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Introduction

Purpose of the Book

This book is meant to present what its title says: principles. It is not a traditional textbook of German criminal law in the way that German academics would understand it. My German colleagues will probably say that I left out too much, emphasised the wrong things and indulged in oversimplification, not to mention the mistakes I may have made. While I do not feel that I should immediately plead guilty to that charge in its entirety, a plea of *nolo contendere* to the first three may be unavoidable, but I will leave that to the judgement of the reader. My intention is to present the salient features of the German substantive criminal law to an Anglophone legal audience in order to allow them to understand the fundamental differences and similarities between a system that is said to be based on a top-down model of deductive logical reasoning, and the inductive, case-by-case pragmatic approach behind the common law. However, as I point out in the chapter on basic concepts (chapter two), this distinction has become much more blurred in recent times than it had been before.

Some difficult choices had to be made to keep the task manageable within the space confines of the book. I have concentrated on the principles found in the so-called 'General Part', and less on individual offences, because the General Part usually tells us more about the genetic code, as it were, of a legal system than individual offences. It also informs the application of all specific offences and the latter can therefore not be understood without the knowledge of the principles of the former. Yet even within the General Part, I have left out one major section, namely the law and practice of sentencing, not to mention procedural issues such as the statute of limitations, jurisdiction, conditions of prosecution, etc. While the last three are not immediately necessary for the understanding of the material principles governing criminal liability, the section on penalties and sentencing would merit a book in its own right, because it has wide ramifications regarding criminal procedure and juvenile criminal law. For the moment, the reader is referred to the Criminal Code to gather information on the principles of sentencing and the arsenal of available sanctions. The presentation will touch upon these in individual places where necessary for the understanding of a certain general issue. The offence categories I selected for closer attention were homicide, and sexual and property offences. Apart from the fact that they represent what one might call

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core concepts of any criminal legal system, major reforms have recently been or are still ongoing in the United Kingdom in these areas. The chapters on the offences are in themselves mere introductions and cannot describe the wide ambits of judicial casuistic interpretations of individual problems. I hope that the reader will nevertheless get an idea of their basic structure.

While I have endeavoured to include comparative aspects, especially with regard to the law of England and Wales which I had the opportunity of teaching and studying more closely since my move to Durham in 2004, this is not a comparative law book. Not every principle received a comparative treatment, but some of them presented themselves as worthy of that attention, be it because of a recent development in legislation or in the case law. To a lesser degree I have included references to legal systems other than that of England and Wales. The terminology used to describe German concepts is meant to imitate the English usage to the closest approximation; however, I trust that readers more familiar with the terminology employed in other Commonwealth jurisdictions or the United States will have no difficulty in adapting. Some German concepts are difficult to express with the vocabulary available in English law, a fact that forced me either to use approximate English concepts such as conspiracy, that have no material counterpart in German theory, or to coin new phrases in the hope that they will catch on, as, for example, the principle of limited dependence as describing the specific doctrine of limited accomplice liability.

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History and Development

The criminal law of Germany, originally codified in 1871, in its present form is mainly based on a major reform in the 1970s and several less fundamental but still major subsequent reforms. However, academic doctrine and judicial practice still rely to some extent on commentary and case law from before that time. While it is true that analysing the historical environment at any given time is a necessary tool in order to understand fully the development and status quo of a legal system, I have decided not to include a separate, general chapter on the development before the 1970s and have only looked at specific issues in reform since then. The major issues that had an impact apart from the 1970s reform were, of course, the period of the Nazi regime from 1933–45, German re-unification in 1990 and the transitional phase since then. Where historical developments were conducive to the description of principles addressed in this book, they were considered in the relevant context.

German Materials Used

Returning to what I said at the beginning of this chapter, the introductory overview character of the book also had an impact on the German sources I used in the footnotes and other references. While I emphasise that academic commentary and doctrine still play a larger role in the German system than, for example, in the law of the United Kingdom, the fact is nevertheless that in practice the law is what the courts say it is. The presentation thus follows in principle the views of the courts, with pertinent references to academic literature on certain contentious matters. Thus, the footnotes contain a large number of case law citations; among those I have tried to restrict myself to quoting decisions of the Federal Court of Justice (*Bundesgerichtshof*—BGH), the Federal Constitutional Court (*Bundesverfassungsgericht*—BVerfG) and of the *Reichsgericht*—RG, the Supreme Court of the German Reich until 1945. In some instances, decisions by state courts of appeal (*Oberlandesgerichte*—OLG), district courts (*Landgerichte*—LG) and county courts (*Amtsgerichte*—AG) were also included.

References to academic commentary have been restricted to a few easily accessible sources, and among those mostly to the standard one-volume commentary founded in 1942 by Adolf Schönke and Horst Schröder, now in its 27th edition of 2006. This commentary, written by a number of Germany's foremost criminal law academics, has the necessary academic depth of analysis and scope of further references in order to function as this main base of citation. While it would be a serious mistake for a German first-year law student to use only one commentary as a source for his or her course assignments, I felt justified in relying mainly on this commentary for our purposes: apart from the much shorter commentary by *Fischer*, which is moreover a practitioner commentary, it is the most up-to-date (and affordable) overall work available that has the necessary depth. The large multi-volume commentaries (for example, the *Leipziger Kommentar* and the *Münchener Kommentar*) are prohibitively expensive for individual academics and are in part several years behind the actual status quo due to their cumbersome publication process. It is a banal insight that any further study of a legal system other than one's own demands foreign language skills commensurate with the requirements of understanding the legal terminology. Any reader with a sufficient command of the German language desiring to gain a deeper insight will already find a wealth of additional information in the more than 2,800 pages of *Schönke/Schröder*. The nature of a commentary is that it contains references to specific treatises and articles on individual problems for further study, and the *Schönke/Schröder* commentary does that in an exemplary fashion; in fact, a German lawyer looking for materials on a certain problem would follow exactly the same route, namely, start with one commentary. In sum, I am convinced that no significant additional gain was to be derived from citing those other commentaries (or even the specialist writings) in the footnotes (although the library of Durham University stocks them).

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A Note on Citation

As in my translation of the Criminal Code, from which this section is actually taken, I have kept to the German method of law citation. To keep the text as short and uncluttered as possible, I have used the German symbol for 'section', which is '§'. After that, the subdivisions are 'subsection' ('(1)', or '(2) to (7)'), 'sentence' ('1st sentence'), 'number' ('No 1', or 'Nos 2 to 5') and letters ('(a)'), 'alternatives', etc. This is not necessarily an exclusive hierarchical sequence, as, depending on the length of individual provisions, numbers could have several sentences, etc.

Thus, for example, the following citation '§ 211(2) 3rd alt' would read: 'Section 211, subsection (2), third alternative' and would denote killing a person out of greed.

The double '§§' means 'sections' and has normally been used here, other than in the German practice, to denote an uninterrupted sequence of sections, such as '§§ 176 to 177'. Unless another law is mentioned, all §§ are those of the Criminal Code.

Chapter Overview

Finally, an overview of how the study of this book's object is meant to progress. It moves from the general to the particular, beginning with the chapter on basic concepts.[1] This lays out the ideology behind the approach of German criminal law, explain the sources of law and their hierarchy, principles of interpretation and the role of precedent, the fundamentally important tripartite structure of offences, basic material tenets of German criminal policy, rule-of-law principles as well as the basic definitional dichotomy between felonies (*Verbrechen*) and misdemeanours (*Vergehen*) and its consequences.

The second chapter looks at the *objektiver Tatbestand*, the equivalent of the *actus reus*, as the bottom rung of the tripartite offence structure, and covers issues such as types and functions of the *actus reus*, acts and omissions, causation and objective negligence.

This is followed by the third chapter on the subjective side of the *Tatbestand*, comparable to *mens rea*. It deals with matters of intent and its delineation from advertent negligence, mistakes of fact in the *actus reus* and the facts underlying generally recognised defences as well as transferred malice scenarios.

Chapter four, the longest chapter, deals with the justificatory defences on the second tier of the tripartite ladder. It first addresses general common issues such as their conceptual basis and the cumulation of defences, the criterion of a sub-

[1] Excerpts of the chapter on Basic Concepts have been used in the Brief Introduction to *The German Criminal Code: A Modern English Translation* (Hart Publishing, 2008).

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jective element, provocation of defence situations and rule-of-law aspects such as retro-activity. The individual defences examined are consent and presumed consent, official authorisation, official power or instructions and superior orders, collision of duties, exercise of justified interests, citizen's arrest, self-defence and necessity.

Chapter five examines the third tier of guilt and particularly in that context the requirements of subjective negligence, as well as the excusatory defences of mistake of law, excessive self-defence, duress and supra-legal duress, insanity and diminished responsibility.

Chapter six attempts to explain the requirements for liability, short of the full commission of an offence. It examines the definition of attempt, impossible attempts and imaginary offences as well as the withdrawal from an attempt and its effects on the offender's liability.

Chapter seven investigates the liability of accomplices under different forms of participation, namely, principals by proxy using another person as an instrument or agent, joint principals, abetting and aiding and how to distinguish between them. The principle of limited dependence (*limitierte Akzessorietät*) under §§ 28 and 29 is explained, as are the effects of errors by the individual participants. Finally, attention is given to the German principle corresponding to conspiracy and withdrawal from a conspiracy.

Chapters eight, nine and 10 contain introductions to the law of homicide, and sexual and property offences.

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