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The Significance of Comparative Law for Criminal Law Reform

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Reform of the criminal law is as old as criminal law itself. Nonetheless, we are witnessing today how this great international movement is surging towards its renewal, leaving the uniformity of history behind. This revitalization is a sign of the intellectual change in the attitude towards crime and the punitive power of the state, dating from the middle of the century. The radical changes in criminal law currently taking place in many countries must be seen in this light.

Of the members of the central European legal family, Germany and Austria have enacted new criminal codes, both of which came into force on January 1, 1975. Switzerland is following in the same direction with partial revisions which, although they do not bite as deeply into the existing tradition as the reforms of her neighboring countries do, nonetheless clearly reflect a desire for renewal of the reform movement. Within the Romance legal family, France has enacted important partial reforms. Probationary supervision and the judicial supervision of the execution of sentences (juge d'application des peines) were introduced in 1958. The tutelle pénale was reorganized in 1970 and new kinds of sanctions were introduced in 1975 in order to curtail

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1. On the division of the world into legal families for private law purposes, see I K. ZWEIGERT & H. KÖTZ, EINFÜHRUNG IN DIE REchtsVERGLEICHUNG 67 (1971).


imprisonment. In addition, France published the Draft of the General Part of a Penal Code in 1976, the content of which differs considerably from that of traditional French criminal law. The Italian Reform Draft of 1960, minimal in its range as had always been the case, was only partly put into effect in 1974 and 1975. There is, however, the new prison law of 1975, which represents an important step towards the restriction of imprisonment, since convicted offenders with a favorable social prognosis may be released on probation under the auspices of the social services after a period of observation (article 47). A vigorous renewal of legal reform is in progress in both Spain and Portugal. After the restoration of democracy in Spain, one of the first demands made was the elimination of the criminal law of the dictatorship and the introduction of a humane and liberal legal order based on the rule of law. Since the political revolution in Portugal, work on criminal law reform has recommenced and has led to a new Draft of the General Part of a Penal Code which, however, emanates from the Correia Draft of 1963.


7. This draft was dropped by the last government and since then new severe legislation on “Security and Liberty” was passed in Feb., 1981. In the meantime, the Socialist French government has appointed a Commission to modify it.
Code was passed by an overwhelming majority in the United States Senate on January 30, 1978 (Senate Bill 1437). However, the companion bill introduced on May 3, 1978 in the House of Representatives (H.R. 6869) never emerged from the Judiciary Committee.\textsuperscript{13}

The General Part of a Model Penal Code was published in Latin America in 1971,\textsuperscript{14} and some nations have remodeled their criminal codes accordingly. In 1969, Brazil enacted a new Penal Code which, however, has not yet come into force.\textsuperscript{15} In Argentina, too, the change in the political power scene has profoundly altered criminal law reform. The 1974/75 Draft of a new Penal Code, prepared by the previous government and influenced by German reforms, was abandoned and a new Draft is now being prepared. The final complexion of Argentinian criminal law is still uncertain, as is also the ultimate political orientation of this second largest country in Latin America.\textsuperscript{16}

Criminal law reform has not remained confined to countries of western tradition and character, but has also affected the socialist legal community. On the basis of the new Fundamental Principles of Criminal Legislation enacted by the central authorities of the Soviet Union in 1958,\textsuperscript{17} new criminal codes were introduced in various individual republics. The socialist states of Europe followed: Czechoslovakia and Hungary in 1961; the German Democratic Republic, Bulgaria, and Romania in 1968; and Poland in 1969. In Poland, however, some aspects of the liberal Penal Code of 1932 were retained.

In Japan the draft of a new Penal Code, which takes account of the reform work in Germany, Austria, Sweden, and the Soviet Union, emerged in 1974 after decades of preparatory work. Much the same as in Germany, an alternative group of university professors of criminal law was formed, and a critical review of the official draft was published. This review of the draft, which seems to follow existing law too closely and is insufficiently liberal, attracted considerable public attention.

\begin{itemize}
\item \textsuperscript{13} Bill to codify, revise, and reform Title 18 of the United States Code (Criminal Reform Act) of 1977, S. 1437, 95th Cong. 2d Sess. (1977); H.R. 6869, 95th Cong. 1st Sess. (1977).
\item \textsuperscript{14} Text in Spanish and Portuguese in Código penal tipo para Latinoamerica, Parte general, vol. I (1973).
\item \textsuperscript{15} The coming into force of the Penal Code has been deferred sine die. On the Penal Code of 1969 see H. Fragoso, Primeiras Linhas sobre o Direito Penal e o Processo Penal (1974).
\item \textsuperscript{16} See E. Bacigalupo, Nuevo Pensamiento Penal 96 (1975).
\item \textsuperscript{17} Text in German translation in F.C. Schroeder, Grundsätze der Strafgesetzgebung, Staatsschutz-und Militärstrafrecht der UdSSR (1975).
\end{itemize}
The world of criminal law is in a state of flux, and one wonders how it could come to pass that the floor has been removed from beneath classical criminal codes of the stature of the German (1871), the Austrian (1803/1852), and the French (1810), all of which determined a whole epoch in the history of criminal law beyond their own national borders. The answer lies in the thesis with which we started, namely, that the attitude toward crime and the possibilities of its suppression has changed. Today, crime is no longer conceived of as a peripheral phenomenon from which law-abiding citizens should keep their distance. Rather, crime is seen as the expression of a social conflict which, like other social conflicts, is susceptible of rational explanation and which must be resolved by rational means. In conformity with this sober basic attitude to the phenomenon itself, criminal law sanctions are selected and applied according to their suitability for the resolution of existing conflicts and the prevention of future conflicts. Sanctions are measures for the elimination of conflicts; their range of application and their assessment in each individual case must be determined in such a way that as a reaction to the crime they sufficiently preserve law and peaceful relations in the community, while not burdening those affected more than is necessary with regard to this goal.

These changes in the criminal law of many countries did not occur in isolation within national borders. For the most part they should not be regarded as the independent achievement of the legislator, but essentially as the product of comparative law. Foreign criminal law and procedure have been the subject of intensive scientific study for more than 150 years with the result that everything that is happening today can be understood as the expression of an international cultural community and must also be evaluated according to the criteria which arise from this context. The necessary aids for the study of comparative criminal law are also fully available today in the form of bibliographies, collections of statutes, periodicals, monographs and congresses.


sional materials. In order to obtain a general view of the topic, three different levels on which comparative law is employed in criminal law reform can be distinguished. Certain primary principles for establishing the shape of a system of criminal law are derived directly from the sense of justice of the international community and thus confront national legislation and the administration of justice in the form of postulates and value criteria. The goal to be achieved is that no country should fall behind a minimum standard, regarded as obligatory, in its criminal law. Furthermore, comparative criminal law occurs within the various legal families, characterized by history, tradition, language, custom, and common socio-ethical convictions. Thus, comparative criminal law is undertaken by the states in partnership in the Council of Europe, by the countries of the British Commonwealth, and by the states of Latin America. In these countries, comparative criminal law is pursued on a regional basis and mainly serves the purpose of legal harmonization. The affected countries participate in the process because they do not wish to fall behind the position reached by neighboring states in the development of their criminal law. Finally, comparative law is also purposefully applied when the issue of the reform of individual legal institutions arises and selected foreign legal institutions are consciously taken as a model. Thus, Germany and Austria relied on the day-fine system used in some Scandinavian countries for the reform of their systems of fining. In this instance, comparative criminal law is undertaken on the level of particular institutions. The legislator wants to acquire model solutions from foreign law and from the experience obtained in its application. The solutions can then be used mainly for the reform of penalties.

I. THE USE OF COMPARATIVE CRIMINAL LAW ON THE UNIVERSAL LEVEL

On the universal level, comparative law has attained importance in different areas of reform. The examples that will be dealt with are as follows: the enforcement of human rights, decriminalization, and the common battle against international criminality.


21. See text accompanying notes 103-10 infra.
A. The Enforcement of Human Rights

Since the Universal Declaration of Human Rights of 1948, a remarkable international consensus\textsuperscript{22} has arisen in relation to the basic content of inalienable human rights and their general binding force. The result has been that countries which fail to reach a minimum standard, based on the rule of law, in their penal system find it difficult to remain firm in the face of growing international criticism.\textsuperscript{23} Obviously, observance of minimum principles underlying criminal proceedings in accordance with the rule of law is paramount in the maintenance of human rights. However, the requirements derived from the protection of human rights also play an essential part in the reform of substantive criminal law.

Article 5 of the Universal Declaration of Human Rights of 1948 already prohibits cruel, inhuman, or degrading treatment or punishment. The same provision is found in article 7 of the International Covenant on Civil and Political Rights of 1966\textsuperscript{24} and in article 3 of the European Convention on Human Rights of 1950.\textsuperscript{25} The German Federal Supreme Court has not only assigned importance to this provision in exceptional cases, but has indeed accorded the provision a central position in criminal law. In that court’s view, a “degrading” punishment is one “that exceeds the degree of guilt.”\textsuperscript{26} Thus, in the German view, the principle of fault in its function of limiting punishment is anchored directly in the law of these major Conventions.

Whether there has been an “over-interpretation” of these texts is an open question. It is, however, undoubtedly correct to state that international human rights are authoritative for national systems of sanc-


\textsuperscript{23} On the international effectiveness of the two large private organizations for the defense of human rights, see \textit{THE REVIEW OF THE INTERNATIONAL COMMISSION OF JURISTS; T. CLAUDIUS & F. STEPAN, AMNESTY INTERNATIONAL} (1976).


\textsuperscript{26} Judgment of July 14, 1971, Bundesgerichtshof in Strafsachen [BGHSt] 24, 173, [177], 1971 NJW 2034.
tions. Thus, the compulsory punishments involving the loss of civil rights (Ehrenstrafen) which, until their repeal in 1969, formed part of the German Penal Code, were from early on regarded by some courts as being irreconcilable with article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.\(^27\) For this reason, they were not applied.\(^28\) The European Human Rights Commission has decided that birching, legally permissible as a criminal punishment on the Isle of Man, contravenes article 3 of the European Convention on Human Rights.\(^29\) The death penalty is not included among the punishments proscribed in international treaties and is indeed specifically mentioned as a permissible penalty in article 2, paragraph 1 (sentence 2) of the European Convention on Human Rights and also in article 2, paragraphs 3-6 of the International Covenant on Civil and Political Rights. However, the latter human rights covenant, signed in 1966, contains a clear indication of a tendency toward its abolition. Internationally, this movement is also beginning to gain ground. The Declaration made at the Amnesty International Conference held in Stockholm on December 11, 1977, expressly condemns the death penalty as an “ultimate, cruel, inhuman and degrading punishment” from the point of view of the protection of human rights and demands its elimination as being “imperative for the achievement of declared international standards.”\(^30\)

The prohibition in international treaties of inhuman or degrading treatment is obviously important for the enforcement of prison sentences. As article 25 of the European Convention on Human Rights has granted the right of individual petition to an affected party, redress has frequently been sought from the Human Rights Commission in Strasbourg, particularly on questions relating to the execution of


Admittedly, due to its restrictive decisions, the Human Rights Commission has thus far contributed little toward the development of basic prisoners' rights. However, the Convention has opened up the way to an international complaint procedure, and the very possibility of control by a supra-national European-level court will itself lead to an improvement in the legal position of prisoners in national prison administrations. Furthermore, the aim of a prison system has already been defined by international law in a modern sense. For the first time, article 10(3) of the International Covenant on Civil and Political Rights imposes the binding rule that imprisonment must serve the purpose of the prisoner's social rehabilitation. The United Nations has also adopted the Standard Minimum Rules for the Treatment of Prisoners of 1955; the European version of these rules was revised, improved, and passed by the Committee of Ministers of the Council of Europe in 1973. Even if these rules do not amount to binding international law, they are nonetheless an indication of the progressive consciousness of the international cultural community.

The European Human Rights Commission has held preventive detention (Sicherungsverwahrung) to be compatible with the European Convention on Human Rights in several decisions. At the same time, the Commission emphasized that it must be connected with a criminal act and that preventive detention in the form of a pure ante delictum measure violates the fundamental right to freedom. One may conclude from this that the double track system of imprisonment, and measures involving the deprivation of liberty, which still characterize the legislation of many countries, cannot be questioned, at least from the point of view of human rights protection. This double track system, however, is gradually being discarded on an international level, as demonstrated by modern English and Swedish criminal law.

One of the major fundamental rights which has been accorded international recognition is the principle of legality (nullum crimen, nulla poena sine lege). We find it in article 11(2) of the Universal Declaration of Human Rights, in article 15 of the Human Rights Covenant

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31. See also H.G. GAN TER, DIE SPRUCHPRAXIS DER EUROPÄISCHEN KOMMISSION FÜR MENSCHENRECHTE AUF DEM GEBIET DES STRAFVOLLZUGS (1974).
32. Resolution 2200C (XXI), supra note 24.
33. German translation in 1958 ZEITSCHRIFT FÜR STRAFVOLLZUG 141.
35. See Vogler, supra note 25, 82 ZStW at 754 and 89 ZStW at 765.
36. The now superseded Preliminary Draft of the French Penal Code of 1976 also evidenced this trend to abandon the double track system. (Editors' footnote).
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(1966), and in article 7 of the European Convention on Human Rights. As the Soviet Union has also accepted this principle in article 6 of the 1958 Fundamental Principles of Criminal Legislation, with all socialist states following, there are now only a few countries that form an exception. Thus, the Rechtsstaat has found a broad base in the international field upon which the courts must now erect an effective protection for the individual.

B. The Principle of Decriminalization

The recognition that criminal law affords only one possible method of social control has, on the basis of comparative law, led to an internationally recognized guiding principle of criminal law reform; namely, that criminal law represents the ultimate means of preserving legal order (the ultima ratio rule).

The international tendency toward the limitation of criminal law extends far beyond the realm of petty crime. The introduction of impunity for abortion during the first twelve weeks after conception (the Fristenlösung) signified decriminalization in the form of the most severe intrusion on the fundamental character of criminal law to date. The fact that such traditionally-minded countries as Austria, France, Italy, and, initially, the Federal Republic of Germany, followed a development begun in Sweden, England, and the United States—even after internal battles—indicates the strength of the argument taken from comparative law against the criminal nature of abortion and in favor of the transition to new, presently untried forms of protection of one of the highest legal interests. In Germany, however, the Federal Constitutional Court declared the Fristenlösung void due to its violation of the fundamental right to life. This eventually led to the new section 218a of the Penal Code which allows abortion on specified grounds (the Indikationenlösung), but which also contains wide openings permitting legal abortion on other grounds. For all practical purposes, this approach means that almost nothing is left of criminal liability for abortion. By comparison, the Austrian Constitutional Court and the French Conseil constitutionnel have rejected the view that the Fristenlösung...
tenlösung violates the fundamental right to life.\textsuperscript{40} Despite these differences, it is possible to say that the three countries are working along the same lines.

Distinctive differences are, however, apparent in the treatment of petty crime. In the Federal Republic of Germany, a procedural solution has been introduced for petty offenses; the prosecuting authorities may stay criminal proceedings in return for the fulfillment of certain conditions (section 153a of the Code of Criminal Procedure). This solution is modeled on American examples of the "diversion" or "pre-trial probation" type and calls to mind the Belgian \textit{classement sans suite surveillé}.\textsuperscript{41} By contrast, the principle of compulsory prosecution enjoys a hallowed position in Austria. For the first time in Austrian legal history, the Austrian legislature has adopted the idea of dispensing with a reaction to petty offenses, now firmly established in the substantive criminal law (section 42 of the Austrian Penal Code).\textsuperscript{42} In France, the prosecuting authorities have a free hand in petty cases at the preliminary investigation stage through operation of the discretionary principle. The most recent legislation in France has introduced a new approach for trial proceedings which lies on the border between substantive criminal law and criminal procedure. After the accused has been found guilty, the court can postpone sentence if it has the impression that the accused is on the way to social rehabilitation, that he will make good the damage suffered, and that the disruption of peaceful legal relations resulting from the crime is subsiding. At the subsequent hearing the court can refrain from passing sentence, sentence the accused, or postpone the decision again (article 469(1) of the Code of Criminal Procedure).\textsuperscript{43} The French solution actually extends beyond the realm of petty crime, although in practice, it will remain confined to minor offenses.

C. The Fight Against International Crime

It is not only decriminalization which illustrates an internationally

\textsuperscript{40} For the reasons, see Jescheck, \textit{Das neue deutsche Strafrecht im internationalen Zusammenhang}, 1975 MAX-PLANCK-GESELLSCHAFT JAHRBUCH 56.


\textsuperscript{42} See Pallin, \textit{Lage und Zukunftsaussichten der österreichischen Strafrechtsreform in Vergleich mit der deutschen Reform}, 84 ZStW 198, 206 (1972); H. ZiPF, \textit{Die mangeldne Strafwürdigkeit der Tat} (1975).

\textsuperscript{43} See also Pradel, \textit{Le recul de la courte peine d'emprisonnement avec la loi n° 75-624 du 11 juillet 1975}, 1976 \textit{RECUET DALLOZ CHRONIQUE} 63, 70; G. Teufel, Reformen zur Ersatzung der kurzen Freiheitsstrafe in Frankreich, (Diss. Freiburg i. Br. 1978).
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recognized guiding principle of criminal law reform, but also its converse: the common fight against international crime, crime which threatens the very basis of civilization. The legal prerequisite for this has long existed in international criminal law in the form of the universality principle. Recently, however, comparative criminal law has also led to the strengthening of the substantive criminal law of states for the purpose of protecting supra-national cultural interests. Examples are the suppression of terrorism, the prosecution of drug misuse, and environmental protection.

The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of December 16, 1970, which imposes a strict duty of punishment on the contracting states, is directed against terrorism (among other goals). In accordance with the Convention, the Federal Republic of Germany enacted section 316c of the Penal Code which deals with attacks on air traffic. France enacted article 462 of the Penal Code on the détournement d'aeronef at an even earlier date and Italy passed a law against crimes contro la sicurezza della navigazione aerea in 1976. The Convention further provides for the inclusion of hijacking in every extradition treaty in force between states party to the Convention. Obviously this does not exclude the grant of political asylum outside the territory of the state of registration of the aircraft.

The European Convention of 1977, concluded in the face of a growing menace, is aimed at terrorism itself. This treaty provides that acts of terrorism, including aircraft hijackings in accordance with the Hague Convention, shall not be regarded as political offenses for the purposes of extradition. In cases where the offender is not extradited, the Convention imposes a duty upon the state to punish (aut

47. “against the security of aerial navigation.” (Editors’ footnote).
The right to asylum is reserved only for cases where the danger of prosecution for racial, religious, national, or political reasons arises. As between member states of the Council of Europe, this appears to be unobjectionable.50

In the field of substantive criminal law, states are also beginning to adapt to the threat posed by terrorism. The new provision penalizing membership in a terrorist association (section 129a of the Penal Code) in the Federal Republic of Germany finds its echo in other countries. Thus, in England, the Prevention of Terrorism Act (1976) makes membership in the Irish Republican Army a criminal offense. In France, conspiring against the authority of the State (article 87 of the Penal Code) and, in Italy, the associazione per delinquere51 (article 416 of the Penal Code) and the banda armata52 for the commission of crimes against the internal security of the State (article 306 of the Penal Code) are illustrations of similar legislation. In the United States, there is the offense of criminal conspiracy (which nevertheless requires an "overt act") and, in Sweden, conspiracy to commit murder, manslaughter, or inflict grievous bodily harm (chapter 3, section 10, together with chapter 23, section 2 of the Penal Code).

The suppression of drug abuse is an area where international cooperation has been in progress since the beginning of the century.53 In this field, states have always applied their criminal law even if therapeutic concepts regarding drug addiction have recently moved to the forefront.54 The present result achieved by this international co-operation takes the form of the Single Convention on Narcotic Drugs of 196155 and the Convention on Psychotropic Substances of 1971.56 Both

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51. "Criminal association." (Editors' footnote).
52. "Armed band," as in conspiracy. (Editor's footnote).
54. For the suppression of drug abuse see the following materials of the Budapest Congress of 1974: Kreuzer, Der Drogenmißbrauch und seine Bekämpfung, 86 ZStW 379 (1974); Herrmann, Der Drogenmißbrauch und seine Bekämpfung, 86 ZStW 423 (1974) (German reports); Mueller, Bassiouni, & Adler, L'abus de drogues et sa prévention, 44 REVUE INTERNATIONALE DE DROIT PÉNAL 69, 123 (1973); Herrmann, Die Verhandlungen der II. Sektion über das Thema "Der Drogenmißbrauch und seine Bekämpfung", 87 ZStW 458, 466, 492 (1975).
treaties impose, in articles 36 and 22 respectively, a duty of punishment on states, including the duty to punish the unlawful "possession" of drugs for personal use. In the Narcotics Law of January 10, 1972, the Federal Republic of Germany considerably intensified its repressive reaction to drug abuse and, in so doing, has made its penal sanctions similar to those of neighboring countries. Consequently, West Germany no longer presents the same attraction to international dealer circles as was previously the case. In conformity with the law in France and in many other states that are parties to the Convention, the unlawful possession of narcotics is proscribed under German law (section 11, para. 1, no. 4). The criticism of this provision neither takes into account the duty of punishment imposed by international law nor the underlying reason for the provision, namely, that only by prohibiting possession can the public effectively be protected against dealers. In Italy, however, the possession of *modiche quantità* of drugs for personal use is exempt from prosecution. In accordance with article 36 of the Single Convention on Narcotic Drugs, the Federal Supreme Court, citing the universality principle, applied German law to a Dutch drug dealer who had brought more than ten kilograms of hashish into Germany from the Netherlands. The criticism that this judgment aroused in a section of the Dutch press is without foundation, for the universality principle is recognized in relation to the suppression of drug trafficking. Furthermore, hashish is acknowledged to be covered by the international drug prohibition.

Environmental protection as the subject of urgent statutory and penal regulation has strongly intruded on public awareness today. The necessity of international co-operation in this field is being increasingly recognized. Still, international treaties fail to impose sufficient

58. For the reasons, see Bundestags-Drucksache VI/1877 at 5.
59. "Moderate quantity." (Editors' footnote).
64. See papers by Oppermann, Steinberger, & van Edig, in *Umweltschutz und Internationale Wirtschaft*, 5, 25, 45 (1975); M. Bothe, *Ausländisches Umweltrecht* (contains foreign legal regulations in environmental law in German translation since 1971).
duties on states to punish for environmental offenses. Neither do the conventions on the prevention of pollution of the sea, which represent an extensively developed subject-matter in international law, contain adequate penal provisions.\textsuperscript{65} It is, however, urgently necessary—as the frequent violations of existing provisions show—to encourage contracting states to prosecute serious violations on the basis of the universality principle and in accordance with penal provisions that reflect the highest degree of uniformity possible.

This state of affairs may be explained by the fact that the role of criminal law in the protection of the environment is not yet settled. In this field, criminal law definitely does not hold the key position it holds in the case of terrorism and is probably of less significance than is the case with the suppression of drug offenses. Even so, existing measures really cannot be dispensed with. As Tiedemann states, criminal law is "secondary" in relation to other coercive measures in this field; it depends on non-penal regulation and is consequently "ancillary"; and, finally, it must be "complementary," that is, it must meaningfully supplement other areas of the legal system.\textsuperscript{66}

German penal measures relating to environmental protection came into existence without any substantial contribution from comparative law. However, there has recently been a decision of the Committee of Ministers of the Council of Europe of July 28, 1977 on the importance of criminal law for environmental protection,\textsuperscript{67} in which a harmonization of the penal law relating to environmental protection is envisaged. The German criminal law of environmental protection is scattered in a multitude of supplementary laws (\textit{Nebengesetze})\textsuperscript{68} which also contain the administrative legal machinery for the control of various environmental stresses and strains. The most important laws are

\begin{itemize}
\item \textit{See also}, Noll, \textit{Strafrechtlicher Umweltschutz}, Schweizerisches Umweltrecht, 393 (1973); W. Burhenne & R. Mücke, \textit{Internationales Umweltrecht} (contains the multilateral agreements since 1974).
\item 68. The draft of an amendment to the Criminal Code is actually under examination.
\end{itemize}
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the Water Supply Law,69 the Refuse Disposal Law,70 and the Federal Intromission Protection Law.71 All of these laws contain both genuine penal sanctions and mere administrative monetary sanctions in accordance with the characteristic division in German law of offenses into crimes (Straftaten) and administrative infringements (Ordnungswidrigkeiten).

Comparative criminal law is, however, also beginning to extend to the field of environmental protection. Thus, a Franco-German symposium discussed the protection afforded by civil, criminal, and public law against traffic noise in Trier in 1977.72 The entire field of environmental protection through the application of criminal law was on the agenda as the subject for section II of the XIIth International Congress on Penal Law in Hamburg in September 1979. The decisive principles for the correct determination of the role of criminal law in relation to other areas of the legal system in conserving the environment were elicited from the comparison of different domestic systems of criminal law.73

II. THE USE OF COMPARATIVE CRIMINAL LAW ON THE REGIONAL LEVEL

On a regional level, comparative criminal law is not confined to individual topics but influences the entire field of criminal law reform. Examples may be seen in the work of the Council of Europe, in the use of comparative criminal law as a means of criminal law reform in the Anglo-American legal family, and in the preparation of the Model Penal Code for Latin America.

A. The Work of the Council of Europe

Since the Council of Europe was formed in 1949, it has intensively studied and encouraged comparative criminal law.74 The European

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72. The papers of Peter Cramer, Hermann Soell, Emmanuel du Pontavice, and Jean Lamarque on Schutz gegen Verkehrslärm have been published in 89 ARBEITEN ZUR RECHTSVERGLEICHUNG at 9, 45, 97, and 27 respectively (A. Metzner ed. 1978).
73. See the publication of the proceedings in ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, XIIème CONGRÈS INTERNATIONAL DE DROIT PÉNAL (Hamburg, Sept. 16-22, 1979), Actes du Congrès, at 151-231 (discussion), 541-52 (resolutions).
Committee on Crime Problems, founded in 1958, and its subcommittees have been primarily responsible for this work. The treaties on the harmonization of the administration of criminal justice, ranging from the European Convention on Extradition (1957) to the European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle (1976) are outstanding examples of this work, but will not be discussed here.\(^7\) European comparative law has also attained increasing importance in the field of substantive criminal law reform\(^6\) and is pursued on different levels in the Council of Europe. Individual scholars have published scientific reports which contain annotated collections of the legislation of member states relating to specific criminal law problems as well as expert opinions on the question of the need to reform these laws.\(^7\) In addition, the European Committee on Crime Problems and its subcommittees have prepared comparative studies dealing with questions relating to the modernization of penal policy.\(^7\) The Resolutions of the Committee of Ministers on problems of criminal law reform must also be mentioned. Occasionally these Resolutions are accompanied by comparative reports of the Criminal Law Committee, for example, the Resolution on the Treatment of Long-Term Prisoners, or the Resolution on Certain Alternative Penal Measures to Imprisonment (both 1976).\(^7\) At present the Committee of Ministers is preparing resolutions on road traffic penal law, including the Resolution on Hit-and-Run Offenses and the Resolution on the Unauthorized Use of Motor Vehicles. In addition, a skeleton law covering road traffic offenses is to be prepared.

\(^7\) See Activités, supra note 74, and the review in H.-H. Jescheck & K. Löffler, supra note 20.

\(^6\) The Council of Europe regularly publishes material for comparative law in the Bulletin sur les activités législatives (with the headings Droit pénal and Procédure pénale et traitement des délinquants) and in the Exchanges d'informations sur les recherches en droit européen, Vol. 8 of which is currently being prepared. (Council of Europe, Directorate of Legal Affairs, Division of Crime Problems, Strasbourg).

\(^7\) See, e.g., M. Ancel, La peine de mort dans les pays européens (1962); H.-H. Jescheck, Dispositions pénales des états membres du conseil de l'Europe concernant l'incitation à la haine raciale, nationale et religieuse (1968); G. Arzt, Le droit au respect de la vie privée affecté par les réalisations scientifiques et techniques modernes (1977).


\(^7\) The decisions of the Committee of Ministers on criminal law matters are published in Council of Europe, Resolutions of the Committee of Ministers Relating to Crime Problems, Book I (1970), Book II (1973), and Book III (1977).
Finally, mention must be made of the conferences organized by the Council of Europe since 1963 and held for the directors of criminological research institutes. Symposia were held in 1974 on drug crimes, in 1976 on economic crime, and in 1977 on the compensation of victims of crime. The United Nations, too, has organized regional conferences in different parts of the world on a comparative basis: for example, the seminar on the prevention of the increase in juvenile delinquency, held in Frascati in 1962.

B. Anglo-American Criminal Law Reform

Criminal law reform in the Anglo-American legal family is based on a comparative criminal law which is substantially limited to English common law and to the statutory law which stems from it. Attention is seldom paid to continental criminal law. However, on certain points, particularly where the common law is obsolete or unproductive, continental criminal law is considered. If “limitation” has been mentioned here, one should obviously not forget that within the Anglo-American legal family itself, a prodigious mass of material with a comprehensive reservoir of model solutions is available for the purposes of criminal law reform. Reform commissions throughout the world are, for reasons of common tradition, language, and legal development, acquainted to a certain extent with the entirety of this law. The statement of the Australian Attorney General Ellicott, at the opening of the plenary conference of the eleven Australian Reform Commissions in Canberra in 1976 is perhaps typical: “None of us should forget the indebtedness we all have to the common law of England and the principles which it secures.”

In England, the application of comparative law for the purpose of reform even has a statutory basis. Section 3(1) of the Law Commissions Act of 1965 provides that “[i]t 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.” Thus, the English Law Commission in its work on criminal law reform refers constantly to legal developments in Commonwealth countries and in the United States and, on

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some questions, (for example, attempt, conspiracy, and incitement) also
consults continental European law. The following comment in the
last Annual Report of the Law Commission is instructive: “We have
indeed no doubt that the exchange of ideas and information is one of
the most fruitful forms of co-operation between Commonwealth law
reform agencies. It is our policy to facilitate and sustain such an ex-
change by every means in our power.” The Advisory Council on the
Penal System made inquiries in continental Europe about specific
points of penal policy when considering questions of reform. Informa-
tion was, for instance, gathered on the day-fine system in Scandinavian
and on the weekend enforcement of sentences for juveniles in Belgium,
Germany, and the Netherlands. Comparative law as the basis of re-
form in the British Commonwealth is institutionalized in the Common-
wealth Law Conference, whose fifth meeting took place in Edinburgh
in 1977, and in the Conference of British Commonwealth Law Reform
Commissions, last held in August 1977 and attended by representatives
of twenty-seven legal systems within the British Commonwealth.

The American Model Penal Code (1962) is a work resulting from
intensive inter-American comparative law which includes English com-
mon law and, on some points, continental European law. It is the
result of ten years of extremely painstaking work by the American Law
Institute, an institution founded in 1923 and staffed by judges, lawyers,
and university professors. To the extent that the solutions of this model
draft (including the reasoning in the thirteen Tentative Drafts) have
been studied and considered for the purpose of recodification in indi-
vidual states—and this has been to a large extent the case—one can say
that criminal law reform in individual states has been the result of com-
parative law. As regards prison reform, European models have like-
wise been taken into account.

84. See Law Commission, Working Paper No. 50, Codification of the Criminal
Law, General Principles: Inchoate Offences—Conspiracy, Attempt and Incite-
ment 115 (1973).
Law Commission Report].
86. Report of the Advisory Council on the Penal System, Non-custodial and
88. Model Penal Code (draft of May 4, 1962). German translation with introduction
and commentary by R. Honig, entitled: Entwurf eines amerikanischen Muster-
strafgesetzbuches (1965).
89. See Wechsler, supra note 12, at 419.
90. N. Morris, The Future of Imprisonment 85 (1974), with references to the insti-
tutions in Herstedvester and Utrecht.
C. Model Penal Code for Latin America

In Latin America, too, criminal law reform has been the outcome of considerable work in comparative law. In 1971 the General Part of a Código penal tipo para Latinoamérica91 was accepted by the sixth plenary meeting of the Editorial Commission in São Paulo.92 The idea of a model law for criminal law reform in the whole of Central and South America, comparable to the American Model Penal Code, can be traced back to a suggestion made in 1962 by Eduardo Novoa Monreal, who was at that time Director of the Instituto de Ciencias Penales of Chile.93 Material for the Model Penal Code was gathered by eight national working parties who processed it to completion in joint editorial sessions. Thus, the draft may be seen as a representative statement, based on comparative law, of the experts from an entire region of criminal law on the topical problems of criminal law reform. That this work could succeed despite the diversity of the political scenery can be attributed to Latin America's still strong awareness of unity which is held together by descent, tradition, geography, language, custom, and interests. The diversity of the systems of criminal law between the Rio Grande and Tierra del Fuego has also proved to be no obstacle to synthesis. The countries of Latin America still belong in a broad sense to the continental European legal family as regards the spirit and system of their criminal law in that they are the special offspring of their mother countries, Spain and Portugal. The influence of Italy which, since the heyday of positivism, has exerted a strong effect on the criminal law science of Latin America must be mentioned as well. Furthermore, the weight of modern German penal law theory and of the drafts for a new Criminal Code that led to the existing General Part in the Federal Republic of Germany can be felt in the Model Penal Code. Three Latin American countries—Costa Rica in 1970, Bolivia in 1972, and El Salvador in 1973—have in the meantime reformed their penal codes on the basis of the Model Penal Code. Mexico followed it in its reform of the conditional sentence. The last plenary session of the Editorial Commission on the Special Part of the Model Penal Code was

91. “Model penal code for Latin America.” (Editors’ note).
held in Madrid in 1977. Spain and Portugal were admitted as members of the Commission as an outward sign of prominent ties with the law of the mother countries.

III. THE USE OF COMPARATIVE CRIMINAL LAW IN THE REFORM OF INDIVIDUAL LEGAL INSTITUTIONS

The significance of comparative law for criminal law reform on the third level, namely the modification of particular legal institutions in accordance with the demands of modern penal policy, will be illustrated by three examples taken from German reform legislation. These are the uniform type of imprisonment, the day-fine system, and the warning combined with a suspended fine (*Verwarnung mit Strafvorbehalt*).

A. The Uniform Type of Imprisonment

The author suggested—with reference to England and Sweden—a transition to the uniform type of imprisonment at the Great Penal Law Commission in 1954.\(^4\) At that time the suggestion did not succeed. The 1962 Draft did not depart from the distinction between three types of imprisonment (section 43). On the other hand, the Alternative Draft (1966) argued in favor of a uniform type of imprisonment and in so doing relied on foreign law (section 36).\(^5\) In 1963 the Criminal Law Reform Committee of the German Federal Parliament was still advocating maintenance of the distinction between penal servitude and imprisonment.\(^6\) This position was adopted with reference to countries—especially Austria and Switzerland—that, like the Federal Republic of Germany, acknowledge a retributive criminal law based on guilt. However, three years later, after discussion of foreign law, *inter alia*, and after discussion of the distinction between *ergastolo*\(^7\) and *reclusione*\(^8\) existing in Italian law at that time, the compromise solution of the Austrian Draft was accepted. This Draft provided for imprison-

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\(^4\) See H.-H. Jescheck, 1 Niederschriften über die Sitzungen der Grossen Strafrechtskommission 81 (1956) [hereinafter cited as Niederschriften].


\(^6\) See Bericht des Sonderausschusses Strafrecht in der IV. Wahlperiode, Bundestags-Drucksache IV/650 (Report of the Special Committee of the Federal Assembly) [hereinafter cited as Bericht]. For the previous history see Protokolle IV at 183, 191 (Dreher).

\(^7\) "Imprisonment for life." (Editors' footnote).

\(^8\) "Imprisonment." (Editors' footnote).
ment only, but it designated a term of imprisonment exceeding five years as "severe imprisonment" (schweres Gefängnis). Only during the second reading in 1968 did the Criminal Law Reform Committee turn to a uniform type of imprisonment, giving its reasons for having departed from the Austrian compromise solution (as indeed the Austrian Draft itself had done). The Committee said in its report that "the point of view taken in penal policy" had changed in the meantime. Today, one can say that this is true not only of Germany; the future belongs to the uniform type of imprisonment in foreign law as well.

B. The Day-Fine System

The most important evidence of the influence of comparative criminal law on criminal law reform in Germany is the reorganization of the fine in accordance with the Scandinavian system of imposing fines on a daily rate basis for a specified number of days. The Norwegian Getz, the Dane Torp, and the Swede Thyrén are regarded as the intellectual originators of the day-fine system. However, models for the system appear in Brazilian and Portuguese legislation as early as the nineteenth century. The daily rate system for imposing fines has held good for decades in Finland (since 1921) and in Sweden (since 1931). In Denmark, where it was introduced in 1939, it is not operative in secondary criminal law (Nebenstrafrecht) and may possibly be abolished from the Penal Code too. It was never adopted in Norway.

The German Penal Law Commission decided in favor of the imposition of fines according to this method at an early stage because it relied both on a comparative report on foreign law and on a general impression of the obviously positive experience of the Scandinavian countries. Admittedly, the Commission made its decision without previously investigating the practical operation of this fining system in

99. See Protokolle V at 497, 502, 872.
100. See Protokolle VII at 2134. See also 1 Strafvollzugskommission, Tagungsberichte 145 (1967).
101. Erster schriftlicher Bericht, Bundestags-Drucksache V/4094 at 8.
102. See the survey in H.-H. Jescheck, supra note 41, at 622.
104. For the movements toward abolition which do not affect Sweden and Finland, see discussion of Waaben, in Driendl, Bericht über das Kolloquium "Probleme der Geldstrafe nach der Reform" 88 ZStW 1137 (1976).
105. Finkler, Vermögensstrafen und ihre Vollstreckung, 2 Materialien zur Strafrechtsreform (part 1) 108 (1954).
northern Europe. Both the 1962 Draft (section 51) and the Alternative Draft (section 49) advocated the day-fine system, relying on Finland, Sweden, and Denmark. The Criminal Law Reform Committee of the Federal Parliament concurred, and the system was introduced as part of the major reform of criminal law in 1975 (section 40 of the Penal Code). On the whole, the new rules seem to be succeeding; the number of fines imposed increased from 63% of all judicial sentences in 1968 to 84% in 1975, and the number of terms of imprisonment enforced in lieu of a fine is notable, amounting to 4% of all fines imposed. This figure must be increased by 1.7%, however, due to partial enforcement.

The judiciary has gradually overcome the difficulties associated with the day-fine system, even if it is necessary to make the critical observation that the courts do not adequately inquire into the personal and economic circumstances of the offender (section 40, paragraph 2, sentence 1 of the Penal Code). On an international level, however, the success of the daily rated fine system has remained modest. Apart from the Federal Republic of Germany, only Austria and, recently, Hungary have introduced it. During the reform deliberations in England, France, and the Netherlands, it was investigated but rejected. In Italy only a few teachers of criminal law have considered it.

C. Warning Combined With Suspended Fine

New types of sanctions, being neither imprisonment nor fine, are to be found in foreign law. Thus, in England there is the "day train-
ing centre” as an implementation procedure for probation, and there is “community service.” In France there is the use of disqualification from a specific profession, disqualification from driving, and confiscation of a motor vehicle, all of which are used as main penalties. In addition, for petty offenses judgment may be deferred or punishment not imposed at all. In Italy there is the libertà controllata of the 1977 Draft, and in the German Democratic Republic there is the probation order (Verurteilung auf Bewährung: section 33 of the East German Penal Code).

The Federal Republic of Germany uses disqualification from driving as a secondary penalty (section 44 of the Penal Code) and, subject to strict conditions, the imposition of punishment may be disregarded (section 60 of the Penal Code). Genuine probation was not introduced along with the suspended sentence. The warning combined with a suspended fine, which consists of a judicial censure on conviction and the reservation of the right to impose a predetermined fine up to 180 daily units (section 59 of the Penal Code), is the only excursion into new penal political territory in the German reform. Its nearest counterpart is “binding over in a fixed sum” allowed under English Common law. However, it does not go as far as deferment of sentence in France or the East German probation order since only a fine and not a term of imprisonment may be suspended during the operational period. Indeed, Welzel, relying on the English examples of probation and conditional discharge, suggested to the West German Penal Law Commission that it should adopt warning with a suspended right to punish—including the right to impose a sentence of imprisonment. However, his point of view did not prevail. The 1962 Draft rejected the warning because of doubts about general deterrence. On the other hand, the Alternative Draft put it to comprehensive use as a general sanction for first offenders for prison terms up to one year (section 57).

The Criminal Law Reform Committee of the Federal Parliament

112. See also A.R. Cross, supra note 11, at 15, 27.
113. See Pradel, supra note 43 at 67.
114. “Controlled liberty.” (Editors’ footnote).
116. See also A.R. Cross, supra note 11, at 14.
117. See Niederschriften, supra note 94, at 104, 188, 195.
118. See the reasoning in the 1962 Draft (Entwurf 1962) at 196.
exhaustively assessed—including reference to English law—the value of avoiding passing sentence against the disadvantage of weakening general deterrence. The principal advantage of a warning as against the provisions of English probation was considered to be the fact that the suspended punishment is determined immediately in the case of a warning, and not after the failure of the offender to keep out of trouble during the probationary period. Where the question of sentence is being determined, the latter course of action must lead to the consideration of factors unrelated to the degree of culpability arising from the offense. In spite of the original doubts of the Ministry of Justice, the Criminal Law Reform Committee decided in favor of the warning as early as 1964, and initially extended it even to terms of imprisonment up to six months. Only at a later stage did the solution involving the fine alone prevail—in view of the restriction of imprisonment by section 47 of the Penal Code. German courts hardly make use of the warning, probably because the imposition of a fine on the offender is scarcely to be regarded as a social handicap. Similarly, in France, the much more extensive opportunities afforded by the reform law of 1975 have only hesitatingly been used in practice. Reasons involving tradition and the additional work load as well as doubts arising from the question of general deterrence may have been decisive here. While binding over in a fixed sum is rarely encountered in England, conditional discharge is used a great deal.

IV. CONCLUSION

Comparative criminal law is a branch of criminal law science and is thus a normative science. It can present a picture of foreign legislation and judicial practice for the purpose of criminal law reform, but its acquaintance with the practical application, actual success, and evaluation of the criminal law abroad does not extend beyond official crime

119. See Protokolle IV, supra note 96, at 421.
120. See Bericht, supra note 96, at 16.
121. See Protokolle V, supra note 99, at 904.
122. Id. at 2183; Zweiter schriftlicher Bericht (second written Report), Bundestags-Drucksache 4095 at 24.
124. See G. Teufel, supra note 43.
125. In England conditional discharge was used in magistrates' courts for indictable offenses between 1966 and 1975 for 12% to 14% of all convicted male offenders and for 19% to 20% of all convicted female offenders. Home Office, Criminal Statistics, England and Wales 31 (1975).
and administration statistics. Thus, a comprehensive grasp of the full significance of foreign criminal law requires constant co-operation between comparative criminal law and comparative criminology. Comparative criminal law has already been in existence a long time, whereas comparative criminology is still a young, although fully developing, science. Their integration lies in the future.


127. The numerous topics handled comparatively in the conferences for directors of criminological research institutes are listed in ACTIVITÉS, supra note 74, at 135.