as a "necessary part" of legal comparative work (Rechtsvergleichung, fn. 7, 1st ed. 1971, p. 47 and 3rd ed. 1996, p. 46), Strangely enough, however, this strong commitment is missing in the respective section of the 3rd English edition of 1998 (fn. 7), pp. 46 f.

[457] Without, however, referring to *Franz v. Liszt* or taking note of *Jescheck*'s preceding contrary position.

[458] *Zweigert/Kötz*, Comparative Law (fn. 7), p. 43. According to the German original (Rechtsvergleichung, fn. 7, p. 42), juxtaposing various solutions is not even described as a "preliminary step" of comparative law; this rather "starts after that".

[459] As presented in Part II. A–C (mn. 55 ff., 97 ff., 133 ff., respectively).

with it does not have to be typical just for theoretical comparative law, as evaluative assessments may actually be advisable here as well. In addition, as will have to be demonstrated below, the respective objectives and methods of evaluation may vary considerably, and the necessity or dispensability of an evaluation cannot be simply, and without more, assigned to one or the other type of – theoretical, judicative or legislative – comparative law.

194 This finding – that is that evaluation is neither a universally necessary part of comparative law nor one reserved only for certain types of it but, depending on the objective of the comparison, is sometimes essential and at other times contingent – is best taken account of by placing evaluative elements of comparative law, in a kind of bundled form, side-by-side with the traditional "trias" of judicative, legislative and theoretical comparative criminal law – thus extending it into a "tetrade".[460] Because the set goals may reach from neutral evaluation to competition guided by particular interests, the label of "evaluative-competitive comparative criminal law" appears appropriate.[461]

4. From evaluative to competitive comparative law

195 As has become clear above, depending on the set comparative objective and the method, quite different things might be meant when comparative law is labelled "evaluative". All interpretations have one thing in common, however: the added value of normative-evaluative as opposed to just descriptive.[462] What is frequently lacking over and above that, however, is a clear fixing of the goal for which comparative law is undertaken. As long as the goal remains unclear, the method to be applied cannot be accurately chosen, because the type of evaluative method also depends, in the end, on the evaluative goal to be achieved.[463]

196 Therefore, what needs to be clarified first of all, is the great variety of possible goals and objectives of evaluative comparative criminal law – especially, as this functional aspect often remains underexposed due to the usual understanding of evaluative comparative law as a mere question of method. If one does not want to be content with the general answer of a "search for better solutions", but wants to ask in a differentiated way what evaluative comparative criminal law might be useful for, then it is necessary to take into account both the quantitative and the qualitative growth in importance which, in the meantime, presents itself as a challenge to evaluative comparative criminal law.

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[460] Those who – as mentioned before on various occasions – speak of "wertende Rechtsvergleichung" seem to have the same in mind although their view is mostly limited to certain fields of comparative law, in particular to gap-filling or the further development of the law for which some sort of evaluation is needed. Nevertheless, the need for independent identification of evaluative comparative elements finds its expression here as well.

[461] My first approaches in this direction (see mn. 33 fn. 88) meanwhile found approval from others, in particular from *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 290; *Hauck*, Funktionen (fn. 55), p. 270; and *Wörner*, Strafrechtsvergleichung (fn. 87), p. 140; *eadem*, Zu Verankerungsmechanismen im Recht anhand des deutschen und des türkischen Strafrechts und Strafprozessrechts, in: Gropp/Öztürk/Sözüer/Wörner (eds.), Die Entwicklung von Rechtssystemen in ihrer gesellschaftlichen Verankerung, Baden-Baden 2014, pp. 567–603 (573). Although not explicitly referring to this terminological classification, "evaluative comparative criminal law" – at least in its substance – is also given a special role by *Jung*, Wertende Rechtsvergleichung (fn. 123), pp. 2 ff., *idem,* Structure (fn. 537), p. 300, and *Rosenau*, Plea bargaining (fn. 422), pp. 1610 f.

[462] At the same time, however, it must be remembered that even a mere description of different legal orders may contain an evaluation by way of the selection of possible criteria of commonalities or differences; cf. mn. 180.

[463] Cf. mn. 322 ff.

In former times, when comparative criminal law operated in a kind of suppliers' market where researchers developed comparative law models – under the greatest possible legal-political restraint –, they had to be glad when politics took notice of it at all. In contrast, comparative law has developed into a demand market where hardly any major law reform is undertaken without looking at it from the perspective of comparative law.[464] This is especially called for where, in the context of progressive Europeanisation and internationalisation, there is a need for assimilation or harmonisation of national legal systems, or where transnational legal principles of some kind are to be developed – these are all tasks that cannot be carried out without evaluating the matter to be compared. **197**

Even insofar as there is only the interest domestically to adapt the traditional law to the demands of the present and to prepare it for the tasks to be expected in the future, it may be appropriate to put one's own law under a comparative law microscope, and be it only to find – in comparison with other countries – one's own law confirmed and in this way still legitimate – or be it, rather, to search progressively for better solutions and, in doing so, possibly enter into a competition of optimisation with other countries. **198**

Both such purely domestic reforms, and those reaching transnationally, may be even more called for when there is the need to keep pace in the legal field with modern developments – especially in the area of economic and telecommunication networks, or cross-border tourism and crime. The more one does not just stop at a mere evaluative comparison but goes looking for the relevant better, the sooner evaluative may develop into competitive comparative criminal law. This may lead to – in different ways – far-reaching objectives. Of these, only those that appear to be most important will be presented – with ascending claims to evaluation while the answer to possibly different criteria of evaluation is reserved to the part on methodology below. **199**

a) Controlling and warning function

Just through a kind of controlling and warning function, evaluative comparative law has a significance that should not be underestimated.[465] By contrasting domestic law with foreign law, and measuring it against it, one can see to what extent it is up-to-date. Insofar, the foreign law may be understood to have a kind of "benchmarking"[466] role for the classification of one's own law. **200**

First of all, one may think of legislation here: for example, to check in the criminal procedural area to what extent the rights given to the accused satisfy human rights standards, or if rights are withheld from the victim which are already granted in other countries.[467] In more practical matters as well, such as concerning the use of audio-visual technology in interviews of particularly vulnerable witnesses, one may become aware of shortcomings in domestic law by looking at foreign procedural law.[468] **201**

However, a look across the border may also be helpful for the administration of justice when uncertain terms have to be interpreted or a choice has to be made between **202**

[464] Cf. mn. 27.

[465] As to this see already *Zweigert*, Universale Interpretationsmethode (fn. 73), pp. 17 ff., further *Ebert*, Rechtsvergleichung (fn. 78), p. 176; *Eser*, Comparative Legal Research (fn. 4), pp. 106 f., pp. 1528 f.; *Hauck*, Funktionen (fn. 55), pp. 270 ff.; *Roberts*, International Criminal Justice (fn. 327), pp. 362 f.; *Rosenau*, Plea bargaining (fn. 422), p. 1611.

[466] As formulated by *Sieber*, Strafrechtsvergleichung (fn. 5), p. 99, for the area of ensuring "good governance". Cf. also the references in mn. 210.

[467] See also *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), pp. 275, 290, 298 with regard to checking the functional equivalence of the member states' laws of evidence within the context of his "executory comparative law of criminal procedure"; cf. mn. 121.

[468] Cf. mn. 135 ff.

ideologically conditioned positions.[469] When, for example, the German Federal Supreme Court in its first volume of decisions concerning the narrowing interpretation of "fornication" in the context of the – then still criminal male homosexuality – informed itself not least of all on foreign developments[470], or when the German Federal Constitutional Court asked for comparative law advice concerning the continuation of the prohibition of incest between siblings,[471] then evaluations are likewise called for.[472]

203 Even in theoretical comparative criminal law, the controlling function may have an important role. Not only may it deliver criteria for the investigation of the validity of theories,[473] or resist possible erroneous trends by warning against them; it may also, on the one hand, cause doubts in relation to many individual questions of a criminal-dogmatic or procedural kind[474] or, on the other hand, also give new support. Above all, however, theoretical comparative criminal law may, when it is not just content with mere description but also has the courage to evaluate what it has found, do invaluable preparatory work for judicative and legislative comparative criminal law.[475]

b) Legitimizing function

204 Control does not only have to have a warning effect, rather it may – in a positive sense – strengthen into a legitimizing force. This may happen by enhancing contested legal positions of one's own law by looking at comparable standards in foreign law – or even at grave flaws in other legal systems.

205 At first glance, this may appear less important for theoretical comparative criminal law. However, even at this level a system of classifying crime such as the differentiation between wrong-doing and guilt and the further three-step subdivision into the definitional elements of the offence, unlawfulness and blameworthiness[476], may see itself confirmed by the fact that it is accepted in foreign criminal jurisprudence too – and that it can do justice to the different levels of evaluation more effectively than, for example, the superficial distinction between the objective and subjective elements of a crime.[477]

206 Of much greater importance is the legitimizing function of evaluative comparative law at the judicative and legislative levels, and even more than this – with increasing Europeanization and internationalization – it becomes a question of finding support in equally matched legal systems or securing international legal principles as widely as possible. Concerning the domestic judicative area, the above mentioned German Federal Constitutional Court judgement about incest should be remembered;[478] concerning legislative matters, the discourse-facilitating role comparative law may play in the context of the legitimization of international criminal law, should be mentioned.[479]

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[469] Cf. *Ebert*, Rechtsvergleichung (fn. 78), p. 176.

[470] BGHSt 1 (1951), pp. 293, 297.

[471] BVerfGE 120 (2008), pp. 224, 230 ff. Cf. mn. 119.

[472] Cf. also the case law material presented by bei *Hauser*, Auslegungshilfe (fn. 291), pp. 1215–1232 and *Schramm*, Erkenntnisse (fn. 61).

[473] Cf. *Ebert*, Rechtsvergleichung (fn. 78), p. 179.

[474] As they may be found in particular in the research fields illuminated by *Wolfgang Frisch*, Einheit und Vielfalt des Strafrechts in Europa. Wirkungen und Grenzen der Strafrechtsphilosophie, in: Kimmo Nuotio (ed.), Festschrift in Honour of Raimo Lahti, Helsinki 2007, pp. 7–23 (8 ff.).

[475] Cf. mn. 96.

[476] Cf. mn. 106 fn. 249.

[477] Cf. *Eser*, Justification (fn. 249), pp. 19 ff.

[478] Cf. mn. 202.

[479] See *Burghardt*, Völkerrechtliche Rechtsprechung (fn. 108), pp. 235–254. Cf. also *Kubiciel*, Funktionen (fn. 66), p. 221.

Last but not least, at home one might expect some increased tolerance – and with this, acceptance – from legal comparative harmony with foreign parallels.[480]

c) Gap-filling function

Much more than just evaluative controlling and giving reasons is needed for the gap-filling function of comparative law. Both, where – as especially in the European area with so-called "cross references in need of evaluation"[481] – unspecified terms or regulations have to be defined[482], or where – as especially in the field of international criminal law – general legal principles have to be developed,[483] the judiciary as well as the legislature are asked to engage in law-creating activity; here again, the preliminary work in comparative law is to be done by legal comparatists.[484] The same applies to the provisionary creation of a "stock pile of solutions", as it is frequently expected from comparative law.[485] **207**

d) Function of critical initiative and innovation

One can expect more, however, from evaluative comparative criminal law, than only a role serving control, legitimization or gap-filling; rather, its function of critical initiative and innovation becomes more and more important. After *Zitelmann* had already pointed out the "criticism evoking" effect of comparative law,[486] *Zweigert* and *Jescheck*[487], in particular, spoke of "critical comparative law".[488] They bestowed the comparer of law – in a way similar to the legal philosopher – "with the power to recognize more clearly the social problem behind the formal systems of current law, and to always remain conscious that apart from the solution given by one's own law, there are other legal solutions which might possibly be superior to one's own."[489] To open people's eyes to the relativity and variability of the law, is most clearly done through comparative law.[490] **208**

If this critical function is meant to achieve a lasting impact, it cannot be content with superficial corrections; in order to develop "critical minds", it will also have to start during legal education[491] and will have to maintain a "critical approach to one's own legal system"[492]; and it will have to contribute in general to a changing of professional **209**

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[480] See *Hauck*, Funktionen (fn. 55), pp. 257 f., and in particular concerning the significance of the aspect of tolerance in legal education *Örücü*, Developing (fn. 78), p. 54.

[481] Cf. mn. 189.

[482] For details see mn. 102 ff., 116 ff.

[483] Cf. mn. 150 ff.

[484] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 109 ff., furthermore *Kubiciel*, Funktionen (fn. 66), p. 218, according to whom comparative law may serve as a(n indispensable) "diagnostic tool", in particular, to find the right balance in transnational harmonization efforts and the securing of civil rights and liberties.

[485] Cf. mn. 70, 144.

[486] *Zitelmann*, Rechtsvergleichung (1900; fn. 35), p. 14.

[487] However, at that time neither *Zweigert* was speaking of "evaluative" comparative law (cf. mn. 175 f.) nor *Jescheck* was including evaluation in comparative law at all (cf. mn. 177, 189).

[488] *Zweigert*, Universale Interpretationsmethode (fn. 73), p. 10.

[489] *Jescheck*, Max-Planck-Institut (fn. 43), p. 144. In the same vein *Rösler*, Erkenntnisinstrument (fn. 10), p. 1087.

[490] With this in mind, explicitly the quote by *Radbruch* in his "Erste Stellungnahme nach dem Zusammenbruch 1945" (mn. 56 fn. 155). Cf. also *Mona*, Comparative Justice (fn. 61), pp. 108 f.

[491] *Örücü*, Developing (fn. 78), p. 54.

[492] *Kremnitzer*, Reflections (fn. 116), p. 30. Cf. also *Ugo Mattei*, Comparative Law and Critical Legal Studies, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 815–836 to the role of critical comparative law through "relentless questioning of the 'dark sides" of apparently emancipatory and progressive agendas" (p. 835).

distortions, as well as to the breaking-down of ideological, encrusted ideas – as they can build up when things are taken for granted in prejudiced trust.[493] In doing so, one might even have to grant comparative law a kind of "subversive" role, as has been demanded recently in quite an aggressive way.[494] Then it will be able to display the hoped-for initiating and innovating functions.[495]

e) Optimizing and modifying function

210 The function of optimization and modification is in many respects also directed towards innovation: be it that generally the need for reformative research has to be established first[496], or that only legal-technical aids to formulation are at stake,[497] or, be it that international standards on "good governance" need to be satisfied.[498]

211 By and large, this is the field where the "search for better and the best solutions", which is frequently connected – in an overall generalization – with "evaluative comparative law", has to be placed.[499] Even if one has to, first of all, think of legislative measures of optimization and modernization – whether at national or international level[500]–, the judiciary may also be called upon optimizing legal development, especially where judges are, by law, left or even obliged to search for "the best solution".[501]

212 In the same way, criminal law theory may feel called upon to compare – over and over again – its dogmatics on crime with foreign developments and, if necessary, to correct it. In the field of criminal policy it may be even more important to keep up with developments in foreign countries.

f) Harmonizing function

213 When optimization oriented towards comparative law goes beyond domestic reforms, in a cross-border situation, the harmonizing function comes into play – with increasing importance in the context of growing Europeanization and globalization.[502] When not only selective assimilation of individual elements of an offence or forms of sanctions are of interest here, but also the mutual recognition of measures of prosecution – right up to a more or less comprehensive standardization of the law[503] –, then comparative criminal law will have to meet the challenge of higher and more comprehensive demands. It cannot be then content with the mere juxtaposing the criminal law of different countries, but will have to take into consideration underlying national characteristics and cultural traditions. This is not achievable without openness to evaluation and selection of the best law at the time.

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[493] Cf. *Eser,* Comparative Legal Research (fn. 4), pp. 107 f.,

[494] Thus following *Fletcher*, Subversive Discipline (fn. 104), pp. 683 ff. see in particular *Mona*, Comparative Justice (fn. 61), pp. 103, 106 ff., who is suggesting to see comparative law as a "subversive discipline" with the particular challenge "to examine our own legal culture with regard to inconsistencies or mental blocks and to search critically for pre-conceived notions of what is considered the normal way by which problems are legally comprehended and solved". However, *Thomas Weigend*, Diskussionsbemerkungen (fn. 74), p. 132, without questioning *Mona's* approach in principle, is rightly calling into doubt whether – reaching for the stars – a "general justice model" should really be taken as a benchmark.

[495] Cf. *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 81), pp. 275, 290, 298.

[496] *Wörner*, Strafrechtsvergleichung (fn. 87), pp. 141 f.

[497] *Perron*, Operativ-funktionalistisch (fn. 87), pp. 122 f.

[498] Cf. mn. 190, furthermore *Frank Meyer*, Internationalisierung (fn. 66), pp. 92 ff.; *Weigend*, Diskussionsbemerkungen (fn. 74), p. 131.

[499] Cf. mn. 179.

[500] As to the variety of these levels see mn. 164 ff.; cf. also *Sieber*, Zukunft (fn. 360), pp. 16 ff.

[501] As is the case at the level of European Community Law; cf. mn. 115 ff., 176 f.

[502] For details see mn. 146 ff.

[503] As to the partly different terminological understanding of the possible steps towards a transnational harmonization – from mere approximation up to complete unification – cf. the references in mn. 146 fn. 364.

g) Preference-setting function

Such willingness, if not even the courage to consider carefully and to assess, is demanded all the more when – going beyond restrained, defensive adaptations – a certain law is meant to be pushed through in an offensive way, and the *evaluative* comparative law develops, in this way, into a *competitive* one. 214

This is definitely not meant to defend those practices that want to force a foreign criminal law onto a country and, in doing so, do not shrink back from very questionable means to exert pressure – possibly motivated by anything up to the desire to dominate. In the context of transplantations of this type, the lack of a comparative legal anamnesis has especially to be lamented – not to speak of the neglect one might fear of the cultural background and the social environment.[504] 215

However, it appears to me that the time has come to go beyond the traditionally rather defensive basic position taken by comparative criminal law and to give the competitive element – which was basically already present in the optimization function – its own, particular meaning: namely in the sense that comparative law need not shy away from a "ranking of legal systems"[505], but would be well-advised – in a kind of legal-political competition – to speak up for the determination and setting of preferences in favour of the legal system that appears to be the best.[506] 216

That comparatists of law might lose their neutral role in such a "competitive spirit",[507] does not have be feared as long as they disclose their evaluation criteria, and these in turn have to prove their worth in free and fair competition. This remains harmless, as long as in this "exterior-science policy of law", as has recently been postulated by *Hilgendorf*,[508] one's own law is not favoured for chauvinistic reasons. A similar reservation would have to be put against an "*instrumental* comparative criminal law", should it, as already described by *Vogel* – not without warning undertones – be designed to work towards a politically or otherwise pre-determined goal.[509] If comparative law is thus turned into a pre-programmed servant, as could be, for example, observed in the notorious battles over the interpretation of the Treaty of Versailles,[510] 217

[504] If, for instance, a country whose procedural system is – according to the "inquisitorial" tradition – characterized by a strong position of the judge, is urged to introduce an "adversarial" model of procedure, this is – because a much higher standard of "equality of arms" between the two parties is needed – not justifiable as long as a legal profession of defence counsels, that is in fact competitive with the prosecution, is missing; cf. *Eser,* Comparative Legal Research (fn. 4), pp. 107; *idem*, Adversatorische und inquisitorische Verfahrensmodelle: Ein kritischer Vergleich mit Strukturalternativen, in: Friedrich-Christian Schroeder/Manuchehr Kudratov (eds.), Die strafprozessuale Hauptverhandlung zwischen inquisitorischem und adversatorischem Modell, Frankfurt/Main 2014, pp. 11–29 = www.freidok.uni-freiburg.de/volltexte/9734 and supra mn. 141. As to the pre-conditions of legal transplantations cf. also *Lagodny*, Übernahmefähigkeit (fn. 726); *Walter Perron*, Menschengerechter Strafprozess – Beweisverfahren und Bürgerinteressen im deutsch-amerikanischen Vergleich, in: Björn Burkhardt/Hans-Georg Koch et al. (eds.), Scripta amicitiae. Freundschaftsgabe für Albin Eser zum 80. Geburtstag, Berlin 2015, pp. 413–430, and infra mn. 287, 328, 335 f.

[505] See *Francesco Parisi/Barbara Luppi*, Quantitative methods in comparative law, in: Monateri, Methods (fn. 74), pp. 306–316 (315).

[506] Further to this, see also the contributions referred to in mn. 194 fn. 461. Cf. also *Esin Örücü*, Methodology of comparative law, in: Elgar Encyclopedia (fn. 66), pp. 560–576, for whom – beyond the traditional "black-letter-law oriented (rule based)" comparative approach – "creative comparative law research" may "point the way to 'ideal systems' ", or at least to the " 'better law' approach" (571).

[507] As appropriately formulated by *Kremnitzer*, Reflections (fn. 116), p. 40.

[508] "Außenwissenschaftspolitik des Rechts": *Eric Hilgendorf*, Von der juristischen Entwicklungshilfe zum Rechtsdialog, in: Roxin-FS (fn. 353), pp. 1451–1463.

[509] *Vogel*, Instrumentelle Strafrechtsvergleichung (fn. 77), pp. 207 ff.

[510] Cf. mn. 16.

then the Rubicon to crude politics has certainly been crossed.[511] Not to allow themselves to be abused in this way, demands of criminal law researchers' critical vigilance and an independence which is ready to defend itself.[512]

218 Without wanting to dismiss such sources of danger, one might, nonetheless, feel reassured by the assessment – arrived at after critical examination – of the Greek-Dutch comparatist *Dimitra Kokkini-Iatridou,* who states "the moment of evaluation to be the best in the entire research process."[513]

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[511] Also critical *Hauck*, Funktionen (fn. 55), p. 260; *Kubiciel*, Funktionen (fn. 66), pp. 218 ff

[512] Cf. mn. 351 ff.

[513] *D. Kokkini-Iatridou*, Some Methodological Aspects of Comparative Law. The third part of a (pre-) paradigm, in: Netherlands International Law Review 33 (1986), pp. 143–194 (191). Cf. also Part III. D. 5 (mn. 322 ff.).

PART III

METHODOLOGY: HOW TO CONDUCT THE COMPARISON OF CRIMINAL LAW

A. Connecting Aims and Methods

1. Dependence of the method on the (set) objective – Openness of methods

Given the diversity of objectives and functions of comparative criminal law, one can hardly expect that all of them can be achieved with the same method. Thus it is all the more surprising that goals and methods – as can be seen from the overview of the great variety of terms and models of comparative criminal law[514] – are frequently presented side-by-side, each as its own kind of comparative criminal law; and that in a way which does not clarify their relationship to each other even for very different, distinct forms of comparative criminal law. In addition, when comparative law models are listed, it is often not really clear whether these are meant to be functions or only methods, or, on the other hand, even both. And even when only comparative methods are of concern, it may remain open whether the involved method is meant to stand alone or needs to be connected with other comparative instruments. **219**

In contrast, one has to assume right from the start that there is no single method by which, alone, one might reach any, and/or every, comparative law objective in an equally appropriate and complete way. Rather, as is acknowledged more and more, there is such a strong interdependence between the different objectives and the methods to be geared toward them, that comparative law – and this applies, of course, to comparative criminal law as well – cannot be limited to one single specific method[515]; therefore, openness of methods is imperative.[516] **220**

However, if this is so, that is, that *the single* method of comparative law does not exist but that the method has to be determined by the specific type of task, and that, therefore, the variety of different objectives may require different methods, then in the rising debate about methods – primarily in the English-speaking literature[517] – quite a few confrontations and absolutisms turn out to be mock battles. Then it is futile to discuss, to touch only on a few points at issue, **221**

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[514] Part I. C (mn. 29 ff.).

[515] See already Part I. D (mn. 37 ff.). Although often only incidentally addressed, such a dependence of the comparative method on the matter of the comparative interest is in particular recognized by *Maurice Adams/Jacco Bomhoff*, Comparing law: practice and theory, in: Adams/Bomhoff, Practice (fn. 198), pp. 1–21 (6, 8); *Maurice Adams/John Griffiths*, Against the "comparative method": explaining similarities and differences, in: Adams/Bomhoff, Practice (fn. 198), pp. 279–301 (279 ff.); *Kubiciel*, Funktionen (fn. 66), p. 215; *Örücü*, Methodology (fn. 506), pp. 564, 572, 573; *Emma Patrignani*, Book Review: Monateri, Methods (fn. 74), MJECL 20 (2013), pp. 549–553 (550); cf. furthermore *Hilgendorf*, Einführung (fn. 6), p. 24; *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 36; *Perron*, Operativ-funktionalistisch (fn. 87), pp. 123 f.; *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 111, 127 f.

[516] Cf. *Hauck*, Funktionen (fn. 55), pp. 255, 272; *Esin Örücü*, Methodological Aspects of Comparative Law, in: European Journal of Law Reform 8 (2007), pp. 29–42 (30).

[517] See – inter alia – fundamentally *Günter Frankenberg*, Critical Comparisons: Rethinking Comparative Law, in: Harvard International Law Journal 26 (1985), pp. 411–450 (426 ff.), the specifically methodological contributions in: Adams/Bomhoff, Practice (fn. 198); William E. Butler/O.V. Kresin/Iu.S. Shemshuchenko (eds.), Foundations of Comparative Law. Methods and Typologies, London 2011, pp. 36–109; *Monateri*, Methods (fn. 74); *Örücü/Nelken*, Handbook (fn. 9); Reimann/Zimmermann, Oxford Handbook (fn. 9), and the bibliography by *Örücü*, Methodology (fn. 506), pp. 574 ff., in addition,-from the more recent German-speaking literature the contributions in: Beck/Burchard/Fateh-Moghadam, Strafrechtsvergleichung (fn. 6) and *Richers*, Postmoderne (fn. 132).

- whether comparative law should be aligned more towards the normative-dogmatic or the empirical-factual,
- whether it may limit itself in a legalistic way to the investigation and comparison of law, or if the social environment and the cultural background should be included,
- whether it should be more "theory driven" or rather more "question driven",
- whether it should focus only on institutions or should be "actor oriented" in a behaviourist way,
- whether the presentation of commonalities is more important, rather than the evidence of differences, or what may be the differences between other varieties and ranges of investigation and comparison. Because, if a comparative criminal law project, for example, only aims – with a dogmatic interest – to compare the specific concept of crime in different legal systems with one another, this may primarily be purely comparative legal research, in a "theory driven" way, where the cultural background may at most be important for the explanation of differences; the number of countries to be included, may also depend on the question, whether possibly small differences between fundamentally homogeneous legal systems are to be investigated by way of a micro comparison, or, whether by way of a macro comparison, fundamental similarities and differences also between heterogeneous legal families are to be demonstrated in a more extensive way – and therefore neglecting the details. In a completely different way, the number of countries to be included will be, on the one hand, pre-determined in, for example, a European reform project for the purpose of harmonizing the investigation procedure – in best possible accordance with the rule of law; on the other hand, it will not be possible to limit this to the mere comparison of written procedural norms, but also legal practice – and not least the nationally and culturally founded styles of investigation – as well as the general political status of the consciousness of human rights will have to be taken into consideration; above all, the investigation is to be directed towards finding commonalities which could be used to achieve consensus.

222 So, instead of playing different approaches off against each other, or even trying to establish one particular method as the only correct one, it makes more sense to ask which of the different methods – be it on its own, or usually more in combination with others – appears best suited to achieve a specific comparative objective. For not just a few of the types of comparative law – labelled as apparently independent – insofar as they must not be understood as more goal-defining than method-oriented anyway,[518] it will soon become apparent that they are actually methods which are partly only necessary and suitable for particular types of tasks, or appear to be required only for individual phases of investigation – these will be examined in detail below. While, for example, the different varieties of "functional" comparative law[519] may be essential for the formulation of the question and the factual problem – but even at this level of investigation, as, for instance, in a purely theoretical comparison of norms, may not be indispensable –, "universal" comparative law[520], as a rule, only plays a role in the selection of countries. Or, while "case-based" and "computer-assisted" comparative criminal law[521] may be useful for the country reports to be compiled, for a comparative law cross-section and a possible legal-political evaluation, the "value comparing""[522],

[518] Cf. mn. 37 ff.
[519] Cf. mn. 34 f. to (6), (23), (24).
[520] Cf. mn. 34 to (5).
[521] Cf. mn. 34 to (10) and (11).
[522] Cf. mn. 34 to (9).

"critical"[523] and "evaluative-competitive" comparative criminal law will be more asked for.[524] Instead of looking at all of these different methods individually, it is advisable that they be included particularly where they may play a role in the process of the comparative law investigation.

2. Guiding principles – Ways of approach

223 The orientation to the different phases of investigation also applies to some catalogues of principles and "blueprints" as they are proposed for the methodology of comparative law. For example, according to *John C. Reitz*,[525] comparative law method is meant to be guided by nine principles: (1) to draw explicit comparisons, and not be content with the mere description of different legal systems, (2) to focus on similarities and differences, and, in doing so, to take account of – in relation to the significance of differences – the possibility of a functional equivalence, (3) to lead to conclusions about distinctive characteristics of each individual legal system and/or commonalities concerning how law deals with the particular subject under study, (4) to raise the comparative law analysis to broader levels of abstraction through its investigation into functional equivalence, (5) to give reasons for the similarities and differences among legal systems and to analyse them in relation to their cultural significance, (6) to describe the normal conceptual world of the lawyers and, in doing so, both to consider all underlying sources, and pay attention to gaps between the "law in the books" and the "law in action", (7) to have the necessary linguistic skills and possibly also social-science capabilities, or to get them second-hand, (8) to organize all steps of investigation in a way that emphasizes explicit comparison, and (9) to conduct the legal comparison in the spirit of respect for the other.

224 These principles are certainly important and note-worthy: however, not for every type of legal comparison, rather only for certain steps of the investigation, or work requirements. Principles (2) and (4), for example, aim primarily at the establishment and formulation of the subject matter to be investigated,[526] while principles (1), (3) to (5), and (8) are to be considered especially for the writing of country reports and their evaluation;[527] differently again, in principles (6), (7) and (9), requirements with regard to the professional capabilities and research-ethical views of the comparative law personnel are postulated.[528] Above all, however, these principles offer very little in the sense of clarity in relation to the individual steps of examination to be taken in comparative law.

225 In this regard, the "methodological blueprint" of *Esin Örücü* leads considerably further, by suggesting five steps for the majority of academic comparative law:[529] (1) In the initial phase, called "conceptualisation", a choice of systems is to be made between an intra-cultural comparison (of traditionally similar legal systems) and cross-cultural comparison; in doing so, there is to be a choice between a macro-, micro- or meso-comparison; as a rule, a comparison of equivalent institutions and concepts is useful,

[523] Cf. mn. 35 to (16).
[524] Cf. mn. 33 to (4).
[525] *John C. Reitz*, How to Do Comparative Law, in: The American Journal of Comparative Law 46 (1998), pp. 617–636.
[526] Cf. mn. 232 ff.
[527] Cf. mn. 295 ff., 310 ff.
[528] Cf. mn. 337 ff.
[529] *Örücü*, Methodological Aspects (fn. 516), pp. 37 ff., and – in revised version – in: Methodology (fn. 506), pp. 568 ff.

however, without – when such a functional method is used – excluding other approaches, with a focus such as psychological, behaviour-oriented, space-covering, configurative, problem-based, or "most similar" or as "most different"; there is also nothing to be said against a multi-approach strategy. (2) In the subsequent "descriptive phase", the focus is on the description of the norms concepts and institutions of the system concerned; here the collection of data is to be carried out on the basis of classificatory schemes, and socio-economic problems could possibly be included. (3) In the phase called "identification" or also "classification", the focus is on the identification or discernment of differences and similarities by placing them juxtaposed, and comparing them with, each other; according to the "empirical school", one has to do this by starting with the facts, "the problem", rather than with hypotheses. (4) Only in the subsequent phase, called "explanation", the actual comparison is to begin, during which the different divergences and similarities are to be assessed. Because a restriction to written or formal regulations may often give an incomplete or distorted picture, political, economic, cultural and other social phenomena are to be considered as possible hypotheses; this might possibly mean that historians, anthropologists, economists or cognitive psychologists might have to be consulted. (5) In the last phase, the so-called "confirmation", the result of the investigation is to be incorporated into a set of final statements – after the verification of the tentative hypotheses and the cumulative "acceptance" of various basic positions. What, however, supposedly does not belong to *Örücü*'s methodological "blueprint" anymore, is the "evaluation", because legal researchers should restrict themselves, on the whole, to description, analysis and explanation of the material compared. If one wants to consider evaluation as a comparative law step in spite of this[530], then this should take place between the phases of "explanation" (4) and "confirmation" (5).[531]

226 In this relatively detailed and structured plan of investigation, which is content neither with a listing of possible methods nor with mere guiding principles, all essential stations of examination are, admittedly, touched upon. However, one could not only imagine that some individual points be categorized differently; in addition, the variety of different objectives does not appear to be sufficiently covered.

227 Similarly expandable and in need of further differentiation is the "four-step model"[532] in *Jescheck's* "intellectual methodology of comparative criminal law research".[533] According to this, (1) initially one's own dogmatic and criminal-political point of view has to be established as the basic working hypothesis, (2) this is to be followed by the exegetical work with the foreign law, (3) continued with the systematic ordering and presentation of the material, and (4) finalized by the legal-political evaluation of the found solutions – this final phase, however, is considered as being already beyond the framework of the actual legal comparison.[534]

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[530] As suggested by *Kokkini-Iatridou*, Aspects (fn. 513), and referred to by *Örücü*.

[531] While *Örücü* left it with this evasive statement in her blueprint of 2007 (in: Methodological Aspects, (fn. 516, p. 40), in her Methodology of 2012 (fn. 506, 570 f.) she sees the purpose of research exactly in the task of determining the higher value of one solution relative to another and concedes that "creative" comparative law research may be interested in pointing the way to "better law"- this, however, cannot be done without evaluations.

[532] As foreign law is, for instance, called by *Hilgendorf*, Einführung (fn. 6), p. 19, and *Schramm*, Erkenntnisse (fn. 61), p. 177.

[533] *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 40 ff. (cf. mn. 36), partly modified in: Strafprozessreform (fn. 133), pp. 771 ff.

[534] Following a similar sequence, *Konrad Zweigert*, Zur Methode der Rechtsvergleichung, in: Studium Generale 12 (1960), pp. 193–200 (with certain refinements in: *Zweigert/Kötz*, Comparative Law, fn. 7, 3rd ed. pp. 34 ff.), suggests to start with posing the working hypothesis for which the own dogmatic or legal-

Even though it remains questionable whether one could draw up a logical and self-contained methodology of comparative law which had any claim to work perfectly,[535] this should not prevent the development of a basic model for legal-comparative work which might, on the one hand, be flexible enough to be applicable to as many and varied objectives as possible; on the other hand, however, concrete enough to serve as a methodological Vademecum for the most important steps of work in the standard case.[536] This is to be attempted in the following – based on own experience in the comparison of law – especially with the focus on the area of criminal law. In order to do this, the essential phases of investigation are to be presented first (Part III.B.). After that, specific prerequisites concerning personnel and necessary aids for efficient comparative criminal law research will be examined (Part III.C.). 228

B. Phases of Investigation – Steps of Examination

To begin with, it should be noted that for the following there has been a conscious decision not to engage in an abstract way with theoretical points at issue, because the clear view that is needed for the practical work in comparative law projects is blurred rather than illuminated by them. Not only do, for example, functional and institution-related approaches often find themselves in confrontation with one another, while they are combined by other authors into a "functional-institutional approach" and contrasted with a "problem-solving approach":[537] most of these labels are also only of significance for certain types of comparative legal research, or only at specific levels of investigation. Therefore, one should handle cautiously the assignment of methodical approaches to particular schools of thought and those ciphers that may easily entice to hasty conclusions – instead the individual problems and requirements of examination should be treated in as unprejudiced a way as possible and free of "labels" at the relevant place of the comparative investigative process. 229

As a rule, five main steps can be recommended for the work procedure: to start with, there has to be the clarification and formulation of the objective the comparison is 230

political point of view may serve as a point of reference, then to juxtapose what was explored by the country report, and finally to evaluate it – insofar going beyond *Jescheck* by considering this step as part included in comparative law (cf. mn. 175 f.). Different from Jescheck's 4-step scheme, the 7-point list of comparative methods by *Sieber (*mn. 34 to (5)–(11), rather than providing a work plan to be be carried out step-by-step, offers various modalities of comparative legal research (cf. also mn. 34 fn. 90, mn. 36 fn. 124, mn. 50 fn. 146). As to yet somewhat different structures cf. *Brand*, Grundfragen (fn. 10), p. 1086; *Rösler*, Erkenntnisinstrument (fn. 10), pp. 1189 f., and the overview by *Kokkini-Iatridou*, Aspects (fn. 51), pp. 178 ff.

[535] As doubted by *Zweigert/Kötz*, Comparative Law (fn. 7), p. 32, and in scepticism even surpassed by *W.J. Kamba*, Comparative Law: A Theoretical Framework, in: International and Comparative Law Quarterly 23 (1974), pp. 485–519 (511), according to whom "it is not possible, nor would it be prudent to attempt to prescribe specific comparative procedures to be followed".

[536] In this sense also *Kamba*, Theoretical Framework (fn. 535) might be able to agree when thus continuing his aforementioned statement: "The most that one can do is to suggest some broad pointers towards a meaningful technique or techniques."

[537] As, for instance, in *Örücü*, Methodology (fn. 506), pp. 561 f., Methodological Aspects (fn. 51), p. 33. In a similar way reinterpreting, *Heike Jung*, Über die Beobachtung als Methode der Strafprozessvergleichung, in: Winfried Hassemer et al. (eds.), In dubio pro libertate. Festschrift für Klaus Volk, München 2009, pp. 222–230 (227), suggests to understand the label "Strukturvergleich" (structure comparison) as comparison of "Funktionskomplexe" (functional complexes) in terms of *Zweigert/Kötz* (in: Theorie, fn. 126, p. 363) or to equate the "funktionale Betrachtungsweise" (functional approach) with "Strukturvergleich" in terms of the respective MPI project at hand (cf. mn. 256 ff.). As to such partly rather confusing contrastings or identifications cf. also the following references concerning the formulation of the comparative task (mn. 232 ff.).

aimed at, together with the elaboration of any working hypotheses, at best in form of a catalogue of questions (1). This has to be followed by the selection of the countries to be included in the comparison of law (2). According to these specifications, country reports are to be written (3). With that, the basis for the actual legal comparison and establishment of a cross-section forming a model has been created (4). The conclusion can then be in the form of an evaluation – depending on the objective, this may be dogmatic or legal-political – and appropriate recommendations (5).[538]

1. Formulation of the task – Working hypotheses – Catalogue of questions

231 "What to compare?" As the first question to be answered in a comparative law analysis[539], this statement is certainly equally as correct as the exhortation that, at the beginning, there should be "the problem or working hypothesis, in short the *idea ["Einfall"]*, without which nothing prospers in the world of spirit".[540] Less certain is whether, in doing so, "one's *own* dogmatic and criminal-political point of view" should be used as a starting point,[541] as this may narrow the field of vision right from the start, and may lead to the prejudicing of the insights to be won.[542] To prevent such pre-programming, one should – in a way as unprejudiced by the own law as possible – first establish clarity concerning the objective and the extent of the problem area to be investigated (a) and, after having excluded overly ambitious targets and unproductive confrontations (b), describe the methods that might be best appropriate for the respective kind of project (c). Regarding the catalogue of questions to be developed therefrom (d), one's own law may definitely serve as a first point of orientation, though it should not act as a limiting borderline. Rather, when the scope of the problem is clarified, an open field of vision is important, even if questionable chances of realizing the project – above all, concerning the countries to be selected – may enforce certain limitations anyway. To accept such restrictions is, however, only sensible insofar as the task still appears to be workable in a successful way, and therefore does not have to be dropped completely.

a) Determining the purpose to be pursued and at what level it is to be carried out

232 The question concerning the setting of the goals of the comparative law research to be undertaken, has to be answered first, because, based on this, the subject and scope of the investigation can be decided and outlined.

233 Even if the *objectives* of comparative research projects, as shown in Part II., can be very different, and there may be cross-overs and overlappings, when the first basic direction is clarified, one has to decide what type of comparative law the project aims at:

– whether the focus is solely on finding evidence of a comparable criminal norm in one or several foreign legal system(s) – in the sense of judicative comparative criminal law,

[538] This basic model, as already presented in *Eser*, Comparative Legal Research (fn. 4), pp. 99 ff., *idem*, Funktionen (fn. 4), pp. 1521 f., has repeatedly proven to be of value in my own comparative projects in criminal law and, based on this experience, is merely to be developed further here.

[539] Thus *Örücü*, Methodology (fn. 506), p. 566.

[540] Thus, in the German edition, *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), p. 33 (emphasis in original); with less pathos phrased in the English edition of Comparative Law (fn. 7), p. 34.

[541] Thus *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 40, to his first step of examination (emphasis in original); critical of this *Nelles*, Internet (fn. 87), p. 1007.

[542] Cf. *Ambos*, Völkerstrafrecht (fn. 429), p. 44; *Rosenau*, Plea Bargaining (fn. 422), p. 1604.

- whether – in the sense of legislative comparative criminal law – knowledge for a reform is to be gained from foreign law,
- whether – in the sense of theoretical comparative criminal law – certain legal terms are to be examined in relation to their construction and regulatory content, or
- whether a primarily theoretical problem should also, secondarily, open up legislative options.

Depending on the answer to this goal-setting initial question, there may be different consequences for the *level of comparison and its scope* right up to the point of the legal systems to be chosen. If, for example, in the area of *judicative* comparative criminal law, one has to find out only whether – concerning the domestic punishment of an offence committed abroad – there is a comparable offence description at the place of the crime, the comparison takes place at a limited micro-level, and can further limit its subject-matter to the identification of a comparable criminal provision from the place where the crime was committed.[543] It might even be sufficient to prove the existence of a corresponding offence proscription, without having to engage further with its scale: as, for example, in a case of incest which, when committed between father and daughter, is explicitly declared punishable, but when – not further defined – "relatives" are involved, may need investigation into family law. If in criminal proceedings, however, the focus is on evaluating whether sibling incest merits prohibition – by comparing the criminal liability or decriminalization in foreign countries,[544] an investigation at the macro-level will have to be conducted. In doing this, the finding will be (the) more convincing, the more national traditions, including their cultural background, are investigated. **234**

On the other hand, if – with a *legislative* objective – the chances for harmonizing the prohibition on multiple prosecutions, *ne bis in idem,* within the European Union are to be explored, a meso-comparison limited to the member states may be sufficient[545] – unless there is also meant to be an inclusion – beyond an inner-European comparison – of relevant experiences of other continents and legal systems in the considerations of the reform. In this case a macro-comparison, as comprehensive as possible, will have to be undertaken, as would be necessary for the identification and formulation of other general principles of criminal liability. **235**

In the context of *theoretical* comparative criminal law, different ranges are also conceivable, in the same way as such projects may open the door for legislative objectives. To find proof, for example, that there are more variants for the establishment of the subjective elements of a crime than only intent and negligence – such as "recklessness" in common law –, a micro-comparison between a few countries would be sufficient. In contrast, such an investigation will have to be more extensive and profound, the more internal delineations of concepts – such as within different forms of intent – and their relevant criteria, have to be covered. Or should, for instance, all conceivable grounds for excluding criminal responsibility be established in a comprehensive way, not even a meso-comparison within related legal families will be sufficient; rather, the search – in a macro-comparison – will also have to be extended to countries which possibly follow different paths in a more or less differentiated system of criminal offences, while leaving a way out for cases where the offence against a criminal **236**

[543] Cf. *Kubiciel*, Funktionen (fn. 66), p. 216.

[544] Cf. BVerfGE 120 (2008), p. 224; cf. mn. 119, 202, 206.

[545] As, for instance, pursued in the reform-oriented comparative project on multiple criminality and prosecution by *Arndt Sinn*, Jurisdiktionskonflikte (fn. 278).

prohibition is – for certain reasons – not supposed to be followed by punishment.[546] If – compared to other countries – such exits out of criminal liability should be lacking, then what was initially only planned as dogmatic legal comparison may develop into a legislative impetus for reform.

b) Questionable targets and alternatives

237 As can be seen from these examples alone, the presentation of some methods of comparison as if they were needed regularly, without consideration for the intended goal, is not, as a general rule, sustainable. In order to sort out the approaches to the finally decisive alternatives of normative-institutional, functional and structural ways of proceeding, the following concepts have to be qualified:

(i) Claim to universality

238 To clarify the dependence of the comparative method on the objective to be reached foremost concerns the particularly far-reaching search for transnationality. In this sense, particularly *Zweigert* – in the area of private law – considered that "the time had come for a comparative law system which examines the interpretation of one's own national law based on comparative investigations, and, in this way, makes comparative law fruitful for the interpretation of one's own law".[547] However important this critical function of comparative law may be,[548] there is no need for every interpretation problem to look across the borders. As can actually be seen from *Zweigert's* examples themselves, he was mainly concerned – considering his controlling function of comparative law – with the legal-political development of law in the sense of legislative comparative law, even though the interpretation of national-legal regulations, in the judicative area, may benefit from the consultation of foreign law.

239 "Universal comparative criminal law", placed in first position in his seven-part list of methods by *Sieber,*[549] raises more expectations than it can fulfil. Even if it is not to be understood as stating the universality of the method, but is only meant to be directed to "the inclusion, in principle, of all legal systems in the world",[550] this can hardly be the comparative rule, but right from the start is only necessary where a research project has a macro-universal or, at least, meso-regional claim; this may be so in the context of the reform-political investigation of transnationally applicable principles of criminal law, or the theory-oriented collection and modelling of systems of criminal offences, forms of sanctioning or procedural structures, and/or essential segments of these. To expect, in contrast, a universal orientation in every comparative law project – even when the focus is just on the clarification of terms or institutions within a certain legal family, or only on the evidence for legal variants in one or several other legal systems –, this does not only overshoot the mark, but may also quickly prove unworkable.[551] Not the least, the

[546] As was to be found out by the MPI-project on "Rechtfertigung und Entschuldigung" (Justification and Excuse) at least approximately; cf. *Eser/Perron*, Strukturvergleich (fn. 1), pp. 4 ff., 14 ff.

[547] *Zweigert*, Universale Interpretationsmethode (fn. 73), p. 19, however, as already conceded by himself, one may meet such a far-reaching challenge, as to principally check the national law against possibly "better" foreign law, only when relevant systems have been extracted from the most important global laws – quite apart from the fact that, because of his – allegedly the own law favouring – *praesumptio similitudinis* (cf. mn. 253 with fn. 583) – he was suspected of ideological bias; as to and against this criticism see *Michaels*, Functional Method (fn. 103), pp. 369 ff.

[548] Cf. *Zweigert*, Universale Interpretationsmethode (fn. 73), pp. 10, 17 f. and supra mn. 208.

[549] Cf. mn. 34 to (5) with further references.

[550] *Sieber*, Grenzen (fn. 66), p. 70 fn. 119; *idem*, Strafrechtsvergleichung (fn. 5), p. 111 fn. 136.

[551] As to these aspects of selecting countries and to further working conditions see also mn. 276 ff. and 338 ff., espectively.

demotivating effect should also not be underestimated when one believes that a comparative law project should be given up completely if one would have to fear that, due to the limitation to certain countries, it might not be acknowledged as "true" comparative law – as would be unavoidable with most comparative law dissertations. It appears similarly excessive to denote the comparison of human and social needs – in contrast to purely legal questions – as a "universalist approach".[552] "Universal(ist)" can at best mean that the social problem is not restricted to national legal borders,[553] but hardly, that there is always a need for global comparative law research to solve the problem.

To prevent any misunderstanding: this is not about calling the idea of universality, in principle, in question – as there may be projects, after all, that with regard to their objectives need to include all legal systems in the world or have at least the tendency to do so. That does not have to mean, however, that comparative law always has to be universally orientated, and therefore would only be possible within larger organisational units or in networks.[554] **240**

(ii) Legal-internal methods of comparison versus culturally-oriented comparative law

One also has to be careful with the alternative "either – or" of certain methods. This applies especially to the contrasting of "legal-internal" methods of comparison[555] and "culturally-oriented comparative law".[556] Insofar as the latter is meant to be given preference – unilaterally – to the other,[557] the following has to be countered. As correct as it is, on the one hand, that it may be sufficient for the comparison of certain terms – such as attempt in relation to preparation or completion – to interpret them only from "within themselves", without having to investigate the cultural background, such an extension of the field of vision may, on the other hand, be necessary when different delineations between the above mentioned terms might have divergent criminal law consequences; therefore, it is necessary to examine whether, for example, a comparatively broad understanding of preparation, still exempt from punishment, is accidental or to be explained by an understanding of freedom that is ideologically-politically based, or even whether there is an increased need for security behind the earlier transition from mere preparation to punishable attempt in another legal system.[558] Accordingly, also with **241**

[552] As suggested by *Örücü*, Methodology (fn. 506), p. 562.

[553] But even such a border-crossing understanding of "social needs" as "universal" is rightly questioned by *Adams/Griffiths*, Similarities (fn. 515), pp. 283 f., and *James Gordley*, The functional method, in: Monateri (fn. 74), pp. 107–119 (118).

[554] As (in this sense) *Sieber's* "universale Rechtsvergleichung" seems to be overinterpreted by *Hilgendorf*, Einführung (fn. 6), p. 21, Cf. also *Perron*, Nationale Grenzen (fn. 44), pp. 283, 301, and for the whole cf. mn. 72 ff.,, 342.

[555] To which *Fateh-Moghadam*, Funktionalismus (fn. 109), pp. 43, 55 ff., wants to see his "operative funktionalism" restricted.

[556] As, for instance, argued for by *Beck*, Interkultureller Dialog (fn. 118), pp. 65 ff.

[557] As in a one-sided manner postulated by *Pierre Legrand*, Le Droit Comparé, 4th ed. Paris 2011, p. 125, in the last sentence of his – not least influenced by the philosophical hermeneutics of the circle around *Martin Heidegger* – tract: "la comparaison des droits sera CULTURELLE ou ne sera pas" (emphasis in original), and as described as characteristic for post-modern thinking by *Richers*, Post-moderne (fn. 132), p. 524. As to this "cultural turn" which is especially directed against the law-oriented functionalism see also mn. 250 f.

[558] As to the, for instance, ideological-politically conditioned preference for objective doctrines of criminal attempt in Japan versus the more subjective concept of attempt prevailing in Germany see *Makoto Ida*, Strafrechtsvergleichung als Kulturvergleich? Dargestellt am Beispiel der Versuchsstrafbarkeit, in: Streng/Kett-Straub, Kulturvergleich (fn. 118), pp. 23–37, and *Streng*, Strafrechtsexport (fn. 35),

respect to these methods, one is not, in principle, preferable to the other, but rather is dependent on the respective objective and, in this way, possibly complementary.[559]

(iii) "Question driven" versus "theory driven"

242 Also the attempt to pursue comparative law either as "question driven" or as "theory driven",[560] is hardly to be understood in the sense of "either – or", but at most, once more, as an alternative that is, in the end, dependent on the objective of the project. It would also be hasty to state that theoretical comparative law has to be principally "theory driven", while judicative and legislative comparative law could not be imagined as anything other than "question driven". The reason for this is, as theoretical comparative law, on the one hand, might be directed to a very specific question, so a legislative project, on the other hand, might be laden with theory, possibly even just to formulate a workable research question. Given this, the necessity to find a clearly defined issue (instead of some high-flown theorizing) and its theoretical analysis (instead of being content with superficial phenomena) are good reasons to, at least, consider contrasting "question driven" and "theory driven".

c) Different(ly) appropriate methods of comparison

243 Irrespective of the research issue – independently of whether it is planned to be more or less universal, only legal-internal or also culturally-oriented, or more question-specific than theoretical in approach –, the question remains what is meant to be the actual *object* of the comparison or, in other words, what is the *tertium comparationis*. This question leads onto a battle field where – summarized in key words – three main directions with fluid transitions face one another: that is legalism, functionalism and structuralism. These different approaches to the determination of what is to be compared concerning the subject matter, however, are not – as some debates might suggest – to be understood as mutually exclusive alternatives. Rather, depending on the objective, each of these comparative methods has to be given its own place.

(i) Legalistic normative-institutional approach

244 While the methods used in the early days of comparative law research were not known under these names then, they can be characterised as legalistic in the sense of normative-institutional, for the reason and insofar as they focussed mainly or even exclusively on the comparison of legal terms and institutions.[561] These variants, also called "begriffsdogmatisch" (term-dogmatic), "institutsbezogen" (oriented to institutions and/or legal constructions), "typological" or "normative comparative criminal law"[562], essentially limit themselves to the question whether certain terms, institutions, differentiations or other configurations of the domestic law can also be found in other legal systems, and to what extent they might be understood in the same, a similar or a divergent sense.

245 Even though this type of comparative science, which orientated itself in a more normativistic way on the law and less on social reality, has in the meantime turned out

pp. 7 ff.; to partly different value criteria on a large-scale basis cf. *Katrin Schubert*, Der Versuch – Überlegungen zur Rechtsvergleichung und Harmonisierung, Berlin 2005, especially pp. 271 ff.

[559] Cf. also *Perron*, Operativ-funktionalistisch (fn. 87), pp. 121 ff.

[560] As analyzed by *Adams/Bomhoff*, Comparing Law (fn. 515), pp. 6 ff. from trends found in the contributions to their anthology – without identifying themselves with that alternative though.

[561] Further to the historical development connected – inter alia – to the "historical school" and terminological jurisprudence cf. *Constantinesco* I, Einführung (fn. 9) pp. 60 ff., and supra mn. 14.

[562] As to these and similar labels cf. *Kokkini-Iatridou*, Aspects (fn. 513), pp. 165 ff.

to be insufficient, one cannot deny it some intrinsic value. In this way, it might be quite meaningful, in the area of criminal law, to find out

- whether a specific legal term, such as "Tatbestandsmäßigkeit" (the fulfilment of the definitional elements of the offence),[563] is unique or has certain parallels in another system of criminal offences,
- whether, going beyond this, the structure of crime is vertically further sub-divided into unlawfulness and guilt, or whether, instead, there is only a differentiation between objective and subjective elements of crime at the same level like, e. g., actus reus and mens rea,
- or whether, in the procedural area, only the accused may lodge an appeal against a conviction but not the prosecution against an acquittal. Of course, thematically these will usually only be micro-comparisons; however, just as these may broaden into a larger macro-comparison, such normative comparisons are conceivable as both an independent task, and a pilot study-like initial stage for a larger comparative project.

However, as may be suspected from just these examples, the findings remain rather selective and often also superficial when the field of vision is limited to legal terms or institutions are considered in isolation. This manifests itself not only through the fact that the meaning of legal terms and legal norms can frequently not be recognized by just analysing them by themselves, but has to be investigated in the context of the relevant social problem to be regulated. In addition, when there is just a comparison of legal terms, one might only gain fragmented insights into a larger context of the relevant norms. This may easily lead to wrong conclusions as well, for example, when the lack of a parallel legal term in the foreign law leads to the rash assumption that there is also an equivalent lack of regulation, while such facts may actually be covered by a different legal term. The significance of a legal institution can also, as a rule, not be understood without a closer inspection of its practical function and theoretical foundation. Normative-institutional approaches certainly do not become worthless because of such reservations, but one has to be aware of their limited validity. **246**

(ii) Socio-functionalist directions

During the search for additional methods of comparison which have become necessary, the *principle of functionality* has in the meantime, gained acceptance as the dominant approach.[564] The basic idea can be traced back to *Jhering's* instrumental theory ("Zwecktheorie"),[565] developed significantly further for comparative private law in the school of *Rabel* and *Zweigert*[566] and incorporated into comparative criminal law probably for the first time by *Jescheck*.[567] Functionalism, in the meantime to be found in **247**

[563] Cf. mn. mn. 106 fn. 249.

[564] As to the world wide dissemination of this orientation see *Michaels*, Functional Method (fn. 103), p. 340.

[565] Cf. supra I.B.1. zu fn. 27.

[566] Thus by *Rabel*, Rechtsvergleichung (fn. 38), pp. 3 f., still designated as "systematical" (cf. supra II.A.2(d)), while for *Zweiger*t functionality is becoming the trademark: first in a merely rudimentary manner [in: Methode (fn. 534), pp. 194 f., and in: Kritische Bewertung (fn. 426), p. 81, and then more explicitly (in *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), 1st ed. 1971, pp. 29 ff., 3rd ed. 1996, pp. 33 ff., and in *Zweigert*/Puttfarken, Analoge Rechtsinstitute (fn. 164), p. 400]. However, insofar as comparative law shall require inclusion of references of "entire legal orders in their spirit and style" [as defined by *Zweigert,* in Kritische Bewertung (fn. 426), p. 79, while in: Methode (fn. 534), p. 193, he merely talks of reference to "different legal orders"], the concept of comparative law appears unduly narrowed and factually restricted to macro comparisons – which can hardly be as *Zweigert* intended it.

[567] This, though, was not yet *verbatim* expressed in *Jescheck*'s inaugural lecture (Strafrechtsvergleichung, fn. 3), but for the first time probably done by decribing the orientation of comparative law on the

different variations,[568] has a common core for which the following is essential: on the basis that in law only that is comparable which has the same function, and that this function is directed at the regulation of a certain social problem, then certain legal terms or institutions are primarily not suitable as reference points for comparison; rather, the legal comparison has – as *tertium comparationis* – to orientate itself, away from conceptual, institutional or dogmatic preconceptions as much as possible, towards the factual problem underlying a legal rule – and in doing so, to its "position in life", so to speak. While this "factual problem of life's reality"[569] can be found more or less equally in any social order, its legal treatment and solution may be regulated in totally different parts of a legal system and in different ways. The actual object of comparison is therefore not the norm – at least not exclusively or primarily – but rather it is the facts of life, the circumstances preceding it in the form of a problem of social order that is in need of regulation.[570]

248 On closer inspection, however, this core is found, above all, in the English-speaking comparative literature in mainly two distinct forms.[571] Regarding a *"functional-institutional approach"*, the question is which institution in system B fulfils an equivalent function in system A under investigation. As is unmistakable, the relevant point of reference here is the legal system – similar to the legalistic approach discussed above – even though the function of an institution or of a legal norm is supposed to be more important here than the terminological concept. In contrast, in a *"problem-solving approach"* the question is how a particular social or legal problem, which presents itself in the societies to be compared, may be solved. In this primarily sociological approach the connection to the factual need for regulation, which is thought to be both human and social and thus at the same time universal, is at the foreground, while the legal regulation necessary to solve the problem has only secondary-instrumental importance.

249 Without wanting to disregard these different accentuations, there is, however, no reason to give preference in principle to one approach over the other because, which way ought to be followed, depends crucially once more on the objective of the

"social problem" as concordant with the "principle of functionality" by *Zweigert/Kötz* and by emphasizing the "functional equivalence" of the various possible solutions to be found by the comparative cross section (in: Strafprozessreform, fn. 133, pp. 772 and 775, respectively).

[568] As, for instance, listed in eight different forms by *Michaels*, Functional Method (fn. 103), pp. 343 ff.:– "finalism", "adoptionism", "classical functionalism", "instrumentalism", "refined functionalism", "epistemological functionalism", "equivalence functionalism" and "functionalist comparative law"; on closer inspection, however, as may be concluded from his subsequent functional analysis (pp. 363 ff.), these variants are less representing methods but rather objectives of functional comparative law. This does not mean that the blame for such confusions as they can be seen again and again in contributions declared as "methodical", should be put on *Michaels;* nevertheless they turn the international debate on functionalism into quite an inscrutable field

[569] "Sachproblem der Lebenswirklichkeit", as concisely phrased by *Ebert*, Rechtsvergleichung (fn. 78), p. 147, and by *Kokkini-Iatridou*, Aspects (fn. 513), p. 174, was found to be "the most suitable" term.

[570] Thus also *Wörner*, Strafrechtsvergleichung (fn. 87), p. 141 in the same sense – although with partly different accentuation – *Jescheck*, Strafprozessreform (fn. 133), p. 772, furthermore *Ambos*, Völkerstrafrecht (fn. 429), p. 44; *Jung*, Grundfragen (fn. 66), p. 2; *Pieth*, Äquivalenz (fn. 87), p. 481; *Rosenau*, Plea bargaining (fn. 422), pp. 1604 f.; *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 113 f. fn. 140. In the same manner, the contributions collected in the recent conference proceedings by *Beck/Burchard/Fateh-Moghadam*, Strafrechtsvergleichung (fn. 6) and *Streng/Kett-Straub*, Kulturvergleich (fn. 118) are – except for certain differences mentioned before or hereafter – more or less explicitly functionally directed as well. For a concise analysis of the basic functional approach see cf. *Thomas Coendet*, Rechtsvergleichende Argumentation, Tübingen 2012, pp. 158 ff.; *Fateh-Moghadam*, Funktionalismus (fn. 109), pp. 44 ff.; *Jaakko Husa*, Farewell to Functionalism or Methodological Tolerance?, in: RabelsZ 67 (2003), pp. 419–447 (422 ff.).

[571] *Örücü*, Developing (fn. 78), pp. 51 ff.; *eadem*, Methodology (fn. 506), pp. 561 f.; similarly differentiating already *Michele Graziadei*, The functional heritage, in: Legrand/Munday, Traditions (fn. 353), pp. 100–127; *Kokkini-Iatridou*, Aspects (fn. 513), pp. 168 ff.

individual project. If, for example, the legal scope of "intent" or "instigation" is to be established, then, on the one hand, it would not be sufficient – as possibly might be the case in a purely legalistic-conceptual approach – to identify similar terms and to check them by looking for commonalties and differences; rather, at least the position and function of these terms within the system of the offence would have to be clarified. If, on the other hand, one had to establish what subjective requirements – in the sense of theoretical comparative criminal law – are placed on criminal responsibility, or – in the sense of legislative comparative criminal law – were to be placed, then one would have to start from the conceivable mental and emotional variants on which the attribution of responsibility depends; then it would be necessary to ask which of the mental variants are covered by criminal law and by which legal terms they are expressed. Similarly, for the establishment of the influences – covered by criminal law – on the commission of a criminal offence, one could not simply start with the concept of instigation, but would initially have to break down the range and variance of such influences. This would have to be done, in order to be able to sensibly ask, which of these variants – possibly with further-reaching questions concerning the reasons and range – are criminalized by the legal systems to be compared, and through which legal terms and possibly different legal consequences this is done and/or should be done. Similarly, in the procedural area, the comparative question concerning the handling of public pre-conviction of prominent suspects might turn out quite differently. The analysis may be more political-sociological when one has to establish to what extent and by which means a legal system usually reacts to occurrences such as public pre-convictions: maybe not all, or by mitigating the punishment, or, on the other hand, even by cessation of proceedings. In contrast, the comparison may take place more in the legal-institutional area when the focus is only on the question of how a renunciation of criminal prosecution is legally constructed – be it as a more or less binding procedural obstacle, or as an excuse by substantive criminal law – and how this is explained. Accordingly, the catalogue of questions may have to be established differently.[572]

(iii) Cultural comparison

In spite of the refinements that can be achieved by the principle of functionality, this method has not escaped criticism either.[573] This can be overlooked, insofar as the more extensive demands have a goal different from comparative law, or at least go well beyond it.[574] This applies, in particular, to the demand of *cultural comparison* of law inspired by a "cultural turn".[575] **250**

[572] Cf. mn. 263 ff.

[573] Cf. in particular *Frankenberg*, Critical Comparisons (fn. 517), pp. 434 ff., see further the overview on criticism and counter-criticism by *Julie De Coninck*, The Functional Method of Comparative Law: *Quo vadis?*, in: RabelsZ 74 (2010), pp. 318–350 (322 ff.), and *Husa*, Methodological Tolerance (fn. 570), pp. 434 ff., and, critically modifying in terms of a legal-internal "operative functionalism" *Fateh-Moghadam*, Funktionalismus (fn. 109), pp. 50 ff.

[574] As is the case with most of the comparative variants listed by *Michaels* (fn. 103) as well as with the "post-modern" approaches presented by *Richers* (fn. 132). As may be remarkable to note, purely theoretical discussions, like those mainly led in English by philosophers, historians and social scientists and critized by *Adams/Bomhoff*, Comparing Law (fn. 515), p. 13 fn. 11 because of their way of "describing 'functionalism' in ways that no comparative lawyer would accept", are hardly taken notice of in the comparative literature in German.

[575] As most prominently propagated by *Legrand*, Droit Comparé (fn. 557); see also *Coendet*, Argumentation (fn. 570), pp. 160 ff.; *Roger Cotterrell*, Comparative Law and Legal Culture, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 710–737; *Frankenberg*, Critical Comparisons (fn. 517), pp. 426 ff.; *David Nelken*, Defining and Using the Concept of Legal Culture, in: Örücü/Nelken, Handbook (fn. 9), pp. 109–132. Similar to the extra-legal debates mentioned before (fn. 574), the English literature on this "cultural turn" does so far not find much resonance among German language publications, with some

251 Considering the equally "culturally formed and culture forming role of the law"[576], one has to make a distinction that is based on the goal aimed for. If, on the one hand, the focus is on comparative law in the sense that specific prerequisites of criminal liability or elements of an offence cannot be appropriately explained and compared with one another without exploring the national-cultural background,[577] then such an omission would not at all be in accordance with the functional method; after all, already this method's founder postulated, "that all law is a cultural phenomenon and that legal norms must never be considered independent of the historical, social, economic, psychological and political circumstances."[578] In contrast, if the primary idea is really to investigate identical or different cultures, then a mere legal comparison is insufficient anyway: in this case, legal phenomena are not only to be compared with one another, but naturally have to be seen and weighted in their respective cultural roles.[579] If this is neglected, then this constitutes a failure of comparison of the cultures as such: this, however, could definitely not be blamed on the functional method of comparative law.

252 In other words, handled properly – and this has to be guaranteed through the appropriate drawing up of the catalogue of questions (infra 2) and the preparation of the country reports (infra 3) – a functional approach and a cultural comparison do not exclude each other, but rather have a complementary relationship in which, depending on law or on culture as the specific objective, one or the other method has the primary role.[580] In the same way one has to deal with theories where – in the sense of "law and economics" – greater weight is to be allocated to economic factors.[581]

(iv) Functional equivalence

253 As a kind of offspring of the socio-functional approach (ii), the doctrine of "functional equivalence", occasionally met with reservations, is agreeable as long as it follows the initial functional thesis that "incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function".[582] One enters on a questionable path, however, when – in a case where a comparable legal term in the sense of a *praesumptio similitudinis* (presumption of similarity) is appar-

exceptions – such as *Beck*, Interkultureller Dialog (fn. 118), pp. 67 ff.; *Fateh-Moghadam*, Funktionalismus (fn. 109), pp. 48 ff.; *Kubiciel*, Funktionen (fn. 66), pp. 213 ff., or *Rosenau*, Plea bargaining (fn. 422), pp. 1607 f. – not even in contributions which, like *Streng/Kett-Straub*, Kulturvergleich (fn. 118), explicitly deal with comparative criminal law as "cultural comparison"; cf. the review by *Albin Eser*, Strafrechtsvergleichung durch Kulturvergleich, in: Jahrbuch für japanisches Recht 2014, pp. 288–295 = www.freidok.uni-freiburg.de/volltexte/9725.

[576] As appropriately differentiated by *Jung*, Kulturelle Identität (fn. 358), p. 470. In the same sense, especially criminal law was already described as a "product of culture" and "lever of culture" by *Franz v. Liszt*, Einheitliches mitteleuropäisches Strafrecht (fn. 118), emphasizing particularly the service to be expexted from comparative criminal law for framing the intellectual life and furthering the development of culture.

[577] As demonstrated by the examples presented in mn. 286 ff.

[578] *Zweigert*, Praesumptio Similitudinis (fn. 547), p. 749.

[579] In this respect *Beck* (fn. 118) is certainly to be supported.

[580] In the same sense, *Kubiciel*, Funktionen (fn. 66), p. 214, and perhaps also *Rosenau*, Plea bargaining (fn. 422), pp. 1608 f.; cf. also *Weigend*, Criminal law (fn. 66), p. 263.

[581] Cf. *Kötz*, Aufgaben (fn. 44), pp. 149 f.; *Rosenau*, Plea bargaining (fn. 422), p. 1609, and – not without a critical undertone – *Florian Faust*, Comparative Law and Economic Analysis of Law, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 837–865; *Nuno Garoupa/Tom Ginsburg*, Economic analysis and competitive law, in: Bussani/Mattei, Comparative Law (fn. 45), pp. 57–72; *Richers*, Postmoderne (fn. 132), pp. 534 f., similarly sceptical with regard to attempts to approach comparative law primarily from the "internal perspective" or in terms of a "legal social science" see *Adams/Bomhoff*, Comparing Law (fn. 515), pp. 3 ff.

[582] Thus the fundamental and widely recognized starting point of *Zweigert/Kötz*, Comparative Law (fn. 7), p. 34; cf. mn. 248 ff.

ently lacking – one keeps on searching until a legal figure, equivalent in function, is found, and moreover, if this is made easier by excluding those legal systems that appear incomparable from the comparison right from the start.[583] To proceed in this way may be unavoidable for practical reasons, or even sensible according to the respective goal of the project, but it is hardly useful as a rule. For, not only that such pre-programming exclusions may generally result in incomplete and warped outcomes; rather, even the essential purpose of a project may possibly be missed – such as the exposure of significant differences up to the fundamental incompatibility of certain legal systems.[584] Differently from what is suggested by the phrases of "functional equivalence of different possibilities of solutions"[585] or of "functional[ly] equivalent solutions"[586], the question of equivalence is not to be oriented toward the solutions (found or to be found for the relevant social problem), but toward the finality (in terms of the objective) of the rule (to be pursued for solving the same social problem): the latter needs to be equivalent only insofar as it has the regulation of the same social problem as its object, while the kind(s) of solution(s) found in relation to this may be equal or different.[587] In the case of difference, solutions found may be legally-politically inopportune, which might lead to their non-consideration at the final level of evaluation. This, however, is not in any way capable of diminishing the theoretical gain in knowledge (even) from legal divergences.

Therefore, if the only important task of the comparative law project in question is to identify and compare with one another the rules and regulations relevant to a common social problem – independently of what the rules are called or of the solutions they offer –, then the discussions about more or less commonality, similarity or difference[588] lose their importance, too. This, then, is only a question of the development of a model and of weighting, both of which, in turn, have to be orientated upon the respective objectives of the legal comparison. **254**

A further point, about which the functional method is not questioned in principle but which demonstrates its need to be complemented, could be referred to as a lack of systematic-structural validity. The functional approach demands basically no more than – instead of being content with the comparison of (actually or seemingly) comparable legal terms – to identify the factual problem in terms of the reality of life as being something which is similar in the countries to be compared, and to find the norms which might possibly apply to it. What rules and regulations, however, are to be included and what findings are finally to be reached in this way, how deep the investigation into different layers of regulations has to be, and which background material has to be incorporated – about all of this, the functional method does not **255**

[583] In this sense – according to the critical interpretation by *Frankenberg*, Critical Comparisons (fn. 517), p. 437 – the position of *Konrad Zweigert*, Die "praesumptio similitudinis" als Grundsatzvermutung rechtsvergleichender Methode, in: Mario Rotondi(ed.), Inchieste di diritto comparato, Padova 1973, pp. 735–758, and *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 34 f.; cf. also *De Coninck*, Functional method (fn. 573), pp. 334 ff.; *Michaels*, Functional Method (fn. 103), p. 369.

[584] Cf. *Adams/Griffiths*, Similarities (fn. 515), pp. 282 ff.; *Roger Cotterrell*, Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity, in: Örücü/Nelken, Handbook (fn. 9), pp. 133–154; *Gerhard Dannemann*, Comparative Law: Study of Similarities or Differences?, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 383–419; *Frankenberg*, Critical Comparisons (fn. 517), pp. 436 f.; *Örücü*, Methodology (fn. 506), pp. 563 f.; cf. also mn. 277 ff., 299 ff.

[585] *Jescheck*, Strafprozessreform (fn. 133), p. 775.

[586] *Sieber*, Strafrechtsvergleichung (fn. 5), p. 114.

[587] In the same vein *Rosenau*, Plea bargaining (fn. 422), p. 1610. Cf. also *Örücü*, Developing (fn. 78), pp. 47 ff.

[588] Critically observed particularly by *Pierre Legrand*, The same and the different, in: Legrand/Munday, Traditions (fn. 353), pp. 240–311; cf. also *De Coninck*, Functional method (fn. 573), pp. 329 ff.; *Gordley*, Functional method (fn. 553), pp. 117 ff.

give any advice.[589] All these questions can be answered in a purposeful way only if, according to the objective of the respective project, the functional comparison is extended and deepened by a structural comparison.

(v) Structural dimensions of comparison

256 The aforementioned goal is served by methods which can be called "structural" comparison. This, however, is a choice of term that needs explaining. Because in the same way as "function", "structure" is made up of multifaceted terms whose meaning and terminology are not uniform.[590] This shows itself, on the one hand, in the factional dispute between "functionalists" and "structuralists" concerning the correct understanding of "comparative law"[591], and, on the other hand, in the idea of seeing in a structural comparison only an adoption of the functional approach[592], or simply to equate the functional approach with structural comparison.[593] If, in contrast, one wants both to leave the sociologically inspired battles over definitions behind and also allow the structural comparison a role of its own, then it has to be conceded that structural comparison of law represents a further development of the basic functional approach (in which the two methods do not have to exclude each other at all, but may complement each other). However, structural comparison has specific features, according to which it stands out in three ways from mere functional comparison – that is by breadth, depth and length – and in this way goes beyond it.

257 As far as the breadth of comparison is concerned, during the discussion of "systematic comparative criminal law" and "structural comparison" as possible objectives of theoretical comparative law,[594] it had already become apparent that they may aim at the investigation and comparison of legal systems in total, or at least at essential parts of them. The method is to be orientated accordingly. If, for example, the interest is broad-ranging with respect to the question how a legal system is structured overall, how certain areas of the law are classified, or what the reaction is to the violation of prohibitions and obligations, then, with regard to the method, it is not sufficient, on one hand, to ask – within the area of investigation – only about the functions of certain individual regulations; rather, each of the respective legal systems has to be looked at as a whole. On the other hand, this does not necessarily require an exploration of the deep structure of the system; rather, the description of the surface structure may be sufficient. It is, of course, another question, how much might be explored through the comparison of such systems. Certainly in the area of criminal law, there may already be a gain of knowledge by finding out whether and to what extent in some countries the reaction to unlawful behaviour consists exclusively of sanctions in the sense of criminal law, while in other countries there is a separation between criminal law and a Regulatory Offences Act; or whether the structure of the crime is graduated in the dogmatics of criminal law of some countries while others forego such gradings. Insofar, however, as in the comparative search for a "better system" the grouping of legal families or the development of general principles of law are of interest, one has to be aware of the limited validity of a broad-range comparison which remains on the surface.

258 For the in-depth dimension of structural comparison, it is essential not only to establish the type and level of the regulations which can be found in a legal system in

[589] Cf. *De Coninck*, Functional method (fn. 573), pp. 336 f., *Eser/Perron,* Strukturvergleich (fn. 1), pp. 14 ff.
[590] Cf. *Sieber*, Strafrechtsvergleichung (fn. 5), pp. 113 f. with fn. 142.
[591] Cf. *Kokkini-Iatridou*, Aspects (fn. 513), pp. 165 ff.
[592] *Jung*, Wertende Rechtsvergleichung (fn. 123), p. 3; *idem,* Structure (fn. 537), p. 301.
[593] *Jung*, Grundfragen (fn. 66), p. 2; *idem,* Theorie (fn. 126), p. 363.
[594] Cf. mn. 82 ff.

relation to the social order problem in question, but rather to take also into account their level of reality.[595] Both written and unwritten regulations may be part of this: on the one hand, in the form of court decisions, forms or administrative guidelines, by which legal rules are put into practice, interpreted, developed further or complemented, or by which directives are given to the legal practitioners; and on the other hand, in the form of "second codes", by which – even though not explicitly fixed anywhere, but rather expressed in general ideas about justice or other values of the users of the law – the "law in the books" becomes "law in action", and in this way becomes the actual "droit vivant".[596] This is not simply a question of the known methodological dualism between dogmatic and empirical science;[597] rather, in order to completely capture the deep structure, three areas and levels have to be established and analysed: one, the position in life that is in question for the comparison; two, the legal regulations that can be found relating to it, including their function, practical application and ideological-social background, together with; and three, the real effects which each of these regulations may entail.[598] If, for example, the penal reaction in different countries to self-defence resulting in death is to be compared, then, first of all, the possible – or at least likely – alternatives concerning the facts are to be described; then the legal rules concerning self-defence have to be established, including their interpretation which, in turn, may depend on different basic attitudes to the relationship of the state monopoly on the use of force and the individual right to defend oneself; and, in doing this, procedural factors, such as different rules of evidence, or court hearings with or without involvement of laymen, may also play a role.[599] In this regard, this is on closer inspection a question of "law as action"[600] and not just "law *in* action". In the same way, in a project comparing the position of the defence counsel, depending on the objective, one would have to describe, first of all, which defence situations are to be covered – self-representation of the defendant and/or legal assistance by a counsel, voluntary or obligatory defence, defence by a lawyer of one's choice or a court appointed defence counsel – and in which procedural phase the type of defence plays a role, including questions of legal aid or the obligation to bear the costs; then the respective rules and regulations, including court rulings and customary procedural

[595] In this sense – though only with regard to the depth of comparison – also the understanding of structural comparison by *Sieber*, Strafrechtsvergleichung (fn. 5), p. 113 fn. 142, p. 116. Although not yet speaking of structural comparison, the linking of the legal regulations and the interdependence with their effects as object of inquiry (for comparative law) can already be found in *Marc Ancel*, Droit pénal comparé et politique criminelle, in: Jescheck/Kaiser, Vergleichung (fn. 134), pp. 73–85, described as "le fonctionnement positif de ces systèmes dans leur réalité sociologique" (81). In the same way *Jung*, Grundfragen (fn. 66), p. 2, although he likes to see structural comparison merely as an adoption of functional comparison (cf. fn. 584 f.).

[596] Cf. *Ancel*, Droit pénal comparé (fn. 595), p. 81; *Jung*, Grundfragen (fn. 66), p. 2; *idem*, Theorie (fn. 126), p. 364; *Perron*, Nationale Grenzen (fn. 44), pp. 286 ff. The concept of "second codes", adopted by *Sieber*, Strafrechtsvergleichung (fn. 5), p. 116, appears to correspond to the "second-order approach", pursued in the Handbook of *Örücü/Nelken* (fn. 9); cf. *Hendry*, Review Essay (fn. 59), pp. 2259 f. The "contextualist" approach, which can be traced back to *Rabel*, also indicates the exploration of the deep structure of a regulation (as necessary); cf. *De Coninck*, Functional method (fn. 573), pp. 336 ff.; *Richers*, Postmoderne (fn. 132), pp. 532 f.

[597] In terms of comparative criminal law and comparative criminology complementing one another as described by *Kaiser*, Vergleichende Kriminologie (fn. 133), p. 90.

[598] Cf. already the preliminary considerations by *Perron*, Strukturvergleich (fn. 212), p. 135, to the MPI "structure comparison project" in question here (cf. mn. 1, 59, 89, 261).

[599] Cf. *Perron*, Nationale Grenzen (fn. 44), p. 286; *idem*, Überlegungen zum Verhältnis von Strafrecht und Strafprozeßrecht, in: Udo Ebert et al. (eds.), Festschrift für Ernst-Walter Hanack zum 70. Geburtstag, Berlin 1999, pp. 473–485 (476 f.).

[600] As impressively postulated by *Jerome Hall*, Diskussion, in: Jescheck/Kaiser, Vergleichung (fn. 134), pp. 39–52.

practice, would have to be established. In this context it might also be important to consider to what degree certain practices are constitutionally feasible and procedurally binding. And finally, one should find out to what extent the relevant norms are applied in practice, including any possible or particular consequences of them.[601]

259 Going beyond such in-depth investigations, a structural comparison may also be advisable in a longitudinal section. If "structure" also means a construct where certain individual parts are joined together in a larger unit and wherein each fulfils a specific function,[602] then the analysis of it must not remain limited to the individual parts, but it also has to include interactions and consequences; in doing so, it is especially important to consider whether and to what extent the weaknesses of an individual part is compensated for by the strength of another, or whether the lack of something on one level is made up for by the strengths on another level. For comparative law this means that, especially on the macro-level, where there is more at stake than the comparison of individual legal elements, not only their in-depth function – including their historical, ideological and other national-cultural background – is to be described, but also links between substantive and procedural criminal law that appear instructive are to be considered and, where applicable, to be followed into other areas of the law.

260 Such longitudinal steps and sections are particularly in order when a sequence of different procedural phases has to be compared. Where, for example, the legal position of the accused is at issue, in one country this may appear to be quite insecure immediately from the emergence of the first suspicion, while, in another, graver fears may arise only at the start of the official preliminary proceedings. Nonetheless, no conclusions as to the – for whoever – "better" procedural law may be drawn from this until the complete course of proceedings has been sounded out, because disadvantages for a suspect in the first procedural phase may be balanced out by a stronger legal position in the phase of the main hearing, or possibly by a more generous phase of legal redress and/or appeals – and vice versa.

261 It is this type of structural comparison that is pursued in the MPI "structure comparison project" this publication emerged from.[603] In using different variants of a crime causing death as points of reference, first the classification of these variants according to the definitional elements of the offence was to be assessed – thereby taking possible country-specific justifications and excuses or grounds for mitigation of punishment into account, then to establish essential criteria relevant to the sentencing – and, throughout these various phases, to consider special procedural features, and finally to follow the treatment of the case and of its different variants into the various modalities of the execution of a sentence; and all this from the point of view of the judges, public prosecutors, defence counsels and law professors questioned about it.[604]

(vi) Summary of what to establish for the determination of the comparative task

262 Depending on the objective and character of the comparative project – theoretical, judicative, legislative, evaluative or in one way or another combined with each other – a micro-comparison may be sufficient or a meso- or macro-comparison necessary. The more the latter is indicated, the broader the area of investigation will have to be – beyond the binational level – to multilateral and right up to universal. To limit the

[601] Cf. *Jung*, Theorie (fn. 126), p. 365. As to further exemplary material and working steps cf. mn. 286 ff.

[602] Cf. mn. 88.

[603] See Preface and mn. 1, 59.

[604] For more information about the concept of this "structure comparison project" see mn. 59 fn. 168 with further references, for details to its findings and results see *Eser/Perron*, Strukturvergleich (fn. 1).

subject matter of the comparison to a contrasting of individual legal norms, terms or institutions, is not, in principle, out of the question, but will, as a rule, be sufficient only where merely their existence or absence has to be shown. In order to establish beyond this a rule's or institution's actual function and social role, its comparability has to be focussed on the factual problem of the real life situation for which they are meant to provide solutions. How the country to be compared proceeds here, can normally not be understood without consideration of its historical, cultural, political and other ideological-social background. This may necessitate a structural comparison which has to be planned, depending on the project's objective, with a different approach in relation to its breadth, depth and length.

d) Working hypotheses – Catalogue of questions

Depending on the objective and the description of the subject matter, that have to proceed according to the aforementioned criteria, working hypotheses must be developed. These should be as precise as possible and elaborated into a catalogue of questions which is structured in a way that meaningful responses can be expected. That, however, is more easily said than done, because one might adopt the wrong approach thematically and also be exposed to subjective prejudices. In order to prevent this, it is important to be aware of such pitfalls right from the start. 263

(i) Thematical aspects

In this regard, one may run the risk, on the one hand, of formulating the working hypotheses in such a broad and general way that the answers to be expected from the country reports become too vague and diffuse to allow useful comparison with one another. On the other hand, questions may be formulated in such a narrow and specific way that apparently unimportant things are not recognized as relevant and, in this way, some essential things may be overlooked. In order to prevent gaps and distortions in the results of the comparison that may be caused by this, it must be possible that the questions be specified – with the same content – for all country reporters, on the one hand, but that they are, on the other hand, flexible enough to allow for possible peculiarities with respect to the country to be incorporated. 264

These two matters can be taken account of by planning a general structural outline that may be supplemented by the country reporters by means of adding possible country-specific features; in doing this, such digressions from the basic scheme must be identified upfront in the country report in order to allow consideration, if necessary, in the later comparative cross-section. In this sense, a general "structural scheme of country reports" was, for example, put at the head of the Max Planck Institute project concerning the "termination of pregnancy in an international comparison", which served both theoretical purposes and also reform-political goals – and was, with over 60 countries involved, unusually extensive.[605] In this scheme, the rough main points of the outline – concerning the framework conditions and the historical development (I.), the current law covering the termination of pregnancy (II.), and the legal-empirical material (III.) – are partly already sub-divided into up to three levels. Additionally, in order to be able to take national special features into account, these levels are partly extended into up to five: so, for example, in the German country report where – concerning the current law (II.) with regard to the permitted termination of a pregnancy (3) – there is a further sub-division into categories of material preconditions (3.1), indications (3.1.1), with medical-social indications (3.1.1.3) which include danger 265

[605] *Eser/Koch*, Schwangerschaftsabbruch (fn. 166), Vol. 1, pp. 13 f.; *idem,* Abortion (fn. 166), pp. VI f.

to life (3.1.1.3.1), dangers to health (3.1.1.3.2) and social factors (3.1.1.3.3).[606] After similar sub-divisions had to be inserted into other country reports as well, a comprehensive basis for the final comparative cross-section was simultaneously established.[607] Similar experiences were also associated with, among others, the judicative-initiated project on "Public prejudgement and a fair trial"[608] and with the reform-politically oriented expert report on "Fighting corruption through criminal law".[609]

266 The catalogue of questions, however, does not only have to be equally clear, specific and flexible, but also as accurate and unbiased as possible. It may easily happen that these requirements are not met when one has not completely grasped the factual matter to be compared, or fails to recognize – due to a narrow or biased perspective – essential questions, or believes that they can be neglected. Even though the thus indicated doubt as to whether comparative law can be neutral and objective at all, only becomes virulent in the phase of evaluation,[610] the wrong way ahead may be set as early as during the elaboration of the questionnaire: this may happen unconsciously because one remains attached to the directives of one's own legal system, without being able to imagine other countries' differing approaches to solutions; or it may even happen consciously, as, for example, by targeted pre-programming of the formulation of the problem, in order to direct the legal comparison towards a desired result, in the sense of a "self-fulfilling prophecy".

267 That the latter, in any case, is to be considered as incompatible with the scientific ethos, and therefore to be excluded, goes without saying. As for the remainder, however, one will never be able to present a universally applicable recipe for the establishment of a catalogue of questions in the face of the great variety of possible objectives and different social facts and legal areas. Despite this, the following guidelines may be useful.

(ii) In perspective view

268 With respect to the point of view from which the catalogue of questions is to be developed, as a rule, it may be obvious to start off with the regulations and institutions of one's own law, including all its differentiations,[611] as this is on offer as an already known framework. However, this can, at most, be a first point of orientation. The reason for this is that possibly not only the factual problem of the real-life situation which is to be compared, may not be fully covered; in addition, through the glasses of one's own law, one may see only one of several other conceivable variations of solutions. That is why, already at this point, it is imperative to take other variations of solutions for the real-life facts into consideration; this means, to anticipate and consider how the relevant life situation may be resolved by ways other than those provided in one's own law.

269 If, for example, in the aforementioned MPI "structure comparison project" in the case of manslaughter with mitigating circumstances, one had limited oneself to the perspective of the German law with regard to the question of what type and duration of

[606] *Koch*, Landesbericht Bundesrepublik Deutschland (fn. 166), vol. 1, pp. 19 ff.

[607] *Eser/Koch*, Schwangerschaftsabbruch (fn. 166), vol. 3, pp. 11 ff.

[608] *Albin Eser/Jürgen Meyer* (eds.), Öffentliche Vorverurteilung und faires Strafverfahren. Eine rechtsvergleichende Untersuchung im Auftrag des Bundesministeriums der Justiz Freiburg 1986; cf. pp. V f., 2 f., 324 f.

[609] *Albin Eser/Michael Überhofen/Barbara Huber* (eds.), Korruptionsbekämpfung durch Strafrecht. Ein rechtsvergleichendes Gutachten zu den Bestechungsdelikten im Auftrag des Bayerischen Staatsministeriums der Justiz, Freiburg 1997; cf. pp. 5 f., 100 ff., 705 ff.

[610] Cf. mn. 351 ff.

[611] Or, as phrased by *Jescheck*, Strafrechtsvergleichung (fn. 3), pp. 37, 40, to take "the town dogmatic and criminal-political position" as point of reference

punishment has to be expected in the end, then it would have seemed natural to focus – in the countries to be compared – solely or, at least, largely on guilt and sentencing according to the substantive criminal law. However, as could already be sensed during the planning of this project, while the possible severity of the verdict of guilty and the corresponding punishment may in one country be mitigated only in the phase of execution, in other legal systems mitigating factors may perhaps already be taken into account in the adjudication and sentencing phase of the procedure.[612] Or, if in the "abortion project" one had searched for the place of where the termination of pregnancy is regulated – according to the then German model, only in the criminal code –, this would not have worked in some of the countries which were compared. In fact, as it turned out, termination of pregnancy may also be regulated in other areas of law, such as health law. In order to be able to grasp such modalities, it was necessary – already in the generally prescribed catalogue of questions – to offer different regulatory alternatives apart from criminal law in relation to the legal sources for termination of pregnancy.[613] That is why it is important to open one's eyes when one chooses the point of view one wants to take, to separate oneself from preconceptions based on one's own law, and to sense with creative imagination which alternatives – apart from those already known – might exist for the solution of the noted factual problem.[614] At the same time, one should also consider, whether one has chosen the real-life elements to be compared in a way that is appropriate for the problem.[615]

(iii) Width and depth dimension

Such a "cast the net wide" approach[616] is also appropriate for the catalogue of questions where the dimensions of the breadth and depth of the comparison are concerned. This applies especially to connections and interactions which – depending on the subject matter of the project – may be expected between substantive and procedural criminal law, and also to other possibly affected areas of law. The historical reasons for the creation and development of the regulations in question, including the country-specific traditions that contributed to them, and other cultural background conditions should also be considered – on the whole, all factors which could be of importance for a coverage that does justice to the real-life facts to be compared. **270**

Accordingly, already in the MPI's "structure comparison project", which in the case of homicide dealt with differences in adjudication and sentencing depending on the respective procedural phases, not only questions of the interaction between substantive and procedural law were sufficient, but rather the diverse styles of proceedings and different professional assessments had to be investigated as well; for this, a case-oriented interview method appeared to be appropriate.[617] **271**

For the aforementioned "abortion project" it was necessary to delve even deeper into the extra-legal ideological-cultural background and sociological areas, because of the focus on the comparison of both legal and social dealings with contraception and unwanted pregnancy in very different legal families and cultural environments. In this context, apart from questions concerning the respective social development, those asking about the **272**

[612] Cf. *Eser/Perron,* Strukturvergleich (fn. 1), pp. 19 ff., 915 ff.; mn. 59 fn. 168.

[613] Cf. *Eser/Koch*, Schwangerschaftsabbruch (fn. 166).vol. 1, pp. 13 f. and vol. 3, pp. XII f., XX f., 99 ff., respectively.

[614] Cf. *Jung*, Theorie (fn. 126), pp. 366 f.; *Rosenau*, Plea bargaining (fn. 422), pp. 1605 f.

[615] Cf. *Nelles*, Internet (fn. 87), pp. 1011 f.; *Richers*, Postmoderne (fn. 132), p. 526.

[616] As postulated for comparative law in several respects by *Adams/Griffiths*, Similarities (fn. 515), pp. 283 ff.,

[617] Cf. *Eser/Perron,* Strukturvergleich (fn. 1), pp. 19 ff., 34 ff., 38 ff. and mn. 59 fn. 168.

underlying societal conditions (such as demographic development, standard of medical care, position of women in society and role of family planning) as well as those concerning social preventive measures and criminological findings were relevant as well.[618]

(iv) Pretest

273 It will not surprise anyone that during the initial preparatory work for a comparative law project, when one uses, understandably, known legal terms and regulations as a base – and these will usually be those of one's own law –, one cannot yet completely assess what different kinds of questions and connections might arise. For this reason, the first draft of the questionnaire often cannot be more than a preliminary sketch of the problem. In order to gain more clarity, it might be useful to broaden the perspective and look out for conceivable alternative regulations by conducting a pre-test, in the same way that it is advisable by conducting pilot studies for the choice of countries to be discussed below.[619] This may be done simply by searching for alternative opinions within one's own legal system and by placing these in the questionnaire for discussion.

274 However, even more information may, as a rule, be gathered when one searches more or less indiscriminately in other – and, above all, particularly different – legal systems for comparable rules, practices or doctrines, and then includes these alternatives in the questionnaire. If one takes into account these new insights and updates the classification scheme accordingly, this may force quite far-reaching restructuring of the working plan of the project.

275 Such developments occurred, for example, during a "transitional justice" project, which focussed on the ways countries, that had overcome a totalitarian period through a change of regime, coped with their unlawful past of state-supported wrong-doing.[620] After we had initially started with three basic models – a "clean break model", a "criminal prosecution model" and a "reconciliation model" – and this concept had been presented for discussion at an international colloquium, substantial changes became necessary.[621] Such perhaps uncomfortable surprises have to be taken into account, nonetheless, by relevant adjustments and fine-tuning of the questionnaire, if one wants to see comparative law as a discipline that is always capable of learning and open to the world.

2. Choice of countries to be compared

a) Orientation towards the comparative objective – Selection criteria

276 In the same way as the catalogue of questions,[622] the choice of the countries to be included in the legal comparison depends substantially on the type of the comparative

[618] Cf. *Eser/Koch*, Schwangerschaftsabbruch (fn. 166). vol. 1, pp. 13 f. and vol. 3, pp. XI f., XIV f., XVII ff., XXXI f., 1 ff., 439 ff. Concerning these extra-legal dimensions cf. also – with regard to the "structure comparison project" – mn. 258, and – with regard to the elaboration of the country reports – mn. 295 ff.

[619] Cf. mn. 276 ff.

[620] Published under the title of "Strafrecht in Reaktion auf Systemunrecht. Vergleichende Einblicke in Transitionsprozesse" in 14 volumes; vols. 1–7 edited by *Albin Eser/Jörg Arnold*, Freiburg 2000–2003, vols. 8–14 by *Albin Eser/Ulrich Sieber/Jörg Arnold*, Berlin 2005–2012. For a summary see *Albin Eser/Jörg Arnold/Helmut Kreicker,* Criminal Law in Reaction to State Crime. Comparative Insights into Transitional Processes. A Project Report, Freiburg 2002 = www.freidok.uni-freiburg.de/volltexte/6349

[621] Cf. *Albin Eser/Jörg Arnold*, Transitionsstrafrecht und Vergangenheitspolitik, in: vol. 14 of *Eser/Sieber/Arnold*, Systemunrecht (fn. 620), pp. 12 ff., 34 ff

[622] Part III. B. 1 (d) (mn. 263- 275).

objective first determined beforehand.[623] If this interdependence is taken seriously, quite a few contentious positions turn out to be inappropriate right away.

(i) No one-sided choice – no "numerus clausus"

277 Above all, a principal objection has to be raised against two opposing extremes: on the one hand, there is the opinion that the required comparability in the search for (the) "better law" – according to the dominant functional method – has the consequence that the comparison should be limited, right from the start, to legal systems of the same kind – excluding systems that appear essentially different. If this is done, the fear is that – because of the comparer's inevitable prejudice and lack of neutrality – the legal comparison becomes an instrument of power, serving primarily the western model of legal thought.[624] This is opposed, on the other hand, by a type of comparative law which considers itself as "postmodern" and for which – because of the relativity, caused by cultural settings, of comparative law findings – the connections between legal systems are of less interest than their differences. According to this, one should search less for constants and mature developments, but rather for the contemporary and transient.[625]

278 On the one hand, it is not really correct to limit oneself in the choice of countries to be considered in a legal comparison, right from the start, to actually or apparently similar legal orders – because after all, in the search for (the) "better law" unexpected perspectives and with these new alternatives may open up through different regulations; or, vice versa, points of view of one's own having become doubtful may be confirmed as really preferable. In the same way, one cannot, on the other hand, neglect the traditional in one's search for the new; because like something that has become what it is over time and has not existed from the beginning, law that has evolved over time shows itself to be principally changeable and, in this way, open to a possible return to the past, should this – with hindsight – turn out to be better.

279 Apart from this, the argument about the contrasting of either similar or different countries is pointless insofar as the choice of countries is, in the end, also dependent on the particular type of the comparative objective.[626] If, for example, the focus is on the judicative comparison of "mutual criminality",[627] the choice of countries is limited to the legal systems of concern, anyway – independent of the fact whether these are far removed or close to one's own law, marked by tradition, or following new paths. Or, if one wants to achieve – in a project of legislative harmonization – as high a degree of commonality as possible, the sensible focus in the choice of countries is on apparently similar legal systems, while one has to cast one's net much further if one wants to head off towards new shores. But even if whole legal systems are to be compared with one another at the macro-level or when universal legal principles are meant to be developed,

[623] Part III. B.1 (a) – (c) (mn. 232–262).

[624] In this sense, reduced to the lowest common denominator a dispute that was, in particular, triggered by *Frankenberg*, Critical Comparisons (fn. 517), pp. 434 ff.– who perhaps overinterpreted *Zweigert/Kötz (*cf. mn. 253 with fn. 583); for details – also with criticism and counter-criticism concerning the aspect of comparatists' neutrality see *De Coninck*, Functional method (fn. 573), pp. 334 ff.; *Graziadei*, Heritage (fn. 571), pp. 101 ff.; *Husa*, Methodological Tolerance (fn. 570), pp. 426 ff.; *Örücü*, Developing (fn. 78), pp. 47 f.; *Richers*, Postmoderne (fn. 132), pp. 525 ff. Especially concerning the inclusion of countries with a different political system (such as – former and present – socialist countries) see *Bogdan*, Introduction (fn. 81), pp. 50 ff.

[625] Cf. *Brand*, Grundfragen (fn. 10), p. 1086; *Erik Jayme*, Rechtsvergleichung, Heidelberg 2000, pp. 103 ff.

[626] Cf. *Bogdan*, Introduction (fn. 81), p. 45; *Jung*, Theorie (fn. 126), p. 369; *Perron*, Nationale Grenzen (fn. 44), p. 123.

[627] Cf. mn. 112.

no generally applicable directives for the choice of countries can be made. If, for example, the primary goal is to show the greatest possible variety, hardly any country can be excluded from the comparison. If, however, the goal of the investigation of universal legal principles is less than their world-wide uniformity – something, that could probably only be achieved at the highest level of abstraction, but is rather their practical applicability as well –, the choice of countries does not need to be global and may limit itself to a representative selection; this, however, has to be oriented towards criteria that one has to choose with a focus on the goal to be reached. In short: in the same way as there can be no *numerus clausus* for the countries to be compared[628], one cannot formulate a *selectio proposita*.

280 With this, the first–placed postulate of "universal comparative criminal law"[629] is, also in relation to the choice of countries, a claim which is dependent on the research's objective. This applies not only for practical reasons, but also because comparative law – by its very nature – lives from being inspired by a certain cognitive interest the satisfaction of which is hardly possible without making choices between more or less informative countries. But even if a comparison necessitates a limiting of the selection to certain countries, comparative law remains "important, indeed indispensable, when not the whole world, but only *individual* legal systems are included."[630]

(ii) Rules of thumb

281 What, however, could then be useful criteria of choice for the necessary inclusion or exclusion of certain countries? Differently from the approach taken in the development of the catalogue of questions and the preparation of the country reports, where, in each case, the net was to be cast rather widely,[631] for the choice of countries, the "*principle of wise limitation*" should, in general, be applied; not only because of the practical difficulty of real comprehensiveness, but also because of the possible disproportion between effort and result – especially when findings can already be gained from the comparison of a style-forming "parent system", which does not require additional investigation of the imitating "daughter laws".[632] Even though these only represent a kind of "rule of thumb", one has to immediately register the reservation straight away, that even the wisdom of limitation needs a suitable criterion. Actually, there is not just the question of limiting but, the other way round, especially inclusion may be required. In both directions, however, one has to orientate oneself, first of all, on the respective type of the comparative objective: countries where the greatest volume of insights can be expected should be included while others can be neglected. But even these may remain noteworthy when the extent of missing results may be relevant: this can be so, for example, with regard to a legal principle which may hastily and wrongly be considered proven if one limited oneself, right from the start, to the consideration only of legal systems which promise a positive result.

282 As is already indicated by this reservation, the criterion of "*presumptively greatest yield*"[633] must not be understood one-sidedly in the sense that, from the outset, only comparable countries are to be taken into consideration; the reason for this is that only the factual life-situation has to be comparable while its solution may vary in different

[628] *Jung*, Wertende Rechtsvergleichung (fn. 123), p. 8; cf. also *Jung*, Theorie (fn. 126), pp. 370 f.
[629] Cf. mn. 34 to (5).
[630] *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), p. 42 (emphasis in original).
[631] See mn. 270 f., 277 ff., cf. also *Adams/Griffiths*, Similarities (fn. 515), pp. 283 ff., 290 ff., 293 ff., 296 ff.
[632] *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), pp. 40 ff.
[633] According to *Zweigert*, Wörterbuch (fn. 129), p. 81, this is the best yardstick for the selection of countries to be compared; cf. also *idem*, Methode (fn. 534), p. 196.

legal systems.[634] That is why the similarity of countries to be compared as a selection criterion – as is favoured traditionally[635] – is, for example, only appropriate where – in the interest of harmonization – the search for the greatest possible number of commonalities is of interest – or where – in the scientific sense – the focus is on a comparison of fine differences. If, however, new alternative solutions are to be revealed or it is exactly the great variety of legal systems that is to be presented, one cannot expect much from legal systems that are very similar, but rather more from those as foreign as possible.[636]

(iii) Legal families

Such caution towards all too stereotypical rules of thumb is especially advisable when setting preferences or contrasting certain circles of related legal systems[637]: be it that the comparison is limited to the standard selection of families of law, such as the Germanic, Romance or Anglo-American, or that simply Civil law and Common law are contrasted,[638] or that one orientates oneself – for the development of general legal principles – on the "major legal systems of the world",[639] where it is hardly surprising that this leading role usually goes to exactly these families of law. However, not only does the western tradition of comparative law land itself with the above mentioned accusation of prejudice and lack of neutrality; rather, the division and classification into specific families of law is already exposed to fundamental objections.[640] The intention is not to completely deny, either, that there is sense – from a higher perspective – in giving the great variety of legal systems a clearer structure by putting them into groups; and for this, common origin, language, system of government, legal style, types of constitution and similar aspects, suggest themselves as categorizing factors. However, in this way, one can only achieve a rough, preliminary choice for the actual comparative law undertaking. **283**

Thus, already at the macro-level, the formation of legal families may depend on whether this is primarily done from a civil law, criminal law or public law perspective. For example, Italy and Spain, counted within the Romance circle of law, are rather close to the German circle with regard to criminal law dogmatics. Or, if the focus is either more on substantive criminal law or on procedural structures, then Japan – with regard to substantive law – would have to be included in the German legal family, while – with regard to procedure – Japan would be closer to Common law – due to its adoption of the adversarial procedural system. Such "outliers" are to be expected the more **284**

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[634] See mn. 253.

[635] Cf. – not without critical undertone – *Dannemann*, Similarities (fn. 584), pp. 407 ff.; *Nelken*, Comparative Legal Studies (fn. 9), pp. 25 ff.

[636] Cf. *Kremnitzer*, Reflections (fn. 116), pp. 32 f.

[637] In detail to the various legal circles and families – though primarily with regard to private law – cf. *David/Grasmann*, Rechtssysteme (fn. 10), pp. 46 ff.; *Zweigert/Kötz*, Rechtsvergleichung (fn. 7), pp. 62 ff., furthermore *Brand*, Grundfragen (fn. 10), pp. 1088 f.; *Rösler*, Erkenntnisinstrument (fn. 10), pp. 1187 f., and to newly emerging groupings cf. "Part III: Comparative law in the flux of civilizations", in: Bussani/Mattei, Comparative Law (fn. 45), pp. 255 ff.

[638] Cf. *Jescheck*, Strafprozessreform (fn. 133), pp. 771 f.

[639] As in particular practised by the ICTY; cf. *Ambos*, Völkerstrafrecht (fn. 429), pp. 45 f., and *Burghardt*, Völkerrechtliche Rechtsprechung (fn. 108), p. 253.

[640] Cf. *Brand*, Grundfragen (fn. 10), pp. 1089 f.; *Constantinesco* III (fn. 9), Die rechtsvergleichende Wissenschaft, Köln 1983, S. 63 ff.; *H. Patrick Glenn*, Comparative Legal Families and Comparative Legal Traditions, in: Reimann/Zimmermann, Oxford Handbook (fn. 10), pp. 421–440; *Esin Örücü*, A General View of "Legal Families" and of "Mixing Systems", in: Örücü/Nelken, Handbook (fn. 10), pp. 169–187; *Weigend*, Criminal Law (fn. 66), pp. 267 f. Even *Kötz*, Aufgaben (fn. 44), p. 149, considers the doctrine of legal circles to be "greatly overestimated". Cf. also mn. 78, 291, 318 f.

frequently, the more finely the comparison is structured and the more deeply one progresses into the micro-level. When the focus of comparison is, for example, on how different legal systems react to participation in a criminal offence by several people, one would not get very far by contrasting the German and Romance circles of criminal law, as the Europe-wide mainly advocated dichotomy into "perpetration" and "complicity" is not followed by two countries which represent a "unitary theory of perpetration", and of which one country (Austria) belongs to the Germanic and the other (Italy) to the Romance legal family.[641]

285 As can be seen from this, although differences are to be expected between different legal families, one cannot easily assume all-round commonality within the same circle of law either. This has a certain appeal, as it prompts the question why even within the same circle of criminal law different paths are taken, while there may be commonalities beyond the boundaries of the circle. Because of such findings, one does not have to forego all of the preparation that might be attained through the use of a rough orientation on legal families; the ultimate point of reference, however, must always be the respective comparative objective.

b) Exemplification through comparative criminal law projects

286 How a choice of countries may be conducted can be briefly exemplified using some of my own comparative criminal law projects. When public complaints about the excessive length of criminal trials became louder in the 1990 s, the German Federal Ministry of Justice felt it necessary to ask the Max Planck Institute to investigate whether there might be rules or regulations in foreign legal systems whose adoption into German law might lead to a speeding-up of criminal trials. Because the formulation of the question appeared too broad and, apart from that, the main point of weakness of the German system of criminal procedure was suspected to be in the public trial, the focus of the comparative objective was on the taking of evidence ("Beweisaufnahme") and, with that, especially on the requirements of immediacy.[642] Given the search for speeding-up alternatives for German criminal proceedings, for the choice of legal systems to be compared, only those countries came into consideration that satisfied the in Germany generally-recognized requirements of a criminal trial – namely that it is efficient and, at the same time, founded on the rule of law and respects the rights of the accused – and, insofar, had developed a stable practice of proceedings. In order not to limit oneself from the start to countries with inquisitorial tradition – such as France, the Netherlands, Austria and Portugal – but rather to also consider adversarial experiences, England and the USA from the Common law were included; as were Italy, Japan and Sweden as examples of mixed forms of criminal procedures that were situated between the maxim of ex-officio judicial instruction and the adversarial presentation of a case. As it turned out, in almost all of these countries, the taking of evidence is less laborious than in Germany, whereby the differences are, on the one hand, essentially caused by differing procedural structures and, on the other, also partly by constitutional deficits which would not be acceptable under German constitutional law.

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[641] Cf. *Albin Eser/Barbara Huber/Karin Cornils* (eds.), Einzelverantwortung und Mitverantwortung im Strafrecht. European Colloquium on Individual, Participatory and Collective Responsibility in Criminal Law, Freiburg 1998, pp. 13 ff. For a recent assessment of the different modes of the commision of and the participation in a crime cf. *James G. Stewart,* The Strangely Familiar History of the Unitary Theory of Perpetration, in: Ackerman (fn. 355), pp. 325–350.

[642] To this and the following cf. *Walter Perron*, Die Beweisaufnahme im Strafverfahrensrecht des Auslands. Rechtsvergleichendes Gutachten im Auftrag des Bundesministeriums der Justiz, Freiburg 1995, pp. 3 ff.

While in the previous project the focus was mainly on procedural structures and limited to structural elements that could possibly be interchanged, in the above mentioned contract project on "Criminal law and criminal procedural law in offences of corruption"[643], the interest was on a conscious expansion of perspective, beyond the law and legal practice in Germany. Based on the findings gained from a preliminary study, countries with an already highly-developed economy (such as – apart from European neighbour countries – the USA and Japan) as well as then newly emerging countries (China, Turkey and, from Latin America, Columbia), were to be included. Apart from the main reports on 13 countries, a further eight legal systems were examined in short or partial reports. The – as expected – great variety of good and bad regulation efforts and experiences, the first results of which were presented at the 61st German Lawyers' Day in Karlsruhe in 1996,[644] not only found lively resonance in the daily press, but could also be consulted for the reform act on the fight against corruption in 1997. 287

Different again and going even further, in the already mentioned "abortion project"[645], the interest was on collecting worldwide – if possible – commonalities and diversity in the law covering the termination of pregnancy; this was combined with the hope of finding, in this way, feasible alternative regulations for possible reform. As legal regulation – especially concerning abortion – depends strongly on ideological values, cultural traditions and developments with regard to society and civilization, what mattered was to go beyond the, already in Europe, divergent regulations and to include other legal and cultural circles. This led to an expansion in the choice of countries to 64: 26 of those European and 38 from outside of Europe. Accordingly, not only the country reports, documented in two volumes, were of an exceptional dimension; as was also the comparative law cross-section, published in an additional volume, including the legal-political closing remarks and recommendations. The findings gained from this project, contributed, not least of all, to the introduction of the "consultation model" into German criminal law.[646] 288

Finally, as far as the selection criteria for the "structure comparison project"[647] are concerned, one had to find a balance between, on the one hand, the inclusion of countries where one could expect – in spite of different historical, legal and criminal-political tendencies – research results that could be generalized and, on the other hand, the exceptionally high demands on the country reporters – because the project was both directed towards criminal law dogmatics and empirically case-based. As this project, in addition, still had no role model whose experiences one could have learned from – thus also having a pilot character –, the selection was limited to Austria, Germany, England and Wales, France, Italy, Portugal, Sweden and Switzerland.[648] 289

c) Pretest – Pilot study – Corrective changes

If one expects the greatest-possible volume of findings from the countries to be selected, without overstretching the country reporters or producing too much unnecessary "data garbage", then caution is advised against hasty preliminary fixings. This 290

[643] *Eser/Überhofen/Huber*, Korruptionsbekämpfung (fn. 609).

[644] As they have been comprehended and summarized by *Überhofen* (fn. 609), pp. 705–790 in his "Rechtsvergleichender Querschnitt".

[645] *Eser/Koch*, Schwangerschaftsabbruch (fn. 166).

[646] Cf. *Albin Eser/Hans-Georg Koch*, Schwangerschaftsabbruch: Auf dem Weg zu einer Neuregelung, Baden-Baden 1992, pp. 5 ff., 163 ff. = www.freidok.uni-freiburg.de/volltexte/9740.

[647] See mn. 1,

[648] Cf. *Eser/Perron,* Strukturvergleich (fn. 1), pp. 19 ff., 37 ff.; and mn. 59 fn. 168.

applies especially when the comparative objective is not from the start – as, for instance, in the question of "mutual criminality" – specifically aimed at certain countries, or when it cannot be determined without a prior look at some promising countries; this applies, for example, to the situation where one is still not clear about the type and extent of the questions to be posed. In this situation, it may be useful to explore – with the help of a preliminary study – which types of countries may best yield productive answers to the questions posed.[649] Even going further, under certain circumstances a useful determination of the comparative objective, including the questionnaire to be developed accordingly, may only be possible where it is based on insights to be gained from a pilot study.[650] In this way, determining the comparative objective and choosing the countries may occasionally go hand-in-hand, even though the former should actually come first.[651]

291 The pre-selection of countries to be made for a pilot study can also be no more than presumptive: one has to try to sense whether at all and, if so, in which legal systems one might make a find for the preliminarily determined comparative objective. To be content with sifting through the legal circle to which the country, that is the actual focus of the comparative work, belongs – as, for example, in relation to Germany, Austria and Switzerland – and to contrast this with some core countries of the Romance and/or Anglo-American legal circles, this way of proceeding[652] will only be sufficient where merely the exploration of the greatest possible comparability is of interest. Insofar, however, as one is searching for unusual alternative regulations or other new types of insights, the net for a sample cannot be cast far enough. This all the more advisable when one cannot really be sure that one has recognized all of the possible relevant variants of a problem; this applies, for example, to projects where one has to expect a great variety of divergences due to cultural reasons: then, just an early look at "exotic" countries may open one's eyes.

292 Depending on how the pretest turns out, the choice of country reports to be prepared will have to be made. The equivalent goes for the – at least interim – determination of the comparative objective and the elaboration of the catalogue of questions that is to form the basis for the country reports.

293 Even then, neither the questionnaire nor the choice of countries needs to be final. If it becomes apparent – during the preparation of the country reports where matters have to be investigated to a greater depth than is possible in a pilot study – that important questions have been overlooked or that one might find substantial comparative material in countries so far not considered, then the catalogue of questions has to be modified and/or the choice of countries extended.

294 Of course, if such corrective changes had to be made, all country reporters must be informed of such rectifications, unless they have already been involved in the updates – in coordination with the project coordinator – anyway. As an example, the latter had to be done during the "structure comparison project" in repeated meetings.[653]

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[649] *Jescheck*, Strafprozessreform (fn. 133), pp. 771 f.; *Jung*, Theorie (fn. 126), p. 371.

[650] As was, for instance, the case in the "corruption project" (fn. 609, pp. 2 ff.).

[651] *Jescheck* (fn. 649) may be understood only in this parallel sense when he describes the choice of countries to be included in the comparison as the "first" question to be posed.

[652] As in its basic approach particularly recommended by *Jescheck* (fn. 649); cf. also *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 40 f.

[653] Cf. *Eser/Perron,* Strukturvergleich (fn. 1), pp. 14 ff., 19 ff., 34 ff. Occassionally, the "abortion project" had to be modified in a similar way: *Eser/Koch*, Schwangerschaftsabbruch (fn. 166), vol. 3, pp. VII f.

3. Preparation of the country reports

It goes without saying that – in the same way as the catalogue of questions[654] and the choice of countries[655] – the respective country reports, which are to be prepared in the next step of the project, also must be oriented towards the comparative objective. What that actually means, needs closer explanation in relation to the perspective to be chosen (a), the matter(s) to be considered ((b)–(d)), and the measures to be taken ((e)–(f)). 295

a) Starting point – Perspective – Integral/holistic approach

Even the question whether the preparation of a country report should be conducted as being based on a certain point of view, and, if so, which one, cannot be answered in such an unambiguous and general way as might appear from some guidelines. This is because, whether "one's own dogmatic and criminal-political point of view" is to be used as a basis,[656] or whether the interpretation of the text of a law should be guided "by the understanding of each of the interpreting researchers"[657]; or whether "neither the regulation in German law of the question concerned […] nor any particular legal solution which – if at all – the rapporteur might have in mind as the ideal solution[658] should be used as a basis, depends on the comparative objective as well as the role of the rapporteur. A study, for example, such as the investigation of "double criminality"[659], where the focus is only on a binational comparison for which the two legal systems are examined by the same person as to their comparability, suggests itself to use, initially, one's own legal system and its understanding as a basis, and then to examine the other legal system in order to find out whether there is a comparable norm for the events related to the offence in question – independently of its criminal legal classification and naming according to the statutory description of the offence. This norm, however, has to be interpreted according to the legal theory and practice of its own environment and not be forced by the legal understanding of the comparing researcher. Putting oneself, in such a way, into the position of the other legal system is also necessary in the case where – in order to investigate mutual criminality or to perform a similar comparison – an expert from the other legal system is called. This expert must not be content with the representation and interpretation of his own law, but must also try to grasp the factual problem in question in light of the legal order the own law is to be compared with. 296

In a similar way – in a multilateral legal comparison – the increase of knowledge will be the greater the less the country reporter limits herself to the (re)presentation of her law, but rather tries to think along the lines, as to how the factual problem in question might be understood and treated in other legal systems. If this preparedness to look beyond the boundaries of one's own law is lacking in a country report and, consequently, the factual problem is not completely covered, then it is up to the project coordinator to ask for rectification or further analysis of these issues. 297

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654 Part III. B. 1 (d) (mn. 663 ff.).

655 Part III. B. 2 (mn. 276 ff.).

656 As initially postulated by *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 40.

657 Thus – following *Schultz*, Grundlagenforschung (fn. 134), pp. 10 f. – described by *Mona*, Comparative Justice (fn. 61), p. 108, as "nowadays hardly disputed anymore".

658 As phrased by *Jescheck*, Strafprozessreform (fn. 133), p. 772 when modifying his former position. In the same sense arguing for "distance from the individual regulations in the positive national law" see *Jung*, Theorie (fn. 126), p. 366.

659 Cf. mn. 111.

298 Such openness is not only necessary in view of the relevant law; rather, a "holistic approach" is needed[660] where one tries to satisfy all of the factors that have a practical impact, and, not least of all, pays attention to historical, cultural and other social background influences. Even though it is not possible to establish a generally applicable check list for this, certain guidelines can be given – as will be seen in the following.

b) Covering the relevant law

299 Whether it appears at the beginning of a country report or is raised only later, the representation of the law relevant to the comparative objective is of outmost importance. Depending on the goal of the project, this may be done in diverse short forms or it may necessitate a comprehensive investigation and explanation. In this way, just a short list of legal norms may be sufficient when the problem focuses solely on the existence or lack of such norms. As a rule, however, just the naming of norms will not be sufficient because also their relevance and importance for the comparative objective will have to be clarified.

300 To do this, the representation of the "law in the books" alone is not sufficient; rather the "law in action" has to be covered.[661] Everything that forms or contributes to the legal life of the system under investigation,[662] has to be considered as a source of law, be it in the form of written rules and regulations or of unwritten judicial law, legal customs or other customary law. As a rule, both the theoretical interpretation of the law in the legal literature and its judicial application in practice are to be considered. In relation to court rulings, it remains to be noted that these are of higher standing in Common law, and therefore have a higher value as sources of law than academic doctrine which, in turn, has a higher status on the European continent.[663] A "holistic approach" becomes more necessary, the more not only the contrasting of individual rules or practices is of interest, but – with a structural-comparative goal – the focus is on the system-connections between different areas of law and, even more, especially the interaction(s) between substantive and procedural criminal law.[664]

301 As far as the legal matter that is to be consulted in relation to the objective is concerned, "the comparatist must treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers there would treat as source of law, and he must accord those sources the same relative weight and value as they do.[665] In addition, one must not be satisfied with the establishment of legal-technical concurrence(s) or difference(s) but has to investigate further than that the extent to which the regulations are based on similar or different ideas about law and justice.[666] Not least of all, one has to pay attention to different styles of interpretation and reasoning,[667] as may arise – especially in a jury system – from the need that substantive criminal law has to be

[660] *Perron*, Straftatsystematik (fn. 198), p. 246; *idem,* Verhältnis (fn. 168), pp. 473, 484.
[661] Cf. mn. 300.
[662] *Zweigert*, Methode (fn. 534), p. 196.
[663] Cf. *Zweigert*, Wörterbuch (fn. 129), p. 81.
[664] *Perron*, Verhältnis (fn. 599), p. 483; *idem*, Straftatsystematik (fn. 198), pp. 244 f.; cf. also *Tatjana Hörnle*, Unterschiede zwischen Strafverfahrensordnungen und ihre kulturellen Hintergründe, in: ZStW 117 (2005), pp. 801–838.
[665] *Zweigert/Kötz*, Comparative Law (fn. 7), p. 35 f.
[666] Cf. *Schultz*, Grundlagenforschung (fn. 134), p. 19; *Mona*, Comparative Justice (fn. 61), p. 108.
[667] Cf. *Jung*, Theorie (fn. 126), pp. 377 f.; *Schultz*, Grundlagenforschung (fn. 134), pp. 15 f.; *Weigend*, Criminal Law (fn. 66), pp. 266 f.; *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 63 ff. Cf. also mn. 347 ff.

formulated and applied in a way that is comprehensible also to legal lay persons[668], and/or that the jurors do not have to give reasoning for their verdict.[669]

c) Inclusion of criminology and other empirical sciences

302 Due to the functional broadening of the view and the orientation of comparative law towards the situation in life,[670] it has become almost common place that comparative criminal law is not to limit itself to the juxtaposing of norms, but that their social basis and real effects have to be considered as well.[671] This, however, is not to be understood as a universally applicable dogma; because the extent to which a criminological foundation, or other sociological extension of the point of view, is always really necessary, depends, once more, on the respective comparative objective and the related catalogue of questions.[672] If, for example, just the judicative determination of "dual criminality" is of interest, it is usually sufficient to establish the existence or lack of an "identical norm at the place of crime"; also, insofar as in such a case grounds for excluding criminal responsibility or obstacles to criminal prosecution may play a role,[673] there is no need for legal-factual investigations. Similarly, in a multilateral comparison of certain theories of punishment, individual elements of crime or criminal-political objectives, an empirical foundation is not always essential.

303 On the other hand, even for such issues it may be appropriate not to be content with a purely normative view, but to direct one's view towards the practical impact of a legal figure or theory. If, for example, the comparison of subjective elements of crime (such as intent, negligence or error) or the extent of grounds for excluding criminal responsibility (such as self-defence or incapacity) is of interest, a full understanding of the relevant norms can hardly be achieved if one does not test – using pertinent court rulings or equivalent fictitious cases – how often and according to which criteria, for example, intent is confirmed or a ground of justification is accepted.[674] It is also difficult to talk about alternatives for speeding up proceedings without having collected data – in the countries to be compared – about the respective length of proceedings and factors connected to this.[675] Comparative-law-based discussions about reform(s) concerning the termination of pregnancy remain equally unsatisfactory if the meaningfulness of prohibiting models is not gauged also against their real power of implementation.[676]

d) Cultural background – Interrelationship of law and culture

304 With this term one can probably best catch what has to be included in a country report in the sense of historical, traditional, ideological, sociological, political or other social background aspects – beyond the legal norms to be listed and the relevant

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[668] Cf. *Perron*, Verhältnis (fn. 599), pp. 482 f.

[669] As was found, for instance, in the "structure comparison project" regarding England and Wales; cf. *Eser/Perron,* Strukturvergleich (fn. 1), pp. 150 ff., 163.

[670] Cf. mn. 247.

[671] Cf. *Hilgendorf*, Einführung (fn. 6), pp. 22 f.; *Jung*, Theorie (fn. 126), p. 366; *Kaiser*, Vergleichende Kriminologie (fn. 133), pp. 85 ff.; *Mona*, Comparative Justice (fn. 61), pp. 111 ff.; *Perron*, Strukturvergleich (fn. 212), pp. 135 f.; *idem*, Nationale Grenzen (fn. 44), pp. 300 f.

[672] Cf. mn. 248.

[673] For details see *Eser*, in: Schönke/Schröder (fn. 246), § 7 mn. 7 ff.

[674] Also to investigate such similarities or differences, the case-based legal-factual method of the "structure comparison project" was designed to serve; cf. *Eser/Perron,* Strukturvergleich (fn. 1), pp. 762 ff.

[675] For this purpose, empirical data to the length of criminal proceedings had to be collected in the "project on taking evidence" (mn. 286 fn. 642), pp. 6, 550, 552 ff.).

[676] Cf. the – remarkably sparse – empirical material available for the "abortion project" (fn. 166), vol. 3, pp. 465 ff.

empirical factors to be included. Differently from what happens in a general "comparison of cultures", of interest here is less the "culture-forming" but more the "culturally formed" role of the law;[677] because, as can be seen not least of all from the functional orientation of the legal system towards the factual problem of life's reality, legal norms and institutions related thereto cannot be fully understood – concerning their comparability or difference – without also revealing the underlying national characteristics in the form of traditions, mentality, ideas about justice, designs of the community or similar value- and order-criteria.[678] This is called for even more in criminal law, as its historical-cultural rooting and dependence is particularly strongly developed.[679]

305 This "mental reality of ideologies"[680] may show itself not only in the general culture, but already in a distinguishable, country-specific "legal culture",[681] as may be expressed in the particular style of a legal system, different role allocations and modalities of action or also in values and forms of behaviour of a certain community of jurists.[682] If, for example, Confucian teachings on morality are internalized to such an extent that one fits in with the customary order without questioning its rational reasons, then the reference to "social morals" – considered to be rather questionable in Germany – or other general phrases have a different status.[683] Peculiarities of the legal language are also not to be underestimated. If, for example, criminal codes are directed primarily at legal practitioners and not at the citizens, because they are not accessible in an comprehensible national language – as was the case for quite a long time in Greece and Japan[684] –, then this may impact both on the judicial system and also criminal law dogmatics. Or, if in a legal system the term for "fulfilment of the definitional elements of an offence" or the distinction between "wrongdoing " and "guilt"[685] is lacking, as in Common law, then mutual understanding may become a problem.[686]

306 Beyond such law internal cultural factors, even more importance may have to be given to historical, general-ideological and other social background conditions of the law to be compared. For the area of criminal law, this experience had to be made in a particularly intensive way during the "abortion project". As already indicated in relation to its catalogue of questions,[687] in each report the explanation of the current law was preceded by a presentation of the social framework conditions and historical develop-

[677] To be understood entirely in line with this weighting – though the underlying distinction may not have been fully recognized (cf. supra III.B.1(a) zu fn. 550 ff., 569 ff.) – are the contributions devoted to cultural comparion in: *Streng/Kett-Straub*, Kulturvergleich (fn. 118); cf. the review by *Eser*, Besprechung (fn. 8), pp. 287 ff

[678] In the same sense – though with partly different accentuation – see particularly *Beck*, Interkultureller Dialog (fn. 118), pp. 65 ff.; *Hilgendorf*, Einführung (fn. 6), p. 22; *Hörnle*, Kulturelle Unterschiede (fn. 664), pp. 803 ff., and *Kunz*, Kulturgebundenheit (fn. 344), pp. 147 ff.

[679] Cf. *Frank Meyer*, Internationalisierung (fn. 66), p. 90, concerning the Lisbon-decision of the German Federal Constitutional Court in BVerfGE 120, 224 (241 f.), and *Beck*, Interkultureller Dialog (fn. 118), p. 83.

[680] *Ebert*, Rechtsvergleichung (fn. 78), pp. 22, 42 f.

[681] For particular emphasis of this difference from an Asian point of view see *Ida*, Kulturvergleich (fn. 558), pp. 26 f.

[682] Cf. *Burchard*, Exekutorische Strafrechtsvergleichung (fn. 87), p. 302; *Vogel*, Transkulturelles (fn. 324), 2 f.

[683] Cf. *Kim*, Korea (fn. 353), pp. 64 f., 238 ff.; *Perron*, Strukturvergleich (fn. 212), p. 132. Cf. also the examples in *Vogel*, Transkulturelles (fn. 324), pp. 4 ff.

[684] As reported in conference proceedings by *Streng/Kett-Straub*, Kulturvergleich (fn. 118) about Japan, Korea and Greece (pp. 240, 242, 244, and 252 f., respectively).

[685] Cf. mn. 106 fn. 249.

[686] As happened, for example, when trying to transfer the 2- or 3-level structure of the crime, as it is familiar from German criminal law, into English: see *Eser,* Justification (fn. 249), pp. 61 ff.

[687] Cf. mn. 267.

ment, whereby – apart from the demographic and economic situation – the standard of medical care and the social position of women as well as the assessment and importance of family planning and termination of pregnancy had to be investigated; with the result that the final, summarizing, comparative law cross-section of country reports was more than 90 pages long.[688]

e) Case-based comparative method

Even if one is – for the legal comparison – not content anymore with the contrasting of legal norms and institutions but orientates the question – in a functional way – towards the factual problem of the real-life circumstances that have to be solved, one cannot be sure that one has found a common basis for comparison by just establishing – actually or seemingly – pertinent offence descriptions and legal terms. The reason for this is that what appears – at first glance – similar or different, may later, when cases are examined, prove itself to be narrower or broader. For example, when the interest is on the extent to which a mental element is necessary for criminal liability for killing a human being and, depending on the possible grading(s) of this mental element, different punishments may be considered, then not very much is gained from the observation that, according to German criminal law, not only intent but already negligence – even though with legal sanctions of different severity – is sufficient for criminal liability; while other legal systems, as, for example, the Anglo-American, consider, as a rule, only "intent" or "recklessness" but not "negligence" as being sufficient. Because, to what extent conditional intent (in terms of dolus eventualis), on the one hand, still comes within "intent" or is only ascertainable as "recklessness" – which, on the other hand, may go as far as conscious negligence[689] –, this can in the end only be reliably differentiated on the basis of cases.[690] In a similar way, the extent of the, in principle, globally recognized justification by self-defence cannot be established in a sufficiently distinctive way without checking it on the basis of different case variants. **307**

Such a case-based comparative method is all the more appropriate when not just individual factual problems and their solutions in different legal systems are to be compared, but when the course of structural differences is to be examined. This is the reason why the case-based method was chosen for the "structure comparison project".[691] **308**

f) Computer-assisted comparison

The more complex a comparative law project is and the more data may occur, the more difficult it becomes to record the data with conventional methods such as written-down lists, tables and suchlike. Such problems in collecting and structuring data can be solved more easily by the use of new technologies, especially computers.[692] To a certain extent, these methods and tools have also been suitable for the "structure comparison project".[693] **309**

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[688] *Eser/Koch*, Schwangerschaftsabbruch (fn. 166),vol. 3, pp. 1–93.

[689] Cf. also *Perron*, Vorüberlegungen (fn. 115), pp. 144 f.

[690] Cf. also *Sieber*, Strafrechtsvergleichung (fn. 5), p. 118.

[691] See mn. 59, 271; cf. also *Eser/Perron*, Strukturvergleich (fn. 1), pp. 34 ff., 41 ff., *Perron*, Vorüberlegungen (fn. 115), pp. 145 f.; *Jung*, Grundfragen (fn. 66), p. 3; *Nelles*, Internet (fn. 87), pp. 1009 f.

[692] For details see *Sieber*, Strafrechtsvergleichung (fn. 5), p. 124; cf. also *Nelles*, Internet (fn. 87), pp. 1005, 1014 ff., and with regard to a parallel in constitutional law *Anne Meuwese/Mila Versteeg*, Quantitative methods for comparative constitutional law, in: Adams/Bomhoff, Practice (fn. 198), pp. 230–257.

[693] Cf. *Eser/Perron*, Strukturvergleich (fn. 1), pp. 41 ff.; as to this project cf. mn. 59.

4. Comparison – Cross-section – Creation of models

310 What should follow the preparation and writing of the country reports, is usually called a "comparative law cross-section". Such a cross-cut is, however, not needed for all types of legal comparison; rather, this work step as well depends on the respective objectives of the different kinds of projects. At any rate, all of them have in common that the actual comparison only starts at this level of the investigation.[694] This actual comparison, however, as "the most difficult part of any comparative law work […] almost completely evades any attempt to capture it in rules."[695] Nonetheless, certain guidelines can be given for this as well, depending on the type of objective and the elicited comparative material.

a) Binational comparison

311 The likely assumption that the establishment of commonalities and differences is a simple matter when only two (or a selected number of a few) legal systems are to be compared with one another, applies, at best, where one has to find out only whether, for example, certain offence provisions, forms of participation or grounds for excluding criminal responsibility exist in both countries: for this, simple evidence of such elements existing or not may be sufficient.

312 However, as soon as it is also of interest whether – as, for example, concerning the judicative requirement of "mutual criminality" – a certain alleged offence is equally covered by differently named offence definitions, or, vice versa, whether crimes of the same name have a different area of application, both a broad as well as an in-depth comparison may be advisable: a broad one, for instance, to the effect that one has to continue looking in other legal areas if comparable elements of an offence or a ground for excluding criminal responsibility similar in function appear to be lacking; an in-depth examination, in the way, that, in order to establish the extent of an amnesty, one may have to progress into possibly available "parent law".[696] Not least of all, in a binational comparison of individual criminal law norms, it may even be necessary to include culturally related background.[697]

313 Extensions and in-depth investigations of this kind are all the more necessary when two criminal law systems in total, or substantial segments thereof, are to be compared with one another, or a transfer from one to another legal system is under discussion. Although no cross-section is needed for this – because of a lack of a comparable mass, so to speak –, it may require the creation of a model that highlights the commonalties and differences.

b) Multinational cross-section

314 When more than two (or a few) countries are to be compared with one another, as a rule, a comparative law cross-section has to be established. Its structuring will be the

[694] As already emphasized by *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 41; cf. also his Strafprozessreform (fn. 133), p. 775, and *Eser*, Comparative Legal Research (fn. 4), pp. 101, *idem*, Funktionen (fn. 4) p. 1522.

[695] As sharply pointed out by *Zweigert*, Methode (fn. 534), p. 198; cf. also his Wörterbuch (fn. 129), p. 81, and *Zweigert/Kötz*, Comparative Law (fn. 7), pp. 44 f. This difficulty may also explain why little additional material is available for this comparative working step.

[696] As was, for instance, required for an expert opinion to prove that a Libanese amnesty can be traced back to a French model; cf. *Eser*, Stellvertretende Strafrechtspflege (fn. 266).

[697] Further to such background information and competitive data to be collected in a functional way, see mn. 302 ff.

easier, the more one can orientate oneself to the catalogue of questions; in practical terms this means that one just has to allocate the answers given in the country reports to the respective question, and contrast them.

By far more often it happens, though, that country-specific peculiarities may become apparent during the preparation of the country reports, which could not yet be anticipated during the development of the catalogue of questions, and which, however, even if they occur only occasionally, appear significant enough to be included in a cross-section. For this reason, especially the comparative law cross-section of the "abortion project" turned out – with more than 500 pages – to be much more differentiated than this could be expected from the specified structural scheme.[698] 315

As far as the type of recording and representation is concerned, this should, on the one hand, neither be a complete account of the individual data compiled in the country reports, nor, on the other, consist only of their summarized repetition; rather, it should already be directed towards the profiling of significant commonalities and differences and, in this way, lead towards possible grouping and identification of types. 316

In doing this, which criteria are to be considered as significant, depends once more not least of all on the objective of the project in question.[699] If this aims, for example, at contrasting a model of regulation, apparently without alternative(s), with the great variety of other approaches to a solution, or if one wants to establish a "stock of solutions",[700] then everything that can demonstrate a certain otherness is to be considered noteworthy and in need of documentation. If, in contrast, certain paths are to be cut into a jungle of diverse opinions, one will have to use quite a large net to put together what appears even remotely functionally similar. Differently again, a systematization may threaten failure in the face of the enormous variety of data collected in a large-scale comparison, because the regulations of some countries may be similar in certain points but different in others – and there is additional overlapping at other levels. In such a case, as had to be dealt with especially in the "state crime project", it might be advisable to refrain from an all-encompassing, total systematization, or to attempt the same only at a high level of abstraction, in order to make certain typification(s) possible – as in the example case, orientated to the type of regime change, the reality of persecution, the reference to the perpetrator, or to modalities of compensation.[701] If, however, an overview on an area-wide basis is of less interest and rather a comparison of structural processes, as especially in our "structure comparison project" is of more interest, then, above all, the various phases in the examination, decision and execution process that are most important for the final fate of a convicted person, and the thresholds which set this course, should be compared.[702] 317

c) Creation of models

It is not possible either to give generally applicable guidelines for the way that alternative models may be developed based on systematizing and typification. 318

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[698] Cf. *Eser/Koch*, Schwangerschaftsabbruch (fn. 166), vol. 1, pp. 13 f. and vol. 3, 3, pp. 1–512, respectively.

[699] If this was respected more, quite a few debates on "similarities" and "differences" (cf. mn. 253 ff.) would turn out to be literally aimless and, thus, pointless.

[700] Cf. mn. 144 f.

[701] For details about the paradigm change that became necessary during the course of this project see *Eser/Arnold*, Transitionsstrafrecht (fn. 621), pp. 12 ff.

[702] Cf. mn. 259 ff., *Eser/Perron*, Strukturvergleich (fn. 1), pp. 19 ff., 29 ff. and – regarding this project – mn. 59.

319 If the primary interest is in differentiating one's own criminal legal order or dogmatics from other legal systems, that one will have to be placed at the centre as the significant model for orientation; more or less divergent models are then to be contrasted with it. In doing this, it might be important to determine as early as during their selection and profiling, what is to stand out as characteristic for one's own criminal law model. Similarly, during the legislative search for a rule that is as similar as possible to one's own law but better, the focus will have to be less on different kinds of rules and more on models that appear to be of the same kind. If one wants to move towards new horizons, however, the creation of models is to be orientated towards alternatives that are as different as possible, and simultaneously forward-looking.

320 The situation is different again when projects of harmonization are concerned – such as during the development of European Community Law, or the establishment of a transnational criminal jurisdiction: insofar as, on the one hand, the guiding function is not immediately to be given to a particular legal system or criminal law dogmatics, on the other hand, however, indiscriminate variety does not appear practicable either – because the goal is to find something new, equally in common and acceptable all round –, then the criteria for typification will have to be set in a way that the more compatible elements of the model stand out and the separating elements have less significance.

321 Finally, clearly not to be overlooked, the development of systems and types moves already in the transition area toward the last working step: the legal-dogmatic and legal-political evaluation.

5. Evaluation – Recommendations

a) Dependence on the comparative objective – Steps of evaluation

322 Independent of whether one understands legal-political evaluation still to be a functional part of comparative law, as is advocated here, or whether one sees in it a task that goes beyond comparative law, as this is done traditionally, even in the latter case there is usually the expectation that comparative law projects, as a rule, deliver a final statement – where a certain level of evaluation is usually unavoidable. This is not meant to say that comparative law is absolutely unthinkable without evaluation, nor that this remains reserved to a certain phase of the investigation, but it means that an evaluation may be – depending on the comparative objective – both in part absolutely necessary and merely contingently required.[703]

323 Barely less than in other methodical steps, the necessity and the scope of evaluations depend on the specific objective.[704] Indeed, on closer inspection, evaluations are not reserved just to the concluding phase of a comparative law project, but can play a role during the preceding investigative steps as well.

324 As early as when the cognitive interest that is significant for the investigation's objective is at stake – as, for example, in the legislative-oriented project concerning the reform of the abortion law –, what matters during the search for grounds for excluding criminal responsibility is less their dogmatic version but rather more, to whether and to what extent the opposing interests of the unborn life and the pregnant woman are given consideration; here, not least of all, ideological basic attitudes or the position of birth

[703] For details on this principal issue see Part III. D. 3 (mn. 187 ff.).

[704] Cf. *Eser*, Evaluativ-kompetitive Strafrechtsvergleichung (fn. 4, 88), pp. 1460 f., and – as to the following passages – cf. pp. 1462 ff.

control might already belong to the catalogue of questions. Accordingly, value judgements may already be unavoidable for the working hypotheses to be formulated at the first level (above 1 (b)).[705]

This applies, similarly, to the choice of countries (above 2): If, for example, in a transnational harmonization project, the highest level of human rights protection for the rights of the accused is to be investigated, one may limit oneself, from the start, to countries of which, from experience, high human rights standards may be expected. In contrast, the choice of countries may be a very different one if only a minimum standard – that can be enforced as widely as possible – is to be guaranteed. 325

Even during the preparation of the country reports (above 3), value judgements cannot be excluded, if, as was done in the judicative comparison of the prohibition of incest, the differing opinions inside one country are to be given weight. 326

Even more evaluation may be required for the comparative law cross-section (above 4) when one has to establish model groupings and fix criteria for this, which are dependent on certain normative guidelines – as, for example, during the "state crime project" with regard to the predetermining differentiation between criminal prosecution, renunciation of prosecution and other legal reactions.[706] 327

But such more or less inherent value judgements are not at issue at this (fifth) level of investigation; rather, at issue are explicit evaluations: be it in the way that out of a group of several elicited theories, models of regulation or other alternatives one has to be given preference over the other or, in some other way, a grading has to be done; be it that, in a competitive sense, recommendations are to be made, or be it that even a formulated proposition for a regulation is presented.[707] An example of the latter can be found in the "abortion project".[708] 328

b) Criteria of evaluation

If the value judgements connected to appraisals, recommendations or propositions for regulations are not to appear arbitrary and are to be comprehensible for a third party, then they are to be oriented to certain criteria which themselves, in turn, have to be disclosed. Insofar as this happens at all[709] or is at least considered necessary, one is, however, usually content with quite general parameters. Especially for the search for alternatives or better solutions, primarily "appropriateness" and "justice" are referred to.[710] While to some comparatists only the criterion of justice appears good enough to be a standard,[711] others specify usefulness as "criminal-political" and complement it by "practicability".[712] Also "tradition" and "people's convictions" are given as value categories,[713] similarly to the case of importation of law where the special conditions of 329

[705] In the same sense, it was decribed by *Zweigert*, Kritische Bewertung (fn. 426), pp. 414 f., as the beginning of a steady process of "value clarification".Cf. also mn. 178 ff.

[706] Cf. *Eser/Arnold*, Transitionsstrafrecht (fn. 621), pp. 15 ff.

[707] Further to such a progression from evaluative to competitve comparative law see mn. 195 ff.

[708] *Eser/Koch*, Abortion (fn. 166), pp. 295 ff.; *idem*, Schwangerschaftsabbruch (fn. 166), vol. 3, pp. 608 ff.

[709] Cf. mn. 351 ff.

[710] As is in terms of "Zweckmässigkeit" (suitability) and "Gerechtigkeit" (justice) exemplified by *Zweigert*, Wörterbuch (fn. 129), p. 81; cf. also *idem,* Kritische Bewertung (fn. 429), pp. 404, 410.

[711] As postulated by *Mona*, Comparative Justice (fn. 61), pp. 103 ff., 115 ff., for whom comparative law is to be integrated "into a comprehensive theory of justice"; but cf. also *Kubiciel*, Funktionen (fn. 66), p. 219, nd *Weigend*, Diskussionsbemerkungen (fn. 74), p. 132.

[712] As done by *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 43.

[713] These parameters that are also named by *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 43, are listed by *Sieber*, Strafrechtsvergleichung (fn. 5), p. 121, and *Hilgendorf*, Einführung (fn. 6), p. 19, as well.

the receiver country and its domestic environment[714], or, in the case of cross-border harmonization, "good governance" are supposed to be important.[715] Above all, however, the best possible guarantee of human rights is given more and more weight.[716]

330 Going beyond these mainly political-practical criteria of different principles, rules and arguments, with regard to dogma one should also think of evaluative criteria such as internal consistency and practical relevance, similar to the way the prospect of acceptance and viability may play a role for one alternative being worthy of preference over others.[717]

331 However, as noteworthy as such parameters may be, one thing needs to be considered: as they might already be in conflict with one another – because the most just, does not necessarily have to be the most practicable, and vice versa –, they cannot be used side-by-side without examining them, should they be suitable at all for the respective legal comparison. Apart from that, justice and usefulness – in the same way as tradition and people's convictions – are open, if not even biased terms that themselves need further definition and evaluation: Just for whom? Useful for what? Worthy of keeping and maintaining or introducing for what?[718] And in any event: from whose perspective should all this be assessed?

332 For the requirements resulting from these questions one cannot give any generally valid guidelines, either. Rather, the following two points are crucial: instead of being content with general, abstract parameters for the evaluation, these are to be oriented towards the objective of the legal comparison in question and, therefore to be clearly defined in relation to each specific area and specific project.[719] And, in addition to this, the evaluative criteria are to be disclosed.[720] In this sense – for the "abortion project"– both the project participants' subjectively different prior understanding and ideological convictions were pointed out, and the legal-political and guiding principles underlying the proposition for regulation were explained.[721]

c) Prerequisites for comparison

333 This keyword does not refer to prerequisites as they are necessary in relation to personnel and institution(s), in order to be able to conduct serious comparative research of law.[722] Rather, of interest here is the self-evident requirement – necessary for meaningful assessment – that this evaluation can only lead to reliable results when – depending on the functional goal of the comparative law project – the substantive problem, for which the matters to be investigated and evaluated (such as principles, regulations, theories and such like) are relevant, is the same for all countries concerned; and where all the relevant criteria of evaluation are considered and the same standards of evaluation are applied.

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[714] Cf. *Weigend*, Criminal Law (fn. 66), p. 268. As to conditions of legal transplants see mn. 214 ff., 335.

[715] See *Sieber* Strafrechtsvergleichung (fn. 5), p. 99, but also *Frank Meyer*, Internationalisierung (fn. 66), pp. 90 ff.

[716] Cf. *Jung*, Wertende Rechtsvergleichung (fn. 123), p. 3; *Rosenau*, Plea bargaining (fn. 422), p. 1611; and *Sieber*, Strafrechtsvergleichung (fn. 5), p. 121, with further references.

[717] Cf. *Schubert*, Versuch (fn. 558), pp. 274 ff., and mn. 35 to (18), 91 ff.

[718] Cf. *Nelles*, Internet (fn. 87), p. 1008.

[719] Cf. *Constantinesco* II, Rechtsvergleichende Methode (fn. 9), pp. 324 f.; *Jung*, Wertende Rechtsvergleichung (fn. 123), p. 9.

[720] As to requirements resulting from this for "evaluation actors" cf. mn. 351 ff.

[721] *Eser/Koch*, Schwangerschaftsabbruch (fn. 166), vol. 3, pp. 515 f., 608 ff. *idem*, Abortion and the Law (fn. 166), pp. 207 ff., 244, 205 f. Cf. also *Eser/Arnold*, Transitionsstrafrecht (fn. 621), pp. 1 f., 10 f., concerning the "state crime project".

[722] See Part III. C (mn. 337 ff.).

This does not have to mean that, right from the start, only legal systems which are based on the same foundations in relation to their factual conditions and social objectives might be compared with one another.[723] This is because it may make quite a lot of sense that, with regard to the same problem, legal systems of different ideologies and social standards are compared in order to investigate underlying causes of mistakes or perceivable opportunities – as it may, for example, be advisable in a project on the termination of pregnancy, in order to find a solution that does justice as much as possible to both the interests of the unborn life and those of the pregnant woman. In doing so, apparent "Wertungsaporien" (in terms of seemingly contradictory values) may also turn out to be deceptive.[724] 334

However, comparative law will reach its limits or can expect little of any use in a situation where the difference of social reality does not even allow for any comparable problem to arise, or where insurmountable legal hurdles would stand in the way of particular envisaged solutions.[725] This may be the case even between quite closely-related legal systems, such as those of Germany and Austria: for example, when seemingly the same terms or institutions are based on a different cultural-traditional pre-understanding or on non-negotiable legal principles,[726] or where the judicative recognition or legislative adoption of "cultural defences" is under discussion.[727] 335

A thorough examination of the comparability and capability for acceptance of foreign law is all the more necessary when greater transplantations of criminal legal systems,[728] fundamental re-orientations or large-scale adaptations of law, are at issue.[729] 336

C. Personal Requirements and Institutional Framework Conditions

As has already been discernible above, comparative law is not a legal occupation that is usually practised by "normal jurists". Rather comparative law, if it is meant to be done and applied in a meaningful way, can be dependent on various underlying conditions which one can roughly divide into personnel (1) and institutional requirements (2). 337

[723] The way *Zweigert*, Kritische Bewertung (fn. 426), p. 420, might – at first glance – be misunderstood.

[724] Thus *Zweigert*, Wörterbuch (fn. 129), p. 80, *idem,* Kritische Bewertung (fn. 426), pp. 414 f.

[725] *Zweigert* is probably to be understood in this sense, according to the sentence following his statement referred to in fn. 723. By the way, here may also be the principal field where the theoretical disputes on similarities and differences (cf. mn. 253 ff.) may come into practical effect.

[726] As demonstrated in an exemplary way by *Otto Lagodny*, Übernahmefähigkeit und Übernahmewürdigkeit ausländischer strafrechtlicher Regelungen – Eine Projektskizze am Beispiel Österreichs und Deutschlands, in: Björn Burkhardt/Hans-Georg Koch et al. (eds.), Scripta amicitiae. Freundschaftsgabe für Albin Eser zum 80. Geburtstag, Berlin 2015, pp. 387–412.

[727] Cf. mn. 106.

[728] Informative as to the history of the more or less successful export of criminal law are the conference proceedings by *Streng/Kett-Straub*, Kulturvergleich (fn. 118), with a review by; cf. also *Eser*, Besprechung (fn. 575). As to preconditions and hurdles for criminal law transfers cf. *Kudlich*, Exportgüter (fn. 116), pp. 170 ff.; cf. also the references in mn. 329.

[729] As to problems such as those (frequently) underestimated in the discussions on the harmonization of European criminal law, cf. already *Eser*, Comparative Legal Research (fn. 4), pp. 102 ff., *idem*, Wege und Hürden transnationaler Strafrechtspflege in Europa, in: Eser, Transnationales Strafrecht (fn. 4), pp. 326–346 = www.freidok.uni-freiburg.de/volltexte/3387; furthermore *Kubiciel*, Europäisches Strafrecht (fn. 367), pp. 67 ff.; *Frank Meyer*, Internationalisierung (fn. 60), pp. 90 ff.; *Perron*, Nationale Grenzen (fn. 42), pp. 287 ff.; *Thomas Weigend*, Strafrecht durch internationale Vereinbarungen – Verlust an nationaler Strafrechtskultur?, in: ZStW 105 (1993), pp. 774–802 (775).

1. Personal requirements

a) Comparatists – Cooperation

338 The question of what kind of demands are to be made of a researcher in comparative law cannot be answered without looking at the objective and type of the respective comparative law project, either. If only academic teaching or a purely theoretical comparative project is of interest, then, naturally, a legal scientist is required. However, even he or she may have to fulfil different types of functions. If it is a matter of a bi-national legal comparison or one limited to a few countries which are close to one's own cultural circle, as is typical for comparative doctoral theses, then usually the same person – during the individual steps of the work – determines the objective and establishes the questionnaire, chooses the countries, prepares the country reports, and finally does the comparison and perhaps also presents a recommendation.

339 However, already for a purely theoretical comparative criminal law project, several people with possibly different requirements may participate. If, for example, a multi-national comparison is to be pursued in which immensely different legal circles are included, then the same researcher may be responsible for setting the objective, performing the comparison and finalizing the evaluation; but for the preparation of the country reports, if not already for the choice of countries, often further experts will have to be included – not least because for language reasons. This circle can become even larger and more colourful when, for an explicitly culture-related project, apart from jurists also the expert knowledge of historians or social scientists is needed.

340 Also in the area of judicative comparative criminal law, different participants may be in demand. If only the establishment of mutual criminality is of interest, the responsible judge herself may possibly investigate and evaluate the needed evidence. This, however, requires access to the relevant legal sources as well as legal expertise; in addition, quite frequently language barriers have to be overcome, too. Here, the involvement of an expert may be helpful – as is permissible, for example, in a German criminal proceeding.[730] Usually this expert will be a law academic; because, apart from the fact that in normal court libraries one is hardly likely to find the necessary foreign material, the "normal" judge or lawyer often does not have the simple tools to handle foreign law in a competent way. Occasionally this preliminary work is even gratefully noted by the judiciary.[731] With this in mind, scientific work in comparative law may certainly feel itself called upon to facilitate access to foreign legal material for legal practice or at least make it easier[732] – even if it might be going too far to see this as a "debt to be discharged" by the researcher.[733]

341 Even more than for the judge, it would be asking too much from the legislators if they want to underpin a reform project through comparative law. This is the reason why in legislative comparative law, in principle, one has to fall back upon scientific researchers –

[730] According to §§ 72 ff. of the German Criminal Procedure Code (StPO); cf. – with reference to a rather early decision by the German Imperial Court (Reichsgericht, in: Recht 1911 Nr. 2267) – see *Schramm*, Erkenntnisse (fn. 61), pp. 157 f.

[731] As, for instance, explicitly stated by *Lord Goff* in *White v. Jones*, in: The Weekly Law Reports (W.L.R.), 1995, 2, pp. 187, 201 ff.; cf. also *Kötz*, Bundesgerichtshof (fn. 291), pp. 840 f.

[732] Cf. mn. 96.

[733] As, in the sense of an academic "Bringschuld", postulated by *Kötz*, Bundesgerichtshof (fn. 291), p. 841.

be it in the form of legal staff working internally for members of parliament, or by engaging external experts, as can be observed ever more frequently.[734]

As can be seen from these few examples, working together cooperatively is of considerable importance in comparative law. This does not mean that comparative law is only possible as a cooperative undertaking,[735] nor does it wish to withhold due recognition from highly respectable comparative studies, as they continue to be presented by numerous individual researchers[736] – and here foremost by doctoral candidates and post-docs working towards an academic career[737]. However, even an experienced comparatist is usually only familiar with a limited number of foreign legal systems. Therefore, he or she will either have to restrict oneself to accessible legal systems – this, however, may diminish the meaningfulness of the comparison –, or one will have to endeavour to get other competent researchers involved.[738] This was particularly necessary for our "structure comparison project".[739] This search for co-operators becomes simpler, the more one can fall back upon an apparatus of country-specific experts – already institutionally set up – and/or their preliminary work.[740] Otherwise one has to recruit one's research team one-self in an *ad hoc* fashion. For the identification of colleagues equally relevantly qualified and willing to cooperate, membership of international associations, such as the Association Internationale de Droit Pénal (AIDP),[741] may be helpful. **342**

However, cooperative legal comparison also has a downside. The more work is done by the team or the broader the roles are distributed between project coordinator, country reporters and the actual person doing the comparing and evaluating, the bigger the problems of coordination and the differences in assessment may be; as a consequence, the question of respective responsibility and ultimate decision-making power may arise. The latter belongs, as a rule, within the project coordinator's area of responsibility, while other project participants will have to answer for their respective contribution. This will hardly cause problems as long as the value-neutral documentation and description of the comparative material to be covered is involved. However, as soon as value judgements are necessary, it has to be made clear who is to have the decisive role in this. This question may arise as early as during the formulation of the comparative objective and the choice of countries when decisions about preferences have to be made – however, especially when final evaluations and recommendations are at stake. **343**

The answer for legislative and judicative comparative law is obvious: the final decision must be with the legislator or the judge; the reason for this is that the choice between several alternatives – if there is no single obligatory solution – is left to the authority that, in the end, has to take on the political or judicial responsibility for it. **344**

Therefore, for the scientific comparatist, the role of an "evaluating actor" appears to be limited to theoretical comparative law. However, this is only partially correct. **345**

[734] Regarding comparative projects the Max Planck Institute was mandated with for legislative purposes, inaddition to those referred to in fn. 608 and 642), a comparative expertise on "remedies in criminal procedure" may be mentioned: *Monika Becker/Jörg Kinzig* (eds.), Rechtsmittel im Strafrecht. Eine international vergleichende Untersuchung zur Rechtswirklichkeit und Effizienz von Rechtsmitteln, Freiburg 2000.

[735] As is occasionally alleged: cf. mn. 240.

[736] In this sense also emphasizing the indispensability of individual comparative research see *Zweigert/Kötz*, Comparative Law (fn. 7), p. 42.

[737] As is done, for instance, in Germany with a second dissertation in terms of a "Habilitation".

[738] Cf. *Jung*, Theorie (fn. 126), p. 369.

[739] Cf. mn. 59 fn. 168 and *Eser/Perron,* Strukturvergleich (fn. 1), pp. 23, 38 f. S

[740] Further to such institutional support mn. 354 ff.

[741] Cf. mn. 19.

Theoretical comparative law is certainly the scientist's very own area of evaluation. However, even insofar as – in other comparative law areas – he or she has to leave the final decision concerning possible alternative solutions to those who are legally or politically responsible for them, this does not exclude the researcher from giving support in the decision and taking on some joint responsibility, which may be done in two ways: on the one hand, in the way that he – even if he only does preparatory comparative work[742] – reaches a level of knowledge that is, in its breadth and depth, inaccessible to the legislative and judicative "customers", if they – as is the rule – are not themselves involved in the investigation of the material.[743] In this way, the researcher may, by giving advice, advance to become an indispensable helper in the decision-making process. On the other hand, the scientist in her role as a political citizen cannot be stopped from giving her opinion and, in doing so, influencing the political decision-making process at least indirectly.[744]

346 For each of these roles, however, that a comparative law researcher may take, one thing is indispensable: in order to avoid personal politics under the guise of seemingly pure science, the comparatist has to disclose where and when his or her assessments go beyond mere elicitation of data, unbiased formation of models and alternatives for decisions, and which evaluation criteria are guiding him or her in doing this.[745]

b) Professional qualifications

347 In order to be taken seriously as a researcher in comparative criminal law, one has to have, on the one hand, particular abilities and, on the other hand, should not have certain weaknesses.

348 In a positive sense, the protagonist has to have the necessary qualifications for the role he or she is to take on in the comparative law process. If he functions as a country reporter, he must be familiar with the law to be investigated and described. In the same way, when reasons of historical-traditional development or socio-cultural background are considered, there has to be knowledge of them, as well as a sense for reciprocity with the legal phenomena of concern. This does not mean that the reporter already has to have this knowledge herself. At least, however, she has to be able to acquire it if necessary, or to have it passed on by consulting experts. If the project participant is responsible for the determination and/or coordination of the comparative objective, the drafting of the catalogue of questions and/or the planning of the actual legal comparison, he will also – beyond knowledge of his own law – have to possess openness towards foreign law and an instinct for other types of possibly relevant phenomena. In doing this, knowledge of the foreign language may be equally important to the basic orientation in a foreign legal system.[746] All these issues are requirements that are paid much too little attention to in legal education, as it is still the case in Germany and perhaps in other jurisdictions as well.[747]

349 One weakness comparative law is said to have, is that it is necessarily superficial.[748] When to record and understand one's own law is already not always easy, then this is

[742] Cf. *Kubiciel*, Funktionen (fn. 66), p. 216.
[743] Cf. *Zweigert/Kötz*, Comparative Law (fn. 7), p. 47.
[744] Cf. also *Eser*, Über Grenzen (fn. 88), pp. 97 f.
[745] Cf. also *Sieber*, Strafrechtsvergleichung (fn. 5), p. 122, and mn. 351 ff.
[746] Cf. *Jung*, Theorie (fn. 126), pp. 377 ff.; *Basileios Markesinis*, Rechtsvergleichung in Theorie und Praxis, München 2004, pp. 76 f., and supra mn. 74.
[747] Cf. mn. 11, 18, 68.
[748] *G. Watt*, Comparison (fn. 104), p. 83, with reference to and in conflict with *F. H. Lawson* und *Alan Watson*.

considerably more difficult for foreign law; because, even if sources are accessible, errors cannot be excluded when they are interpreted and evaluated. This danger is the greater, the more there might be occasion for misjudgements due to different ways of thinking and styles of argumentation.[749] Not to talk at cross-purposes is frequently only achievable in a comparative law dialogue.[750] Also the susceptibility to dilettantism, that supposedly has damaged comparative law from the beginning,[751] is not to be underestimated: be it that one is not even well enough acquainted with the tools for comparative research, or that one simply capitulates before the overwhelming volume of material that is difficult to assess, and consequently that this material is only registered superficially. In order to respond to these dangers, meticulous precision in the recording and evaluation of the material to be compared is necessary, as well as self-critical caution concerning hasty conclusions.[752]

The same also applies to the obvious danger of eclecticism in comparative law, where one focuses – more or less consciously – on legal systems or evidence that are most promising to deliver the confirmation of one's hypotheses. Especially politicians involved in legislative projects may succumb to the temptation of such a selective way of "picking out the best", by acknowledging only those comparative law results – in the style of a "self-serve shop" – that fit in with their own party-political ideas.[753] Attention is also necessary in relation to "citation cartels" of schools which represent the same opinion.[754] **350**

c) Personal integrity

As is already discernible in the aforementioned pitfalls to be avoided, scientific and linguistic competence alone is not enough for a comparatist. What is expected of him or her as well, is ideological impartiality,[755] and the same applies to the respectful handling of the foreign law.[756] This does not mean that comparative law researchers have to approach their work with a type and degree of neutrality, as is declared impossible, anyhow, by some people who are sceptical of comparative law – when their intention is evidently to discredit it.[757] In the same way, the legal comparatist does not have to refrain from any value judgement, as such a concluding recommendation may well be demanded.[758] What is important, however, is impartiality in the sense that neither one nor the other of the legal systems and cultures which are included in a legal comparison **351**

[749] Fundamentally to this see *Coendet*, Argumentation (fn. 570), pp. 132 ff. and, particularly with regard to the area of criminal law, *Jung*, Theorie (fn. 126), pp. 371 ff.; *Kudlich*, Exportgüter (fn. 116), pp. 182 ff.; *Perron*, Nationale Grenzen (fn. 44), pp. 295 f. Cf. also mn. 156, 301, 304.

[750] As could be experienced during a German-Anglo-American law colloquium on "Justification and Excuse"; cf. *W. Cole Durham*, Reminiscence of Dialogue: Beyond the Papers of the Freiburg Conference, in: Eser/Fletcher, Rechtfertigung (fn. 249), vol. II, Freiburg 1988, pp. 1489–1554 (1515 ff., 1528 f., 1539 ff. and *passim*).

[751] Thus already *Rabel*, Rechtsvergleichung (fn. 38), p. 21, who – though not without some chauvinism – thought it appropriate to contrast Russian generosity and French elegance with "German diligence". Cf. also *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 38; *idem*, Max-Planck-Institut (fn. 43), pp. 143 f.

[752] Cf. *Frankenberg*, Critical Comparisons (fn. 517), pp. 443, 445 f.; *Jung*, Grundfragen (fn. 66), p. 3.

[753] Cf.mn. 145.

[754] As, for instance, shown for the area of private law by *Markesinis*, Rechtsvergleichung (fn. 746), pp. 77, 85 ff.,

[755] Cf. *Adams/Griffiths*, Similarities (fn. 515), p. 286; *Grande*, Criminal Justice (fn. 45), pp. 195 ff.; *Kremnitzer*, Reflections (fn. 116), p. 40; *Örücü*, Methodology (fn. 506), p. 572.

[756] In particular with regard to the significance of "constructing friendship", if a comparative law project is hoped to be successful, cf. *Günter Frankenberg*, How to do projects with comparative law: notes of an expedition to the common core, in: Monateri, Methods (fn. 74), pp. 120–143 (121 ff.).

[757] Cf. mn. 277.

[758] Cf. mn. 322 ff.

is given a preferential position, right from the start, or that others, in turn, are put last, but rather that the researcher proceeds with the greatest objectivity and impartiality possible.

352 This applies especially to the selection of countries that is to be oriented towards the working hypotheses, which, in turn, are dependent on the project's objective. It also applies to the country reports which are to be written in an unprejudiced way. Only when a statement about the suitability or plausibility of a legal rule or dogmatic construction is expected, may the reporter give his opinion and disclose the evaluation criteria underlying this position. The comparative law researcher has to remain conscious of the impartiality to be maintained also during the working steps which might already demand somewhat more of an assessment: this applies to the actual legal comparison with possible model calculations and, naturally, to the concluding evaluation.[759]

353 These basic principles of scientific integrity have to be remembered especially in the context of contract research, where a client may expect a certain result.[760] As can unfortunately be observed quite frequently, one attempts to suppress unwelcome results from a comparison by subjecting the research contract to the client's reservation of publication. To accept this is not compatible with the self-image of a scientist who understands the freedom given to do research being associated also with the responsibility to publish the researched matter. This does not exclude that a publication may be delayed until possibly necessary precautions have been taken, as, for example, in the case of comparative law findings whose publication may contain political dynamite. The publication of a comparative law project should, however, at best be delayed by such a waiting period, and not totally cancelled. This applies – in the public interest – all the more when the project has been financed through public funds.[761]

2. Institutional equipment

354 In view of the great variety of tasks and the differences in the methods to be used, it cannot come as a surprise that comparative criminal law research cannot be conducted in a meaningful way without appropriate equipment. This includes both, access to a library that is so equipped with foreign law materials as to allow the development of understanding of the legal systems of the countries to be compared,[762] as well as access to already existing or still to be collected data – as particularly necessary for empirical preliminary work or accompanying investigations.[763]

355 As far as the "bibliographical equipment"[764] is concerned, the core literature and general introductions to comparative legal research[765] as well as literature on foreign laws, in particular covering the "candidate countries" that are more frequently used for comparative law research, should be present as basic building blocks.[766] In the same way

[759] Cf. mn. 314 ff., 318 ff., 329 ff.

[760] As was the case in a really exemplary way in the one-sided interpretation – because the own national interest had to be served – of the Versailles Treaty by the representatives of the conflict parties; cf. mn. 16, 217.

[761] Cf. mn. 46 and *Eser*, Über Grenzen (fn. 88), p. 98.

[762] Cf. *Jescheck*, Strafrechtsvergleichung (fn. 3), p. 39.

[763] Cf. *Örücü*, Methodology (fn. 506), p. 565.

[764] "Bibliographishes Rüstzeug", as concisely phrased by *Rösler*, Erkenntnisinstrument (fn. 10), p. 1190.

[765] .As, in particular, the literature referred to in mn. 3 and 415.

[766] This includes – beyond treatises, text books and commentaries of the various countries like mentioned before – also anthologies and conference proceedings, which – when already oriented to

as the relevant journals should also be available.[767] Insofar as the special literature required for a particular project – such as collections of law and judicial decisions, congress materials, monographs or academic papers and essays – is lacking, it must be possible to acquire this or to have it conveyed in a different way.

As far as the collection and accessibility of data is concerned, ever increasing support can be expected from modern, computer-based information systems.[768] For their use, possibilities of access – which have been opened up to courts by the European Convention on Information on Foreign Law of 1968 – should also be available for comparative law research.[769] In addition, that many collections of law and judicial decisions, as well as contributions to numerous journals and some books, in the meantime, may be called up online, has made access to foreign criminal law very much easier. 356

However, even a very well-stocked private library will only – as a special exception – be able to muster what is necessary for comparative law research projects, apart from smaller projects. One may not even easily expect from university libraries or law departments that they have all the necessary resources on hand – unless there is enough funding for a foreign law section. The latter, however, is not the case everywhere, even though one may happily observe that, because of the increasing importance of European law, the national literature of these countries may benefit from this development also for their libraries. 357

Even more expedient is, of course, the establishment of institutes which are set up to gather – as globally as possible – criminal law literature and other relevant materials, as is the goal of the Max Planck Institute for Foreign and International Criminal Law in Freiburg.[770] With its current total holdings of more than 455 000 volumes and around 358

comparative criminal law – may contain reports on various foreign jurisdictions. This literature, if not at hand, should al least be accessible.

[767] As primarily devoted to comparative criminal law, the following journals may be listed:
- *Criminal Law Forum, Dordrecht* – online: http://link.springer.com/journal/10609;
- *eucrim*: The European Criminal Law Association Forum, Freiburg i. Br. – online: http://www.mpicc.de/eucrim/archiv.php;
- *European Journal of Crime, Criminal Law and Criminal Justice*, Leiden – online: http://booksandjournals.brillonline.com/content/journals/15718174;
- *European Journal on Criminal Policy and Research*, Dordrecht – online: http://link.springer.com/journal/10610;
- *Global Journal on Crime and Criminal Law*, Holmes Beach/Florida;
- *International Criminal Justice Review*, Thousand Oaks/California – online: http://icj.sagepub.com/;
- *Journal of International Criminal Justice*, Oxford: Oxford Univ. Press – online: http://jicj.oxfordjournals.org/;
- *International Criminal Law Review*, Leiden – online: http://booksandjournals. brillonline.com/content/journals/15718123;
- *International Journal of Comparative and Applied Criminal Justice*, Abingdon – online: http://www.tandfonline.com/loi/rcac20;
- *International Journal of Law, Crime and Justice*, Amsterdam – (only) online: http://www.sciencedirect.com/science/journal/17560616;
- *International, Transnational & Comparative Criminal Law* – (only) online: http://www.ssrn.com/link/intl-transnational-comp-law.html;
- *Revue Internationale de Droit Pénal*, Toulouse – online: http://www.penal.org/?page=mainaidp&id_rubrique=41&lang=fr;
- *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW)/Auslandsrundschau, Berlin
- online: http://www.degruyter.com/view/j/zstw;
- *Zeitschrift für internationale Strafrechtsdogmatik*: ZiS – (only) online: http//www.zisonline.com/

[768] As to computer-assisted comparative criminal law. cf. mn. 309.

[769] Cf. *Schramm*, Erkenntnisse (fn. 61), p. 158.

[770] For details about the emergence and concept of this institute see *Jescheck*, Max-Planck-Institut (fn. 43), pp. 128 ff., as to its further development up to the mid 80 s see Max-Planck-Gesellschaft, Berichte und Mitteilungen, Heft 4/85, pp. 9–20, and considering the present position see https://www.mpicc.de/de/int/forschung/forschungsprofil/forschungsperspektiven.html.

1500 – mainly foreign – journals and periodicals[771], apart from smaller, individual research projects, also larger cooperative projects can be conducted. As these work opportunities are not only open to members of the Institute but also to foreign guest researchers, the Max Planck Institute offers, not least of all, also a popularly used forum for the intensive exchange of ideas and cross-border cooperation.[772]

D. A Guideline for Comparative Work in – primarily but not only – Criminal Law

359 It would not be surprising if the complexity of different objectives in comparative law work and the contentiousness of some methods, as well as the necessary prerequisites, that became apparent in the preceding work, put off some researchers from daring to go near comparative criminal law at all. However, this would be hasty and misguided. Even though one frequently has to warn, on the one hand, against superficiality in dealing with foreign law and has to insist on thoroughness in its examination and evaluation, the demands arising from this are not to be understood in the sense that comparative criminal law can only be undertaken with the involvement of a great number of personnel and institutional resources, and therefore is practically closed to an individual researcher. This is definitely not so. The reason for this is that independently of whether it concerns a large or a small project, the successful or failed outcome depends significantly on understanding, right from the beginning (and on adjusting this, as necessary, during the work process), what one wants to achieve, which methods appear required and suitable, and to what extent the necessary professional capabilities – of the research personnel as well as institutional resources for the work – are available. From the great variety of what had to be presented above in a theoretical way, the essence – for the practical work – is now going to be summarized as follows.

0. Guiding principle throughout: Orientation of method and individual work steps towards the objective of the legal comparison

360 In principle, from start to finish caution is called for towards argument about methods – frequently observed – where one method is played off against another, and one or the other approach is declared to be the only correct one. This may be even more misleading when one commits oneself to a particular method without having posed for oneself the question beforehand – or at least has revealed to some degree – what the purpose of the comparative law work is actually meant to be. For this reason and independently of the fact whether the work is limited to a comparison of terms or is directed towards the function of particular institutions, whether a micro-comparison might already be enough or a macro-comparison should be aimed at, whether and to what extent cultural background is to be investigated or the legal comparison is to be laid out as a comparison of cultures from the start, or whatever else should be investigated with a theoretical, judicative-practical or legislative-political objective – all these different kinds of demands cannot be dealt with by using one single method. Rather, the method to be applied in each case depends decisively on the objective –

[771] For further information see. http://www.mpicc.de/ww/de/pub/bibliothek/about.cfm; its MPIS (cf. mn. 73, 415) is accessible via: Infocrim.org

[772] As to such communicative conditions and possibilities of a transnational criminal law discourse cf. also *Kühl*, Europäisierung (fn. 198), pp. 780 ff.

which is to be determined beforehand.[773] Therefore, summarizing it in keywords, the guideline to be followed throughout consists of three steps:

0.1. First of all, the *objective* of the comparison to be conducted has to be determined (step 1). **361**

0.2. The *method* has to be oriented towards this objective. In doing this, one has to choose – in the sense of openness of methods – the comparative method that appears most suitable in each case; if necessary, several methods are to be combined. **362**

0.3. In the same way in which the legal comparison as a whole depends methodically on its objective, the individual *work steps* are to be orientated towards it and, if necessary, to be varied. For example, in the interest of gaining as comprehensive an overview as possible, it may be advisable to establish the catalogue of questions (step 1.2) as well as the choice of countries (step 2) according to macro-criteria; in contrast, in terms of micro-comparison it may possibly be sufficient – based on the results gained during the preparation of the country reports (step 3) – to limit oneself for the creation of models (step 4) as well as the legal-political evaluation (step 5) to legal systems close to each other or, vice versa, to extremely alternative legal systems. In short: at every level of the work, one has to examine by which methodical path and with which aiding materials the intended objective is best achieved. **363**

1. First working step: Goal setting

What is to be investigated by comparative law, for what purpose, and to what extent? The investigation has to start with these questions. The answer may be simple if, for example, in the context of a dogmatic paper or a criminal proceeding, the single question arises whether a particular element of an offence – under this or that name – also plays a role in a foreign legal system, or whether a crime committed by a German citizen is equally punishable at the foreign place of the crime as it is according to German law. In such cases, the following steps will also not be completely unnecessary insofar as for the choice of countries (2) one has to search for places where offence elements similar to that of the own law may be found, or, concerning the question of dual criminality, the equivalence has to be compared (4). Such easily manageable comparative cases are, however, probably more the exception. This is the reason why it is very important for the determining of the further working steps – and in order to avoid, on the one hand, that the problem is understood only in an incomplete way, and, on the other hand, that unnecessary detours may be taken – to establish the objective of the investigation and comparison as clearly as possible. In order, however, not to overtax oneself in doing this, it may be advisable as early as during the process of setting the objective, that the feasibility of results – which may be desirable but hard to achieve – is contemplated and the working plan laid out accordingly. **364**

Without wanting to repeat in detail what may be – out of a great variety of conceivable goals[774] – considered to be the individual objective of comparison, two things – in keyword-style – are necessary to put the task into concrete terms:[775] **365**

[773] For details to the connection between aims and methods see Part III. A (mn. 219 ff.).
[774] Presented in mn. 50–218.
[775] For details see mn. 231–262.

1.1. Choice and formulation of the comparative objective

366 In order to do this, one has to clarify particularly,

- whether the comparison is, in its fundamental direction, to serve – only or mainly – theoretical, judicative or legislative purposes (or possibly different purposes in a particular combination with each other),
- whether it is to be, according to its basic design, merely a comparison of norms or institutions or a structural analysis of greater depth,
- whether its scope demands only a micro-comparison of a particular legal figure or individual institution (and even that limited to terminology and usability), or whether a macro-comparison of a complete system of crimes and sanctions is to be undertaken,
- whether, in relation to depth and clarity, only the normative-legal quality of particular norms or institutions is to be identified, or whether and to what extent also historical-cultural background, ethical implications and empirical impact factors should be included,
- whether, as far as the disciplinal cognitive interest is concerned, the focus is to be less on a culture-oriented legal comparison (in terms of comparison of law formed by culture), and more on a legal-oriented cultural comparison (in terms of comparison of culture as formed by law),
- whether, considering different degrees of commonality and difference, the search should be focussed on rules and regulations that are as close as possible, or rather diametrically opposed alternatives, or
- whether, in addition, other comparative purposes are to be achieved.

1.2. Development of a catalogue of questions based on working hypotheses

367 Depending on the type and degree of differentiation of the intended goals, one has to develop working hypotheses that are as specific as possible, and to put them – structured accordingly in an answerable form – into a questionnaire. In doing this, one has to pay attention especially to the following:

- In order to be able to get comparable answers from the legal systems to be investigated, the questions have to, on the one hand, be specific enough to prevent findings that are all too vague or diffuse, but, on the other hand, must not be so specialized that they might provoke failed results where really similar results might be found.
- As far as comparisons of norms and institutions are of interest, one's own legal system offers itself as a guide to the type and differentiation of the questions. However, in order not to narrow the field of comparison from the start, or even pre-program it in a prejudicial way, one must separate oneself from preconceptions based on one's own law and try – with creative imagination – to sense which alternatives apart from those known from the domestic law might be found in other legal systems.
- Such openness to possibly different legal terms, institutions and differentiations is even more necessary, the more legal systems that appear to be very different or are of a larger number, are to be included in the comparison.
- Insofar as more is at stake than the presentation of similar penal norms, legal terms or institutions, also cultural dimensions and empirical facts are to be included in the catalogue of questions – always depending on the comparative objective.[776]

[776] For further details concerning this working step see mn. 263–275.

2. Second working step: Choice of countries

In the same way as the catalogue of questions (1.2), the choice of countries to be included in the legal comparison also depends significantly on the substantive problem (1.1) – which had to be determined beforehand. In this process, essentially the following has to be considered: 368

2.1. Basic direction

Even in this respect one has to be careful about one-sidedly orientated maxims.[777] 369

- The choice – in principle – is neither, on the one hand, to be limited to countries that are close to each other in a geographical, cultural-historical, legal-dogmatic, legal-political or other way; nor should one look out, on the other hand, for legal systems that are as different or far-removed as possible. When one has to find out for a criminal law dogmatic comparison, for example, in which legal systems a particular theory of crime has found support, one may restrict oneself, from the start, to legal systems known to be similar and only include foreign legal systems as a kind of test. When, however, the interest of a legislative comparative project is on ways to move away from habitual paths and discover new types of alternatives, one has a better chance of finding these in different, rather than similar, legal systems.
- A similar approach applies to the supposedly necessary search solely for (the) "better law". Even though this may be the rule, it may definitely happen in a comparative law project that – in order to avoid going down wrong tracks – the focus may be on highlighting "bad criminal law" or on identifying unsuitable theories. 370

2.2. Number of countries to be included

In this respect, no generally binding directives can be made either. 371

- If, for example, the judicative comparison of mutual criminality is of interest, the choice of countries is naturally limited to the legal systems concerned, independently of whether they are far removed or close to one's own law, traditionally marked or following new paths.
- If, in a legislative harmonization project, an as high as possible degree of commonality is aimed for, the choice of countries will expediently focus on legal systems that appear similar. In contrast, the net of countries will have to be cast much further, the more new kinds of alternative regulations are to be tracked down. 372
- If, in a macro-comparison, the existence of the greatest possible variety of systems of criminal offences or sanctions is to be established, hardly any country can be excluded from the comparison right from the start. 373
- However, even if a larger number of countries is to be included in the comparison, the "principle of wise limitation" is to be observed, even just for practical reasons; in doing this, the criterion of "presumptively greatest yield" may serve as a guideline for the respective problem. 374
- One should proceed in the same way with the usual concentration on particular "legal families". As it may, on the one hand, be appropriate to limit oneself to "close relatives" in order to establish the greatest possible commonalities, it may, on the 375

[777] As to this and the following see mn. 276 ff.

other hand, be advisable to extend to, and contrast, as many foreign legal systems as possible if the greatest possible variety is to be established.

376 – In the same way, the postulate of "universal comparative criminal law" is to be orientated towards the particular comparative objective. Insofar as the claim to universality is achievable at all, this does not have to mean any more than that comparative criminal law has to have the tendency towards being globally open and, therefore, that specific criminal law circles are not to be excluded from the start.[778]

2.3. Preliminary study – Subsequent improvements

377 If the comparative objective as such is not, as, for example, in the question of mutual criminality, already fixed to specific countries, or if the setting of the objective might itself still depend on whether and to what extent countries can be found that appear interesting enough to be investigated, then the choice of countries may not be made at once. Such difficulties can be dealt with in two ways:

378 – Firstly, by employing a pilot study to test an apparently suitable number of different countries as to whether and to what extent usable answers to the problem in question can be expected, and/or from where additional countries can sensibly be included in the legal comparison. Such a preliminary study may also be useful as early as at the time when the comparative objective itself is formulated.

379 – Secondly, even when the choice of countries appears to have been finally made, amendments may become necessary: this may happen when it does not become apparent until the writing phase of the country reports (step 3) that legal systems which were initially selected do not yield anything usable, while suitable materials for comparison can be expected from countries so far not considered. Accordingly, as was possibly necessary for the determining of the comparative objective, the list of countries may have to be corrected and complemented afterwards.[779]

3. Third working step: Country reports

380 While the determination of the comparative objective (step 1) and the choice of countries (2) usually is within the competence of the project leader, the writing of the country reports is in the hands of country reporters appointed for this task – unless, as is the case with individual projects, this is also done by the project leader him – or herself. In order to be able to deliver comparable materials, the country reporters have to keep to uniform guidelines. If these have not been formulated in connection with the determination of the comparative objective, they must be available at the beginning of the preparation phase of the country reports at the latest.

381 In the same way as the catalogue of questions and the choice of countries noted above, the guidelines for the country reports have to be orientated towards the comparative objective – and this is to happen straight away, independently of whether they are apparent from the catalogue of questions or have to be established separately. For both the establishment of the relevant materials and for their presentation, the following has to be kept in mind:

[778] Cf. also mn. 72 ff., 538 ff.
[779] Cf. also mn. 290 ff.

3.1. Starting point: Perspective – preconceptions

In this context, the matter is to become conscious of the easily overlooked question, namely whether and to what extent the preparation of a country report is to be carried out from a particular perspective and, if so, which one: should it be based on the perspective of the law which was used as the foundation when the comparative objective was determined and the questionnaire developed? Or on the perspective of the country reporter which is possibly based on a different preconception of the questions to be answered than that underlying them? Even though – or just because – it might be expected that legal terms under investigation, institutions and their underlying elements, differentiations and specifications, consciously or subconsciously, would be interpreted from the habitual perspective of one's own law, and answered accordingly. In order not possibly to miss the target, the comparability of the national findings must be safeguarded. This can be done in different ways: 382

- The simplest way of guaranteeing uniformity and comparability is when the person asking the questions and who prepares the country report are the same; the reason for this is that, even if – as usual for individual projects – the person who has established the catalogue of questions has to report on several foreign legal systems, he will use the same prior understanding for all of them. Otherwise, the deviations would have to be disclosed. 383
- If the person who developed the questionnaire is not the same as the one who prepares the country report – as is usual for larger projects –, then uniformity and comparability are to be established through the reporter being open to recognizable prior understandings and reporting from that perspective; or, when and as far as the reporter based her work on a different prior understanding, that she would disclose that. 384
- However, in order not to be misunderstood: when the expectation of the country reporter is that he becomes conscious of his own prior understanding and discloses that perspective, this does not mean that the foreign law should not also be understood, and presented, based on its own intrinsic understanding (step 3.2.); rather, this is only a warning against approaching foreign law with a preconception which is formed by one's own ideas of the law, and in this way, being in danger of receiving wrong answers in response to ill-conceived questions – with the result that the comparability of the findings would suffer.[780] 385

3.2. Coverage and presentation of the relevant legal matter

This central step of work also depends significantly for its scope and detail on the comparative objective. As a rule, especially the following will have to be investigated and presented: 386

- the legal norms and practices relevant to the comparative objective, be they written or unwritten;
- insofar as it appears necessary, the specific legal sources; here everything that contributes to the legal "life" of the system under investigation has to be considered;
- the function and interpretation of the norms and institutions in question: these should be investigated and presented, first of all, based on the intrinsic understanding

[780] See also mn. 296 ff.

of the legal system in question – in order to avoid misunderstandings due to any prejudiced perspective;[781]
- the application of the relevant norms in legal practice.

3.3. Inclusion of other sciences or contexts

387 Depending on the way the comparative objective is formulated, it may be necessary – going beyond the presentation of the relevant law – to consider extra-legal phenomena, in particular:
- criminological aspects and other empirical factors,[782]
- cultural-historical, political or other ideological background factors. If the focus of a project is actually less on the comparison of laws and more on the comparison of cultures,[783] the questions and answers will have to be primarily orientated towards that.

3.4. Methodology of investigation

388 When the research objective is limited to the comparison of normative terms or institutions, it can be, as a rule, sufficient to gather the relevant legal matter from law gazettes, collections of judicial decisions, legal literature or other written sources. If one wants to go beyond this and also investigate and compare the structures and empirical factors of legal systems, other investigative methods have to be included. This applies especially to the
- case-based comparative method and
- computer-assisted comparative law.[784]

3.5. Subsequent amendments

389 As was the case for the choice of countries (step 2.3), it may also become apparent during the writing of individual country reports that a legal system has special features that are not reflected in the catalogue of questions (step 1.2) which, however, might be significant for the overall evaluation.

390
- If these are just exceptional characteristics of the country in question, it might be sufficient to refer to them in the country report.
- If such phenomena appear to be so serious, however, that they might also be relevant to other countries, the project leader's attention is to be drawn to this in good time so that – if necessary – the questionnaire can be adjusted accordingly and taken into consideration for the other country reports as well.[785]

4. Fourth working step: Comparison

391 While the country reports serve – in terms of "Auslandsrechtskunde" – the collection and description of criminal law materials of foreign countries, the actual comparison of the various laws – and, thus, comparative (criminal) law in its true sense – starts only with the juxtaposition and assessment of the findings from the different countries.[786]

[781] Cf. mn. 299 ff.
[782] Cf. mn. 302 f.
[783] For details see mn. 250 ff., 304 ff., 366.
[784] Cf. mn. 307 f., 309, respectively.
[785] Cf. also mn. 338 ff.
[786] Cf.mn. 57 ff., 310 ff.

4.1. Catalogue of criteria

Depending on the purpose of the comparison – as will become apparent in an exemplary way from the options described hereafter – first of all a catalogue of possibly relevant criteria has to be drawn up so that commonalities or differences between the different countries can be identified. It is advisable to orientate this on the catalogue of questions that forms the basis for the country reports; if necessary, it is to be complemented or modified by variables that resulted from them. 392

4.2. Binational comparison

Such a comparison may be simple if only two (or a selected number of a few) countries are compared. However, as soon as more than the simple showing of individual norms or institutions is required, the establishment of commonalities or differences may, in accordance with these demands, call for a greater effort of assessment.[787] 393

4.3. Multinational cross-section

As a rule, this type is necessary for the comparison of a greater number of countries. If more than the mere listing and juxtaposing of individual norms or institutions is of interest, there is, on the one hand, neither the need – with regard to the detail of the representation – for a complete account of the individual data compiled in the country reports, nor however, on the other hand, is their summary sufficient. Rather, the assessment and representation has to focus on the profiling of marked commonalities and differences and, in this way, lead towards possible grouping and identification of types.[788] 394

4.4. Creation of models – Establishment of basic structures and general legal rules

The more precisely the comparative law cross-section is already structured for typification (step 4.3), the easier it will be to discover common and different basic structures, develop general legal rules or form models of regulations. Their orientation may also depend on – among other things – whether already known information is to be confirmed or whether different alternatives are to be explored.[789] 395

5. Fifth working step: Evaluation – Recommendations

In a concluding working step, depending on the comparative objective, an evaluation may become necessary – provided that this is not yet contained in the preceding creation of the models. This does not have to mean that comparative law always has to end with recommendations. However, in contrast to the opinion that evaluation does not belong to the area of comparative law anymore, or that legal comparatists would be well-advised to stay clear of it, "evaluative-competitive comparative criminal law" has a legitimate function.[790] 396

[787] Cf. mn. 311 ff.
[788] For details see mn. 314 ff.
[789] Cf. also mn. 318 ff.
[790] For details to this fundamental issue see Part II. D (mn. 173 ff.), especially mn. 187 ff.

5.1. Options of evaluation

397 According to the objective of the project, different types of evaluation and recommendations may be considered, as for example:

- in a theoretical comparative law project, the determination which, of some different crime theories, is for particular reasons to be accepted or rejected;
- in a legally-politically orientated project, the recommendation to give preference to one model of sanctioning over another;
- in a commissioned project for a legislative comparison, the formulation of a draft regulation; in doing this, a value judgement necessarily has to be made between different alternative solutions.

5.2. Criteria of evaluation

398 Since evaluative pre-conceptions may already – in connection with setting the comparative objective – have an impact on the formulation of working hypotheses (step 1.2) as well as later on the creation of comparative models (step 4.4),[791] such prejudices can be excluded even less at the stage of the concluding evaluation and recommendations. For this reason, the following is all the more important:

- In order to prevent the possibility that the value judgements connected to appraisals or propositions appear arbitrary, and so that they are comprehensible for a third party, the evaluation criteria used for this part of the work, are to be disclosed; especially the following:
- During the search for "better law" or more practicable alternative solutions, "justice" and "suitability" are naturally at the centre of attention; however, even for these criteria the decisive parameters have to be disclosed.[792]
- If the focus is on alternative regulations that might affect human rights, these have to be given increased consideration in recommendations.
- In criminal law-dogmatic comparative projects, evaluation criteria such as internal consistency and practical relevance will be of particular importance.

5.3. Prerequisites for comparison and recommendation

399 Even though this may be regarded as a matter of course, comparisons and therefore also recommendations can, from the start, only make sense where comparable problems form the basis of possible alternatives and where no insurmountable hurdles might prevent their acceptance. This is the reason why this also needs to be investigated and reasons given.[793]

[791] Cf. mn. 327.
[792] Cf. mn. 329 ff.
[793] Cf. mn. 333 ff.

PART IV
OUTLOOK: WHAT REMAINS TO BE DONE

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

After the German version on development, aims and methods of comparative criminal law had been concluded, the question arose whether it might be useful to consider some of the questions that could only be touched on in passing in that publication in more depth. This concerns especially the question of the status of comparative criminal law in the more recent literature: To what extent is comparative criminal law given an independent role, which distinguishes it from general comparative law? Which concepts underlie the presentation of comparative criminal law and which focal points are established in doing this? Furthermore, which future tasks present themselves for comparative criminal law? These questions prompted an exemplary analysis of the more recent literature concerned with comparative criminal law.[803] In the following text, the main parts of this evaluation are presented in an English update. **411**

A. The Emancipation of Comparative Criminal Law

Comparative criminal law as "a long neglected discipline" that only now appears to be "on the rise",[804] this widespread perception is partly right and partly wrong. It is wrong insofar as first contributions to comparative criminal law can be traced back to the middle of the 19th century. But as already indicated in the survey on developmental phases of comparative law,[805] at that time comparative criminal law was still far away from being considered a discipline in its own right. It suffered rather from the predominance of comparative private law which even managed to get itself identified with (the overall field of) comparative law – as if there were no other legal fields worth comparison.[806] **412**

With this perception of a discipline which primarily focused on private law and – with a claim to selectness – represented comparative law almost absolutely, it was not a simple matter for comparative criminal law research and teaching to establish a place of its own within the field of comparative law. This does not mean to say that the building blocks for it were missing; because, as already noted, at the change of the 19th to the 20th century there were initiatives and publications that crossed borders, such as especially the highly esteemed "Vergleichende Darstellung des deutschen und ausländischen Strafrechts".[807] However, on closer inspection exactly this – with its 16 volumes – particularly impressive milestone was not yet an example of genuine "comparative" (criminal) law, but just a presentation of foreign criminal laws in the sense of "Auslandsrechtskunde".[808] One should certainly not underestimate its importance but it represents basically nothing more than a preliminary step to the actual comparison of criminal law. At least, however, this found its expression in the rising numbers of transnational comparisons of individual elements of crime (such as, for example, justification and excuse, perpetration of an offence or the participation in it, or attempt and withdrawal) or of specific offences (such as abortion, corruption or environmental offences).[809] **413**

[803] Published under the title: Zum Stand der Strafrechtsvergleichung: eine literarische Nachlese, in: Christoph Safferling et al. (eds.), Festschrift für Franz Streng zum 70. Geburtstag, Heidelberg 2017, pp. 669–683.

[804] As, for instance, described by *Grande*, Comparative criminal justice: (fn. 45), pp. 181 f.

[805] Part I. B (mn. 5 ff.).

[806] Cf. the references in mn. 19 fn. 45.

[807] See mn. 19 fn. 50.

[808] Cf. mn. 57 ff.; see also mn. 432 ff.

[809] As to the diversity of such individual comparisons of different breadth or specifically greater depth as they can be seen from the examples given for the descriptions of the aims and methods cf. – inter alia – mn. 61 ff., 97 ff., 133 ff., 286 ff.

414 In order to establish comparative criminal law as an independent discipline within comparative law, however, further aspects – beyond those individual investigations – had to be added: there was a need for general reflection concerning aims and methods specific to comparative criminal law. If one wants to connect this development to some names, one has to remember *Hans-Heinrich Jescheck* who in the initial phase of work in the field described the tasks set for comparative criminal law.[810] I myself contributed with the differentiation of comparative law into the "judicative", "legislative" and "scientific-theoretical" categories[811] which I supplemented later with an "evaluative-competitive" category.[812] In addition, the spectrum was broadened by *Ulrich Sieber* who added ideas of universal goals and modern techniques of comparison.[813] What had been achieved in this way, was then deepened by others looking at individual aspects[814] or, for that matter, criticised as well.[815]

415 Furthermore, comparative criminal law in its process towards becoming an independent entity needed to take further steps, though, in order to stand out from general comparative law as something distinguishable and to attract broader recognition in terms of topic-specific publications. This happened in differently far-reaching ways: first, in the way that in some textbooks or compendia which appear in an apparently all-inclusive way under the heading of "comparative law", at least a separate chapter was allocated to criminal law comparison,[816] and second, in the way – and this to a much more significant degree – that "comparative criminal law" even finds itself increasingly represented under its own title in independent publications.[817] This break-through, however, cannot yet be

[810] *Hans-Heinrich Jescheck*, Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung, Tübingen 1955,; cf. also mn. 18, 45, 118 fn. 292.

[811] *Albin Eser,* The Importance of Comparative Legal Research for the Development of Criminal Sciences, in: Les systèmes comparés de justice pénale, Toulouse 1998, pp. 77–108; *idem* (in an updated German version), Funktionen, Methoden und Grenzen der Strafrechtsvergleichung, in: Hans-Jörg Albrecht et al. (eds.), Internationale Perspektiven in Kriminologie und Strafrecht. Festschrift für Günther Kaiser zum 70. Geburtstag, Berlin 1998, 2nd vol, pp. 1499–1530 (in short: FS Kaiser).

[812] *Albin Eser,* Evaluativ-kompetitive Strafrechtsvergleichung. Zu "wertenden" Funktionen und Methoden der Rechtsvergleichung, in: G. Freund et al. (eds.), Grundlagen und Dogmatik des gesamten Strafrechtssystems. Festschrift für Wolfgang Frisch zum 70. Geburtstag, Berlin 2013, pp. 1441–1466 (in short FS-Frisch).

[813] *Ulrich Sieber,* Strafrechtsvergleichung im Wandel – Aufgaben, Methoden und Theorieansätze der vergleichenden Strafrechtswissenschaft, in: U. Sieber/H.-J. Albrecht (eds.), Strafrecht und Kriminologie unter einem Dach, 2006, S. 78–151.

[814] As, for instance, with regard to the role of the cultural background of comparative criminal law dealt with in the conference proceedings by *Franz Streng/Gabriele Kett-Straub* (eds.), Strafrechtsvergleichung als Kulturvergleich. Beiträge zur Evaluation deutschen "Strafrechtsexports" als "Strafrechtsimport", Tübingen 2012, with a review by *Albin Eser*, Strafrechtsvergleichung durch Kulturvergleich, in: Jahrbuch für japanisches Recht 2014, S. 288–295 = www.freidok.uni-freiburg.de/volltexte/9725.

[815] As, in particular, in the contributions edited by Susanne Beck/Christoph Burchard/Bijan Fateh-Moghadam, Strafrechtsvergleichung als Problem und Lösung, Baden-Baden 2011.

[816] Though different in extent and focus cf. R. Blanpain/V. Hendricks (eds.), International Encyclopaedia of Laws, in 6 volumes dealing with Criminal Law (edited by F. Verbruggen/V. Franssen, Deventer Loose Leaf 2016), as of yet with 30 country reports; *Luis E. Chiesa,* Comparative Criminal Law, in: *Markus D.* Dubber/Tatjana Hörnle (eds.), The Oxford Handbook of Criminal Law, Oxford 2014 pp. 1089–1114; *Markus D. Dubber,* Comparative Criminal Law, in: *Mathias Reimann/Reinhard Zimmermann* (eds.), The Oxford Handbook of Comparative Law, Oxford 2006, pp. 1287–1325; *Elisabetta Grande*, Comparative criminal justice: a long neglected discipline on the rise, in: Mauro Bussani/Ugo Mattei (eds.), Comparative Law, Cambridge 2012, pp. 191–209; *Paul Roberts,* Comparative Law for International Criminal Justice, in: Esin Örücü/David Nelken (eds.), Comparative Law. A Handbook, Oxford 2007, pp. 339–370; *Thomas Weigend,* Criminal Law and Criminal Procedure, in Jan M. Smits (ed.), Elgar Encyclopedia of Comparative Law, Cheltenham/UK, 2nd ed. 2012, pp. 261–278.

[817] Without any claim to completeness see – in order of publication – *Richard J. Terrill,* World Criminal Justice Systems, 8th ed., Waltham/MA 2013, 723 pp.; *Jean Pradel,* Droit pénal comparé, Paris

the final point as long as there continue to be publications which present themselves – unreservedly – under the heading of "comparative law" without taking any notice of criminal law.[818] It cannot be overlooked either that among the independent comparative textbooks covering criminal law, there is not a single one penned by a German writer,[819] and that is – unless overlooked – neither in this nor in another language. In this respect the "Comparative Criminal Law" presented here – just as the "Strafrechtsvergleichung" underlying it[820] – may consider itself as the most comprehensive presentation of its theory and practice from a primarily German perspective so far.

Even if on further examination of this literature covering comparative criminal law it becomes apparent with what variety it may be designed and how differently the focal points may be chosen in doing this, progress that can hardly be underestimated can simply be seen in the emancipation of comparative criminal law from a comparative private law that traditionally considered itself as, so to speak, competent of everything. Not only is the disciplinary status of comparative criminal law strengthened in a scientific sense – in terms of "droit pénal comparé comme une discipline propre"[821]; rather, the practical increase in importance, which comparative criminal law has achieved especially through progressing internationalisation and globalisation of the economy and society,[822] has gained its deserved acknowledgement as well. Not least of all, based on an emancipated understanding of comparative criminal law it will be easier to determine its specific functions and methods of comparison according to its own needs and the specific features of criminal law. **416**

1995, 733 pp.; *John Hatchard/Barbara Huber/Richard Vogler* (eds.), Comparative Criminal Procedure, London 1996, 256 pp.; *George P. Fletcher,* Basic Concepts of Criminal Law, New York 1998, 232 pp.; *Craig M. Bradley,* Criminal Procedure. A Worldwide Study, Durham/NC 1999, 446 pp.; *Francesco Palazzo/Michele Papa,* Lezioni di diritto penale comparato, Torino 2000, 239 pp.; *Alberto Cadoppi,* Materiali per un'Introduzione allo studio del diritto penale comparato, 1st ed., 2001, 2nd ed., Padova 2004, 525 pp.; *J. F. Nijboer,* Comparative Criminal Law & Procedure, Deventer 2005, 55 pp.; *Harry R. Dammer/Erika Fairchild,* Comparative Criminal Justice Systems, Belmont/MA 2006, 432 pp., in its 5th ed. by *Harry R. Dammer/Jay S. Albanese, Wadsworth* 2014, 364 pp.; *Stephen C. Thaman*, Comparative Criminal Procedure. A Casebook Approach, Durham/NC 2002, 280 pp.; *Francis Pakes*, Comparative Criminal Justice, Cullompton/UK 2004, 200 pp.; *George P. Fletcher,* The Grammar of Criminal Law. American, Comparative, and International, Volume One: Foundations, Oxford 2007, 366 pp. (to be understood as a basically reoriented continuation of his well-known "Rethinking Criminal Law" of 1978, 898 pp.); *Kevin John Heller/Markus D. Dubber,* The Handbook of Comparative Law, Stanford/CA 2011, 660 pp.; *Markus D. Dubber/Tanja Hörnle,* Criminal Law. A Comparative Approach, New York/NY 2014, 671 pp.; *Johannes Keiler/David Roef* (eds.), Comparative Concepts of Criminal Law, 1st ed. 2015, 2nd ed., Cambridge 2016, 304 pp. Also *Markus D. Dubber/Tanja Hörnle,* The Oxford Handbook of Criminal Law, Oxford 2014, 1203 pp., may be mentioned here insofar as they – beside the contribution by *Chiesa* (fn. 816) – present various models of criminal law.

[818] As is still the case with – inter alia – *Maurice Adams/Jacco. Bomhoff* (eds.), Practice and Theory in Comparative Law, Cambridge 2012, *Michael Bogdan,* Concise Introduction to Comparative Law, Groningen 2013, *Mathias Siems,* Comparative Law, Cambridge 2014, and – though perhaps more easily forgivable because essentially methodological – *Jaakko Husa*, A New Introduction to Comparative Law, Oxford 2015, and *P. Giuseppe Monateri* (ed.), Methods of Comparative Law, 2012. – A sort of middle position is most recently represented by *Uwe Kischel,* Rechtsvergleichung, München 2015: even though comparative criminal law is not given a separate chapter, it is at least passim taken note of.

[819] An exception to this deficiency may perhaps be seen in the "International Max Planck Information System for Comparative Criminal Law" (MPIS), in which the publications listed in mn. 58 fn. 165 have appeared so far (cf. mn. 73). Regarding their content and design, however, these publications represent neither a textbook nor a theory of comparative criminal law but rather a collection of materials; these are certainly important and informative by describing foreign law; but they do this in terms of "Auslandsrechtskunde", and thus represent merely a pre-stage to the actual comparison of law; cf. mn. 57 ff.

[820] *Eser* (fn. 2).

[821] *Pradel,* Droit pénal comparé (fn. 817), pp. 1 ff.

[822] Cf. mn. 22.

B. Concepts and Focal Points in Publications on Comparative Criminal Law

417 If one lets those publications pass in review that appear under the heading of "comparative criminal law" in the sense of an independent discipline within comparative law – or a corresponding foreign-language equivalent such as "droit pénal comparé" or "Strafrechtsvergleichung" – then considerable differences, already in the outward appearance, catch one's eye.

1. Size – Choice of countries

418 Differences can already be seen from looking at the size.[823] Even if one disregards the special position of the 12-volume "Max Planck Information System" (MPIS)[824] and ignores the numerous monographic comparisons concerning individual questions of criminal law, considerable differences concerning the length of publications which appear under the heading of "comparative criminal law" or "Strafrechtsvergleichung" may be noted. While some contributions are content with a length of up to 70 pages (Weigend, Grande, Eser in FS-Kaiser und FS-Frisch, Roberts, Dubber in Reimann/Zimmermann, Nijboer, Sieber in Sieber/Albrecht) and others range from 200 to 400 pages (Pakes, Chiesa, Eser in Eser/Perron, Palazzo/Papa, Fletcher, Hatchard/Huber/Vogler, Keiler/Roef, Dammer/Albanese, Bradley), yet others reach up to more than 700 pages (Cadoppi, Dubber/Hörnle, Pradel, Terrill).

419 The choice of the countries covered also varies quite considerably. Looking just at the numbers – that is without, at this stage, considering any selection criteria – the extremes span from 2 up to 27 countries. At the smaller reference point, disregarding the occasional look beyond that, one finds Dubber/Hörnle with their casebook limiting the comparison to two countries, followed directly by Hatchard/Huber/Vogler and Keiler/Roef who each include a third country. The opposite pole is represented by the MPIS which, in the end, includes 27 countries. In between, one finds Palazzo/Papa with 5 countries, Dammer/Albanese and Dubber/Hörnle in their Criminal Law Handbook with 6 criminal law models each, and Terrill with 7 country reports. The European "Structural comparison project" by Eser/Perron with 8 compared countries would also have to be counted within the group of works of this scale,[825] while Bradley with 12 and Heller/Dubber with 17 presented legal systems tend towards the larger reference point. Equally substantial as the publications focussing on specific countries, however, are those that are less country-specifically fixated but rather thematically oriented and which, therefore, choose their materials for comparison based on the best way of presenting similarities or differences. With this in mind – that is without a fundamental pre-programmed focus on particular countries – Cadoppi, Chiesa, Dubber/Hörnle Handbook, Fletcher, Nijboer, Pradel, Pakes, Roberts, Thaman and Weigend proceed.

420 However, the number of countries is not in itself of essential importance. If it is greater or even more open, the choice may, on the one hand, offer more room for the consideration of variants. However, this may also go hand in hand with the danger of

[823] If not indicated otherwise, the names referred to in the following pertain to the publications listed in fn. 810-818.

[824] Cf. mn. 415 fn. 819.

[825] *Eser/Perron*, Strukturvergleich (fn. 1), pp. 49–759.

superficial arbitrariness and a loss of any coherent comparability. If, on the other hand, the choice is limited to only a few countries, the perception for the possibly great variety of modalities of regulations may be lost.

421 For this ambivalence of a varyingly large or small number of investigated countries, a review of the different publications also delivers revealing illustrative material. If one is content with the presentation of only two criminal justice systems, as did for example Dubber/Hörnle in the Casebook, then the choice usually falls on a comparison of Common Law and Civil Law, and here usually the US-American criminal law system is called on to illustrate the former and the German one the latter. That may have the advantage that one can deal within an equally concrete and intensive way with specific topics. However, in doing so, one can easily lose sight of the fact that the Common law system – essentially adopted from England – has long ceased to be a uniform entity and has differentiated itself into, among others, Canadian, Australian and Indian variants. And there is no lesser narrowing of the perspective by viewing Civil Law represented solely by German criminal law as this cannot even stand for all German-speaking criminal justice systems such as those of Austria and Switzerland, not to mention the Romance legal systems – usually also included in Civil Law – such as especially those of France, Italy and Spain. Insofar a broadening of the horizon may already be achieved by including, apart from those legal systems primarily representing Common Law and Civil Law, a third country to be compared – sort of standing in between; this was done in Keiler/Roef's Comparative Concepts by adding to the comparison of England and Germany, with the Netherlands, a third country. Or it may be done in a way as in the Comparative Criminal Procedure by Hatchard/Huber/Vogler where the English Common Law was juxtaposed with the German as well as the French criminal procedure, both as representing the Civil Law. Although presented in a substantially more concise way, in the comparative Lezioni by Palazzo/Papa the Civil Law spectrum was extended beyond Germany and France through the inclusion of Italy and Spain. In the structure comparison project by Eser/Perron, which extends to eight countries, the Civil Law area, juxtaposed to the Common Law represented by England and Wales, is further diversified by also including Portugal next to France and Italy for the Romance legal circle and by opening the German legal circle to Austria and Switzerland; in addition, the Nordic legal circle emerges through the inclusion of Sweden.

422 If one moves away from the principal comparison of Common Law and Civil Law, the choice becomes more variable but also more arbitrary. This is already reflected in the presentation by Dammer/Albanese which is based on six "model nations" and where the legal systems of China, Japan and Saudi Arabia are placed side-by-side with that of England representing the Common Law and the criminal law systems of Germany and France representing Civil Law. The choice of seven "World Criminal Justice Systems" by Terrill is to a large extent similar whereby, however, continental Europe is only represented by France – that is, differing from the usual practice, not by Germany as well – and where in addition to the above mentioned "model nations" of China and Japan the "justice systems" of South Africa and Russia are included while Saudi Arabia as well as Iran and Turkey appear only as variants of Islamic criminal law. In a less country- and more model-specific way, six criminal justice systems are also presented in the Criminal Law Handbook by Dubber/Hörnle where they are meant to illustrate a commonality under particular historical-cultural or political-organizational aspects: thus the medieval canon law, the indigenous legal traditions, the Islamic law, the Jewish law, the Marxist and Soviet law and military justice. In the presentation of twelve criminal procedures in the "Worldwide Study" by Bradley, and going beyond the already mentioned countries, Israel and with Argentina for the first time a representa-

tive of Latin America are also included. Heller/Dubber get to seventeen countries by including in addition to the before-mentioned countries also Australia, Egypt, and India as well as incorporating the Rome Statute of the International Criminal court, while Italy remains unconsidered. Additional not yet mentioned names appear, of course, in the with 27 reported-on countries most comprehensive MPIS: thus from the European area Bosnia-Herzegovina, Greece, Austria, Poland, Romania, Scotland, Hungary and Switzerland, from Africa Ivory Coast and Uganda, from Latin America Uruguay and from Asia South Korea. On the other hand, some countries which received attention in other publications are not represented in the MPIS. This applies to Egypt, Argentina, the Netherlands as well as especially Germany whose criminal justice system is evidently assumed to be known.

423 Even if one disregards, because it is scarcely manageable anyhow, to what extent the respective material for comparison in the rest of the publications – which offer neither special country reports nor are focussed on specific countries – is drawn from one or another of the above-mentioned countries,[826] a certain selection profile is recognizable: consistently the Common Law and the Civil Law are presented in the form of certain countries, whereby the former is represented either through the English or the US-American criminal law and the latter primarily through the German and the French – or occasionally only by one of the two (mainly the German). Consequently other Common Law countries and continental European legal orders only play a minor part in comparative criminal law in the way that is occasionally granted to the Italian, Dutch or Spanish law, while the Nordic countries remain almost unexposed. That applies even more to other continents which find only occasional attention, as does happen, from Asia for China, India, Iran, Israel, Japan, South Korea and Turkey, from Africa for Ivory Coast, Saudi-Arabia, South Africa and Uganda as well as from Latin America for Argentina and Uruguay, while complete lack of attention has to be noted for such important countries as Brazil or Mexico. It is all the more remarkable then how religiously-founded legal systems such as the Jewish, Islamic or canonical ones, or political-ideological legal orders such as formerly or still socialist ones, find increasing attention.

2. Selection criteria

424 If one tries to discover according to which criteria the respective choice of countries was made, one should be able to draw conclusions from the character of the respective publication and its objective. However, this is only sporadically the case; this is so because even when there is an explanation at all – as is usually done in a preface or introduction – what purpose the comparison of criminal law is meant to serve or why a specific country has been selected for comparison – or, even though obviously eligible, has not been considered –, the explanations mostly turn out to be quite short. At least one can draw certain conclusions from both the (greater or smaller) number and the (criminal law doctrinal, legal-political or otherwise somehow important) status of a selected country.

425 If, for example, a publication is meant to give an impression of the worldwide diversity of different criminal justice systems, then the circle of countries to be presented really cannot be large enough; in doing this, however, what also matters in the selection which nonetheless has to be done, is to decide whether rather the leading basic models

[826] As, for instance, by *Fletcher* who in his comparative work likes to refer in particular to German criminal law.

– representing Civil or Common Law – are to be presented or whether more unusual variants are to be preferred. The wider the circle of selection is drawn here, the more difficult it will be, not only to report about the countries in question, but also to submit them to a closer comparison as well.

426 In contrast, if a publication is to serve primarily didactic purposes, these can themselves differ: if only an overview of different legal families is to be given, more or less substantial country reports with a special accentuation on essential commonalities and differences may suffice. This, however, will not be enough when – going beyond a simple juxtaposition – norms are to be subjected to as concrete as possible an individual comparison; that is, more than just a parallel report on norms is meant to be presented. This has its price, though, considering the number of countries to be selected: For the mere descriptive presentation of foreign law, there is really only an upper limit in the sense that competent country reporters can be won over and there is sufficient space available for the publication. The other way round one reaches the limits of what can be achieved much faster when a real comparison of criminal law is to be carried out; then one must of necessity limit oneself to the consideration of a smaller number of countries.

427 The question of selection presents itself in yet a different way when theory and practice of comparative criminal law are at issue. Certainly, even the theory can hardly be presented without some exemplary material from different legal systems. However, there is less of a need here for the comprehensive presentation of individual countries but rather for the reference to meaningful phenomena, from wherever these may be drawn. The approach has to be substantially different for individual projects of judicative or legislative comparative criminal law: there the number and choice of countries to be included in a comparison depends decisively on the concrete question to be solved.[827]

3. Basic categories. Teaching material – Foreign law presentations – Comparative theory

428 Insofar as the publications under consideration here are at stake, a division into three basic categories, according to objective and choice of countries, suggests itself: teaching material, country reports and theoretical papers on comparative criminal law – however, while these groups may, on the one hand, be subdivided further, they can, on the other hand, not be completely strictly distinguished from one another either.

429 (i) This applies already to the *teaching material* which is represented by a classical textbook in the form of the "Droit pénal comparé" by Pradel: this work presents itself with an extensive introduction into the history of comparative criminal law, covers thematically both substantive as well as procedural criminal law, is theoretically directed in a model way towards legal-political guidelines and distinguishes – as far as necessary – according to legal families without, however, describing them in detail. The "Comparative Criminal Justice Systems" by Dammer/Albanese have more of the characteristics of a course book: it informs about certain topics – such as legal families, jurisdiction, criminal procedure and sentencing – from the respective view point of six "model nations", presents a lot of information in tables and is repeatedly animating the reader by discussion questions to reflect on and revise the read material.

[827] Further and for details on the diversity of aims and the choice of countries to be selected for the comparison see mn. 97 ff., 133 ff., 276 ff., 386 ff.

430 The type "casebook" is represented by Thaman's "Comparative Criminal Procedure" which identifies itself as such: as is usual for this kind of study material, it is concentrated on the criminal justice process, though without recording it in its entirety, focussed on certain procedural elements (such as the participants in criminal proceedings, the rights of the accused and means of evidence), reprints prominent decisions from different legal orders, puts checking questions and gives additional information. Even though it does not describe itself as a "casebook", the materials and court decisions represented in "Comparative Criminal Law. A Comparative Approach" by Dubber/Hörnle come quite close to this. Apart from its considerable size, two special features of this book, which – according to its foreword – first and foremost devotes itself to criminal law and only secondarily to comparative law, have to be emphasized: even though it covers, as far as the subject matter is concerned, only substantive criminal law but, in going beyond the general elements of crime, also covers special offences, it remains, in principle, concentrated on a comparison of US-American with German law. A similar limitation – even though with England, Germany and the Netherlands at least on three countries – Keiler/Roef imposed on themselves in their "Comparative Concepts of Criminal Law"; however, they are not satisfied with a juxtaposition, commented on only in brief, of regulations as well as decisions but conduct a real comparison of the essential concepts of crime. Insofar as they want to see, in their introduction, a certain parallel only in the "Basic Concepts of Criminal Law" by Fletcher, this is correct in a limited way only; for him less a textbook-like presentation of the system of crime and its essential elements is of interest but rather the search for quasi-antagonistic concepts; this is done by comparing, for example, "subjects versus objects" or "offences versus defences" with one another without restricting, however, his comparative material to particular countries.[828]

431 In a similar way, but more in essay-style, in Pakes' "Comparative Criminal Justice" selected topics of the criminal justice system are addressed from the point of view of different countries – after a short introduction into the methods and goals of comparative law. As can already be gathered from the titles of the books, the "Materiali per un' Introduzione allo studio del diritto penale comparato" by Cadoppi as well as the "Lezioni di diritto penale comparato" by Palazzo/Papa would like to be understood as study books. One can agree with this insofar as in the former a longer historical review is followed by a comparison between Common and Civil Law (with a main focus on the principle of legality) and in the latter – after a methodological introduction – the penal codes of several European countries are introduced one after the other.

432 (ii) However, because the teaching materials by Cadoppi and Palazzo/Papa are in character more like reports where little room for actual comparison remains, they find themselves at the border towards the type "*foreign law presentation*". Those publications belong in this category that first of all want to inform about different criminal justice systems without submitting them to a more detailed comparison at the same time. In order to achieve this, the respective country reports may be aligned more or less strictly with a uniform catalogue of questions or they may be structured rather more essay-like. As long as the different legal systems are just presented next to each other and their comparison is left to the reader, such components, merely descriptive of foreign law, are certainly important but still just pre-stages to the genuine comparison of criminal law.[829]

[828] Cf. my review of Keiler/Roef, in: Maastricht Journal of European and Comparative Law (MJECL) 23 (2016), pp. 375–382.

[829] Cf. mn. 57 ff.

Even though it sees itself, according to the introduction, originally as course material, Terrill's – not really comparative – "comparative survey" of seven "World Criminal Law Justice Systems" belongs into this category because it contends itself with a few comparative remarks; at least the comparability is made easier by the fact that the individual country reports – apart from an overview of different forms of Islamic law – are constructed according to the same pattern. The same applies – with certain cuts – to Bradley's "Worldwide Study" of "Criminal Procedure" which presents itself with twelve country reports. 433

In contrast, the MPIS on "National Criminal Law in a Comparative Legal Context"[830] – which with 27 country reports looks much more like a worldwide study – stands out due to a stringently adhered to catalogue of criteria; in this way a comparison, even though it is not conducted within the information system itself, can be done according to one's own needs for information. Something similar applies essentially also to the sixteen country reports in "The Handbook of Comparative Criminal Law" by Heller/Dubber, while the six system- and model reports in "The Oxford Handbook of Criminal Law" by Dubber/Hörnle are, understandably, laid out more like essays. Different again, in the "Comparative Criminal Procedure" by Hatchard/Huber/Vogler only three countries are covered; however, this is done, respectively, not only based on a differentiated catalogue of questions, rather the reports are both introduced with a comparing overview and finally also compared to one another. The approach in the "Structural Comparison" by Eser/Perron is the same; here the eight country reports – which were built up according to consistent criteria – are analysed in a comprehensive comparative law cross-section and evaluated. 434

(iii) In the category of *theoretical papers* on comparative criminal law one can also note remarkable variety. The focal points here – with a certain degree of overlapping – are content-wise partly directed more towards criminal law, partly methodologically towards the comparison as such. As has already been noted in reference to Dubber/Hörnle's Casebook, of interest for Fletcher is primarily the rethinking and the substantiating of criminal law – as was already the case in his "Rethinking Criminal Law" of 1978 and is so again in his more recent "Grammar of Criminal Law"; in this work, the frame of reference of the countries used as illustrative material is drawn wide. For that kind of thing, there is considerably less room in the brief introduction to "Comparative Law and Procedure" by Nijboer, both thematically and concerning the here presented legal families as well. 435

The more methodologically oriented and also mostly quite short papers are above all descriptions of functions and instructions for work in comparative criminal law. This is demonstrated in Chiesa's "Comparative Criminal Law", for example, through the confrontation of Common Law and Civil Law, using attempt and dolus eventualis while in Weigend's "Criminal Law and Criminal Procedure" aspects for reform are highlighted with a view to the increasing internationalisation of the administration of criminal justice. Also for Grande, in expectation of "Comparative criminal justice: a long neglected discipline on the rise", future prospects are in the foreground when she critically looks at stereotypes and transplantation problems. An intermediate position between methodology and content-focused comparison is taken by Dubber with his "Comparative Criminal Law" (in Reimann/Zimmermann) where he gives functional descriptions and short reports about selected topics. Something similar applies to Sieber's "Comparative Criminal Law in Flux" (in Sieber/Albrecht) where apart from theoretical ways of approach also concrete developments are mentioned. 436

[830] Cf. mn. 415 fn. 819.

437 In contrast, the publication at hand, which – rather than giving a comprehensive description of specific foreign law and legal families – presents the so far probably most detailed analysis of the aims and methods of comparative criminal law, sees itself primarily as a contribution to the theory of comparative criminal law and its practical application.

4. Thematic focal points

438 As became already discernible in the previous characterisations, the individual publications show differing kinds of concepts and varying priorities regarding subject matter. This applies both in the context of the legal systems selected for consideration and also to the subject matter presented.

439 Insofar as there is any explicit, country- or model-specific explanation at all or if this is recognizable in some other way, the field of comparison may reach from narrow in a biased way to almost as wide as one likes. The former applies, for example, to the case where, coming from the viewpoint of one's own law, one uses this as the sole standard (as does Dubber with the US-American because one's own law is most familiar or considered to be of growing importance)[831], or one includes only one further legal system (as does Hörnle in cooperation with Dubber for the German criminal law).[832] If, on the other hand, one wants to cover as broad a spectrum as possible of different legal systems, then the field of vision cannot be broad enough: such as was done in the MPIS where over and above the usual European-American Civil and Common Law criminal law systems also the Asiatic judicial area, Islamic legal cultures, African traditions and socialist developments were to find themselves considered.[833] As can already be seen from the overview of the choice of countries, between these two corners move groups of compared countries of greater or lesser size which are oriented partly on the comparison of Common Law and Civil Law, on further traditional legal families or on historical-ideological-political criteria.[834]

440 With regard to the topics of the legal areas and subject matter presented for comparison, there are, on the one hand, publications exclusively devoted to substantive criminal law and, on the opposite side, those of a predominantly procedural nature; there are also occasionally combinations of both areas of criminal law, though, publications which use "criminal procedure" (such as those by Bradley, Hatchard/Huber/Vogler and Thamann) or "criminal justice" (like Terrill's) in their title obviously confine themselves to procedural law. However, this assumption is not necessarily conclusive – because even where, based on the title, a procedural impression is given, topics of substantive criminal law may be addressed as well (as is done namely by Dammer/Albanese, Grande, Pakes and Roberts). All the more, one can find a mixture of substantive and procedural aspects where this is expressed already in the title (as in Nijboer and Weigend). The other way round, even where one might expect only a consideration of substantive law because of the labelling as "Criminal Law", "Strafrecht" or "Droit pénal comparé", also questions of procedure may be addressed (as in the "Casebook" by Dubber/Hörnle, Dubber in Reimann/Zimmermann, Heller/Dubber and Pradel).

441 As far as topics of substantive criminal law are concerned, and this applies both to those publications whose exclusive focus lies here (as in Cadoppi, Fletcher, Keiler/Roef,

[831] *Dubber* in Reimann/Zimmermann (fn. 816), pp. 1308 f.

[832] *Dubber/Hörnle* in Comparative Approach (fn. 817), p. V.

[833] Cf. Sieber/Cornils, Sieber/Forster/Jarvers, and Sieber/Jarvers/Silverman, respectively (fn. 165), in each publication p. VIII.

[834] For details see mn. 418 ff.

Palazzo/Papa and in the MPIS) and to the above-mentioned mixtures of substantive-procedural publications, the focal point is unmistakably on the general part of criminal law. One can notice this almost throughout the MPIS. But also in other country reports and legal comparisons the same elements of crime are frequently given special attention. This applies especially to the theoretical foundations of criminal law including the purposes of punishment and the system of offences (Dubber/Hörnle; Heller/Dubber, Keiler/Roef, Pradel), the principle of legality (Cadoppi, Dubber in Reimann/Zimmermann, Dubber/Hörnle; Heller/Dubber, Keiler/Roef), the objective and subjective elements of criminal responsibility (Chiesa, Dubber/Hörnle; Keiler/Roef), participation in an offence and attempt (Dubber/Hörnle; Keiler/Roef and also Chiesa, respectively) as well as certain grounds of excluding criminal responsibility such as justifications and excuses (Dubber/Hörnle; Heller/Dubber, Keiler/Roef). In addition, constitutional requirements (Dubber/Hörnle) and corporate criminal liability (Dubber/Hörnle, Keiler/Roef) are occasionally given attention as well.

The picture presenting itself for the special part of criminal law shows considerably more gaps. If special offences are presented at all, this is mostly limited to homicide or sexual offences (Dubber/Hörnle). Occasionally theft and perversion of the course of justice as well as new forms of hate crimes and organised crime are examined (Heller/Dubber); in doing this, the particular choice may turn out quite locally different. **442**

Finally, the occasional presentation of legal families and model nations is worth mentioning. Most of the time this is done with an orientation towards the – also in comparative private law – usual traditions (as in Dammer/Albanese, Heller/Dubber and Terrill). Occasionally, however, and in view of topical developments, also more independent and more political models may be applied as, for instance, by differentiating between authoritarian and liberal criminal justice systems (Pradel).[835] **443**

C. Concluding Remark

In order to get a complete picture of the status of comparative criminal law in the contemporary literature, one naturally should also look at the countless comparative papers dealing with individual questions, may these be of the general or the special part of criminal law or of the criminal procedural law. However, in the present context the main intention was to convey an equally differentiating and summarising impression of those publications that see comparative criminal law as an independent discipline. **444**

Even if, concluding from this overview, that comparative criminal law is on the right track, much might still be improved. The essence of what that requires, has already been indicated in the considerations presented in the concluding "Outlook" of Part IV. Indeed, there is still a lot more work to be done in comparative criminal law. Hopefully, this contribution to its theory and practice provides sustainable foundations upon which to build. **445**

[835] Further to this cf. also the survey on selection criteria mn. 424 ff.

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