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The Importance of Comparative Legal Research for the Development of Criminal Sciences

THE IMPORTANCE OF COMPARATIVE LEGAL RESEARCH FOR THE DEVELOPMENT OF CRIMINAL SCIENCES

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I. Introductory remarks

"Comparative law is in full flourish ... It is widely accepted as an effective means of learning about other legal cultures and improving one's own legal system... And yet: 'a taste of the big, wide world' should not tempt us to oversimplify things or regard the world as a self-service shop of legal cultures. Because again and again, even in Europe, we come up against strange obstacles, which dampen our exuberance." These opening words from the newly released book, *Core Issues of Comparative Legal Research*, by my private law colleague Bernhard Großfeld from Münster¹ could hardly more aptly articulate the ambivalence, which, also for us in comparative criminal law, is unavoidable: on one hand, the enormous potential for acquiring knowledge and creating law, which is to be gained from comparative legal research, and, on the other hand, the sobering limits to which comparative law is subject. The central theme of this paper is how the correct balance between optimism and pessimism can be established without, in the face of anti-comparative national 'autism', losing hope in extending the horizons of our knowledge transnationally.

I would like to lead you through this broad field in four steps of varying length. In the course of a short review of the history of comparative law, we first establish what can be understood by this discipline (Section 2).² Following this, the tasks and functions of comparative law in relation to, firstly, the actual application of law and legal policy formulation and, secondly, the comparative research that the former necessitate are described in somewhat greater detail (Section 3). In order to reach these goals, it is all the more important to apply the correct methods (Section 4). Finally, I examine the specific limits to which comparative legal research is subject (Section 5).

II. On the concept and history of comparative law in criminal law

If I seem consciously avoid making a sharp distinction between the concept and development of comparative law, it is not the result of intellectual laziness. Rather, it is based on the view that comparative law is generally understood to be that which the author in question - whether out of personal curiosity or with a view to a specific task - considers worthy of research in a

¹ B. Grossfeld, *Kernfragen der Rechtsvergleichung* (Mohr/Siebeck, Tübingen 1996) pp.1, 3.

² Admittedly, I do not want to dwell too long on the old terminological dispute about whether the denotation 'comparative law' would be better replaced by 'comparative jurisprudence' or 'comparative legal research', as in the title of this paper and which comes closer to the German term 'Rechtsvergleichung'; because even in so far as the term comparative 'law' is used here it does not refer to a certain set of rules, but rather the 'comparison' of various laws. For background this terminological debate, I also refer you to: H.C. Gutteridge, *Comparative Law: An Introduction to Comparative Method of Legal Study and Research*, 2nd ed. (University Press, Cambridge, 1949), pp.1, as well as the literature at infra Fn. 3.

foreign legal system. If his focus is on the 'exotic' peculiarities of a foreign legal system, then the nature of his comparative research is conducted along the lines of the administration of a museum: especially interesting forms of foreign legal systems are placed next to one another as if they are 'fossils' to be compared for their differences and similarities with his own legal system. In contrast, a comparative jurist who orientates himself according to legal policy looks primarily beyond his own legal system in order to find support for his political postulations from foreign law. There are naturally an array of gradations and differing objectives between these two extremes, that is, between the comparative 'museum approach' and the political instrumentalisation. Thus, it would appear an almost hopeless task to arrive at a definition of comparative law which, while being all encompassing, is both equally specific and generally accepted. Therefore, it hardly comes as a surprise that 'comparative law' is not defined in the newly released book by Großfeld which I cite above. Rather, through the description of legitimate and illegitimate tasks or, to be more precise, good and bad methods of comparative research, a more visual approach to the discipline as opposed to more conceptual one is presented.

Nevertheless, two elements may be identified as essential for any form of comparative jurisprudence: firstly, a look beyond the borders of a legal system (generally one's own) and secondly, a comparison between two (or more) legal systems. Another question is that of the true object to be compared. It might be that only certain legal principles or institutions are examined - whether merely their current manifestation or their historical development and future prospects. Or, it might be the normative self-perception of the law itself, its actual implementation in a given legal system, or any other aspects which are considered. All of these are possible forms of comparative law. However, in order to elevate comparative research to the level of a science, a third element must be added, i.e., it must be conducted according to generally recognised methods and, therefore, above all, it must be conducted purposefully and in a methodologically correct way.³

³ Even these three minimal elements of comparative legal research, however, reveal themselves in the current literature on comparative legal research only to varying degrees of clarity. In so far as comparative legal research is defined at all, we encounter, for example, the following concepts from this century:

Holland, 'The Elements of Jurisprudence', 13th ed. (London 1924), p. 8; cited according to L.-J. Constantinesco, *Rechtsvergleichung I* (Heymann, Köln 1971), p. 209: 'Comparative Law collects and tabulates the legal institutions of various countries, and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realised in actual systems.'

E. Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung', in K. Zweigert & H.-J. Puttfarcken (eds.), *Rechtsvergleichung* (Wissenschaftliche Buchgesellschaft, Darmstadt 1978), pp. 85-108 (86): 'Comparative Law means that the legal norms of a State (or another law making community) are compared with the legal norms of another order or even with as many others as possible from the past and present. We investigate which questions are asked here and there and how they are answered and thereupon how the answers relate to one another.'

Without wanting to make a personal judgment on whether, in the following instances, the comparative legal research conducted is 'good' or 'bad', I would like to give a number of examples in which, for a variety of reasons, a consideration of foreign law was found to be valuable.

In the first place, tribute must be paid to a non-jurist who, as a philosopher, evidently hoped to gain knowledge of justice by looking beyond the borders of his own *polis*. Thus, Aristotle, compared the Greek city states in the fourth and fifth centuries BC on the following grounds:

As we have set out to investigate which of all is the best state-run community for people who, as far as possible, are capable of living their lives as they desire, we must also consider the other state constitutions, those which are in use in certain states ... as well as those suggested by individuals, in order to ascertain which features of them are correct and useful...⁴

It is unlikely that this meant that Aristotle was considering the complete transplantation of a constitution from one *polis* to another. Rather, he hoped to a certain extent to be able to extract the elements which would result in the best possible constitution for free people. In contrast, the Romans probably had the adaptation of a foreign legal system in mind when they imitated Greek legal institutions in their Law of the XII Tables.⁵

Although it would appear to be a great leap from the ancient Romans to the beginning of the 19th century, I do not imply that no form of comparative jurisprudence took place in the interim. In the Middle Ages, some canonists and lawyers compared secular and canon law. In addition, there was what was referred to as the 'law merchant' which arose at the beginning of the modern age. Last but not least, one could recall Montesquieu who attempted to develop a modern statutory concept by viewing law as a social

H. Lévy-Ullmann, 'Droit Mondial du XXe Siècle'; cited according to Gutteridge, *op.cit.*, p. 3: 'Comparative Law is a branch of legal science whose object it is to bring about systematically the establishment of closer relations between the legal institutions of the different countries.'

Zweigert & Kötz, *op.cit.*, p. 3: 'Comparative Law is that juridical discipline which makes different national laws at the same time its subject and creates the necessary conceptual and methodical prerequisites..'

H. Scholler, 'Rechtsvergleichung als Vergleich von Rechtskulturen', in F. Haft et al. (eds.), *Strafgerichtsbarkeit. Festschrift für Arthur Kaufmann* (C.F. Müller, Heidelberg 1993), pp. 743-759 (744): 'Comparative Law shall be understood to be the comparison of legal cultures. It is necessary for Comparative Law question the very essence of things ('Sinnfrage'), in which it enquires after the meaning of the circumstances ('Sinn der Lebensverhältnisse'), which were or are the basis of the legal culture.'

As an example of the difficulty to definitionally contain comparative law, reference is also made to the work of one of the most profound comparatist of this century, namely, M. Rheinstein, *Einführung in die Rechtsvergleichung*, 2nd ed. (Beck, München 1987), pp. 1 ff with additional references.

⁴ Aristoteles, *Politik*; cited according to Rheinstein, *op.cit.*, p. 41.

⁵ For details see W. Hug, 'The History of Comparative Law', in *Harvard Law Review* XLV (1931/32), pp. 1027-1070; reprint in Zweigert & Kötz, *op.cit.*, pp. 109-161 (110, 130).

phenomenon whose national differences lay in the diversity of the historical, ethnic, political and other frameworks.⁶

These differing efforts, however, largely deal more with the comparison of discrete phenomena. The comprehensive approach of Montesquieu did not achieve a complete breakthrough until the idea, conceived by Leibniz and developed by Feuerbach, of 'universal jurisprudence'. This was not a matter of the superficial imitation of a foreign law, but rather it concerned a deeper understanding of one's own legal system. Accordingly, this finding was accorded with great significance. In support of this, I quote Anselm von Feuerbach:

Why does the legal scholar not yet have a comparative jurisprudence? The richest source of all discoveries in every empirical science is comparison and combination. Only by manifold contrasts the contrary becomes completely clear; only by the observation of similarities and differences and the reasons for both may the peculiarity and inner nature be recognised in an exhaustive manner. Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most nearly related to us and those farthest removed, create universal legal science, i.e., legal science without qualification, which alone can infuse real and vigorous life into the specific legal science of any particular country.⁷

Although Feuerbach was a criminal lawyer and his disciple Carl Joseph Anton Mittermaier, a great supporter of and prolific writer on the 'universal' ideal,⁸ comparative research experienced its first major breakthrough in the 19th century in the field of civil law. This was thoroughly understandable when one considered that with increased cross-border trade and other economic activities an interest in foreign legal systems was awakened. And as a result, it was necessary to have rules created from preliminary comparative research for governing cross-border conflicts. Not surprisingly, the great names, such as, Sir Henry Maine in England or Rudolf von Jhering in Germany, as well as the first associations, such as, the *Société de Législation Comparée* of 1869 in France, were principally associated with comparative research in the civil law and that this area also experienced a period of substantial development in the 20th Century, especially due to the

⁶ For further details see Hug, *op. cit.* pp. 113 ff, Rheinstein, *op.cit.*, pp. 40 ff; Constantinesco, *op.cit.*, pp. 69 ff; Gutteridge, *op.cit.*, pp. 11 ff.

⁷ J.P.A. Feuerbach, 'Blick auf die deutsche Rechtswissenschaft. Vorrede zu Unterholzners juristischen Abhandlungen' (München 1810), in *Anselms von Feuerbach kleine Schriften vermischten Inhalts* (Proff & Co., Osnabrück 1833), p. 163; cited according to the English translation of Hug, *op.cit.*, p. 147 f.

⁸ For further details on the comparative law meaning of Mittermaiers in the area of the law relating to the constitution of the courts and criminal procedural law, see E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, 3rd ed. (Vandenhoeck & Ruprecht, Göttingen 1965), pp. 288 ff.

efforts of Edouard Lambert in Lyon and Ernst Rabel in Berlin.⁹ Nevertheless, it is extremely presumptuous that even today - at least in Germany - books are still appearing with sweeping titles including the term *Rechtsvergleichung* (the comparison of law) although a quick glance at the table of contents reveals that only civil law is being compared.¹⁰ This not only means that those achievements in comparative law, which are essential for the development of modern public international law, are being ignored, but that ethnological legal research is being excluded which, though less orientated towards legal and more towards cultural studies, nevertheless operates with comparative methods. Again it is von Feuerbach and Maine who may be identified as the primary initiators of such studies in this strongly empirical discipline, although a complete development of the discipline first took place with researchers, such as, Josef Kohler in Germany and Karl Nickerson Llewellyn in the USA.¹¹

From the beginning of the 19th century, comparative criminal legal research, which is our primary interest here, did not have to be hidden under a rock.¹² Even if only a couple of examples in its development can be named, once again von Feuerbach and Mittermaier should first be mentioned, as they were successful in achieving what is known today as 'legislative comparative law'.¹³ Here, I mean the introduction of modern principles of procedural law in relation to indictments, oral proceedings, the public nature of proceedings and the free evaluation of evidence as well as the prosecutor as a special public authority functionally separate from the court. These were based on models found in the common law procedural system and the then new French law.¹⁴ One further development for academia was the establishment of a chair for comparative criminal law at the Faculty of Law in Paris in 1846.¹⁵ In 1888 the first cross-border scientific organisation was established.

⁹ For details cf. K. Zweigert & H. Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed. (Mohr/Siebeck, Tübingen 1996), pp. 53 ff, Rheinstein, *op.cit.*, pp. 40 ff, and also H. Coing, 'Aufgaben der Rechtsvergleichung in unserer Zeit', in *Neue Juristische Wochenschrift* 34 (1981), pp. 2601-2604 (2604).

¹⁰ This applies namely to the following handbooks and textbooks on comparative law: A.F. Schnitzer, *Vergleichende Rechtslehre I*, 2nd ed. (Verlag für Recht und Gesellschaft, Basel 1961); at any rate comparative law in criminal and public administrative law at least rates a short mention in the introduction (p. 2); see further K.H. Ebert, *Rechtsvergleichung. Einführung in die Grundlagen* (Stämpfli & Cie, Bern 1978); I. Schwenzer & M. Müller-Chau, *Rechtsvergleichung. Fälle und Materialien* (Mohr/Siebeck, Tübingen 1996) as well as Großfeld, *op.cit.* Even in the Zweigert & Kötz work (*op.cit.*) with its so-called title 'Einführung in die Rechtsvergleichung' (Introduction to Comparative Law) on the front cover, it does not become apparent until the inner cover, that it essentially only addresses comparative research of private law.

¹¹ G. Radbruch, *Paul Johann Anselm Feuerbach. Ein Juristenleben* (Springer, Wien 1934), pp. 190 ff., cf. also Zweigert & Kötz, *op.cit.*, pp. 8 f, 56 f, Rheinstein *op.cit.*, pp. 42 ff, 71, 75.

¹² Cf. in particular on the following H.-H. Jescheck, *Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (Mohr/Siebeck, Tübingen 1955), pp. 10 ff.

¹³ Zweigert & Kötz *op.cit.*, p.49.

¹⁴ For further details on the development of this 'reformed' criminal procedure in Germany since the first half of the 19th Century see Schmidt, *op.cit.*, pp. 324 ff.

¹⁵ Zweigert & Kötz, *op.cit.*, pp. 54, 57.

This took place with the founding of the International Criminal Association (IKV) by the Belgian Prins, the Dutchman van Hamel and the Austrian von Liszt who taught in Germany. Under the decisive influence of von Liszt, *A Comparison of German and Foreign Criminal Law*¹⁶ consisting of 16 volumes, was published in the first decade of this century and was the most comprehensive work up to that time. The uniqueness of this work (even outside Germany) has caused it to be recognised, as stated by Radzinowicz, as 'a landmark in the history of comparative penal studies'.¹⁷ Also, the International Association of Penal Law (AIDP), which was strongly orientated to political reform, was called into being under French leadership after World War I and, despite its current American president (Bassiouni), is still primarily dominated by Europeans.¹⁸ Clearly, partly in reaction to this, a certain counterbalance was achieved in the common law with the setting up of The Society for the Reform of Criminal Law, largely at the insistence of the Canadians. In contrast to the mostly longer term reform goals of the AIDP, the Society does not shy away from also putting more topical and timely reform issues on its agenda.¹⁹

These activities are all the more worthy of our admiration as they are generally the result of private initiative, are sustained by great academic or legal political idealism and, finally, are conducted on a voluntary basis. In relation to the State and politics - be it on a national or international level - this means that at most comparative legal studies shed light on a foreign legal system, offer reform models or pose political postulates. However, in the end, they are carried out completely at the discretion of the political decision-making bodies which decide whether they want to hear and implement the comparative message. To put it in business terms, the scientific discipline of comparative law is the supplier of a product for which, in the past, there was no demand on the political side. However, there has been decisive change, if not a complete reversal. For example, at the European level, economic convergence is increasingly compelling the harmonisation of law for which the achievement presupposes appropriate preliminary work in the field of comparative law. In view of the fact that the responsible ministries can not carry out such work, comparative law researchers and institutes are being increasingly called in as experts. The same may be observed at the international level when, for instance, international criminal courts are being set up. Traditional public international law for the prosecution of 'international crimes' has little or no rules for the substantive elements of punishability and

¹⁶ K. Birkmeyer et al. (eds.), *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts. Vorarbeiten zur deutschen Strafrechtsreform* (Liebmann, Berlin 1905-1909), 16 vols.

¹⁷ L. Radzinowicz, 'International Collaboration and Criminal Science', in *The Law Quarterly Review*, 58 (1942), p. 128.

¹⁸ The activities of the AIDP primarily find their expression in their journal *Revue Internationale de Droit Pénal* (Editions Erès Paris).

¹⁹ The activities of this Society are reported in *The Reformer* (The Society for the Reform of Criminal Law, Vancouver B.C.); see further *Criminal Law Forum - An International Journal* (Rutgers University School of Law, Camden N.Y.) for which the Society is co-publisher.

the procedures to be observed. In view of this, this gap cannot simply be filled by drawing upon one particular national legal system. Thus, the development of rules which reflect the broadest possible consensus is required. However, this too is difficult to accomplish without the appropriate preliminary comparative work. It is the political side today which must be happy when its demands are met by comparative legal studies. In this way, the market for comparative jurisprudence is changing from one driven by supply to one driven by demand. This presents an opportunity for comparative legal research that should not be missed.

We have thus arrived at the question of the tasks of comparative law through which it actually gains its relevant substance. As the historical review has revealed, a look beyond the borders of a legal system as well as a comparison with another legal system can serve different aims, each of which requires its own appropriate method. It follows that a substantial concept of comparative law in each case can only be defined in the light of its function and, accordingly, is also variable up to a certain degree.

III. Functions of comparative criminal research today

Two objectives are often clearly discernible in today's comparative jurisprudence: on one hand, the consultation of foreign laws to create national legislation in the spirit of 'legislative comparative law'; and on the other hand, the comparison of differing legal orders for the purpose of better understanding law in the spirit of 'academic-theoretical comparative jurisprudence'.²⁰ In addition, as already suggested by the civil lawyer Zitelmann at the beginning of this century,²¹ there is additional objective for the consideration of a foreign legal system: the comparative study which is necessitated by the application of law in individual circumstances and as such could perhaps be described as 'judicative comparative law'.²²

1. 'Judicative comparative law'

If this form of comparative law - although frequently not even mentioned as anything exceptional - is to be regarded as a field of research in its own right and indeed is to be dealt with first, then perhaps the sceptic should be made aware of the immediate and practical importance of comparative legal research.

A clear example of when the national criminal court judge must investigate foreign criminal law is in the area of what is known mostly on the European

²⁰ See Zweigert & Kötz, *op.cit.*, p. 49.

²¹ E. Zitelmann, 'Aufgaben und Bedeutung der Rechtsvergleichung', in *Deutsche Juristen-Zeitung* V (1990), pp. 329-332; reprint in Zweigert & Puttfarcken, *op.cit.*, pp. 11-17 (11).

²² Even without using this term, this form of comparative legal research is also described notably by Ebert, *op.cit.*, pp. 176 ff; Zweigert & Kötz, *op.cit.*, pp. 16 ff and H. Uytendaele, *Richterliche Rechtsfindung und Rechtsvergleichung* (Stämpfli & Cie, Bern 1959), pp. 58 ff, 67 ff.

continent as, *international criminal law*. This refers to the question of judging criminal acts committed in a foreign country by the law of the place of the court hearing the case. Take, for example, a case in which a German citizen is murdered in Brussels by an Austrian. If, while on his return to Vienna, the murderer stops over in Frankfurt and visits Goethe's house, is recognised as the suspected murderer and arrested, he can be sentenced under German law if according to §7 paragraph 1 of the German Criminal Code (StGB) the criminal act is punishable under the law of the place where the crime was committed. In the case of murder in Belgium, this may be easily ascertained. However, consider a recent case before the Düsseldorf State Court of Appeal in which a Kurd killed a fellow countryman in Lebanon on the grounds of an alleged betrayal and was arrested upon entering Germany in Düsseldorf and put on trial for murder. German law applies equally here, if the offender cannot be extradited for certain reasons, and the crime is also punishable in the place in which it was committed (§7 para. 2 No. 2 StGB), which is certainly true under Lebanese law. However, what influence on the punishability of the act in the place of the crime could occur if the offender invokes the defence that the man had committed an act of betrayal or if the State of Lebanon grants an amnesty for politically motivated homicide? As an expert witness before the court, I recently had cause to experience just how difficult it can be in such a case to establish and correctly construe the appropriate law of the place in which the crime was committed.²³

Beyond the question of the applicable law, as above, the consideration of foreign law can also play a role in particular, in determining the extent of the guilt of the accused and the *punishment* to be measured out. An example of this occurs with regard to incest which is punishable to very different degrees in various countries. Suppose that a recent immigrant to a country is charged with the crime of having sexual relations with his stepdaughter. He claims that he was unaware of the criminality of his act in his new place of residence because this form of sexual intercourse is not punishable in his homeland. If the court does not want to exclude such defense pleas as to the prohibited nature of the act from the beginning, then the court has no other way than to look into the law in the accused's previous home.²⁴

In a similar way, the judicial authorities of a country can be compelled to investigate foreign penal law if the *principle of dual criminality* becomes an

²³ Cf. A. Eser, 'Grundlagen und Grenzen „Stellvertretender Strafrechtspflege“', in *JuristenZeitung* 18 (1993), pp. 875-884.

²⁴ With regard to this manner of considering foreign law, see Jescheck, 'Entwicklung', *op.cit.*, p. 27. With regard to the handling of such cases in German case law, cf. *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt) 10 (Heymanns, Köln/Berlin 1958), pp. 35-42, and also B. Jähnke, '§ 211 (Mord)', in H.-H. Jescheck, W. Ruß & G. Willms (eds.), *Strafgesetzbuch. Leipziger Kommentar*, 10th ed. (W. de Gruyter, Berlin/New York 1989), § 211 annot. 39.

issue in the extradition or, as is mostly common in criminal matters, in the guaranteeing of mutual judicial assistance.²⁵

While the above-mentioned examples deal with 'classic' cases of comparison of foreign law by a domestic judiciary, 'judicative comparative law' is being posed new challenges with the rise in *supranational criminal justice*, as has recently been observed in the tribunals for international crimes in the former Yugoslavia and Rwanda. To date, neither the treaty-based nor the custom-based public international law have at their disposal substantive rules for the punishment of international crimes. As a result, the relevant statutes rely in part on national law (above all with regard to sanctioning according to the law of the place where the crime was committed).²⁶ Therefore, supranational prosecutory bodies are also being compelled to conduct comparative legal research. As this is admittedly not easy, closing such gaps could become an important task for the 'legislative comparative law' to which we return later.

However, at this point there is yet another important function of foreign law to be emphasised, namely, the role of the *interpretation of one's own law*. This is, obviously, of foremost concern to those countries where the domestic criminal or procedural code has been adopted from a foreign country. For example, Turkey transferred the Criminal Procedure Code from Germany, and when the interpretation of certain regulations or legal institutions, such as, with the problem of inadmissible evidence, is in question, it would seem reasonable for the judges applying the adopted law to seek clarification from the case law of the country from which the problematic regulations originate.²⁷ Although less obvious than the case in which a regulation has been adopted from a foreign legal system, such cross-border assistance in interpretation can nevertheless also be helpful in cases which concern principles of procedure which are fundamentally important to understanding the structure of the procedural system. Take, for example, the principles of 'orality' and 'immediacy' of the hearing of evidence in trial. These have been, beyond a doubt, in Germany for over 100 years. Recently, however, they have proved to be a hindrance in proceedings and, as a result, dysfunctional.

²⁵ Cf. P. Gully-Hart, 'Loss of Time Through Formal and Procedural Requirements in International Co-Operation', in A. Eser & O. Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law* (Eigenverlag des Max-Planck-Instituts, Freiburg 1992), pp. 245-266 (261 ff); K. Cornils, 'Leges in ossibus? Überlegungen zur doppelten Strafbarkeit einer Auslandstat', in J. Arnold et al. (eds.), *Grenzüberschreitungen* (edition iuscrim, Freiburg 1996), pp. 211-228 (213 ff).

²⁶ Cf. in detail Art. 24 of the Statute for the International Yugoslavia Tribunal (UN-Doc. S./25704, 3.5.1993, par. 32 ff) and Art. 23 of the Statute for the Rwanda Tribunal (UN-Doc. S/Res/955, 8.11.1994) which has the same content, and further Art. 47 of the 'Draft Statute for an International Criminal Court' (UN-Doc. A/49/10, pp. 29-161). Cf. also the authors noted *infra* at Fn. 51.

²⁷ This occurs though typically only indirectly, for example, in relation to the obligations to caution a suspect, reference is made to the presentation of German case law in E. Kern & C. Roxin's text book on criminal law by a Turkish author, E. Yurtcan, *Ceza Yargılaması Hukuku* (Strafverfahrensrecht), 5th ed. (Alfa Basım Yayım Dağıtım, İstanbul 1994), p. 255, and this depiction of the law in turn was considered in the decision of the first criminal division of the court of appeal of the Turkish High Court A2: E 157/K438 (21.2.1995).

If we then take into account that these high principles also have considerably less value in other countries, such as, France and the Netherlands,²⁸ it can prove useful to return to the 'parent laws' from which the principles originated in order to reflect upon whether their original function has since been altered.²⁹

Even in the interpretation of pure domestic law, it is worth looking beyond a country's borders. Just how much a judge can learn in his application of law by consulting and taking into account the legislation, doctrine and practice of a foreign legal system was very impressively demonstrated within German-speaking legal circles a couple of years ago by a Swiss law professor.³⁰ Although this type of comparison in such circumstances is especially obvious and useful when it is a question of the same word, for example, wrong key (*falschen Schlüsse*) with regard to aggravated theft or disposal (*Absetzen*) with regard to receipt of stolen goods, the judge can obviously gain insight from similar concepts or elements, such as, intent and negligence or perpetration and complicity, for the interpretation of his own law by considering a related foreign legal system.³¹

One further matter should not be underestimated when looking beyond a country's borders: should the judge be confronted with a foreign law in the interpretation of his own law, he may become critical of his own country's law. In this spirit, the German Federal Court has, for example, allowed itself to be moved to adopt the restrictive interpretation in relation to homosexual acts following a consideration of foreign developments.³² In this way, judicative comparative research can acquire a *control function* through the mere means of interpretation.³³

²⁸ Cf. further to this point W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht des Auslands, Rechtsvergleichendes Gutachten im Auftrag des Bundesministerium der Justiz* (edition iuscrim, Freiburg i. Br. 1995), in particular pp. 112 ff, 299 ff, 569 ff.

²⁹ With regard to the return to the historical roots of a legal institution in a foreign 'parent law' generally, cf. H.-H. Jescheck, 'Rechtsvergleichung als Grundlage der Strafprozeßreform', in *Zeitschrift für die gesamte Strafrechtswissenschaft* 86 (1974), pp. 761-782 (765); for a special treatment of the changing significance of the procedural maxims mentioned, see A. Eser, 'Funktionswandel strafrechtlicher Prozeßmaximen: Auf dem Weg zur "Reprivatisierung" des Strafverfahrens?', in K. Kroeschell (ed.), *Recht und Verfahren* (C.F. Müller, Heidelberg 1993), pp. 21-51; also published in *Zeitschrift für die gesamte Strafrechtswissenschaft* 104 (1992), pp. 361-396.

³⁰ R. Hauser, 'Die Rechtsvergleichung als Auslegungshilfe in der höchstrichterlichen Rechtsprechung im materiellen Strafrecht', in Th. Vogler et al. (eds.), *Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag* (Duncker & Humblot, Berlin 1985), vol. 2, pp. 1215-1232.

³¹ With regard to this interpretive function of comparative legal research generally, cf. also Zweigert & Kötz, *op.cit.*, p. 16 f, and further M. Bogdan, *Comparative Law* (Kluwer, Götterborg 1994), pp. 32 f, Ebert, *op.cit.*, pp. 176 f, Gutteridge, *op.cit.*, pp. 101 ff.

³² Cf. BGHSt, *op.cit.*, 1 (1951), pp. 293-298 (297).

³³ On this point generally, see Ebert, *op.cit.*, pp. 176 f, 179 f, K. Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode', in *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 15 (1949/50), pp. 5, 17 ff.

Incidentally, if the judiciary of different countries would, in turn, look into the mirror of a neighbour country's legal orders, and if this would lead to a converging interpretation, then the investigation of the judicature beyond the borders could acquire a *harmonisation function* as has recently been called for in a similar manner by the President of the German Federal Court in relation to a harmonisation of European law.³⁴

2. 'Legislative comparative law'

As soon as the judge not only interprets but rather, by taking foreign law into account, seeks to harmonise and alter the function of existing law, he is already in effect overstepping the border between the implementation and the active creation of law. In so doing, the judicature enters the realm of what is known as 'legislative comparative law'. Some authors would even regard this as the most important political task of comparative law.³⁵ In England, this objective recently received even a legislative basis: Section 3 (1) Law Commissions Act 1965 states:

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.³⁶

The same intentions were also determinative for the above-mentioned treaties on German and comparative criminal law³⁷ from the first decade of this century. This is also true of the 'materials for the reform of the criminal law'³⁸ which (although clearly on a smaller scale) were prepared for the newly revived reform movement in the Fifties.

Obviously, the extension of one's horizons by looking beyond the borders of one's own legal system must not be allowed to lead to the false conclusion that what is newly discovered is necessarily best or correct. A comparison of different laws can offer different alternatives for interpreting regulations. Which of these, however, is the most preferable for the country concerned or

³⁴ W. Odersky, 'Harmonisierende Auslegung und europäische Rechtskultur', in *Zeitschrift für Europäisches Privatrecht* (ZEuP) 2 (1994), pp. 1-4 (2).

³⁵ Cf., for instance, Jescheck, *op.cit.*, ZStW 86, p. 765, and further Coing, *op.cit.*, p. 2603, as well as the fundamental analysis by U. Drobnig & P. Dopffel, 'Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber', in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 46 (1982), pp. 253-299.

³⁶ Cited according to H.-H. Jescheck, 'Die Bedeutung der Rechtsvergleichung für die Strafrechtsreform', in A. Kaufmann et al. (eds.), *Festschrift für Paul Bockelmann zum 70. Geburtstag* (Beck München 1979, pp. 133-154 (148)). With regard to a previous British forerunner of this statutory commission, compare the self imposed duty of the British Royal Commission on Criminal Law in its 'Fourth Report of Her Majesty's Commissioners of Criminal Law 1839', in Jescheck, *op.cit.*, *Entwicklung*, p. 16.

³⁷ *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts*. Cf. *supra* at Fn. 16.

³⁸ 'Materialien zur Strafrechtsreform'. Band II: *Rechtsvergleichende Arbeiten*, 2 Volumes (Alleinvertrieb H. Heger, Bonn 1954 und 1955).

under the circumstances is in the end a value judgment which must be made by the legislature. To this extent, legislative comparative research merely has a preparatory function.³⁹ At the same time the 'stockpile of solutions'⁴⁰ can considerably enhance the choice available to the legislature.

If, in this context, we subscribe to Alan Watson's words that 'law develops mainly by borrowing',⁴¹ then the reform of the law of criminal procedure in the last 150 years in Germany is a prime example. The 'liberal criminal trial' of the 19th century would have been unimaginable without the English and French models, and such major improvements to the legal position of the accused in recent times would have been impossible without the US Supreme Court.⁴² Although it was originally an active importer of foreign models, Germany has found itself again and again in the position of exporter now that they have been integrated into its own system. Japan and Turkey, to name two countries, have borrowed considerably from German criminal and procedural law.⁴³

If we refrain from examining further historical examples of the reception of one law into the law of another country and turn to the tasks and functions of legislative comparative research, essentially, three levels are distinguishable: a national, a regional and a supranational level.⁴⁴

The *national level* deals with true 'borrowing' in the sense that a country more or less adopts certain rules or even institutions either directly or in a modified form from another country. In the first instance, this might be purely selective individual pieces of reform, as for example, the introduction in Germany of the cautioning of a suspect by prosecuting authorities following

³⁹ Cf. Jescheck, *op.cit.*, 'Entwicklung', p. 43, ZStW 86, p. 781, Drobnič & Dopffel, *op.cit.*, p. 269, Zweigert & Kötz, *op.cit.*, p. 16. Cf. also on this point *infra* at III.1 on the fifth step of comparative research.

⁴⁰ As already described vividly by Zitelmann, *op.cit.*, p. 13.

⁴¹ A. Watson, *The Making of the Civil Law* (Harvard University Press, Cambridge/Massachusetts 1981), p. 181.

⁴² For further details see Jescheck, *op.cit.*, ZStW 86, pp. 765 ff, further C.D. Robinson & A. Eser, 'Le droit du prévenu en silence et son droit à être assisté par un défenseur au cours de la phase préjudiciaire en Allemagne et aux Etats-Unis d'Amérique', in *Revue de Science criminelle et de Droit pénal comparé* 1967, pp. 567-618; A. Eser, 'Aussagefreiheit und Beistand des Verteidigers im Ermittlungsverfahren. Rechtsvergleichende Beobachtungen zur Rechtstellung des Beschuldigten', in *Zeitschrift für die gesamte Strafrechtswissenschaft* 79 (1967), pp. 565-623.

⁴³ On this transfer process cf. - amongst others - K.-F. Lenz & R. Heuser, *Strafrechtsentwicklung in Japan und der Volksrepublik China* (edition iuscrim, Freiburg 1995), pp. 4 ff or A. Önder, 'Die Entwicklung und Rezeption des Straf- und Strafverfahrensrechts in der Türkei', in *Zeitschrift für die gesamte Strafrechtswissenschaft* 70 (1958), pp. 313-322.

⁴⁴ With regard to these three levels - even if with a partly different emphasis - cf. already Jescheck, *op.cit.*, *Bockelmann-Festschrift*, pp. 136 ff. The division of 'legislative' comparative law into three levels meant here certainly corresponds, although by no means completely, with the three levels of the cross-border administration of criminal justice; for details see: A. Eser, 'Basic Issues of Transnational Cooperation in Criminal Cases: A Problem in Outline', in E.M. Wise (ed.), *Criminal Science in a Global Society* (Rothman & Co., Littleton/Col. 1994), pp. 3-20.

the American model; or the reform of the abortion laws in Poland by adopting the German indicative model by allowing an abortion only on certain recognised grounds. Over and above the replacement of mere parts of legal 'software', there may, however, be circumstances in which larger parts, if not even the whole 'hardware', are replaced. Examples of this include the reform of fines along the lines of the so-called 'day-fine system' in Scandinavia; and the fundamental restructuring of the Italian criminal procedural law from an inquisitorial to an adversarial system.⁴⁵ However, whether such transplantations are large or small at the national level, they always involve a fundamental one-sided process: the recipient country examines and chooses from foreign 'supply' what it considers appropriate without any reciprocal feedback necessarily taking place. At this level, the comparison of legal systems can easily deteriorate into a mere 'self-service shop' in which each country fetches that which fits best into its legal political concept at the given time.

If conducted correctly, this is different at the *regional level*. This will be the case when certain regions of the world, for example, the European Union, pursue a certain degree of *legal harmonisation* in order to minimize cross-border difficulties or to create a cross-border criminal policy. This may involve various far-reaching steps. The first step starts with legislation which is independent of any one nation although oriented to the developments in neighbouring countries and eventually supported by reciprocal laws on the mutual assistance for the enforcement of criminal law. The next step is to adopt independent national regulations which have been mutually agreed upon in the spirit of 'separate but uniform' system, and the final step might be for the countries concerned to agree on regulations which generally bind them and which have in effect supranational force.⁴⁶

At the *supranational level*, where in part standardisation may already have been achieved and may in some regards also be considered as *universal*,⁴⁷ the comparison of legal systems can also operate in a number of different ways.

Firstly, by investigating *supreme principles of law* which have found wide recognition among 'civilised nations' and which accordingly may be used as measures and standards for other countries. This is especially the case with prohibitions on cruel, inhumane or debasing punishments contained in general human rights declarations or in relation to the recognition of the

⁴⁵ On details of the new reform activities especially in the procedural area, cf. A. Eser, 'Entwicklung des Strafverfahrensrechts in Europa', in *Zeitschrift für die gesamte Strafrechtswissenschaft* 108 (1996), pp. 86-127.

⁴⁶ On such different cooperation and harmonisation activities on the European level, cf. the contributions in U. Sieber (ed.), *Europäische Einigung und Europäisches Strafrecht* (Heymann, Köln 1993), Ch. Harding et al. (eds.), *Criminal Justice in Europe. A Comparative Study* (Clarendon, Oxford 1995), S. Riondato, *Competenza Penale della Comunità Europea* (Cedam, Padova 1996), and A. Cadoppi, 'Towards a European Criminal Code?', in *European Journal of Crime, Criminal Law and Criminal Justice* 4 (1996), pp. 1-17.

⁴⁷ Cf. Jescheck op.cit., *Bockelmann-Festschrift*, pp. 137 f.

principle of legality and culpability.⁴⁸ This applies in an even more compelling way to those cases in which a country has agreed by treaty to punish certain types of behaviour, for example, genocide or certain kinds of environmental pollution.⁴⁹ However, despite the resulting uniform legislation of several countries in the fulfillment of public international law duties, in the end, it nevertheless remains a matter of parallel national legislation of different countries.

Therefore, true supranational legislation only occurs when the punishability of certain '*international crimes*' is no longer absolutely dependent upon the recognition of the individual country and when an international court of criminal justice exists which is empowered where necessary to also prosecute international crimes against the will of a non-cooperative country. The establishment of international tribunals for Yugoslavia and Rwanda is surely an important step in this direction. Thus, the hope for the creation a permanent international criminal court would appear to no longer be completely illusory. Scepticism is, however, justified as long as the drafts for an International Criminal Code or an International Criminal Court Statute do not contain any general rules for implementation,⁵⁰ and is above all be justified, if the treaty drafters, who come primarily from the area of public international law, continue to be of the opinion that they can dispose of the special knowledge of criminal law experts, even when it concerns substantially criminal law materials as is the case with the law and procedure for international crimes. Minimal prerequisites and rules for punishability and criminal sanctioning should at least certainly be formulated, even if it may not appear to be especially necessary to preface an international criminal codification with a detailed 'general part', although common for most criminal law codes today.⁵¹

Finally, a further step at the transnational level could be the development of a *universal 'model code'*. Certain examples in fact already exist such as the 1971 General Part of the Model Penal Code for Latin America⁵² or the 1988

⁴⁸ For further details see Jescheck, *ibid.*

⁴⁹ Cf. 'Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948', in UN Treaty Series, vol. 78 (1951), No. 1021, pp. 277-323., respectively 'International Convention for the Prevention of Pollution from Ships, 2 November 1973', in B. Rüster & B. Simma (eds.), *International Protection of the Environment*, vol. II (Oceana Publications, Dobbs Ferry N.Y. 1975), pp. 552-568.

⁵⁰ Cf. M.Ch. Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (Edition Erès, Paris 1993), therein, with particular regard to the deficits of general rules, see A. Eser, 'The Need for a General Part', pp. 43-52.

⁵¹ With regard to the current state of the discussion on this question cf. Ch. Nill-Theobald, 'Anmerkungen, über die Schaffung eines ständigen Internationalen Strafgerichtshofs', in *Zeitschrift für die gesamte Strafrechtswissenschaft* 108 (1996), pp. 229-239 (233 ff), further K. Ambos, 'Zum Stand der Bemühungen um einen ständigen Internationalen Strafgerichtshof und ein Internationales Strafgesetzbuch', in *Zeitschrift für Rechtspolitik* 29 (1996), pp. 263-271.

⁵² Código Penal Tipo para Latinamerica.

Cf. Jescheck, *op.cit.*, *Bockelmann-Festschrift*, p. 149 f.

Project Model Criminal Procedure Code for Latin-America.⁵³ After all, the former has already been used as the basis for the criminal law reform in Costa Rica (1970), Bolivia (1972) and El Salvador (1971). However, even leaving aside a consideration of the real value of uniform criminal laws on a global level, it is not possible to raise expectations too high at present.⁵⁴

This scepticism clearly has nothing to do with comparative law as such, but rather has its real origins in politics: the best comparative synopses and alternatives remain models without value as long as the political will to realise them is missing. On the international stage, this will to implement often comes up against the fear of loss of sovereignty. At the same time, the legal comparatist should not allow himself to become frustrated by the incalculable aspects of high politics because in order to prepare the way for political decisions at all alternative models must be on the negotiating table. Thus, this is the appropriate time to address theoretical comparative jurisprudence.

3. 'Theoretical comparative jurisprudence'

If, on the basis of the preceding discussion on 'judicative' and 'legislative' comparative research, I give the impression that the individual judge or parliamentarian could be expected to conduct comparative studies themselves this hardly corresponds with reality, although it may be the case in isolated situations. Quite apart from the fact that the necessary foreign resources may neither be found in normal court libraries nor parliamentary information services, the 'normal' judge, lawyer or politician generally does not possess the simple tools to competently deal with foreign law. Even in gaining access to the appropriate materials and correctly classifying them, the help of a scientific comparatist is invaluable. Therefore, an important function for comparative researchers and institutes lies even in the pure *practical investigatory aid*. In this respect much could be reported from the activities of the Max Planck Institute for Foreign and International Criminal Law.⁵⁵

When one speaks of 'scientific' comparative legal research, obviously more is meant than a mere information service for foreign law. The role of our institute and similar ones is much more decisive in respect of the analytical investigation of different laws, a comparison of common ground and differences, and the search for models and fundamental structures. Of the

⁵³ Proyecto de Código Procesal Penal Modelo para Iberoamerica. Cf. J.L.L. Rodríguez, *Die Unschuldsvermutung und die materiellen Voraussetzungen der Untersuchungshaft. Ein Beitrag zur Strafprozeßreform in Lateinamerika* (Eigenverlag des Max-Planck-Instituts, Freiburg 1995), pp. 5 f.

⁵⁴ Although raising the issue of a model code, at the same time also sceptical, see H. Schultz, 'Strafrechtsvergleichung als Grundlagenforschung', in H.-H. Jescheck & G. Kaiser (eds.), *Die Vergleichung als Methode der Strafrechtswissenschaft und der Kriminologie* (Duncker & Humblot, Berlin 1980), pp. 7-25 (23).

⁵⁵ In my capacity as co-director of this Institute, I can give you an idea of the extent of the reports and information requested of us - namely an average of about 200 a year.

many goals which may be pursued in this process,⁵⁶ I define three possible cognitive goals.

First of all, theoretical comparative jurisprudence can *improve the understanding of one's own legal system*. Ernst Rabel tried to clarify this interest in self-knowledge with the following illustration: 'Imagine that a small child is looking into the mirror for the first time; it grasps for the other supposed child; it will get to know itself for the first time. To hold up a mirror to one's own legal system, one must stand outside it'.⁵⁷ Although it primarily addresses the criticism of law and legal politics, Rabel's illustration also applies to legal doctrine. This is especially true for countries, such as Germany, which are particularly proud of their highly developed legal doctrine, in which the confrontation with the 'simple' theories of other countries may lead to the sobering realisation that theoretical overbreeding can be virtually counter-productive if it loses sight of the practical relevance in pursuing art for art's sake.

In contrast, drawing attention to the purely *instrumental function of legal doctrine* is also a significant task of comparative legal research.⁵⁸ Not least of all, theoretical comparative research can also assist the judge to better understand the goals and limitations of his own legal system in his application of law as part of judicative comparative law.⁵⁹

Comparative legal research acquires a no less important role on a *political* level. However, we only mention two areas of application. The first concerns collaboration on *legislative projects* in which by means of comparative legal studies the above-mentioned 'solutions stockpile' of conceivable regulation alternatives is presented. In this context, it is remarkable that extensive legal reform, at least in Germany (and probably also in some other countries), hardly ever takes place anymore without prior investigation of how other countries deal with the similar problems. The result of this for us, at the Max Planck Institute, is that approximately a third of our work consists of writing comparative legal reports for parliaments or ministries. However, lately mention can only be made of our comparative law reports for the collection and evaluation of evidence in criminal proceedings⁶⁰ or for the combating of

⁵⁶ Generally on 'comparative research in criminal law as pure research' see Schultz, *op.cit.*, further G. Kaiser, 'Strafrechtsvergleichung und vergleichende Kriminologie', in G. Kaiser (ed.), *Kolloquium Strafrecht Strafrechtsvergleichung* (Max-Planck-Institut, Freiburg 1975), pp. 79-90; and Jescheck, *op.cit.*, ZStW 86, p. 764.

⁵⁷ Rabel, *op.cit.*, p. 92.

⁵⁸ Especially impressive on this point, see H. Kötz, 'Rechtsvergleichung und Rechtsdogmatik', in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 54 (1990), pp. 203-215 (208 ff). On this 'control function' of comparative legal research by supplying criteria for the investigation of the correctness of theories cf. also Ebert, *op.cit.*, p. 179.

⁵⁹ Cf. *supra* at III.1.

⁶⁰ W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht des Auslands. Rechtsvergleichendes Gutachten im Auftrag des Bundesministeriums der Justiz* (edition iuscrim, Freiburg 1995).

corruption.⁶¹ Even if such investigations may primarily only be intended for the relevant national legislator, they can, however, also be of value to other countries in their efforts to achieve a harmonious standardisation of the forms mentioned under 'legislative' comparative research. In this way they can even develop a transnational effect.

We have already addressed the second politically relevant field of application, namely, that of the mediation role of comparative legal research in *international cooperation*. If, for instance, the practical implementation of the Schengen Agreement for the dismantling of borders between the EU member states, a highly topical point of dispute, faces continued difficulties, then the reason lies in the fact that to date too little is still known about the different objectives and structures for criminal prosecution and the justice systems between the various countries.⁶²

The lack of knowledge of the particulars of another legal system alone can hinder international cooperation in criminal matters and, thereby, go as far as leading to blocking extradition or mutual judicial assistance treaties, as happened in the negotiations between the USA and Germany. If, on one hand, the Americans are unable to understand that, according to German law, the German judiciary can claim the competence to sentence a crime committed by a German in the USA, then, on the other hand, the Germans will have no understanding when, 'of their own initiative', American prosecutors believe they are entitled to investigate an American businessman who is suspected of committing fraud in the USA and who has fled to Germany. Instead, both countries will regard an investigation as being in complete violation of their sovereignty.

As was shown in a conference dealing with such questions held at the Harvard Law School in June 1988,⁶³ a common platform can only be found when the different approaches for dealing with crime in foreign countries have been established. On the one hand, it has been established that the common law tends to deal more restrictively with the extraterritorial application of substantive criminal law. On this narrower basis, however, the common law has no doubts about exercising within its procedural jurisdiction and carrying out an investigation extraterritorially in relation to a crime committed domestically. Therefore, countries may demand the extradition of foreign citizens to the place where the crime was committed. On the other hand, it is a continental European tradition to extend the area of application of national criminal law, more or less, beyond the borders of one's own

⁶¹ This report which was commissioned by the Bavarian Ministry of Justice on *Strafrechtliche Korruptionsbekämpfung (Combating Corruption in the Criminal Law)* was submitted to the Ministry at the end of July of this year and is due to appear soon in 'edition iuscrim'.

⁶² Cf. D. O'Keeffe, 'The Schengen Convention: A Suitable Model for European Integration?', in *Yearbook of the European Law* 11 (1991), pp. 185-219, W. Schomburg, 'Strafrecht und Rechtshilfe im Geltungsbereich von Schengen II', in *Neue Juristische Wochenschrift* 48 (1995), pp. 1931-1936.

⁶³ 'Proceedings of the Harvard Law School Conference on International Cooperation in Criminal Matters', in *Harvard International Law Journal* 31 (1990), pp. 1-127.

country and, as a result, to also subject extraterritorial crimes in an expansive way to one's own domestic jurisdiction. The result of this is that one's own citizens cannot be extradited because they may also be convicted of a crime committed in a foreign country according to their own law.⁶⁴ Which of these conceptions is the better or even the fairer is not a question for debate here. Rather, I have been trying, above all, to demonstrate just how important the instructional nature of scientific comparative legal research can be for the elimination of misunderstandings and in the preparation of cross-border cooperation.

Last but not least, in the midst of all these application-orientated objectives, the most original function of truly scientific comparative jurisprudence must not be forgotten: namely, its *function as basic research*. It may be debatable whether this type of comparative legal research is or must be really so 'free of any purpose', as postulated by some.⁶⁵ For a researcher to subject himself, without any particular goals, to the arduous task of studying a foreign legal system presupposes a view of researchers that is unlikely to find its equivalent in reality. What, however, is not necessarily essential is the usefulness of basic research in terms of an already predetermined application. The researcher's view will be free for the unprejudiced examination and evaluation of the characteristics and structures of another legal system only when he is freed from the restrictive expectation that he must attain a particular result or that he must substantiate a particular position.

In this respect, there are three particularly valuable research goals. The first is a *phenomenology of criminal law* which could lead to the development of a transnational model for the most important types of crime as well as the evaluation of the variables which may be most relevant in the future. Not only would information on the interests to be protected and on the most significant modes of violation be expected, but more importantly, one could also exchange different experiences about diverging legal orders in this way.

Such a phenomenology, that is oriented more towards the external manifestation of crime could still, however, be expanded as well as deepened by a *general structural comparison* for the penetration of the outer facade and for the discovery of deeper commonalities or differences. At the Max Planck Institute in Freiburg we have taken the first steps in this direction by pursuing comparative research for the justification and excuse as 'key issues' of the general theory of crime.⁶⁶ In a further step, this should be followed by a

⁶⁴ For further details on this problem cf., A. Eser, 'Common Goals And Different Ways in International Criminal Law: Reflections from a European Perspective', *ibid.* pp. 117-127.

⁶⁵ Cf., for example, Jescheck, *op.cit.*, ZStW 86, p. 764, Kaiser, *op.cit.*, p. 82, Schultz, *op.cit.*, p. 8, when speaking of 'pure' research.

⁶⁶ For further details cf. A. Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime', in A. Eser & G.P. Fletcher (eds.), *Rechtfertigung und Entschuldigung. Rechtsvergleichende Perspektiven I* (Eigenverlag des Max-Planck-Instituts, Freiburg 1987), pp. 1-8, 17-65, and also A. Eser, 'Eröffnungsansprache', in A. Eser & W. Perron (eds.), *Rechtfertigung und Entschuldigung III* (Eigenverlag des Max-Planck-Instituts, Freiburg 1991), pp. 1-6 (2 ff).

general structural analysis of the criminal law.⁶⁷ In the event that the associated ideas are realised, that which had already been promoted by von Liszt in the spirit of a 'general theory of criminal law'⁶⁸ and to which Jimenez de Asúa already contributed in his multiple volume work *Tratado de derecho Penal* might, in the end, really succeed.⁶⁹

Finally, the *cultural function* of comparative legal research must not be forgotten:⁷⁰ the dominating moral concepts in a society as well as the societal and State reaction to value deviations are expressed so clearly in no other area of law as in criminal law.

IV. Means and methods of comparative legal research

If reference is also to be made to the method of comparative legal research, then it is less concerned with each general procedure, as is pursued in every discipline which claims to be scientific, and much more with possible peculiarities which are particular to comparative legal research. And yet, it would be false to expect a generally binding canon of methods because, just as the possible objectives of comparative legal research are diverse, the relevant methods are varied. If we are concerned with a structural analysis, for example, the various ways in which different legal orders deal with the involvement of several persons in the commission of a crime, then the research plan as well as the methodological implementation must, from the start, be more complicated than is the case with the examination of 'double criminality' in which simply the existence of two corresponding crime provisions must be identified. Nevertheless, apart from such isolated questions, a number of ground rules may be identified based on many years of experience, which in most cases have proved to be promising.

1. *Methods of approach*⁷¹

In the *first step*, it is necessary to *define the substantive problem* which is to be investigated in view of the different legal orders. In addressing this so-called 'functionality question'⁷² certain legal institutions or even individual legal norms can also be directly put to test, as was mostly the case in the early days of comparative legal research. However, in so doing it must be

⁶⁷ For further details see W. Perron, 'Überlegungen zum Erkenntnisziel und Untersuchungsgegenstand des Forschungsprojektes „Allgemeiner strafrechtlicher Strukturvergleich“', in J. Arnold, *op.cit.*, pp. 127-136.

⁶⁸ F.v. Liszt, *Die Strafgesetzgebung der Gegenwart in rechtsvergleichender Darstellung*, I. Band (Berlin 1894), pp. XX, XXI, XXV; cited by Schultz, *op.cit.*, 21 ff.

⁶⁹ L.J. de Asúa, *Tratado de Derecho Penal*, Band I-VII (Buenos Aires 1949 f.); cf. Schultz, *op.cit.*, p. 23 f.

⁷⁰ Cf. Kaiser, *op.cit.*, p. 82.

⁷¹ Cf. with regard to the following also - although in a partly different sequence or with different emphasis - Jescheck, *op.cit.*, 'Entwicklung' pp. 36 ff, ZStW 86, 771 ff; as well as generally, Zweigert & Kötz, *op.cit.*, 31 ff.

⁷² Notably, Zweigert & Kötz, *op.cit.*, 33.

taken into consideration that from the absence of a corresponding legal norm in another legal system, the complete lack of any rule cannot simply be concluded without a second thought. Because, as legal norms, as they are to be correctly understood, do not draw their meaning from themselves, but rather draw it from the social problem to be regulated in each case. Since this can be covered by a different legal norm in another legal order, one can, on no condition, be satisfied with comparative research as the mere description of legal norms or legal institutions. Rather, one must refer back to the underlying social assumptions and its social integration. Therefore, instead of being satisfied with the question, whether, for example, a comparable term exists in another legal system for 'intention' or 'incitement', the mental processes or ways of influence on another person, which in one legal system are understood as 'intention and 'incitement', should first be described. Only after having done this, does it make sense to ask the question, whether these psychological processes or the exertion of influence are covered in another legal system with similar concepts or by means of other rules. In other words, the real subject of comparison is not (only) the norm, but rather its presupposed real-life situation as a problem of social order to be regulated by law.⁷³

In the *second step*, the *selection of countries to be compared* must follow. In so doing, a *pilot study* can prove useful in order to avoid missing the truly relevant countries, on one hand, and to exclude from the outset unproductive countries, on the other.⁷⁴

The *third step* consists of the production of individual *country reports*. These will vary greatly in length depending upon the formulation of the question. Thus, one can be satisfied with a simple list of the legal norms at most in those cases in which the individual questions alone depend upon the existence or lack of such norms. As a rule, however, a reliable country report cannot be compiled without a consideration of the pertinent case law and an evaluation of legal doctrine.⁷⁵ Thus, because it does not merely depend upon 'law in the books' but rather 'law in action', criminology is gaining greater and greater importance as an additional instrument of comparison.⁷⁶ Not least of all, in each of the country reports, attention must be paid to special stylistic features of the relevant legal system⁷⁷ as well as linguistic and other cultural peculiarities.⁷⁸

⁷³ This methodological reorientation is, according to Coing, *op.cit.*, p. 2604, primarily to be attributed to Ernst Rabel and his school.

⁷⁴ Cf. Jescheck, *op.cit.*, ZStW 86, p. 771. Inasmuch as he denotes the choice of country as the 'first' question to be asked, to avoid misunderstandings it remains to be observed that the choice of country can hardly be made without the prior determination of problems of order and regulation as the genuine subject of comparison.

⁷⁵ Cf. Schultz, *op.cit.*, 9 f.

⁷⁶ For further details see above all Kaiser, *op.cit.*

⁷⁷ Cf. Schultz, *op.cit.*, p. 15 f as well as Zweigert & Kötz, *op.cit.*, pp. 62 ff generally on the 'style' of the different legal circles.

⁷⁸ Particularly instructive on these comparative relevant aspects is Großfeld, *op.cit.*,

The *fourth step* is to compile a *comparative cross-section* on the basis of the country reports. This should, however, not amount to merely a summarised repetition of the individual data contained in the country reports. Rather, it should be directed towards profiling common ground and differences and, where possible, to lead to the development of models. Reference to particular deviations will obviously not be excluded since such conspicuous features are able to not only present a critical contrast to the 'main stream', but can also indicate the forward-looking potential for legal political reforms. In this way the comparative legal cross-section, in particular, can develop into a reservoir for the 'stockpile of solutions' which is especially important for 'legislative' comparative law.

As a *fifth step*, a separate legal political evaluation of differing regulatory alternatives (possibly in connection with formulation suggestions to the legislature) can follow. Caution is, however, demanded. As already indicated in relation to 'legislative' comparative law, coming up with regulation alternatives is one thing and making the final choice between them another.⁷⁹ Such a political decision can naturally also not be denied the researcher in his role as a political citizen. This role, however, has to be disclosed so that the researcher avoids conducting personal politics under the guise of pure science.

2. *Institutional prerequisites*

In view of the great variety of tasks and functions and the differences in the methods which can be applied, it should not come as a surprise that legal comparative research cannot be sensibly conducted without the appropriate 'equipment'. In addition to the general know-how of the methodology of the comparatist, there is above all the availability of a *library* by which the legal system of the country can be examined. Insofar as a research visit is not possible in the country being examined, as is generally the case, a sufficient library set up at the domicile of the researcher is required. The financial problems associated with this are naturally greater the broader the definition of the research project is and the greater the number of countries to be included is. In the nature of things, this problem is best confronted by institutionalising libraries in which the legal material of as many countries as possible is gathered in a systematic and comprehensive way.

In a similar way, the need for competent *personnel* must also be addressed. Even an experienced comparatist is generally only closely acquainted with a limited number of foreign legal systems. Therefore, the extension of a research project to cover further countries is not possible without the collaboration of other researchers, who understand sufficiently well the language as well as the law of the countries concerned. To gather such country-specific experts in the same institution at the same time opens up greater

⁷⁹ Cf. *supra* to Fn. 39.

opportunities for more intensive cooperation, in particular, also with guest researchers.

Therefore, it would be desirable if there were as many comparative legal institutes as possible. However, immense costs often stand in the way, because a precondition for establishing and running an institute from the standpoint of personnel and a library overstep the dimensions of a normal university. With the already mentioned Max Planck Institute for Foreign and International Criminal Law in Freiburg, I am greatly pleased to represent just such an institute that strives to integrate of research personnel and library⁸⁰ and—what may absolutely be understood to be an invitation—that also gladly keeps its working facilities open to foreign researchers.

V. Limitations of comparative legal research: Hurdles in the harmonisation of law

Up to now, the sunny side of comparative criminal research has come to light, but certain downsides must not be overlooked. Technically, these downsides involve both the *danger of dilettantism and eclecticism* when, for instance, the foreign law is not sufficiently mastered⁸¹ and/or the materials discovered are more or less randomly selected or, due to the uncertainty of the criteria and indications, less reliably evaluated.⁸²

The temptation to make 'short-sighted' value judgments, whereby the hoped for result is rashly inferred from seemingly appropriate individual facts, is no less dangerous. However, even with the most professional methodology, comparative legal research can run into difficulties if, for example, the documents or other materials from countries which appear to be rich in information are - for whatever reasons - inaccessible or, if from the outset, in some other way provide an incomplete picture of the factual appearance or possible regulation alternatives that can be expected. To have to decide in conditions of uncertainty, however, is not something exclusive to comparative law, but rather is due to the natural limitations of human knowledge of a virtually general phenomenon. Therefore, the impossibility of gathering all the appropriate documentation offers no reason for distancing oneself from the start from attempts at comparison. Rather, it is an occasion to indicate the limitation of investigation and the limited nature of the conclusions drawn from it.

Beyond the inherent weaknesses of comparative law, which can be counteracted to a certain degree by proceeding in such way that the methodology is

⁸⁰ On the conception and development of this Institute cf. in detail H.-H. Jescheck, 'Rechtsvergleichung im Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg i. Br.', in *Zeitschrift für die gesamte Strafrechtswissenschaft* 79 (1967), pp. 128-144; on the developments up to the mid 80ies cf. *Max-Planck-Institute for Foreign and International Criminal Law Freiburg* (Max-Planck-Gesellschaft. Berichte und Mitteilungen Heft 4/95), pp. 9-20.

⁸¹ Cf. Jescheck, *op.cit.*, 'Entwicklung', p. 38.

⁸² Cf. Kaiser, *op.cit.*, p. 82. Schultz, *op.cit.*, p. 21.

carefully taken into account, legislative comparative research in the field of criminal law, in particular, can come up against substantive limitations. The reasons for these lie probably less with the method and more with the materials and, therefore, especially in the *unattainable nature of the desired goal*. Above all, one must be prepared for disappointment when one hopes for the transplantability of rules from one legal system to another or when a mutual harmonisation is striven for, but the legal comparison yields fundamental structural differences which stand in the way of such intentions.

As this problem in the current discussion on a *harmonisation of European criminal law* seems to be underestimated in part, let us consider a number of critical reflections⁸³ - not out of fundamental opposition to such harmonisation efforts, but rather so as to not miss a legitimate goal by looking in the wrong direction.

So as not to give in to any illusions on the question of an alignment of national criminal law throughout Europe, one must realise from the beginning that the regulative content and the effectual mode of criminal law norms are not only determined by the various *crime provisions*, but also by the general rules of imputation as well as the manner of implementation of the substantive law in criminal trials. The different crime provisions may well be very similar even if within the "classic" delicts of murder, robbery, theft and deceit significant differences may be identified. However, it would be still by far more difficult to attempt to align the general *rules of imputation*. Even a first glance in the criminal law text books of countries such as Germany, England and France, which are all based upon long established individual legal traditions, reveal the multiplicity in the systemisation of the prerequisites of punishability. While the breakdown of a crime into the 'definitional elements of the crime' (*Tatbestandsmäßigkeit*), 'unlawfulness' (*Rechtswidrigkeit*) and 'culpability' (*Schuld*) appear to criminalists in Germany to have a *quasi-natural* law character, their English colleagues with their differentiation between *actus reus* and *mens rea*, and their French colleagues with their distinction between the *éléments légal, matériel* and *moral* maintain something similar. There are even substantial differences between the important individual rules of the general aspects of criminal law. Thus, the extent of the acts constituting an offense is determined not insignificantly by the criminality of attempt, the different forms of participation in a crime as well as the punishability of committing an act by omission. To appreciate the actual variety of these rules, one must only cast a short look at the relevant surveys on foreign law in Jescheck's textbook.⁸⁴

The interdependence of the *law of criminal procedural* and the substantive legal elements of a crime which must be proven can be just as easily overlooked because even here the functional differences are considerable. This is the case even if one disregards, for once, the particular difficulties of

⁸³ For more details see the more or less sceptical positions of the authors cited supra in Fn. 46.

⁸⁴ Cf. H.-H. Jescheck & Th. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5th ed. (Duncker & Humblot, Berlin 1996), pp. 527 f, 612 f, 661 f.

police investigation authorities and the rules on the inadmissibility of evidence and only takes into account the taking of evidence in court.⁸⁵

In *Germany*, we have an official investigation procedure with a comprehensive and strongly formalised main proceeding (with professional and lay judges) in which the principle of the immediacy applies with regard to the presentation of evidence and in which the defense can gain very strong influence by exercising its rights to question witnesses, to make statements or to apply for further evidence. Thus, the material of the trial is thoroughly analysed by well-prepared professionals with the result that, in complicated matters, such as is primarily the case in the area of economic crime, without the cooperation of the defense even an only fairly fast completion of the trial is no longer possible. Therefore, in an accordingly thorough manner, even the pre-trial investigations of the police and public prosecutor must be conducted, and as a consequence, various substantive elements of the crime can prove accordingly difficult to resolve.

In contrast, in *England* the hearing of evidence takes place in adversarial proceedings before lay judges who have no knowledge of the subject of the trial before the beginning of the main proceedings. Although they are instructed in the trial by a professional judge presiding over the proceedings, they are on their own when it comes to the deliberation of judgment. Evidence is presented contradictorily by the prosecution and the defense and from the perspective of a one-sided fixed interest and in such a way that must be understood and digested by the lay judges *hic et nunc*. Therefore, complex subject matter must be drastically simplified while the defense must not give the impression of wanting to prevent a fair trial for the accused by the obstruction of justice and delay tactics. In this way, detailed factual situations can be easily managed as both sides have no interest in too great an extension. In particular, the clarification of doubts regarding subjective elements of the crime remain largely the responsibility of the defendant. On the other hand, contradictory statements by witnesses and atmospheric factors acquire very much greater significance, particularly as the jury frequently decide more intuitively on the basis of the very fragmentary impression that the main proceedings offer.

In *France* jury trials are also held. As, however, the main proceedings are conducted by a professional judge who does not appear as a neutral arbitrator, but rather is under a duty to independently clarify the truth, he influences the jury in a much stronger way than his English colleague. Besides, the principle of the immediacy of the trial does not apply to the same extent as in the German trial; but rather, the taking of evidence is essentially conducted with reference to the files of the *juge d'instruction* who takes evidence in a less formalised hearing in which the subject matter is in fact dealt with carefully, but not nearly as thoroughly as in Germany. In this way even complicated material may be managed swiftly.

⁸⁵ On the proof and further details of the following procedural orders discussed cf. Perron, *op.cit.*, pp. 23 ff, 96 ff, 560 ff.

Without wanting to rate the differences mentioned from a legal-political stance, it would nevertheless seem unmistakable that in England, France and Germany - remaining with these examples and ignoring scarcely less divergent criminal law orders of other countries - different substantive regulations would in each case have to be introduced to balance out differences, if one wanted to achieve the same results in the daily practice of criminal prosecution. On the whole, it should have become clear even from these few points that for a real harmonisation of criminal law on the European level very comprehensive changes would be necessary. The actual extent of these changes can hardly be realistically estimated even by experts. This does not mean that such harmonisation would be completely impossible. Neither is it denied in any way that - not least of which because of the incomplete nature of European legislation up to now - through the case law practice of European courts a type of 'common European law' develop for certain fundamental legal principles and institutions.⁸⁶ However, as long as Great Britain, for example, has failed to produce both a uniform and written criminal code for its own national domain,⁸⁷ it seems hardly imaginable that it would be willing to agree to a comprehensive European criminal code, even if it were only through adopting a model of that kind.

VI. Outlook

These sobering findings are surely painful for all those who had hoped for a quick harmonisation of the different national criminal law systems in Europe. If comparative legal research appears disillusioning in this respect, there is still something positive to be said: by way of an early warning system, comparative legal research can, above all, draw attention to essential structural differences and unintended side effects of radical reform plans by focusing on the experience of other legal cultures.

This warning function of comparative research cannot be taken seriously enough particularly in such a time as ours when the former socialist countries are occupied with the fundamental rebuilding of their criminal law systems. If it should actually happen that some of the successor states to the ex-Soviet Union are convinced by 'common-law missionaries' to make the move from traditional inquisitorial to adversarial trial proceedings, then one can only be stunned in the face of such ignorance on a comparative law level. If such a change in systems appears to have succeeded in Italy only after a fashion,⁸⁸

⁸⁶ Cf., for example, K. Tiedemann, 'Der Allgemeine Teil des europäischen supranationalen Strafrechts', in Vogler et al. *op.cit.*, vol. II, pp. 1411-1440.

⁸⁷ With regard to efforts which are moving in this direction, but which up to now have appeared to have still had little success cf. B. Huber, 'Landesbericht Großbritannien', in A. Eser/B. Huber (eds.), *Strafrechtsentwicklung in Europa*, vol. 3.1 (Eigenverlag des Max-Planck-Instituts, Freiburg 1990), pp. 479-594 (510 ff), and vol. 4.1 (Freiburg 1993), pp. 635-744 (678ff).

⁸⁸ Cf. E. Amodio, 'Das Modell des Anklageprozesses im neuen italienischen Strafverfahrensgesetzbuch', in *Zeitschrift für die gesamte Strafrechtswissenschaft* 102 (1990), pp. 171-195.

how much more is the adversarial system doomed to failure in such countries in which public prosecutors traditionally had a stronger role and in which a similarly strong and functioning system of lawyers is still missing. This, admittedly political, assessment should neither be regarded as an absolute rejection of the adversarial system nor as a plea for a continuation along the old inquisitorial lines. That the latter could lead to a good future is equally as doubtful. Instead of a fundamental change of systems with all varieties of inconceivable side effects, certain interim solutions are conceivable by taking into account the total social context, including the cultures of procedure that have evolved. Such interim solutions are all the more imaginable considering that, in many countries, the old truly inquisitorial system, in which the prosecutor and judge coincided to a large extent, has already been replaced by an instructional system in which the judge is responsible for ascertaining the facts, but in which the 'parties' are more actively involved. Equally, at the other extreme, some adversarial systems are moving more towards the centre.⁸⁹

Perhaps the most important potential of comparative legal studies is the chance it offers to gain knowledge about different systems, to promote the opening up of systems and possibly the overcoming of certain systems. It can open our eyes to different legal cultures and is, thereby, capable of also counteracting intellectual sterility and social inflexibility. And if comparative law would in a positive sense lead to *déformations professionnelles* (liberating oneself from one's professional training), one could join Kötz in identifying two aspects, namely, a certain 'scepticism of dogma', on one hand, and a degree of 'openness towards other social sciences' as is generally atypical for jurists, on the other.⁹⁰ Such an unbiased search for truth, which is conducted with open eyes for other people, countries and their social and legal systems, is particularly called for in these times in which fundamental movements are claiming absolute truth to be theirs and are finding support again and again from pure 'doctrinaire' jurists. It is in this search for truth that comparative research acquires its greatest importance, for 'what the experiment is for the natural sciences, comparative investigation is for the other sciences'.⁹¹ For this reason, in the legal field as well, comparison is the best medicine against the myth of absolute truths.

⁸⁹ Cf. N. Jörg, St. Field & Ch. Prants, 'Are Inquisitorial and Adversarial Systems Converging?', in Harding *op.cit.*, p. 41-56.

⁹⁰ H. Kötz in a to date unpublished presentation 'Aufgaben und Probleme der Rechtsvergleichung an den juristischen Instituten der Max-Planck-Gesellschaft' on the occasion of the 25th Anniversary of the Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg (Februar 1991).

⁹¹ Thus - with reference to *Durkheim* (Les règles de la méthode sociologiques, Paris 1895) - the succinct conclusion of Kaiser, *op.cit.*, p. 79.