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MEDITATING THE DIFFERENT CONCEPTS OF CORPORATE CRIMINAL LIABILITY IN ENGLAND AND GERMANY-PHILOSOPHICAL INSIGHTS ON COMPARATIVE LAW

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Comparison has become increasingly important in a globalised world, especially in law. But until today, aims and methods of practical comparative law are vague, subjective, bi-ased–as can be seen on the example of comparisons of the concept "corporate criminal liabil-ity", which does exists in Anglo-Saxon countries, while it is refused in Germany. Not one com-paratist discusses the reasons for the German refusal. Thus, a dialogue between the theoretical "new comparative law" and practical comparatists has to be entered. This article allows practi-tioners to understand the theoretical background of the criticism on comparative law by dis-cussing Nietzsche's thoughts on subjectivity of knowledge, on understanding ourselves through the 'Other', questioning traditional Western philosophy, law and values. It also shows how a more adequate "comparison" could look like, uncovering social, philosophical and eco-nomic backgrounds for the English and German decisions on corporate criminal liability and thus provides understanding instead of mutual evaluation.

Keywords: Comparative Law, Corporate Criminal Liability, Comparison, England, Germany

"Comparative law may have been the hobby of yesterday but is destined to become the science of tomorrow".
(Lord Goff (1997) pp.747 et seq.)

Introduction

Today's world has been deeply affected by globalisation. Different cultures have deepened their knowledge of each other and are forced to create common solutions to worldwide problems. This has lead to an increasing interest in comparing different nations' approaches to common problems – either to improve the own, former solution or to find a compromise if the problem has become international.

Still, one area of comparison has long been neglected: Comparative law (Reimann/Zimmermann, 2006, p.v.; Harding/Örücü, 2002, pp.vii et seqq.). The discipline is affected by many unanswered questions: "What do lawyers do when

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they say that they engage in comparisons? What methods and approaches do they adopt? Does comparison (have to) focus on similarity or difference? […]?" (Reimann/Zimmermann, 2006, p.v et seq.). There have only been few attempts to find an-swers: More than twenty years ago Frankenberg (1985) published his "Critical Comparisons", for example. Since then theorists have engaged in a debate about a "better" comparative law. "Critical Comparison"[1] is influenced by postmodernism, postcolonialism, poststructuralism. It argues that the aims of comparative law are unclear, criticises the legocentrism and eurocentrism of traditional comparisons, and reminds of the cultural or social conditions that allow and create different legal solutions in different countries. But this theoretical debate has not reached the practice of compara-tive law. Most practical comparisons use traditional methods, compare black-letter law instead of the reality of law, do not question the objectivity of their intention, viewpoints or evaluation criteria. They aim to harmonise or improve legal systems without discussing if this undertaking is, in fact, possible.

The following article analyses this gap between theoretical discourse and practical undertakings, based on the assumption, that one possible reason for it is the lack of dialogue between theorists and practitioners. To initiate this dialogue, the flaws and possible improvements of comparative law will, in the following, be discussed not just in theory, but on a practical example.

As example the debate around corporate criminal liability (CCL) will be chosen–for practical and theoretical reasons. Practical reasons are the increasing importance of the question of CCL, on national, European[2] and international level. It has to be answered how to proceed if a German firm with offices in Britain violates British criminal law. On theoretical level, CCL is appropriate to ex-plore comparative law: The many traditional comparisons on the topic[3] provide a solid base for ex-emplifying the limitations of traditional comparison. The topic is, furthermore, closely connected to cultural, social, economic and philosophical concepts, allowing an interesting engagement in the cultural background of legal solutions and in possible ways for comparatists to embrace these differences.

This article will first discuss some failures of traditional comparative law, clarified on some com-parisons of CCL. In the second part, the transition towards a new comparative law will be shown from a theoretical perspective, including some philosophical insights[4] about knowledge. Finally, the insights will be exemplified on some sketches about the cultural background of CCL in England and Germany.

Traditions–pragmatic Comparisons

Comparative law shares the aims, methods, but also difficulties of all comparative disciplines. (Jansen, 2006, p. 306) Many comparisons are biased, the methods

vague and evaluation criteria sub-jective. (Frankenberg, 1985, pp.416 et seqq., Legrand, 1996a).[5]

Traditions in Comparative Law

In its beginnings, the possibility and usefulness of comparative law were undoubted; it even was argued that profound insight into law depends on comparison. Comparison intended to broaden knowledge, to improve legal systems or to harmonise them. The methodology was simple: 'Black letter laws' were described and, mostly on undefined criteria, evaluated. This approach is to be criticised, because it claims to be objective research, while on the other hand the choice of targets of comparison, classifications and the assumption of the likeness of problems are necessarily subjec-tive. Most traditional comparison thus either overrated the solutions of their own law or were over-whelmed by the law of the other (Zumbansen, 2005, p. 1075). This method also suffers from lego-centrism: "The implied adequacy of law to solve what appear to be universal and perennial prob-lems of life in society betrays and underscores … how their [Western cultures; note from the au-thor] notion of law is itself privileged" (Frankenberg, 1985, p.43). Furthermore, traditional com-parisons often lack adequate consideration of cultural, political, social conditions of the countries whose laws they compare.

Traditional Comparative Undertakings about Corporate Criminal Liability

The following practical comparisons about corporate criminal liability (CCL) show the subjectivism of traditional comparison. This indicates that in practice the theoretical debate, which has criticised all these points for over twenty years, is almost irrelevant. CCL is a legal construction for prosecut-ing and convicting collective entities under criminal law. By now it has been implemented into the criminal laws of many countries, like, for example, England. Other countries, such as Germany, refuse its adaptation (Ashworth, 2006, pp. 113 et seqq.). But the legal solution of harmful corporate activities cannot be left to the single nations to deal with, as many corporations act internationally (Beale/Safwat, 2005; Hartan, 2006; Wagner, 1999; Wells, 1995; Wells, 2001a). The attempt to find the best international answer to corporate misbehaviour has led to numerous publications comparing the different legal solutions on this topic. As starting point for comparison one can simply state: In England, corporations can be convicted for different crimes, even if intent is required (Tesco Su-permarkets v Nattrass, [1972] A.C. 153). In Germany only individuals are criminally liable[6]; collec-tives can be fined for violations of administrative law, which excludes moral blame (Mitsch, 2005 §6, recital 2; BVerfGE 27, 18 (33)).

In the original undertakings in comparative law, these findings would already have been the base for comparison, often followed by a vague evaluation. And in some of the actual comparisons on CCL the methodology still has not changed:

Khanna (1996) merely summarises the legal situation of CCL in the U.S., the UK and Germany[7]. He annotates, even before his comparative inquiry, that the "analysis indicates that corporate criminal liability in the United States is far more extensive and less restrictive than corporate criminal liability frameworks in other countries and raises the ques-tion of why these differences have developed" (Khanna, 1996, p. 1488). As he claims to restrain from CCL, this reference seems to intend to strengthen his solution, as argument of the kind 'the others do not do it as well'. This oversees that their solutions could be wrong or all solutions right in their culture. Without further analysis, the enumeration of facts is hollow and can speak neither for nor against any alternatives.

Another example for a problematic comparison is the analysis of Stessens (1994), who already starts with a subjective intention: "This article aims to examine the question of how to punish cor-porate criminality in a comparative perspective" (Stessens, 1994, p. 493, emphasis added). He thus assumes that corporate criminality should exist and aims towards harmonisation. "It [comparing national systems] also creates a 'supranational', European perspective: by highlighting the differ-ences between the respective national solutions to the same question (i.e. how to punish corporate criminality), it may give some hints towards a (European) harmonisation of the legal solutions" (Stessens, 1994, p. 493, emphasis added). This disregards that there could be good reasons for a country to refuse CCL. His evaluation criteria do not become clear. "Comparing national law sys-tems,…, enables us to get a clearer view of the advantages and disadvantages of corporate criminal liability" (Stessens, 1994, p. 493) presupposes that there is one worldwide normative system. His main normative criterion is efficacy, ignoring that several legal systems–like Germany–include other, non-utilitarian evaluation criteria in their decisions. Consequently his conclusion "[t]he only effective way to combat corporate crime is to direct punitive sanctions against corporations" (Stes-sens, 1994, p. 518) is biased.

Slightly more progressive is the examination of Beale/Safwat (2005), contrasting the growing en-actment of CCL-laws in Western Europe with the United States' rise of opposition. They admit: "We acknowledge that there are also other significant factors our article does not discuss–including differences in the history, traditions, and social conditions of the various Western European countries" (Beale/Safwat, 2005, p. 162). Despite of this awareness, the analysis of German law re-mains subjective: The heading of the section is "Movement Toward Corporate Criminal Liability in Germany" (Beale/Safwat, 2005, p.122, emphasis added). It states that Germany has not "over-come" its opposition to the imposition of criminal liability on artificial entities. The administrative fines imposed by the German government are called „quasi-criminal", a term which some German scholars would oppose, and the consideration of the opposing arguments does not represent their influence in the German debate (Lagodny, 1999, pp. 285 et seqq).

The German concern about the "purity" of "blame" and "fault" in criminal law and the German law's emphasis on classifications are mentioned, but not adequately discussed. The study argues that it is "questionable whether the hold-outs will continue to rely on civil or quasi-criminal sanctions" (Beale/Safwat, 2005, p.139, emphasis added). As it is intended to learn from the European approach it should have given greater emphasis to the opponents.

Another study of Wagner (1999) concludes after describing legal situations in different countries, thereunder Germany and England, that "the field of corporate criminal liability is a multi-faceted issue. There are no simple solutions to the problem. […] Another question is whether corporate liability should be criminal in nature, or whether the unique circumstances of punishing a corporate entity merits different approaches. […] it also seems to be clear that a singular approach will not be sufficient to deal with either the conviction of corporations, or the sanctioning of corporations" (Wagner, 1999, p. 10). It is unclear how he reaches this conclusion, because the fact that there are divergent conceptions in different countries could also mean that all of them are right in each country. Even if he means that there is not one right approach on international level–why does he conclude this from the national situations?

All these comparisons show that the theoretical concerns about questionable aims, subjectivism, transparent methodology, integration of cultural and social backgrounds, problems of translation, etc., do not have any visible impact on practical comparisons: The existing practical comparisons make the evaluation of different concepts, the harmonising, and the finding of common solutions more difficult. Of course, on the first view, the best way to evaluate a legal solution like CCL and finding a common way seems to be such a traditional comparison as undertaken by the researchers above. But can these writings really lead to finding the best solution? Can they really convince Germany to give up its position? Or, if the position would be imposed on Germany, would this really solve the social situation or would it always be a foreign, non-sutiable legal concept which would not be accepted and thus not help to regulate the German situation? These open questions show that comparative law has to be revised methodologically. A less biased, broader way has to be found in order to truly compare or at least to understand, before comparison can maybe help to im-prove laws or find international compromises.

Transitions

The analysed flaws of traditional comparative law have led to the movement of Critical Compari-sons, criticising, i.a., monopolisation of certain types of rationality and universalism[9].

Critical Comparisons

Using tools of critical theory, feminism, literary theory or postcolonial theory, Critical Comparisons state that reasoning, language and judgement are determined by cultural, moral, epistemic, linguistic frameworks (Peters/Schwenke, 2000, p.802). Critical Comparisons sometimes even question the essence of comparative law as making it impossible to overcome parochialism, enable distancing, free observers from their cultural disposition.

The debate has been going on for the last twenty years. Already in the first important article[10] Frankenberg (1985) rightly states that "because of comparative legal scholarship's faith in an objectivity that allows culturally biased perspectives to be represented as 'neutral' the practice of com-parative law is inconsistent with the discipline's high principles and goals" (Frankenberg, 1985, p. 411), and criticises comparative law for reinforcing the justificatory construction of domestic reality through silencing the 'Other'. Interestingly he admits that his is not "the whole and true and only story of comparative law past and present" (Frankenberg, 1985, p. 426), thus consequently himself being cautious towards universal truth. But he is not always consistent in this: His criticisms of "juxtaposition plus"[11] only emphasises the weak points.[12] He does not sufficiently take into account that not necessarily the method implies to never critically expose one's own system – comparatists just fail to do it. More rightly targeting the method itself is his criticism of functionalism: "How solutions can be 'cut loose' from their context and at the same time be related to their environment, how law can be 'seen purely' as function satisfying a 'particular' need, escapes me. It seems to re-quire two contradictory operations: first, suppressing the context and considering it; and then mov-ing from the general (function) to the specific without knowing what makes the specific specific" (Frankenberg, 1985, p. 440). Comparative law could provide a platform for learning[13] only if one is prepared to become aware of one's assumptions. This requires thoughtful connection of new to ex-isting knowledge, self-criticism, and tolerance of ambiguity. Frankenberg also addresses the practical implementation of the "dialectical exchange between the self and the other"[14] The impossibility of comparison[15] is dissolved by reference to dialecticism. Neither "going rational" nor "going na-tive" will lead to an understanding of foreign legal cultures–neither universalism nor relativism will resolve the dichotomy between the self and other.

Over the next 25 years the various points of criticisms as well as the possible new approaches of comparison have been refined. The main focus of the "Utah Group"[16] was to "change the project of comparative law from a naive epistemological project ... to a critical and interventionist project"[17]. A remarkable statement can be found in "Akhnai": "Wisdom, not rational coherence, is the best to which we can aspire; peace, by real compromises in real politics, not justice from ideal agreements in hypothetical conversations, is the goal to which we

should aspire" (Greenwood, 1997, p. 345). The last thoughts could be seen as an inclusion of practical comparatists who have to find real solutions.

Also practice-oriented[18] Legrand (1995) emphasises commitment to interdisciplinarity. He also asks how academics can forget about the significance of theoretical concerns, and claims that compara-tive law not being easy cannot mean to be content to espouse credulity. Comparatists should focus on difference, remain critical, open up the definition of law, and maintain distance. A dialogue with practical comparatists becomes possible, because "if we can understand the roots of our resistance to change, perhaps reform become thinkable" (Fletcher, 1998, p. 700).

Still, although these theorists try to recognise the needs of practical comparatists, the main counter-argument against Critical Comparisons is its impracticability. One cannot always deeply engage with "the history, economy, sociology, psychology and politics of law" (Frankenberg, 1985, p. 439) if one wants to find pragmatic solutions, improve one own's legal system or harmonise on interna-tional level. It is a consequence of the economic globalisation that for many problems and situations international solutions have to be found. The above criticised comparisons mainly intend to improve the practical legal situation, the study of Beale/Safwat (2005) even admits the lacking framework discussion, is honest about its limitations. To argue that evaluative comparison is impossible and one should find other ways to improve law, is unrealistic, as comparison is part of every learning process, improvement, change. Humans never fully understand reasons and frameworks of their actions, and cannot know all consequences[19]; still they have to find solutions on individual and so-cial level. But this does not justify, and this speaks for Critical Comparisons, to claim inherently subjective analyses being neutral and objective, to evaluate on unclear and biased criteria, to reduce the understanding of the other's legal culture instead of broadening knowledge.

Especially in the area of comparative law the insight of "postmodernist"[20] mindset is valuable and the emphasis on creating an adequate theoretical base cannot be strong enough. At the minimum there should be studies concerned with deepening knowledge, exploring the legal culture of the 'Other', the background of constellations, the normative framework. More practice oriented studies should be open about their limitations, at least, and avoiding subjectivity as far as possible. At the maximum the practical oriented studies should be based on the 'postmodern' studies, testing on them to what extent their practical aims are achievable and basing their descriptions and evaluations on these basic studies.

Dialogue between Theory and Practice

To answer the question "how could a radically different comparative law look like" (Stramignoni, 2005, p. 77), the gap between theory and practice has to be approached. Also here understanding of this 'Other'–theorist or practitioner–is

important. One has to concern oneself with their motiva-tions, limitations, and playfields. The different participants have to enter this discourse (Derrida, 2006, p. 360), have to speak each other's language. This could be realised dialectically –as it seems to actually have begun. First the thesis 'practical comparison, evaluation, harmonisation is possible by looking at the black letter law of different countries' was dominant, followed by the anti-thesis of theoretical questioning, deconstructing, radicalising. The synthesis should be the dialogue be-tween theory and practice[21], which should begin with understanding the other side, opening the own premises and foundations, and show ways for both sides how to approach in a closer connected way.

One reason for the gap could be that in the theoretical debate the starting point, which clarifies the limitations of knowledge, of understanding oneself and the 'Other' are often assumed, as most of the participants are knowledgeable of postmodern thought. Practicing lawyers, on the other hand, are often unaware of these philosophical debates. Therefore a reminder of the basis of this dis-course, of rethinking knowledge, understanding, perceptions and bias, could be a first step of enter-ing the dialogue with the practice. This will be undertaken in the next section, by including Nietzsche as the first philosopher in Western thought who exposed and criticised traditional, Enlightenment thinking – the thinking practical lawyers often still are educated in. Thus by expos-ing them to his critiques of knowledge can allow the practitioner to understand this base of the de-bate. This does not mean to extract concrete approaches and ways of comparing out of their state-ments, but to discuss his view on knowledge, on understanding.

Another way to enter the dialogue, which will be taken in the third part of this analysis, is to show on a concrete example how another understanding can look like.

Nietzsche–Breaking the Ground

To summarise Nietzsche's philosophy, expound his opinion on a certain topic, must miss the point, as Nietzsche has developed his opinions over time, sometimes apparently contradictory[22]. But with the awareness that one will only represent a glimpse of his thoughts, some ideas about 'knowledge', especially about the 'self' and the 'other'[23], can be gained, as Nietzsche is specifically concerned about perceptions and limits of human knowledge[24]. He opposes the Enlightenment, its claim of a universal truth and values, the ability of human beings to understand reality[25]. He questions the quest for the truth behind cognition. "What really is it in us that wants the truth'?" is one of the first questions asked in Beyond Good and Evil (BGE I 1). At first it seems "provokingly silly" (Tanner, 1973, p. 11), but it is makes sense as exposure of the faith of metaphysicians to find the truth[26] and as doubt that it is actually a value-free wish to discover the truth that motivates them. By stating that there is always a "will to power" to convince others about

one's own value system, Nietzsche ques-tions the base of science and philosophy and thus helps to improve distant, critical reading of ideas or 'neutral' scientific results.

Not just the neutrality of the aim is what Nietzsche questions, but also the possibility of gaining objective knowledge, truly understanding the world. "There is only a perspective seeing, only a perspective 'knowing' and the more affects we allow to speak about one thing, the more complete will our 'concept' of this thing, our 'objectivity' be" (GM III 12). This statement is made in the con-text of the Genealogy of Morality, an examination which starts with "We are unknown to ourselves" (GM I 1). That we cannot know ourselves, because we have not searched ourselves, is on the base of our false knowledge. Only if we question ourselves, our position and determination, we will broaden our understanding. GM is dedicated to an in-depth analysis of what we know, how we know, and how we perceive to know. The above stated relativism is not to be interpreted as claimed in relation to knowledge in general, as GM is primarily an examination of moral values, their "origin"[27] and the interpretation of reality on which they are based. If and how these thoughts are trans-ferable to other areas of reality is irrelevant for this article, as it is, in fact, concerned with the value-based concept "law", and irrelevant for Nietzsche as in his eyes search for truth necessarily is based on values[28]. Especially important in that context is the notion of "opposite values"[29]. He argues that morality is merely a prejudice, categories such as "good and evil", "true and untrue"–and "just" and "unjust"–are created by humans and do not exist as such, do not exist universally, but are bound to a certain cultural background.

Another here relevant aspect is how language in Nietzsche's view is part of necessarily perspective understanding of the world, ourselves, the 'Other'. Nietzsche, as many others, understands language as one of the limitations and frameworks of knowledge and recognition. As we think in language, this is an important factor in the above mentioned perspectivism of our worldviews–the categories and meanings that are given to the world around us by the language we grow up in, we speak, we think, frame our view of reality. Nietzsche stresses: Language is power, it disturbs and splits us as much as it organises us. Whoever names has the power to limit the knowledge of others and to con-stitute their thoughts.

Is this a nihilist view of the world leaving nothing but standing still? Often said about Nietzsche's philosophy, this is in fact a misinterpretation. Nietzsche clears the way for a philosophy from the "perspective of life", recognising the will to power of living things, rebuilding morality on life's exuberance[30]. But even if one does not agree with his moral claims[31]–Nietzsche has broken the ground for a new way to think about knowledge and understanding: a relativistic view, aware of one's determination, sceptical about generally accepted truths, realising

the conditions of language, culture[32], genealogies, and will. We have to go the way to knowledge, and enjoy the way as such as the finale might disappoint us; we have to overcome our anxiety and explore, with open eyes, our origins[33], as well as our future.

Returning to comparisons: They start with a certain, biased intention. A comparatist necessarily has a subjective, conditioned viewpoint he cannot leave. He has to explore this viewpoint, before he can start understanding the 'Other'. To explore the 'Other', it is not enough to analyse the actual legal situation; the conditions of his situation also have to be included. It has to be realised that the oppo-sition a comparison sets, the values used to find the 'better' solution of the compared, are man-made, never neutral. All these aspects are premised in the debate around Critical Comparisons. But to enter the dialogue with practitioners one has to open them up again and thus allow understanding. This is, in this case, the realisation of his conditions from the theorist's standpoint as well as an opening of them for the practitioner.

The insights into Nietzsche's thoughts about knowledge and thought are not meant to lead to defi-nite instructions for comparative law in the sense of telling practical comparatists what to do, how to compare, how to find the best legal solution to either improve or harmonise the law. They are meant to provide awareness, allow the practitioners to understand their biases and reconstruct practical comparisons in this awareness. This is the first step to enter the dialogue between theory and practice, to enter into a discourse about "how a radically different comparative law looks like" (Stramignoni, 2003, p. 77).

Transformations

The following last section attempts to start the dialogue between theoretical and practical compara-tists. Although not all social, legal, economic influences onto corporate criminal liability can be discussed, the chosen factors will clarify some differences between England and Germany. The approach is consciously not a legal one, but includes sketches from different disciplines.

The Background

Society–Some Basic Facts

Germany's Nazi-history led to the establishment of a federal, egalitarian[34] political system, based on a constitution (Adorno/Levin, 1985, p. 122). Its boom in the 50s and the social market econ-omy[35], guarantee social harmony (Albert, 1993, pp.110, 124). England has, in the recent history, not experienced any dictatorship (Pounder/Kosten, 1994, p. 1). Its liberal capitalism (Albert, 1993, p. 100) is influenced by the industrial revolution, and still shows economically built class structures (Royle, 1987, p. 155).

Philosophy–An Often Neglected Background Factor

Ewald (1995) rightly states: To exercise comparative law one has to include philosophy. A society is, i. a., characterised by its philosophical, especially ethical, background. England is influenced by utilitarianism, a philosophy evaluating actions on consequences, on contribution to the utility of society (Midgley, 1975, pp. 161 et seqq.). German society, on the other hand, is shaped by deonto-logical philosophy (Dübber, 1996, p. 452), primarily concerned with the fulfilment of values, and restricting the relevance of consequences for the judgement over an action by these values them-selves[36]. An example for the influence of this philosophy is Art.1 of the German constitution: "Hu-man dignity is inviolable."[37] This also leads to a different relevance of 'rights' (Legrand, 1996a, pp. 70 et seqq.): As in England there is no set collection of rights, individual rights are less important than in continental Europe.

Also relevant for the here discussed example are the philosophical debates on conceptions like "per-son", "autonomy", "responsibility": The essence of a person is a clue to understanding perceptions and treatment of corporations, so Iwai (1999). Personhood has been debated for centuries, meta-physically, normatively, conceptually[38], and often recurring criteria are: Self-Awareness, rationality, identity. In Germany, personhood is generally seen as a basic condition for moral and criminal "re-sponsibility". Kant and Hegel, i.a., have discussed these concepts extensively[39]. For Kant autonomy is the expression of human dignity, and thus of moral and legal responsibility (Schaber, 2004, p. 7). English, utilitarian thinking necessarily leads to another concept of personhood. Without stating that this is the representation of all utilitarian perceptions of 'person', one could look at the example of Singer's concept (Singer, 1994): He does not start from certain a priori, but from the consequences of defining a 'person' and follows Lock in separating the concept of 'person' from 'human'(Singer, 1994, pp. 90 et seqq). As personhood includes certain responsibilities and rights, it should only be used in the case that the conditions for being responsible or having this right, being able to claim it, are given (Hymers, 1999, pp.126 et seqq.). Thus, simplified: While Kant starts with an a priori con-ception of humans as persons, thus being responsible and having rights, Singer starts with the per-son, to which society subscribes rights and duties, and decides from this conception about the pos-sessing of personhood.

Civil and Common Law–A Few Thoughts

Descriptive Overview

A German lawyer confronted with the common law system experiences scepticism: a judge who searches mystic sources for the "common law"; judgments more concerned with facts than with logic, neutral argumentation, lay persons deciding about the fate of offenders–all this seems mys-terious, inexact. This strangeness is

caused by a divergent legal mentalité (Legrand, 1996a, p. 56): Common law has not left the inductive phase of methodological development and thus defies systematisation[40]. English lawyers regard being illogical as virtue, logic as eccentric continental habit[41]. Systemising is regarded as useless theoretical exercise; the real scope of legal work is searching for the most convincing pragmatic solution. Law is facts oriented and develops through analogies. Civil law, on the contrary, is based on a system of institution which allows discussion independently of factual immediacies[42]. The ways the legal systems approach conflicts diverge: While civil law attempts to solve them beforehand through hierarchic organised norms, common law reacts to the conflict . The relevance of coherence in a legal system is relevant for the question of corporate criminal law, as in the German debate the argument that this concept is incoherent with the system of criminal law is very important.

Connecting with the Background

To overcome some of the strangeness on has to connect these different legal mentalités to the findings above, being aware that these explanations can here only be rough and shallow: The more stable, traditional English society allows reliance on former judgments and traditions, the inner sta-bility more tolerance of unsystematic law. Utilitarian influences lead to more emphasis on practica-ble solutions of each case over coherence and structure. The stricter class system could be one rea-son for giving judges more power. Germany's reliance on coherence, on its constitution and a struc-tured and powerful legal system are not just caused by its deontological mindset, but also, e.g., on the terrifying experiences with extremism and uncontrolled state power in the Third Reich.

Approaching Corporate Criminal Liability

Building up on this, the structures behind CCL will be looked at: Criminal law and corporations.

Criminal Law–Development, Structures, New Perspectives

Criminal law is the state's means to forbid certain actions and punish the citizens break these prohi-bitions. In both countries there has been a long debate about the question if criminal law fulfils a retributive or a consequentialist function (Lacey, 1988, pp.16 et seqq): Is the punishment retribution for the offender's morally wrong action, or does it intend to prevent from future crimes?

Although the retributive function has, for a short time, influenced the English debate, in the public opinion and for the legislator, deterrence and rehabilitation were always the main reasons to enact criminal laws. In Germany there is a strong academic opposition against purely consequentialist criminal laws[43], and the German Supreme Court (BVerfG) connects Criminal law to the guilt and moral

responsibility of the offender[44]. This connection has to do with the German legal specialty of using "administrative sanction law" (Ordnungswidrigkeitenrecht) to sanction actions that do violate certain regulations without being 'morally wrong'. Criminal law, on the other hand, expresses a moral judgement over the action of the offender. From a consequentialist view, this German differ-ence is hard to understand and only becomes clear if one takes the discussed importance of deontol-ogy with its great emphasis on retribution, morality, guilt, into account. This indicates that criminal responsibility in Germany is closer connected to moral responsibility, personhood, human dignity, than the English concept.

This traditional view of criminal law is to be complemented by Nietzschean thoughts on punish-ment: He states that criminal law can maybe "tame" man, but not make him better–to the contrary, it might make him worse (GM II 13-16). Also connected to Nietzsche's concern about power[45] is the theory, represented i.a. by Reiman (2000), about criminal laws, prosecutions, convictions, being expressions of the power structures of society, oppressions to secure the power of the dominating class[46].

The Corporation

In the following, German and English 'corporations' will be looked at. A corporation is a form of business organisation, an entity separate from its owners, with certain own legal rights and duties[47].

Ordinary Language

The ordinary language approach (Wittgenstein, 1953) allows some insights onto the perception of corporations. The English 'corporation" is derived from the Latin word "corpus" (body)[48]. In Ger-many, ordinarily the word 'Unternehmen' is used[49], which has the literal meaning "undertaking". This difference irradiates divergent views: While the English emphasise the entity, Germany fo-cuses on "activity".

Structures

As shown by Albert (1993), the German and English economy and structures of corporations differ:

Germany as example of the "other capitalism" represents a different vision of economic organisa-tion. Its characteristic features produce a stable, dynamic system. In contrast to the English, German society has a tendency to avoid controversial issues and stick to a consensus. Democracy and pros-perity are too recent not to be fragile, therefore social discipline is important. The egalitarian view, the search for social consensus is expressed in lesser differences between the highest and lowest wages than in England, direct taxes and high taxes on capital. This leads to financial stability and long-term development[50].

The economic environment does have influence onto the structure of corporations: In Germany, all parties of a corporation participate in decision-making (Mitbestimmung); this industrial democracy is describable as "conflictual partnership" (Lane, 2003, p. 86), leading to a 'company spirit' and loy-alty. The payment is high, as is the duration of the jobs in a certain company. The Anglo-American model is based on maximising profit by high competitiveness between employees; there is less par-ticipation, less connection to the employer, less sense of regarding the corporation as a community.

Corporations in the UK and U. S. do have an independent structure, a personality character. A tradi-tional view about this personality character is mirrored in the debate of "nominalism" against "realism"[51], convincingly analysed by Iwai (1999)[52] : Is the construction of a legal person based on its real personality in society or only an abbreviated way of writing their names together for legal transitions? As he rightly argues, this depends on what the law has created – and that it creates a more independent, economic powerful structure in the more utilitarian, less egalitarian English society, seems to be plausible. Thus it seems that in Germany corporations are transparent associations, communities of individuals, while in England corporations are created as independent, powerful structures standing more outside of civil society than being integrated and integrating.

History and Genealogy

This feeling can be complemented by a genealogical view, inspired by Nietzsche (Flyvbjerg 2000, p. 1). In the 16th and 17th century[53], CCL was unthinkable, because the juristic fiction of a corporate personality and its blameworthiness was opposed[54]. Later the concept of the legal fiction of a 'cor-poration' of an entity with own rights and duties became recognized (Bakan, 2004, p. 6 et seqq.), in both countries, although their structures evolved differently, as shown above[55]. As a next step courts in the U.S. and England developed the concept of CCL, first for public nuisance by municipalities, later on for actions of commercial corporations or crimes requiring intent (Khanna 1996, pp. 1482 et seqq). In Germany, this conception was discussed but, as mentioned, never realized. A genealogical point of view, in a Nietzschean way concerning power relations, clarifies that the 'origin' of corpo-rations lies in consciously limiting the liability of the powerful owners and managers. The more independent from the acting individuals this entity is, the less liable are these individuals. Corpora-tions were funded to allow more people to associate for the fulfillment of greater undertakings, and the developing of an independent structure of these associations allowed them to restrict their liability. Although as Midgley (1975) argues it is wrong that "[o]bviously, any legal guarantee is directly at the services of economic interests to a very large extent" (Weber, quoted by Midgley, 1975, p. 154), in the case of restricted liability of corporations one can still argue: "When everyone is re-sponsible, then no one is

responsible, and the ethic of responsibility itself is imperiled" (Parker, 1996, pp. 393 et seq.).

This genealogical interpretation is especially relevant for the criminal liability of corporations. No argument besides comforting the powerful individuals behind corporations can really justify crimi-nally punishing a corporation[56]: CCL is said to prevent harmful acts of the independent entities 'corporation' polluting the environment, exploiting workers and third-world countries, fooling shareholders. It is said to allow expressing the mixed feelings towards these economic giants whose structure seem uncontrollable by individual decisions (Colvin, 1995, pp. 1 et seqq), to blame them for their actions (Wells, 1995, pp. 45 et seqq.). But these arguments are, in fact, wrong: The deter-rent or rehabilitative effects are low (Scholz, 1997, p. 255), i.a. because of the high standard of proof of criminal law[57] and the usual low sanctions[58]. Also the blaming effect is questionable, as messages about corporate behaviour can be sent in other ways (Parker, 1996, p.383) and the moral blameworthiness of corporations does not exist, as they balance "harms produced, costs imposed, and economic activities foregone" (Scholz, 1997, p. 258).

Thus it can be concluded from none of the arguments usually given for punishing corporations be-ing convincing, that the real reasons could in fact lie in the power structures behind corporations, in securing the power holders, the owners and managers, from having to go to prison and being mor-ally blamed, as the society has found someone else to be blamed: The abstract entity of a corporation.

Pulling the Strings Together: Understanding Some Differences

The findings of the last section give a few indicators why CCL has emerged in England, but not in Germany. These, of course, have to be developed further in future research on comparison of the situation in both countries, especially if it is intended to find a compromise on European level But still, these findings make it easier to understand the 'Other': As Parker observes, the blame of criminal law traditionally was an answer to individual fault, responsibility[59]– and as such not appli-cable to entities. Why these obstacles were easier to overcome by English than by German law be-comes clear if one sums up the interpretations of England and Germany discussed. As has been shown, CCL is an expression of the public skepticism towards the more and more uncontrollable corporate structures, but also securing the position of the acting individuals behind corporations.

The invention of a new legal concept, incoherent with the existing system, is easier in the English traditional society than in the German, more recent one. The English common law system, based on a utilitarian mindset, allows instant solution of the specific problem of corporations acting harmful, without the need of strict coherence[60]. The lesser dependency on written law, lesser feeling of threat

by the thought of a powerful state and powerful judges, is also caused by most citizens not experi-encing dictatorship or threatening abuses of strength by the state in their lifetime (Pounder/Kosten, 1994, p. 1). This especially is the case for criminal law, which in Germany is generally regarded as dangerous, while in England it is a welcome solution for social problems. The emphasis on egalitarianism, rights, deontological values in German criminal law is strongly built on a concept of per-sonhood, human dignity, moral guilt, but also 'Rechtssicherheit' (security of the law) and equality. From this emerges the need of coherence, for basing judgements onto existing laws, and basing criminal convictions on moral responsibility, of being a person which in German deontological thinking equals being human.

This last aspect is relevant for understanding the contrasting English approach, starting from the problem of corporations causing harm, and the public wanting to blame them, and in a utilitarian way constructs the personhood from the rights and the duties this entity has. Thus blaming and treating corporations as persons can partly be understood from the philosophical background.

Also the economic differences, the more egalitarian, social harmonic, integrating approach of Ger-many in contrast to the more liberal, utilitarian approach of English capitalism, explains the struc-tures of corporations as more independent, economically powerful in England, more restraint and integrated, community-oriented in Germany. Expressed already in the name, corporation- Unternehmen, in Germany the focus lies on the economic action, on the business activity, while in England corporations are an independent entity in a much broader sense. This also has as conse-quence that the public perception could differ, as German workers and clients are more personally connected to corporations, and might not experience them as such uncontrollable, blameworthy entities. They are already restricted, by preventive, administrative laws, by the investing banks, by the concept of 'Mitbestimmung', while Anglo-Saxon corporations are focused on their shareholders and thus mainly controlled on the outcome, on the profit, less they achieve this profit. Thus not just the perception of corporations as threatening, independent, differs, but also the feeling of their controllability, and the need for the usage of criminal law.

The described meaning of CCL for the powerful individuals behind also can be connected to the described cultural background in England and Germany. As in Germany the power-relations in cor-porations are differently diversified, and the economy is in itself more egalitarian, the base for such a concept that distracts the criminal blame from acting individuals onto a structure, is less given. The class structure, the power relations are not as clear as in England, also not in the corporations.

These only are a few aspects of CCL, only some short sketches on its background, its geneaology, its structurality. But already from these sketches a deeper understanding of the 'Other' and thus oneself is possible. One has to be

aware that these sketches are drawn from a German perspective, thus have to be subjective and cannot give a 'neutral' picture–if such a thing exists. They are more a cubistic painting of the situation than a scientific drawing, but they still do give a picture. They allow understanding the English solution from the German, and maybe even the German solution from an English view, and even give new light to the English solution for an English lawyer.

Conclusion

The present analysis has engaged in answering the question: How can a new comparative law look like (Stramignoni, 2003, pp. 77)? This question has already been discussed in theoretical compara-tive law, which is why here the focus was directed on the aspect that, despite of this debate, practi-cal comparisons still follow traditional methodology. Thus the precise question of this article was: How could a new comparative law in practice look like?

The transfer of theoretical insights on comparison into practice should be approached by opening a dialogue between theory and practice. This article provides a first step into this dialogue. Theorist and practitioner have to allow each other an understanding of their backgrounds, premises, aims, as well as their crucial arguments. Here the dialogue is entered from the viewpoint of a theorist, thus the focus lies on clarification of the philosophical roots and the actual theoretical debate of com-parative law for the practitioner, using a practical example, and thus transferring the theoretical in-sights into practice. The suggestion on how a new comparative law could look like thus is: Theorist and practitioner have to enter a dialogue, theorists have to clarify their approaches on examples and practitioners have to recognise the theoretical concerns about traditional comparisons and imple-ment the theoretical insights.

After demonstrating the failures of traditional comparative law on theoretical level as well as on the chosen example of 'CCL', the development of Critical Comparison was clarified by discussing its philosophical background, especially on the philosophy of the first thinker attacking Enlightenment perceptions of knowledge, Nietzsche. By referring to his philosophy, the theoretical debate of com-parative law was clarified for the practitioner. The original thoughts of this thinker show the limits of our knowledge and our viewpoints onto the world, in an understandable matter. Possible ways of engaging in comparison become clear: The relativism of knowledge and values, and the relevance of genealogies for understanding the man-made world of ourselves and the 'Other' are the crucial beginnings of truthful, less biased but more understanding comparison. To engage in a productive dialogue of a new comparative law, which can actually be transferred into the practice of compar-ing, one has to enable a fresh view onto the ongoing theoretical debate. In future, practitioners will have to provide an insight of their aims, backgrounds, and premises as well.

From the analysis of the chosen example one can draw the conclusion that a broader approach, in-cluding a close look onto the background of laws, does provide a deeper understanding of one's own and the 'Other's' legal system. It also allows the 'Other' to critically view his solution by in-cluding the necessarily new and different viewpoint of a foreigner: The English concept of CCL can, for example, be explained with the more traditional and more class-oriented structure, utilitar-ian background of English society, the less structured but more problem-solving design of common law systems. Because of this background, criminal law in England is enacted more on the base of its possible consequences, less depending on concepts such as moral responsibility or personhood (which in utilitarian mindset itself is constructed starting from the rights and duties a person has instead of from 'Kantian' a priori assumptions of 'human dignity'). Corporations are constructed and perceived differently in the Anglo-Saxon, liberal capitalism in contrast to the social market economy of Germany. They are a more independent entity in the English system, which is repre-senting the power structures of society: The limited liability of corporations actually secures the individuals behind corporations, restricts their personal liability. The English concept of CCL is, simplified, an expression of public opinion of its scepticism towards the powerful, uncontrollable, independent identities which have developed their own character, influence as structures the behav-iour of the acting individuals. It is an expression of a strong belief in criminal law. But it also is a measure to secure power, the power of the acting and deciding individuals, as their liability is lim-ited by this concept. From a consequence-oriented viewpoint it is understandable to limit even the criminal liability of individuals that invest and decide in big corporations, high economic profits because the acting individuals are prepared to take more risks.

This allows practical comparatists to base their undertaking on a deeper understanding of the differ-ences and of their standpoint towards these differences. This analysis, for example, is written from a German viewpoint, and the analyser has necessarily, at the beginning of the comparison, a better understanding for the German way, the German society, while the English structures and origins remain strange. But by engaging in the differences one begins to understand the reasons for these differences, as well as one's own reasons for a certain evaluation of them.

Thus the dialogue between theorists and practitioners can lead to a new comparative law.

By clarifying their background, premises, assumptions the theorists allow the practitioners to fully understand their concerns. Only by engaging with practical example, the real aims, tasks and abili-ties of the practitioner, the theorist will be part of creating a real, new comparative law. This in-cludes going back to the original philosophical questions of knowledge, of ourselves, of the 'Other''.

The practitioner, on the other hand, has to accept that only by engaging in a broader undertaking than just comparing black-letter law, he will be able to truly compare. Only on this base it is possi-ble to understand, or even evaluate or harmonise. It is possible to question one's own legal solution once, through comparing, its premises and background are understood. The same accounts for the 'Other', who only by a viable account of his legal solution will engage in rethinking its basis as well as its consequences. Every analysis becomes more truthful, more real, when the premises are ana-lysed it is clear which of them are accepted and which not. Only this provides a solid base for fur-ther discussion.

Such an approach does not exclude evaluation or harmonisation. On the contrary, it is thinkable that Germany at some points adapts corporate criminal liability, because of international political pres-sure, for example[61]. But how this change is to be evaluated, can only be discussed if the roots of the refusal are clear, if the price that has to be paid–incoherence of criminal law, for example – is known, if the reasons of the other side are more convincing even in the value system of Germany. It also is thinkable that England at some points gives up on this concept[62], and this process as well becomes more transparent if all relevant aspects are included. A broad analysis as delivered here can also help to find international solutions independently of national laws, again because one can discuss every premise, every assumption, every background condition in which one differs.

Comparative law today faces an enormous challenge (Reimann/Zimmermann, 2006, p.v.), as in-ternationality of conflicts, economic crises and social problems require international solutions–including legal solutions. Divergent legal systems have to engage with each other (Hartan, 2006, p. 12).

Comparative law cannot face this challenge if theorists cannot convince practitioners of the need to consider their concerns, and practitioners cannot find theoretical answers that are realisable in prac-tice (Hartan, 2006, p. 12). Thus what is needed in an international community is dialogue between theorists and practitioners of comparison as well as between national legal systems. In order to fulfil this task, this dialogue first has to deconstruct–the background, the structures, the premises and the values. Finally, a way to reconstruct, based on a deeper understanding of each other, has to be found.

Notes

1. Other labels: New approach; cultural immersion approach, engaged comparativism, discourse analysts, Utah group (Peters/Schwenke, 2000, p. 802).
2. Some European Transnational Proposals can be found in Beale/Safwat (2005), pp. 126 et seqq.
3. See: infra I. 2.
4. As basic thoughts here was chosen the philosophy of Nietzsche, mainly because he can be seen as first to question Enlightenment's way of thinking.
5. This also might have been a reason for its continuing neglect, already diagnosed by Gutteridge (1946).

6. Norrie (1996, p.543) connects this to liberal "conception of the individual as an abstract, universal subject endowed with rational action, autonomy and selfdetermination. The individual is a unified, centred being who acts as the basis for legitimating the state, law and punishment. […] The rational subject receives 'just deserts' from the state through law. The 'penal equation'-crime plus responsibility equals punishment -is founded on liberal bedrock." He refers to Kant and Hegel.
7. "Even now, Germany does not impose criminal liability on corporations" (p. 1490).
8. Beale/Safwat (2005, p. 122) refer to Pieth (1999, pp. 113, 116): "[T]he fear [of German scholars] is that essential safeguard of both substantive and procedural law would be put at risk from derogations of the "principle of personal guilt or blameworthiness".
9. Exemplary: Peters/Schwenke (2000, p.802) or Flessas (2005, p.108): "The emphasis on knowledge is intimately connected with the definition of 'culture' in modernity."
10. On early methodology: see Gutteridge (1946). Kahn-Freund (1974) reminds that in case of "transplantation" of laws to a foreign system questions about adjustment and rejection have to be asked and the context taken into account.
11. This is how Frankenberg calls the position of practical comparison mixing different approaches.
12. One of them is to assume that law was a coherent body of precepts with clear internal structures.
13. About other people's normative practices and ideas and about the biases of one's own cultural and legal education.
14. The dialecticism of continental philosophy was heavily criticised by Popper (1937), for allowing to put up with contradiction. This seems to be one of the crucial points: Is a contradiction resolvable or has the „aporia" to be accepted?
15. Because of historical and social determination of the comparatist.
16. Named after the publications in the Utah Law Review, 1997.
17. Berman (1997, p. 286) claims: "in face of exoticization, normalize, in the face of normalization, exoticize, in the face of the hermeneutic compulsion, formalize and fragment".
18. Still, the observation that following his claims will „naturally take the comparatist away from the traditional approaches to comparative legal studies which ... do not accept the need for theory and obstinately pursue similarity and consensus as if confined to a groove" (p.242), does not help to enter a constructive dialogue with practical comparatists.
19. Habermas (1990, pp.92 et seqq.) discusses Nietzsche's and Derrida's refusal of metaphysics.
20. Doubtful about the notion "postmodernism": Peters/Schwenke (2000, p.801).
21. This brings together opposite movements: The Nietzschean / Foucaultian view on power, and the Habermas claim for discourse and dialogue, see Flyvbjerg (2000), pp.1 et seqq.
22. To the following see generally Tanner (1994).
23. According to Flessas (2005, p.109), Nietzsche sees the "ground(s) of knowledge as flawed exactly because, instead of deriving self-knowledge through experiencing our own, individual lives, the space of knowledge is extra-life".
24. "He who fights monsters should look into it that he himself does not become a monster. When you gaze long into the Abyss, the Abyss also gazes into you" (BGE IV 146).
25. Smith (1999 p. xv): "Genealogy's critique of Christian and liberal humanist values takes the form of a counter-narrative to the Enlightenment view of historical development as one of progress and emancipation".
26. To Nietzsche's overturning of platoism, Heidegger (1979, p. 200 et seqq.).
27. Not in a strictly historical sense, as Nietzsche considers normal historians not to be concerned about history–what is relevant for him is the "real origin", the ahistorical but thus even more true narrative behind what is.

28. "For Nietzsche, the questioning of the value of truth is implicated in the questioning of moral values, since moral values characteristically seek to establish themselves as truths", Smith (1999, p. viii).
29. "All great things bring about their own destruction through an act of self-overcoming in the nature of, life–the lawgiver himself eventually receives the call: Submit to the law you yourself proposed" (GM III 27).
30. See the entry about "Nietzsche", Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/nietzsche/.
31. Yovel (2005, p. 25): "Nietzsche's prophecies, we must keep in mind, are untimely meditations. He is 'pregnant with future' [reference to GM II 16, not from the author]"
32. Although it can rightly be questioned if cross cultural perspectivism is an empirical fact or merely a plausible assumption: "Cross Cultural Perspectivism", Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/relativism/supplement1.html#crosscultperception.
33. One facet of a Nietzschean view onto the world is exploring the genealogy of concepts, truths, realities. To the reasons for his genealogical approach Owen (2003, pp. 249 et seqq).
34. Albert (1993, p. 124): "They are, first and foremost, egalitarian societies."
35. *http://www.bmwi.de/BMWi/Navigation/Ministerium/Geschichte/wirtschaftspolitik-seit-1949,did=159298.html*
36. Ethics, in: Internet Encyclopedia of Philosophy, http://www.iep.utm.edu/e/ethics.htm#SH2a.
37. To the Kantian Interpretation of human dignity: Kant (1966) BA 79f. Especially relevant for criminal law: "man and generally any rational being exists as an end in himself, not merely as a means to be arbitrarily used by this or that will" BA 84.
38. 'Personal identity', in: Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/identity-personal/.
39. Habermas (1995, p. 294) even calls the Kantian philosophy the „philosophy of the subject".
40. Simpson, quoted by Legrand (1996a, p. 65): "the common law mind … is repelled by brevity, lucidity and system".
41. Lord Macmillan, quoted by Legrand (1996a, p.67): "the life of law has not been logic; it has been experience".
42. Copper, quoted by Legrand (1996a, p.67): "The instinct of the civilian is to systematize. The working rule of the common lawyer is solvitur ambulando".
43. This is connected with Kant and Hegel defending a retribution theory. To mention is also Feuerbach, who partly created German criminal law, and also follows an absolute justification of punishment, similar to Kant's. (Rosbach, 2000).
44. About this meaning of "criminalization" for German law, see Lagodny (1999, pp.279, 282 et seqq).
45. Flyvbjerg (2000, p. 1): "Foucault, following Nietzsche, is the philosopher of wirkliche Historie (real history) told in terms of conflict and power."
46. "Power is always present", Foucault (1988, p.11, 18).
47. 'corporation', http://www.investorwords.com/1140/corporation.html.
48. 'corporation' Merriam-Webster's Dictionary of Law, http://dictionary.reference.com/browse/corporation.
49. The debate in Germany is about 'Unternehmensstrafbarkeit'(Wells, 1995; Hirsch, 1995), not about „juristische Personen".
50. An interesting view onto the differences as well as the convergences or better modifications of the U.S. system in Germany, and the attempts to combine different ideas and traditions today: Jackson (2003).

51. See also Colvin (1995), pp. 1 et seqq.
52. Iwai's analysis has flaws, though, for example his account of the corporation as a thing. It is true that one cannot own a person – but one could also rethink if in the context it is not a different concept of "ownership" instead of changing the concept of "person". But he is right that it is necessary to include philosophical, social, economic considerations.
53. Thus this situation in England was the case before Bentham and his utilitarianism became influential.
54. From that one cannot conclude that the German solution is out-dated, as historical change does not equate progress.
55. A wrong understanding of civil law countries' situation can be found in Bernard (1984). He states that they never really developed the concept of juristic persons. This does not mirror legal reality. It might not be the same concept as in England, but it is a concept of a juristic person. Albert (1993, p. 103) states: "In the neo-American model, a company is a negotiable good like any other, whereas for the Rhine economies it is not just a commodity, but a community".
56. Bernard (1984) states, that CCL evolved, even though judges did not regard it as effective or useful. This is a naïve view onto judgments. If the concept would be unwanted, judges could have argued otherwise.
57. CCL does not lower this standard, see Khanna (1996, pp. 1512, 1533).
58. One also has to remember that the criminal fines ultimately are paid by the shareholders, but they, on the other hand, do normally not have any control over the actions or omissions of the company.
59. According to Nietzsche these are at least the now given meanings, even if the tradition is older (GM II 13).
60. Bernard (1984) also observes that the concept grew because of the judicial interpretation of common law.
61. So recently Austria (Verbandsverantwortlichkeitsgesetz, since 2006) and France (Hartan, 2006, pp.96 et seqq.).
62. Peters/Schwenke (2000) discuss the growing U.S. skepticism.

References

Adorno, Theodor W./Levin, Thomas Y. (1985). On the Question: "What Is German?", New German Critique, No. 36, pp. 121-131.

Albert, Michael (1993). Capitalism against Capitalism, Whurr, London.

Ashworth, Andrew (2006). Principles of Criminal Law (5th edition), Oxford/New York.

Bakan, Joel (2004). The Corporation. The Pathological Pursuit of Profit and Power, Constable & Robinson, London.

Barron, Anne (2005). (Legal) Reason and its 'Others': Some Recent Developments in Legal Theory, in: Penner, James/Schiff, David/Nobles, Richard (eds.), Jurisprudence and Legal Theory, Oxford University Press, Oxford.

Beale, Sara Sun/ Safwat Adam G. (2005). What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability, Buffalo Criminal Law Review, 8, pp. 89-162.

Berman, Nathaniel (1997). Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion, Utah Law Review, Vol. 1997; pp. 281-286.

Bernard, Thomas J. (1984). The Historical Development of Corporate Criminal Liability, Criminology, 22, pp. 3–18.

Buonamano, Roberto (1998). The Economy of Violence: Derrida on Law and Justice Ratio Juris, 11, pp.168-79.

Clarkson, C. M. V. (1996). Kicking Corporate Bodies and Damning Their Souls, *The Modern Law Review Limited* 1996, Vol. 59, pp. 557-572.

Coffee, John C. (1981). No Soul to Damn, No Body to Kick, an Unscandalised Inquiry into the Problem of Corporate Punishment, *Michigan Law Review*, Vol. 79, pp. 386-459.

Cohn, E. J. (1947). Comparative Law. An Introduction to the Comparative Method of Legal Study and Research, *The Modern Law Review*, pp. 224-229.

Collins, Hugh (1991). Methods and Aims of Comparative Law, *Oxford Journal of Legal Studies*, 1991, Vol. 11, pp. 396-406.

Deiser, George F. (1908). The Juristic Person. University of Pennsylvania Law Review and American Law Register, Vol. 57, (Vol. 48, New Series). pp. 131-142.

Derrida, Jaques (1990). Force of Law: The 'Mystical Foundation of Authority', Cardozo Law Re-view, Vol. 11, pp. 920-1046.

Derrida, Jaques (2006). Writing and Difference, Routledge, London/New York.

Dübber, Markus (2001). Book Review: Evans, Richard J. (1996). Rituals of Retribution: Capital Punishment in Germany, 1600–1987, New York, Law and History Review, Vol. 19, pp. 449-453.

Engle, Karin (1997). Comparative Law as Exposing the Foreign System´s Internal Critique: An Introduction, Utah Law Review, Vol. 1997, pp. 359-369.

Eser, Albin (1973). The Politics of Criminal Law Reform: Germany. *American Journal of Comparative Law*, Vol. 22, pp. 245-262.

Eser, Albin (1989). A Century of Penal Legislation in Germany-Development and Trends, in: Eser, Albin/ Thormundsson, Jonatan (eds.), Old Ways and New Needs in Criminal Legislation, Max Planck Institut, Freiburg i. Br., pp. 1-26.

Eser, Albin (1989). Hundred Years German Penal Legislation-Development and Trends. De Jure, Vol. 22, pp. 1-22.

Eser, Albin (1999). Opening Address: Aim and Structure of the Colloquium, in: Eser, Albin/Heine, Günther/Huber, Barbara, (eds.): Criminal Responsibility of Legal and Collective Entities, Freiburg im Breisgau, pp. 1-6.

Ewald, William (1995). Comparative Jurisprudence (I): What Was It Like to Try a Rat?, University of Pennsylvania Law Review, Vol. 143, pp. 1889-2149.

Flessas, Tatiana (2005). Aphorisms, Objects, Culture, in: Goodrich, Peter/Valverde, Mariana (eds.), Nietzsche and Legal Theory, Half-written laws, Routledge London/New York, pp.105-124.

Fletcher, George P. (1978). Rethinking Criminal Law; a Valuable Analytical Study on Criminal Liability with Emphasis on Jurisprudential and Comparative Aspects, Especially of German Law, Little, Brown, Boston.

Fletcher, George P. (1998). Comparative Law as a Subversive Discipline, *American Journal of Comparative Law*, Vol. 46, pp. 683-700.

Flyvbjerg, Ideal Theory, Real Rationality: Habermas Versus Foucault and Nietzsche, Paper for the Political Studies Association's 50th Annual Conference, The Challenges for Democracy in the21st Century, London School of Economics and Political Science, 10-13 April 2000.

Foster, Nigel G. (2002). German Legal System and Laws, 3rd ed., Oxford University Press, Oxford.

Frankenberg, Günter (1997). Stranger than Paradise: Identity & Politics in Comparative Law, Utah Law Review, Vol. 1997, pp. 259-274.

Frankenberg, Günter (2006). How to Do Projects with Comparative Law-Notes of an Expedition to the Common Core, Global Jurist Advances, Vol. 6, pp. 1-30.

Frankenberg, Günther (1985). Critical Comparisons: Rethinking Comparative Law, *Harvard International Law Journal*, Vol. 26, pp. 411-455.

Gearey, Adam (2000). We Fearless Ones: Nietzsche and Critical Legal Studies, *Law and Critique*, Vol. 11, pp. 167–184.

Greenwood, David (1997). Akhnai, *Utah Law Review*, Vol. 1997, pp. 309-358.

Gutteridge, Harold (1946). Comparative Law–An Introduction to the Comparative Method of Legal Study and Research, Cambridge University Press, Cambridge.

Habermas, Jürgen (1995). The Philosophical Discourse of Modernity, Cambridge University Press, Cambridge.

Harding, Andrew/Örücü, Esrin (2002). Preface, in: Harding, Andrew/Örücü, Esrin, (eds.), Comparative Law in the 21st Century, Kluwer Law International, London/The Hague/New York, pp.vii-xiii.

Hart, Herbert L. A. (1968). Punishment and Responsibility, Clarendon Press, Oxford.

Hartan, Cora Constanze (2006). Unternehmensstrafrecht in Deutschland und Frankreich - Ein Rechtsvergleich angesichts europäischer Harmonisierungsbestrebungen; Dr. Kovaç, Hamburg.

Hasnas, John (2006). Rethinking Vicarious Criminal Liability: Corporate Culpability for White-Collar Crime, online-text, *http://www.heritage.org/Research/LegalIssues/wm1195.cfm.*

Heidegger, Martin (1969). Identity and Difference, Haper&Row, New York; Translation and Introduction by Joan Stambaugh.

Heidegger, Martin (1979). Nietzsche Vol. I. The Will to Power as Art, Routledge, London/Henley.

Heine, Günter (1999). Sanctions, in: Eser, Albin/Heine, Günther/Huber, Barbara, (eds.): Criminal Responsibility of Legal and Collective Entities, Freiburg im Breisgau, pp. 237-254.

Hirsch, Hans Joachim (1995). Strafrechtliche Verantwortlichkeit von Unternehmen, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 107, pp. 285–323.

Huss, Alphonse (1978). Die Strafbarkeit der Juristischen Personen, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 90, pp. 237–260.

Hymers, John (1999). Not a Modest Proposal: Peter Singer and the Definition of Person, Ethical Perspectives, Vol. 6, pp. 126-137.

Iwai, Katsuhito (1999). Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance, *The American Journal of Comparative Law*, Vol. 47, pp. 583-632.

Jackson, Gregory (2003). The Cross-National Diversity of Corporate Governance, Dimensions and Determinants, Ruth v. Aguilera, *Academy of Management Review*, Vol. 28, pp. 447–465.

Jansen, Nils (2007). Comparative Law and Comparative Knowledge, in: Reimann, Mathias/Zimmermann, Reinhard, (eds.), The Oxford Handbook of Comparative Law Oxford Uni-versity Press, Oxford/New York, pp. 305-338.

Johnson, Richard (1986-87). What is Cultural Studies Anyway?, Social Text, Vol. 16, pp. 38-80.

Johnson, Richard (2007). Post-Hegemony? I Don’t Think So, Theory, Culture and Society, Vol. 24, pp. 95-110.

Jung, Heike (1998). Grundfragen der Strafrechtsvergleichung, Juristische Schulung, Vol. 38, pp. 1-7.

Kahn-Freund, Otto (1974). On Uses and Misuses of Comparative Law, *The Modern Law Review*, Vol. 37, pp. 1-27.

Kant, Immanuel (1966). The Moral Law : Kant’s Groundwork of the Metaphysic of Morals; Trans-lated and Analysed by H. J. Paton, Hutchinson, London.

Kennedy, David (1997). New Approaches to Comparative Law: Comparativism and International Governance, Utah Law Review, Vol. 1997, pp. 545-638.

Khanna, Vikramaditya S. (1996). Corporate Criminal Liability: What Purpose Does It Serve? Harvard Law Review, Vol. 109, pp. 1477-1534.

Lacey, Nicola (1988). State Punishment. Political Principles and Community Values, Routledge, London.

Lagodny, Otto (1999). The Case of Substantive Criminal Law before the Bars of Constitutional Law–An Overview from the Perspective of the German Legal Order, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 7, pp. 277-288.

Lane, Christel (2003). Changes in Corporate Governance of German Corporations: Convergence to the Anglo-American Model?, *Competition & Change*, Vol. 7, pp. 79–100.

Legrand, Pierre (1995). Comparative Legal Studies and Commitment to Theory, *Modern Law Review*, Vol. 58, pp. 262-273.

Legrand, Pierre (1996). European Legal Systems are not Converging, *International and Comparative Law Quarterly*, Vol. 45, pp. 52-81.

Legrand, Pierre (1996). How to Compare Now, Legal Studies, Vol. 16, pp. 232–242.

Legrand, Pierre/Munday, Roderick, eds. (2003). Comparative Legal Studies: Traditions and Tranisitions, Cambridge University Press, Cambridge.

Lord Goff of Chieveley, Robert (1997). The Wilberforce Lecture 1997. The Future of the Common Law. *International and Comparative Law Quarterly*, Vol. 46, pp. 745-748.

MacIntyre, Alasdair (1995). Genealogies and Subversions, in: Schacht, Richard (ed.), Nietzsche, Genealogy, Morality: Essays on Nietzsche's Genealogy of Morals, University of California Press, Berkeley, pp. 284-305.

Michaels, Ralf (2007). On the Functional Method in Comparative Law, in: Reimann, Mathias/Zimmermann, Reinhard, (eds.), The Oxford Handbook of Comparative Law, Oxford University Press, Oxford/New York, pp. 339-382.

Midgley, Juliet (1975). The Rôle of Legal History, *British Journal of Law and Society*, Vol. 2, pp. 153-165.

Mitsch, Wolfgang (2005). Recht der Ordnungswidrigkeiten, Springer, Berlin.

Nelken, David (2006). White-Collar Crime, in: Maguire, Mike/Morgan, Rod/Reiner, Robert (eds.), The Oxford Handbook of Criminology, Oxford University Press, Oxford, pp. 844-877.

Newburn, Tim/Rock, Paul (2006). The Politics of Crime Control, Oxford University Press, Oxford.

Nietzsche, Friedrich (1974). The Gay Science, Vintage, New York, translation by Walter Kaufmann.

Nietzsche, Friedrich (1990). Beyond Good and Evil, Penguin Classics, London, translation by R.J. Hollingdale.

Nietzsche, Friedrich (1996). On the Genealogy of Morals, Oxford University Press, Oxford, transla-tion by Douglas Smith.

Norrie, Alan (1996). The Limits of Justice: Finding the Fault in the Criminal Law, *The Modern Law Review*, Vol. 59, pp. 540-556.

Otto, Harro (1998). Die Haftung für kriminelle Handlungen in Unternehmen, Jura, Vol. 1998, pp. 409-418.

Owen, David (2003). Nietzsche, Re-evaluation and the Turn to Genealogy, *European Journal of Philosophy,* Vol. 11, pp. 249-272.

Parker, Jeffrey S. (1996). Doctrine of Destruction. The Case of Corporate Criminal Liabiliy. *Managerial and Decision Economics*, Vol. 17, pp. 381-398.

Peters, Anne/Schwenke, Heiner (2000). Comparative Law beyond Post-Modernism, *International and Comparative Law Quarterly* 49, pp. 800-834.

Pieth, Mark (1999). Commentary on: National and International Developments: An Overview, in: Eser, Albin/Heine, Günther/Huber, Barbara, (eds.): Criminal Responsibility of Legal and Collective Entities, Freiburg im Breisgau, pp. 113-118.

Popper, Karl (1937). What is Dialectic?, in: Conjectures and Refutations: The Growth of Scientific Knowledge, New York, pp. 312-35.

Pounder/Kosten (1994). Managing Data Protection, (2nd ed.), Butterworth-Heinemann, Oxford.

Reimann, Mathias/Zimmermann, Reinhard (2007). Preface, in: Reimann, Mathias/Zimmermann, Reinhard, (eds.), The Oxford Handbook of Comparative Law, Oxford University Press, Oxford/New York, pp. v-vii.

Rosbach, Oliver (2000). Strafrecht und Gesellschaft bei Anselm von Feuerbach, forum historia iuris, 1.12.2000, *http://www.forhistiur.de/index_de.htm.*

Royle, Edward (1987). Modern Britain. A Social History 1750-1985, Arnold, London.

Schmidt, James (1989). Habermas and the Discourse of Modernity, *Political Theory*, Vol. 17, pp. 315-320.

Scholz, John T. (1997). Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory, Law and Contemporary Problems, Vol. 60, pp. 253-268.

Schaber, Peter (2004). Menschenwürde und Selbstachtung: Ein Vorschlag zum Verständnis der Menschenwürde, Studia Philosophica, Vol. 63, pp. 93-106.

Singer, Peter (1993). Practical Ethics (2nd ed.), Cambridge University Press, Cambridge.

Spivak, Gayatri C. (2001). Questioned on Translation: Adrift, Public Culture, Vol. 13, pp. 13-22.

Stessens, Guy (1994). Corporate Criminal Liability: A Comparative Perspective, *International and Comparative Law Quarterly*, Vol. 43, pp. 496-497.

Stocker, Barry (2006). Derrida on Deconstruction, Routledge, London/New York.

Stramignoni, Igor (2005). Categories and Concepts: Mapping Maps in Western Legal Thought, *International Journal of Law in Context*, Vol. 1, pp. 411-426.

Stramignoni, Igor (2001). Book Review: Oxford Essays in Jurisprudence, *Law Quarterly Review*, Vol. 117, pp. 340-343.

Stramignoni, Igor (2002). The King´s One Too Many Eyes: Language, Thought and Comparative Law, *Utah Law Review*, Vol. 4, pp. 739-773.

Stramignoni, Igor (2003). Meditating Comparisons or the Question of Comparative Law, San Diego *International Law Journal*, Vol. 4, pp. 57-90.

Stramignoni, Igor (2004). Francesco's Devilish Venus: Notations on the Matter of Legal Space, California, *Western Law Review*, Vol. 41, pp. 147-240.

Tadros, Victor (2007). Criminal Responsibility, Oxford University Press, Oxford.

Tanner, Michael (1994). Nietzsche. A Very Short Introduction, Oxford University Press, Oxford.

Velody, Irving (1986). Bookreview: Antipositivist Theories of the Sciences, by Norman Stockman, Contemporary Sociology, Vol. 15, pp. 437-438.

von Foerster, Heinz/Pörksen, Bernhard (2002). Understanding Systems. Conversations on Episte-mology and Ethics. Springer, Heidelberg/New York. (Literal translation of the German original: The truth is the invention of a liar)

Wagner, Markus (1999). Corporate Criminal Liability: National and International Responses; Background Paper for the International Society for the Reform of Criminal Law 13th International Conference, Commercial and Financial Fraud: A Comparative Perspective, Malta, 8-12, online-text, *http://www.icclr.law.ubc.ca/Publications/Reports/CorporateCriminal.pdf.*

Weisberg, Richard (2005). Nietzsche's Hermeneutics: Good and Bad Interpreters of Texts, in Goodrich, Peter/Valverde, Mariana (eds.), Nietzsche and Legal Theory, Half-written laws, Routledge, London/New York, pp. 149-164.

Weissmann, Andrew/Newman, David (2007). Rethinking Criminal Corporate Liability; *Indiana Law Journal*, Vol. 82, pp. 411-451.

Wells, Celia (1993). Corporations: Culture, Risk and Criminal Liability, *Criminal Law Review* Vol. 551, pp. 551-566.

Wells, Celia (1995). Corporate Manslaughter: A cultural and legal form, Criminal Law Forum, Vol. 6, pp. 45-72.

Wells, Celia (1995). Die Strafrechtliche Verantwortlichkeit von Unternehmen in England und Wales–Sich wandelnde Vorstellungen und Gesetzesreform, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 107, pp. 676-688.

Wells, Celia (2001). Corporate Criminal Liability in Europe and Beyond, *New South Wales Law Society Journal*, Vol. 39, pp. 62-66.

Wells, Celia (2001). Corporations and Criminal Responsibility (2nd edition), Oxford University Press, Oxford.

Wittgenstein, Ludwig (1953). Philosophical Investigations, translated by G. E. M. Anscombe, Blackwell, Oxford.

Yovel, Jonathan (2005). Gay Science as Law: An Outline for a Nietzschen Jurisprudence, in Good-rich, Peter/Valverde, Mariana (eds.), Nietzsche and Legal Theory, Half-written laws, Routledge, London/ New York, pp. 23-48.

Zumbansen, Peer (2005). Comparative Law's Coming of Age? *German Law Journal* (online), Vol. 6, pp. 1073-1084.

Zweigert, Konrad/Kötz, Hein (1998). An Introduction to Comparative Law, Oxford University Press, Oxford.

Internetsources

Crosscultural Perception, in: Stanford Encyclopedia of Philosophy, *http://plato.stanford.edu/entries/relativism/supplement1.html#crosscultperception*

Friedrich Nietzsche, in: Stanford Encyclopedia of Philosophy, *http://plato.stanford.edu/entries/nietzsche/*

Personal Identity, in: Stanford Encyclopedia of Philosophy, *http://plato.stanford.edu/entries/identity-personal/*

Ethics, in: Internet Encyclopedia of Philosophy, *http://www.iep.utm.edu/e/ethics.htm#SH2a.*

Wirtschaftswunder Soziale Marktwirtschaft, Bundesministerium für Wirtschaft und Technologie, *http://www.bmwi.de/BMWi/Navigation/Ministerium/Geschichte/wirtschaftspolitik-seit-1949,did=159298.html*