

# Table of Contents

	Margin number
<b>Part I. Development and Concepts of Comparative Criminal Law: Where we Stand</b>	
A. Setting the Scene – Objectives .....	1
B. History and Significance of Comparative Criminal Law .....	5
1. Developmental phases .....	5
2. Increasing importance and emancipation of comparative criminal law .....	20
C. Variety of Concepts, Terms and Models .....	29
D. Aims – Methods – Prerequisites: Differentiating, Defining and Integrating .....	37
E. Comparative (Criminal) Law as “Purpose-free” Science? .....	45
 <b>Part II. Aims and Functions of Comparative Criminal Law: Why Explore Foreign Law</b>	
A. Theoretical Comparative Criminal Law .....	52
1. Broadening the horizon through foreign law – reflection on one’s own law .....	54
2. Basic research in comparative criminal law .....	57
a) Foreign law presentation (“Auslandsrechtskunde”) versus foreign law comparison (“Rechtsvergleichung”) .....	57
b) Micro comparison – macro comparison – basic research .....	60
c) Universal comparative criminal law – Claims and achievability .....	72
d) “Systematic comparative criminal law” – “Structural comparison” .....	82
3. Facilitating communication and promoting consensus by comparative criminal law .....	91
4. Critical control and innovation function of comparative criminal law .....	95
5. Preparatory function of comparative criminal law for practical purposes .....	96
B. Judicative Comparative Criminal Law .....	97
1. Direct consideration of foreign law in the application of law .....	101
a) Foreign law import .....	102
(i) “Authentic” – “Implementing” application of foreign law .....	103
(ii) “Limiting” application of foreign law .....	104
(iii) “Blanket-type” application of foreign law .....	105
(iv) Application of foreign law by “completing the offence definition” .....	106
(v) “Incorporated international crimes” .....	107
(vi) “Subsidiary” application of foreign law .....	108
b) Dependence of punitive power on foreign law .....	109
(i) Relevance for mistake of law .....	110
(ii) Dual criminality .....	111
(iii) Mutual criminality .....	112
(iv) Transnational prohibition of multiple prosecutions .....	113
(v) Principle of complementarity .....	114
2. Judicial finding of justice and further development of the law through comparative criminal law .....	115
a) Horizontal-transnational Broadening of the Field of Vision .....	116
(i) Comparative criminal law as an “interpretation aid” .....	117
(ii) Recourse to foreign “parent law” .....	118
(iii) Filling gaps – further development of the law .....	119

*Table of Contents*

b) Supranational influences on national criminal law .....	121
(i) Priority of European Union Law .....	122
(ii) Interpretation favourable to international law .....	124
c) Influences of national law on supranational criminal law .....	125
(i) Interpretation of international criminal law through reference to national law .....	126
(ii) Recourse to general principles of law .....	127
(iii) Development of a supranational criminal law dogmatics .....	129
3. Executory comparative criminal law .....	130
C. Legislative Comparative Criminal Law .....	133
1. Aims and tasks .....	135
a) Optimization and modernization of one's own national criminal law .....	135
(i) Optimization .....	136
(ii) Modernization .....	138
(iii) Stockpile of solutions – (no) self-service shop .....	144
b) Transnational adaptations of criminal law .....	146
(i) Assimilation .....	147
(ii) Harmonization .....	148
(iii) Unification .....	149
c) The development of universal and supranational criminal law .....	150
(i) Identification of the highest legal principles .....	151
(ii) Preparation of international conventions .....	152
(iii) Optimizing international criminal justice .....	153
2. Levels and ranges of regulations .....	157
a) Differences in scope .....	158
(i) Selective changes of law .....	158
(ii) Structural changes .....	159
(iii) Model Penal Codes .....	162
(iv) New transnational judiciaries .....	163
b) Different levels of regulation .....	164
(i) National level .....	165
(ii) Regional level .....	167
(iii) Universal level .....	169
(iv) Supranational level .....	171
D. Evaluative-Competitive Comparative Criminal law .....	173
1. History of concepts .....	174
2. Different aspects of evaluation .....	178
3. Evaluation as part of comparative law .....	187
4. From evaluative to competitive comparative law .....	195
a) Controlling and warning function .....	200
b) Legitimizing function .....	204
c) Gap-filling function .....	207
d) Function of critical initiative and innovation .....	208
e) Optimizing and modifying function .....	210
f) Harmonizing function .....	213
g) Preference-setting function .....	214

## Table of Contents

### Part III. Methodology: How to Conduct the Comparison of Criminal Law

A. Connecting Aims and Methods .....	219
1. Dependence of the method on the (set) objective – Openness of methods .....	219
2. Guiding principles – Ways of approach .....	223
B. Phases of Investigation – Steps of Examination .....	229
1. Formulation of the task – Working hypotheses – Catalogue of questions .....	231
a) Determining the purpose to be pursued and at what level it is to be carried out .....	232
b) Questionable targets and alternatives .....	237
(i) Claim to universality .....	238
(ii) Legal-internal methods of comparison versus culturally-oriented comparative law .....	241
(iii) “Question driven” versus “theory driven” .....	242
c) Different(ly) appropriate methods of comparison .....	243
(i) Legalistic normative-institutional approach .....	244
(ii) Socio-functionalist directions .....	247
(iii) Cultural comparison .....	250
(iv) Functional equivalence .....	253
(v) Structural dimensions of comparison .....	256
(vi) Summary of what to establish for the determination of the comparative task .....	262
d) Working hypotheses – Catalogue of questions .....	263
(i) Thematical aspects .....	264
(ii) In perspective view .....	268
(iii) Width and depth dimension .....	270
(iv) Pretest .....	273
2. Choice of countries to be compared .....	276
a) Orientation towards the comparative objective – Selection criteria .....	276
(i) No one-sided choice – no “numerus clausus” .....	277
(ii) Rules of thumb .....	281
(iii) Legal families .....	283
b) Exemplification through comparative criminal law projects .....	286
c) Pretest – Pilot study – Corrective changes .....	290
3. Preparation of the country reports .....	295
a) Starting point – Perspective – Integral/holistic approach .....	296
b) Covering the relevant law .....	299
c) Inclusion of criminology and other empirical sciences .....	302
d) Cultural background – Interrelationship of law and culture .....	304
e) Case-based comparative method .....	307
f) Computer-assisted comparison .....	309
4. Comparison – Cross-section – Creation of models .....	310
a) Binational comparison .....	311
b) Multinational cross-section .....	314
c) Creation of models .....	318
5. Evaluation – Recommendations .....	322
a) Dependence on the comparative objective – Steps of evaluation .....	322
b) Criteria of evaluation .....	329
c) Prerequisites for comparison .....	333

## Table of Contents

C. Personal Requirements and Institutional Framework Conditions .....	337
1. Personal requirements .....	338
a) Comparatists – Cooperation .....	338
b) Professional qualifications .....	347
c) Personal integrity .....	351
2. Institutional equipment .....	354
D. A Guideline for Comparative Work in – primarily but not only – Criminal Law .....	359
0. Guiding principle throughout: Orientation of method and individual work steps towards the objective of the legal comparison .....	360
1. First working step: Goal setting .....	364
1.1. Choice and formulation of the comparative objective .....	366
1.2. Development of a catalogue of questions based on working hypotheses .....	367
2. Second working step: Choice of countries .....	368
2.1. Basic direction .....	369
2.2. Number of countries to be included .....	371
2.3. Preliminary study – Subsequent improvements .....	377
3. Third working step: Country reports .....	380
3.1. Starting point: Perspective – preconceptions .....	382
3.2. Coverage and presentation of the relevant legal matter .....	386
3.3. Inclusion of other sciences or contexts .....	387
3.4. Methodology of investigation .....	388
3.5. Subsequent amendments .....	389
4. Fourth working step: Comparison .....	391
4.1. Catalogue of criteria .....	392
4.2. Binational comparison .....	393
4.3. Multinational cross-section .....	394
4.4. Creation of models – Establishment of basic structures and general legal rules .....	395
5. Fifth working step: Evaluation – Recommendations .....	396
5.1. Options of evaluation .....	397
5.2. Criteria of evaluation .....	398
5.3. Prerequisites for comparison and recommendation .....	399
Part IV. Outlook: What Remains to Be Done .....	400
<b>Epilogue. On the Status of Comparative Criminal Law: An Appraisal of Current Literature</b>	
A. The Emancipation of Comparative Criminal Law .....	412
B. Concepts and Focal Points in Publications on Comparative Criminal Law .....	417
1. Size – Choice of countries .....	418
2. Selection criteria .....	424
3. Basic categories. Teaching material – Foreign law presentations – Comparative theory .....	428
4. Thematic focal points .....	438
C. Concluding Remark .....	444