

Book Review

Michael Bohlander*

General Editor; Chair in Comparative and International Criminal Law (Durham Law School); International Co-Investigating Judge (ECCC); Judge, Kosovo Specialist Chambers.

Albin Eser, *Comparative Criminal Law*, CH Beck/Hart/NOMOS, 2017, xvi + 188 pp.

Albin Eser is one of the great scholars in comparative and international criminal law, both in Germany and internationally. He has been for decades and not only in those fields – indeed the author remembers using his very demanding but highly instructive texts and materials on German criminal law as a revision aid for the university examinations in the 1980s. A book under his name on the topic of comparative criminal law is thus worthy of serious attention. That being said, the book, at first glance a seemingly rather slim volume, is not a textbook on substantive issues of comparative criminal law, but more of a compendium on its aims, functions and methodology, and on avoiding common pitfalls in the practice of comparative criminal law research. The work is in essence a modified translation of the methodological part of a study previously published in German, on the issue of structural comparisons in criminal law at the example of a homicide case (Albin Eser/Walter Perron (eds.), *Strukturvergleich strafrechtlicher Verantwortlichkeit und Sanktionierung in Europa*, Duncker & Humblot, Berlin, 2015).

The book is divided into four major thematic sections, beginning with a review of the state of affairs of comparative criminal law, followed by a chapter on its aims and functions. Chapter III contains an analysis of the different methodological avenues that can be employed, which is then distilled into what Eser calls 'a practical guide' for comparative criminal law research. The book concludes with an outlook on the work that remains to be done, followed by an analytical review of the current literature in the field and a useful bibliography. The wealth of information contained in the mere 158 pages of actual exposition has by necessity made the exposition very dense, which in turn makes any attempt at a summary and succinct evaluation into a rather formidable exercise.

In substance, Eser emphasises that in recent years, the comparison of criminal law has gradually come out of the traditional shadow of the field of comparative private law, and that it should do so even more in the future. This is certainly supported by the increasing emergence of transnational, international, and supranational criminal law environments, where the interplay of criminal law values and principles across borders has taken on new significance, and emancipated itself from the predominantly academic domain. Especially the continued connection to the pervasive and basic 'legal families' approach often found in

* The views expressed are solely those of the author.

private law and generalist works seems questionable in Eser's eyes, when it comes to transboundary criminal law conversations. The same, Eser opines, is true with regard to the inclination to accept too readily the existence of more or less clearly defined traditions of major 'legal circles' (translation of the German *Rechtskreise*). Eser tries to move comparative criminal law research away from this thinking in ready-made default conceptual drawers and rightly posits that one has to establish the aim of the comparative exercise in each instance first and then choose the appropriate method, concluding that there is no 'one-size-fits-all method'.

Comparison occurs in judicial, legislative and theoretical frameworks: Judges may, for example, have to decide on mutual equivalency criteria, as impressively demonstrated by the recent extradition proceedings in Germany against the Catalan politician Carles Puigdemont, where a major issue was whether the Spanish offence of *rebelión* and the German crime of high treason were sufficiently congruent to allow for the surrender of Puigdemont to Spain under an European Arrest Warrant. Comparative research is also used by legislators to support or test reform proposals in the domestic system based on experiences in comparable foreign jurisdictions. Eser points out that such comparison can and in many cases must be made on a number of epistemological levels. While in some cases a purely 'normative-institutional' comparison may be enough, others will require a 'functional', 'structural' or 'cultural' paradigm to be employed. All of these can appear in combination at the confluence of research streams aimed at the – highly risky exercise of – evaluative determination between the relative merits of diverse systems for the purpose of regulating certain factual real-life phenomena, the so-called 'evaluative-competitive' aspect. Eser understands the book as a tool which 'eases and encourages [the] practice' of comparative criminal law, and at the same time as projecting a 'general theory of comparative criminal law and its practice'.

On a more *realpolitik* level, Eser warns that it is crucial 'not to be tempted by expectations that are unachievable, to be armed against hasty conclusions and party-monopolization for hoped-for positions, and also methodically not to fall prey to superficiality and dilettantism' (at 141). Comparative research has its limits, and recognising and acknowledging them will strengthen the impact of research done within its proper remit. Eser makes a special reference to the importance of comparative research for the environment of international criminal justice, where in his view, shared in principle by the author, there is still too much emphasis on the relative merits of common and civil law foundations, as well as the application of rules and principles founded on that dichotomy. Eser argues that it is necessary to move beyond this petty dispute and arrive at the establishment of 'universally acceptable legal principles' or, in other words, a kind of legal meta-level.

That aspect in particular, however, is where, in the view of the author, the chasm between theory and practice becomes most evident. Eser's book is a *tour de force* of best practice in the academic and practical spheres of comparative criminal law research. While one may certainly always find individual points to argue about, the gist of Eser's conclusions rings true. The problem is, and the author has argued this before, that especially in the field of international criminal practice, the intellectual and logistical preconditions to abide by this guide to best practice are often conspicuously absent. Thorough comparative research work

takes time to begin with, something which the sheer budgetary constraints under which the highly cost-intensive international(ised) courts are operating do not encourage. Secondly, the staff working in the field have often either not been able shed the prejudices arising from their own domestic legal socialisation, or they have already been socialised in the international criminal justice milieu that began to manifest itself with the advent of the ICTY in the early 1990s: If something appears to be settled law and practice, for example, under the *ad hoc* tribunal's by now copious case law, lawyers steeped in their practice before those courts will often find it hard to let go of their habits when – as often happens in this field – moving to a new court that may operate under different fundamental systemic criteria. To this extent, the tug of common law and civil law, while no longer desirable as a major focal point of the debate in theory, still seems to dominate everyday practice. The fact that the courts are overwhelmingly staffed by people from a wide variety of national backgrounds and jurisdictions adds to the problems, including the need for translations into several working languages, i.e. English and French as soon as the United Nations becomes involved, with the inevitable delaying effects and financial drain on a court's resources. In this author's view, nothing would in principle speak against recruiting the international component especially of hybrid courts from legal systems which match that of the target jurisdiction, for example, based on prior colonial systems' influence, and from a pool of candidates who speak, ideally, the local but at least the foreign language which is used most commonly in the current professional setting of that target jurisdiction and who are able to engage on a fully proficient level with source materials of any existing colonial parent jurisdiction – always bearing in mind that children tend to develop their own views as they grow more mature. The fact that in any hybrid court set in a domestic context comparative research across systemic divides may become necessary is neither here nor there in this context: Any lawyer with the proper linguistic background can learn, and then practice within, the framework of comparative law, but as the example of the ECCC has shown, the first port of call for comparative research on the procedure is the French system, because the Cambodian procedural law in criminal proceedings is based on it, and the ECCC is meant to apply Cambodian law in case of lacunae in the ECCC's Statute or its Internal Rules – lawyers with a background in and concomitant linguistic command of systems based on French law will thus be at an advantage based not only on intellectual capacity but on actual experience with regard to a major aspect of comparative work. Alas, the practical foundations for such an approach do not yet exist, and some may indeed query its usefulness and legitimacy.

While Eser's compelling analysis and sound exhortations to develop a uniform best practice may for some time continue to run afoul of the restraints affiliated with their application in practice, his book can still at least remedy the flaws of that imperfect practice to a certain degree by raising awareness of the common problems and pitfalls. One way to do this would be to make this book compulsory reading for anyone who engages in legal work in international criminal justice settings before they take up their first post.