

# **Criminal Law: A Technical Tool or a Cultural Manifestation On Uniformity and Subsidiarity<sup>1</sup>**

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<sup>1</sup> The article is a revised version of a paper presented at Kolloquium über die Bekämpfung Organisierter Kriminalität, Izmir 2001. Translation by Malene Frese Jensen.

“Auf dem ganzen Gebiete des Rechts gibt es keinen Begriff,  
der an culturhistorischer Bedeutung sich nur von ferne  
mit dem der *S t r a f e* messen könnte,  
kein anderer ist so wie er das getreue Spiegelbild  
der zeitlichen Denk- und Empfindungsweise des Volkes,  
der Höhenmesser seiner Gesittung,  
kein anderer macht so wie er alle Phasen  
der sittlichen Entwicklung des Volkes mit durch,  
weich und biegsam wie das Wachs,  
in dem jeder Eindruck sich ausprägt.”<sup>2</sup>

Rudolph Jhering

## 1 Introduction

A number of trends exist in the present development of the law, all of which point toward the establishment of Universal Laws instead of the traditional national laws. They are especially:<sup>3</sup>

(1) The endeavours by the United Nations to prosecute war criminals and terrorists.

(2) The work taking place within the Council of Europe, particularly on human rights issues and through the many treaties on mutual assistance, *e.g.*, with regard to extradition, and transfer of sentenced persons.

(3) The deliberate movement within the European Union for legal harmonization and unification of criminal law.

Beside the formal efforts there are all the latent tendencies in present time, meaning, that we are pushed and pulled in the same direction. We are subject to the same economic development. We are part of the same political development across the world. We watch the same international newscasts on television. We discuss the same novels and movies. We read the same philosophers, sociologists, and jurists. And so forth.

International interdependence has “always” existed. All the European legal systems, including their criminal justice systems, have a foundation in Hellas, Galilee and Rome. Like all other elements of our cultures, law is a manifestation of “the soul of Europe”.<sup>4</sup> The legal systems are furthermore all influenced by the ideological and political currents that originated in England and France in the Age of Enlightenment. Many countries have criminal codes influenced by the French Code pénal (1810) and by the German Strafgesetzbuch (1871). Our first “real” prisons were modeled after the prison in Philadelphia. Towards the end of the 19th century we were influenced by Italian criminology and the discussions in the *Internationale Kriminalistische Vereinigung*. During the last 20-30 years we have experienced parallel developments regarding principles of sentencing

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2 Rudolph Jhering: *Das Schuldmoment im römischen Privatrecht*, Giessen 1867 p. 2.

3 *E.g.*, Mireille Delmas-Marty: *Politique criminelle d'Europe*, in Nils Jareborg (Ed.): *Towards Universal Laws, Trends in National, European and International Lawmaking*, Uppsala 1995 p. 83 *et seq.*

4 Johannes Sløk: *Europas sjæl*, Odder 1994.

and the rejection of treatment ideologies. We have seen similar trends in our countries concerning increased protection of the environment, the working environment, privacy and information; a disproportionate response to problems of drug control; the legalization or depenalization of homosexuality and pornography. And now we are witnessing a reverse tendency. State security and victims are in focus; as a misunderstood consequence we are disregarding human rights for suspects and investing more power in the police.<sup>5</sup> A new puritanism has evolved, which manifests itself with regard to paedophilia, pornography, prostitution and smoking. Many other examples might be mentioned.

Traditionally *academic scholars* played a dominant role in the development of criminal law. They all exemplify that the best place for viewing the surrounding world is the top of the ivory tower. It seemed natural, even inevitable, that the national legal systems were strongly influenced by experiences from other countries, since an international and comparative outlook constitutes a central premise in all methods applied by true academic scholars. The different practices and solutions chosen by the individual countries may be compared to natural laboratories, whereby one can evaluate the results of different procedures and means. Academic scholars have always found wisdom in such “natural experiments”.

Nowadays we speak much more about ‘internationalization’ than we used to. But in some fields it amounts to more talk than action. The largest problem for criminal policy making today – on the national as well as on the European level – is that in many countries criminal policy has become an *arena for politicians* who pander to the voters’ lowest prejudices, and who scour for all sorts of symbolic legislation. And unfortunately criminal law is extremely well suited for usage as symbolic legislation. Criminals and criminality are “good enemies” as Nils Christie and Ketil Bruun show in their book on drugs.<sup>6</sup> Then the field is open for a public debate not embarrassed by factual knowledge. Often the only relevant facts seem to be answers given in mass media polls. Recently fear of transnational drug trading, organized crime, illegal immigration, trafficking in women, and terrorism has erased fundamental penal law principles in most countries.

Another consequence of removing penal legislation from the professionals and the scholars and converting it into a political domain has been that the legislative powers are less interested in features and developments in neighbouring countries’ legal systems than earlier academic researchers were. This is not least important with respect to the accept of a fundamental *Rechtsstaat* principle in criminal policy namely the duty to *search for the least intrusive and yet efficient intervention*. Such a method results in the lowest human and economical costs. Therefore we always ought to look for inspiration in the countries which have been able to cope on the lowest level of interference.

In practice the political interest in neighbouring countries has nowadays often been of the opposite kind. Many countries have tried to influence their

5 E.g., Vagn Greve: *Sheep or Wolves*, European Journal of Crime, Criminal Law and Criminal Justice 2005 p. 515 *et seq.*

6 Nils Christie & Ketil Bruun: *Den gode fiende*, Narkotikapolitikk i Norden, Oslo 1985.

neighbours as to the necessity of stricter legislation than the neighbour itself has found necessary. Germany has been outraged over free abortion in the Netherlands. Norway has considered it a threat that Denmark (stated a bit polemically) sentences drug dealers months, when Norway hands out years. There has been heavy pressure from USA for (additional) criminalisation of terrorism, money laundering and insider trading. And so forth. Also without this sort of pressure politicians have found inspiration for new criminalizations in other countries.

## 2 The Situation in the European Union

In the following I limit myself to countries inside the European Union. Within this part of Europe, the delimitation of *the criminalized area* is to a wide extent the same.

First, the Union has already unified large areas by the Treaty, regulations, directives, framework decisions, etc.<sup>7</sup> In numbers this part is extremely big.

Second, our common cultural heritage has given us almost the same sorts of crimes in the core criminal law (homicide, theft, etc.).

Third, other forms of international cooperation have lead to uniform rules for genocide, hijacking, traffic, illegal drugs, etc.

Therefore, the differences are so petty that they – speaking in quantitative terms – seem to be insignificant matters. Certainly, the formal appearances and wordings differ in large areas, but the contents of the rules will almost be the same.

However, *the general conditions for imposing criminal responsibility* stand out distinctively. This applies to the requirements in criminal law as to attempt, complicity, *mens rea*, the imputation of legal persons, etc.<sup>8</sup> Of course, there is also in this context a considerable overlapping, yet the differences remain the most conspicuous.

The contents of *the sanctions and the sentencing* are characterized by great differences. Inevitably, all member states punish through deprivation of liberty and money and, luckily none through deprivation of life. But at this point the real resemblance cedes.

There is for me no doubt that we have embarked on a “union-train” heading towards unification in criminal law with shorter or longer halts at the intermediate station, that of harmonization. However, the discussion must relate to the desirability of the goal and the chosen course.

There may exist more beautiful concepts than ‘harmony’ and ‘unity’, but hardly many. Therefore it also seems natural to give support and approval to politicians, administrators, thinkers and fellow citizens, who would like to create harmony and unity.

7 E.g., Thomas Elholm: *Does EU Criminal Cooperation necessarily mean increased repression?* (In press).

8 E.g., Karin Cornils: *Straffelovens § 21 – Rechtsvergleichende Überlegungen zur Versuchsstrafbarkeit im dänischen Recht*, in Thomas Elholm *et al.* (Eds.): *Ikke kun straf...*, Festskrift til Vagn Greve, København 2008 p. 89 *et seq.*

Unfortunately, ‘harmonization’ and ‘unification’ are not necessarily as positively valued as ‘harmony’ and ‘unity’. Too often these words evoke associations and reactions corresponding to standardization by means of the “bed of Procrustes”. And no doubt, on many occasions this may be an accurate description of real life.

This ambivalence makes it necessary to analyse the situation a step further. In the next part of my contribution I shall try to outline when and under which conditions harmonization or unification is desirable or at least acceptable. I shall try to do this by mentioning a number of the fundamental principles in criminal policy and discuss their relevance for unification endeavours.

### 3 Fundamental Principles in Criminal Policy

Criminal law separates itself from other parts of the legal system by openly admitting that its core is infliction of human suffering. Such cruelty is difficult to defend ethically. At the very least it is necessary to consider the system’s fundamental principles. Some of the basic principles are likely also of importance in the choice of or rejection of the models of European cooperation, be that harmonization or unification. In addition there are a few considerations solely of importance for the choice between harmonization and unification.

#### 3.1 *Harmony Between Law and the Public Sense of Justice*

A classic distinction within criminal law is made between *mala in se* and *mala prohibita*. There are evil acts that will always be crimes, *e.g.*, homicide, arson and theft. Other acts are forbidden for practical reasons in certain periods and in some areas, *e.g.*, acts included in fiscal law, in business law and in traffic law.

This classification could make it natural to let *mala in se* crimes form a part of a common law book decided upon in Brussels or Strasbourg, while the Member States on their own took care of *mala prohibita*. Such a division of labour would simply turn the present system on its head. Perhaps such an argument only amounts to a practical objection.

However, that practical objection is supplemented by another substantial counter argument. True enough, the crimes considered *mala in se* are certainly common goods, but their delimitations are frequently mined with utmost difficult questions. Homicide is, of course, punishable everywhere, but how shall one treat mercy killings of old and sick persons, killings of trespassers and burglars, homicides of brutal spouses, abortion, etc.? Will it be easy for Scandinavia to agree with Germany on abortion and with the Netherlands about mercy killings? When will Denmark accept the Norwegian-Swedish position with regard to the sinfulness of drinking and the catastrophes caused by the use of cannabis? And Germany the Dutch one? The Danish provision on bigamy includes homosexual partnerships, not easily accepted in some catholic countries. Incest between grown-ups is a serious crime in Denmark and Germany, but not even an infraction in France and Spain. Brothels are treated in completely different ways by the Member States. Some European Union countries severely punish *Auschwitz Lügen* while (hopefully) it is unthinkable that such remarks ever will be punished in Scandinavia. In the Mediteranean

region people still have an honour; but it is often difficult for Scandinavians to see any sense in defamation cases. And so on. The problems of such delimitations are presumably the most culture-related questions we face within the criminal law.

Consequently, the tentative distinction above between what belongs and what does not belong in a common law book is useless, but it draws attention to some other significant facts. A part of the criminal justice system merely functions as a pragmatic tool for an efficient administration of society or of its economic system. It is social engineering. Criminal law provides the necessary oil to make the societal machinery work smoothly or at least with less friction. The legitimacy of the rules depends – as long as they respect the principle of proportionality, the principle of guilt, etc. – to a high degree on their utility.

Other parts of the criminal justice system closely relate to fundamental ethical principles, to our assessments of evil and good and to our general opinion of what constitutes moral responsibility. These views rest deeply in the human soul as a foundation for beliefs in justice and equity. I am familiar with the many weaknesses embedded in the *historical school*. Yet I am convinced that this school of thought has made a decisive contribution to answering the question of what bestows legitimacy to a legal system. The inner feeling of justice being served constitutes a main prerequisite of legitimacy, and it can only be created through a long and slow historical process.

The first recognition of the ties between national values and the laws is attributed to de Montesquieu. The epoch-making element in de Montesquieu's work is that laws shall suit the people they are meant for and that it would be a peculiar and unusual case, if the laws of one country would fit elsewhere. Since the time of de Montesquieu this view has gained broad support, but was particularly powerful at the time of the national awakenings at the beginning of the 19th century.

When dealing with the part of the criminal justice system influenced by ethical considerations, rules which differ from fundamental principles, including their historical roots are unacceptable regardless of how efficient and useful they may be. Of course, I am not saying that our national criminal justice systems have arisen in splendid isolation from all other systems and foreign influences. Quite the opposite as indicated by my earlier remarks concerning the academic context of former legislative endeavours. "All culture stands on foreign ground in the end – only barbarity is truly local ... " (Esaias Tegnér).<sup>9</sup> At this point I am only advancing the claim that law as all other cultural phenomena has a specific national character, which can not be removed without causing serious damage.

Such views are not only part of our cultural history. They are also uncovered in the society by present-day researchers within political science. They have compared Denmark and Sweden, two countries regarded out in the world as very much alike. Yet the political scientists point to existing enormous differences in their legal systems based on distinctive developments in the 18th century or even before that time.<sup>10</sup> The two peoples embrace divergent views in "untouchable

9 Quoted after Stig Strömholm: *Comparative Legal Science – Risks and Possibilities*, in Markku Suksi (Ed.): *Law Under Exogenous Influences*, Turku 1994 p. 5 *et seq.* (p. 7).

10 Tim Knudsen: *Den danske stat i Europa*, København 1993.

areas". In Denmark there are far more issues which the state cannot touch without getting in conflict with considerable segments of the population. An example would be the different treatment of AIDS in the two countries. Or in broader terms, the use of coercive measures as regards to problematic individuals, be it drug users or insane persons. In my view such differences must be analysed and discussed, yet also accepted.

### 3.2 *Creation of a Legal Ethos*

There are those who recognize existing national differences but who then argue, that it is a task of the legal system to create a common value system. This reminds us of the familiar thinking according to which a specific piece of penal legislation is seen as affirming or creating a shared moral system in the broad society. It seems to be a decisive condition for such moral-creation that the penalty is accepted as just retribution. Up to now there is not much evidence that the European Union has succeeded in having its policy initiatives accepted in this way. Surveys among Danish fishermen indicate that EU rules are seen exclusively as fiats. If there is no public acceptance an established moral may easily break down. An example from another area may be mentioned. The public condemnation of drunk driving decreased in Sweden, when the Parliament changed the legal blood alcohol concentration level from 0.5 to 0.2 permille.<sup>11</sup>

The late Norwegian professor in criminal law, Johs. Andenæs, mentions that there is less respect for legislation in the USA than in European countries, and he suggests that

“[t]his can again be tied to the strong pluralistic character of the American society and the way the machinery of politics works. The citizens do not consider the legislation as solemn and authoritative expressions of the "will of the state", but as the result of a highly secular power structure and struggles among various pressure groups.”<sup>12</sup>

The same sentiment applies at the very least to an equivalent degree towards EU regulating present-day Europe. Andenæs continues:

“If an attitude towards respect for the law is lacking, the authorities achieve a position which in many ways is similar to that of an occupation force in enemy territory ...”<sup>13</sup>

What is wise behaviour if you are or if you are considered to be an occupying power? No one can be a better counsellor than Niccolo Machiavelli on mixed principalities:

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11 Lars Åberg: *Ikke lenger så negativt å bryte promillegrensen!* Samferdsel 1992:1 p. 28 *et seq.*

12 Johs. Andenæs: *Strafferett og moraldanning*, in Henrik Hessler (Ed.): *Festskrift till Per Olof Ekelöf*, Stockholm 1972 p. 38 *et seq.* (p. 48); translated here.

13 *Ibid.*

“[If the annexed states] belong to the same country and speak the same language ... [he who] conquer[s] such states and who wishes to keep them, ... must attend to two things: 1. No survivors of the former ruling family must remain; 2. The conqueror must not change the laws or taxes of the states.

However, when territories in a country with foreign language, customs and constitution are acquired, then the difficulties set in, and it will take great luck and great skills to retain them.”<sup>14</sup>

Keeping these thoughts in mind, the consequence of a ‘Europeanization’ of criminal law – or, in other words, further transferring of parts of the national systems to the union – most probably will be a reduction in lawabiding as well as a decrease in the respect for the institutions of the community.

To coerce different national groups to submit to the same laws corresponds to coercing a child to do something beyond its development. It is manifestly brutal but also contra-indicated, because such behaviour creates a counter reaction suppressing and delaying the wished for ‘Europeanization’.

### 3.3 *Democratic Legitimacy*

Legislation – and especially penal legislation – must have a democratic mandate in order to be legitimate, *nulla poena sine lege parlamentaria*. The European Parliament has often invoked this principle, and it forms a cornerstone in our political system. However, the European Parliament has apparently not realized that this principle does not primarily point towards the competence being assigned to the European Parliament. Rather and properly understood it indicates a decentralized competence in criminal law in accordance with the principle of proximity.

Moreover, it has frequently been overlooked that democracy is not merely a question of polls and majorities.

“The essence of democracy is not determined by the vote, but rather by the dialogue, the negotiation, by the mutual respect and understanding, and by the ensuing growing sense of the interest of the unified whole.”<sup>15</sup>

Another issue is that Scandinavian democracies put far more emphasis on consensus than do some other states.

### 3.4 *Protection of Minorities*

Democratic legitimacy does not necessarily pertain to promotion of the interests of the majority. The point that “real democracy” depends on respect for the views and rights of minorities has several times been expressed in conjunction with our assessment of the “new” Central-European states. Transferred to our area, this indicates that regional differences in attitudes and values must lead to regional criminal justice systems. The right to self-determination should not only be a right belonging to former colonies facing the colonial power. It must also be recognized as a right for regions facing the centralized power.

14 Niccolò Machiavelli: *Il principe*, 1512; translated here.

15 Hal Koch: *Hvad er demokrati?* 5. udgave, København 1991 p. 23; translated here.

We shall in other words respect pluralism of values. It has been just as difficult for human rights law as for criminal law to accept that values can differ in different countries and within the national entities. At a number of conferences, discussion has taken place concerning the problem whether the fundamental values are truly universal. The discussion continues. Today we take for granted that the *International Covenant on Civil and Political Rights* (1966) contains an

“Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The provision is however interpreted narrowly. For example, national minorities are not protected.

*The Vienna Declaration and Programme of Action* (1993) expresses something of a similar nature:

“19. ...

The persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.”

We may immediately agree on the necessity of protecting some cultural phenomena. (But not, for instance, circumcision of girls in Africa or the death penalty in USA). Even a large and vigorous country such as France has felt the need to protect her linguistic culture by means of prohibition of English shop-names. The Union is protecting its movies against foreign (*i.e.*, American) moviemakers. We protect our religion, our language, our shop-names, our movies production as important parts of our national heritage. Why is our legal culture so unimportant that there is no need for protecting its distinctive features?

A greater recognition of legal culture would be in fine accordance with the expansions of human rights protection occurring in other areas. Contemporary acknowledgments of, *e.g.*, women’s rights, children’s rights, etc., may be mentioned; all amounting to *the right to be different*.<sup>16</sup> And in particular, the development as to rights for indigenous people.

### 3.5 *The Supranational Systems*

We see a characteristic difference between the two dominating supranational systems in Europe. In *Council of Europe* national differences are more often acknowledged than in the *European Union*. The discrepancy may partly be explained as a result of the necessity of achieving consent inside the Council of

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16 S.E.M. Alvaro Mario Brilhante Laborinho Lucio: *For a Europe of Values*, in Mireille Delmas-Marty (Ed.): *The Criminal Process and Human Rights, Towards a European Consciousness*, Dordrecht 1995 p. 175 *et seq.* (p. 178).

Europe area. But the basic premise appears even in the core human rights area by the acknowledgement of a margin of appreciation.

It is obvious that Council of Europe was created to further human rights while the European Union was created to further economic cooperation. Council of Europe is based on legal considerations, while the European Union is run by economists on economic models.

### 3.6 *Rule of Law*

The principle of rule of law requires that an individual easily can get information on whether an intended act is illegal before the act is undertaken. Following the extensive and continuously growing international relations, there arises an obvious need that travellers and merchants will not be exposed to unwanted surprises from another legal system. Employers and employees, manufacturers, wholesalers and retailers, tourists and students may be unduly suppressed in their entirely legitimate activities when they find it hard to adapt themselves to other legal systems or refrain from making special adaptations. This need draws attention to the independent value of having legal systems containing the same substantive rules. To an even higher degree the argument applies to the central administrator who thus can confine her/himself to learning her/his own rules. We here have some substantial arguments in favour of unification.

The point of view is old. So is the suspicion that its actual importance has been exaggerated. Compare, for instance, von Savigny:

“Zweytens klagt man über die grosse Verschiedenheit der Landesrechte ... Dass durch diese Verschiedenheit die Rechtspflege selbst leide und der Verkehr erschwert werde, hat man häufig gesagt, aber keine Erfahrung spricht dafür, und der wahre Grund ist wohl meist ein anderer. Er besteht in der unbeschreiblichen Gewalt, welche die blosse Idee der Gleichförmigkeit nach allen Richtungen nun schon so lange in Europa ausübt: eine Gewalt, gegen deren Missbrauch schon *Montesquieu* warnt.”<sup>17</sup>

Based on the same reasons, clear advantages would result from having the same formal legislation in many areas. The prevailing substantive uniformity inside EU law ought to be made obvious by establishing formal uniformity. In this way, we could eliminate or reduce uncertainty as to whether the law in fact is the same. This demand is already somewhat fulfilled in the existing prohibition against reformulation of EU regulations in national law.

The insistence on uniformity carries great weight regarding definitions of the crimes (*actus reus*) and is also in part valid with respect to the defences. The other conditions for imposing punishment are in this connection of minor importance. If the criminalized act has been committed, it is not of major significance whether the defendant knew of divergent concepts of *mens rea*, different definitions of negligence or varying sentencing principles, etc.

On the other hand, it is an exaggeration to look at the differences as criminogenic. Criminals are not moving themselves or their activities from one

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17 Friedrich Karl von Savigny: *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, Dritte Auflage, Heidelberg 1840 p. 41.

country to another in pursuit of imprisonment in four years instead of six years. What matters to them is the possibility of profits and the perceived risk of being caught and prosecuted.

#### 4 The Use of the Principles in Criminal Policy

The weight of these arguments would support rejection of common criminal legislation in the core areas closely intertwined with ethics, until(!) a common culture has developed.

In ethically neutral areas it is desirable to try to remove actual differences and create greater compability between the national legislations. However, even “petty” differences may be hard to remove. Consider, for instance, a unified traffic code which implies that we all have to drive on the left side of the road.

Many administrators and politicians tend to view the general conditions for imposing criminal liability as merely “formal” rules that might easily be unified. Therefore it is crucial that we clearly demonstrate the close relationship between, on the one hand legal provisions on attempt, complicity, intention and negligence, etc., and, on the other, the national legal culture. When we explain our principles of attempt, complicity, etc., underlying our legal convictions, we constantly relate such principles to our principles of moral condemnation. And, in turn, the latter depend mainly on prevailing religious movements in our countries in the 19th century or even earlier.

The economic integration that lies at the heart of Union law is arguably an important explanatory factor of the emergence of punitive sanctions. This law builds on models of rational economic actions, which tend to point towards negative general prevention (deterrence) more than to the positive general prevention. In this respect it is ignored that criminological research has not been able to explain much crime by rational choice models. It is also overlooking that negative general prevention is incompatible with modern ethics.<sup>18</sup>

Neither can the sanctions be unified without decisive infringements of fundamental national assessments of right and wrong. Arguably, almost all sentencing is based more on tradition than on reason. However, that is no argument for unification. If, nonetheless, unification is seen as the goal, it should be combined with the principle that *all unnecessary punishments are unethical*.<sup>19</sup> This would lead to unification at the lowest punitive level. Apart from such real arguments, one might weigh in economic considerations. This may seem a somewhat utopian perspective when we compare our sentencing practises in Northern countries with the “heavy” Member States. However, it is the only defensible one.

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18 Kimmo Nuotio: *The rationale of the Nordic Penal Policy compared with the European Approach* (in press).

19 Kimmo Nuotio: *The Ethics of Criminal Justice*, in Thomas Elholm *et al.* (eds.): *Ikke kun straf ...*, Festskrift til Vagn Greve, København 2008 p. 491 *et seq.* (p. 497).

The road ahead leads through an identification of neutral or common areas, the establishment of a model penal code for the relevant parts, and thereafter a local or regional acceptance of the move.