Reflections on the Influence of Philosophy on Criminal Law

Explaining Uniformity and Variety of Criminal Law in Europe

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Abstract

Among the cultural factors that have shaped the criminal codes of European states, philosophical thinking obviously has a foremost position. The essay indicates the common philosophical roots of European criminal codes. It shows that the common philosophical ground of these codes is the result of ideas developed especially by the philosophies of natural law and rational law and the philosophy of enlightenment. These philosophies have formed substantive criminal law, the codes of criminal procedure, today's theory of punishment and general principles of substantive criminal law as well as the catalogue of offences and important procedural principles. They have thus created important elements of uniformity. Nonetheless, there is still considerable variety in the criminal codes of European states. This essay gives examples of such variety and illuminates their background. It shows especially that variety begins where the guidance of philosophical thinking ends. Here, other cultural factors can exert an influence. Finally, the essay deals briefly with the question of whether philosophy can still be a guide today – when we try to decide whether and to what extent we should harmonize the criminal codes of Europe or maintain variety.

Introduction

Comparative jurisprudence shows that there is, despite much variety, a common stock of criminal law beyond the borders of particular European states. For some people this stock is the basis and the nucleus for further harmonization or standardization of criminal law in Europe. Others consider this common supply to be a sufficient guarantee of legal unity in European's criminal law – they judge the remaining variety beyond this common stock not negative but as something that should be maintained.

I am not intending to intervene in this current discussion, at least not directly. I would like to treat another topic, a topic currently less discussed. I am interested in the ingredients of this common stock and in the forces which have shaped it. Since this common base is limited, the question also arises where the common

stock ends and where variety begins – and why it has come and could come to that variety.

These questions are not only academic and of scientific interest. They are obviously also interesting from a practical perspective such as the possibility and the desirability of more legal uniformity in those fields of criminal law which are currently still characterized by variety. Whether uniformity in those fields is attainable and desirable depends decisively on the reasons and the forces responsible for uniformity and – on the other side – standing behind the variety currently to be found.

Of course, it is not possible to show the whole background of the common European stock of criminal law in a short essay, and even less that of variety. I have to leave aside reflections on legal anthropology as well as on the roots in Roman or Canon law.[2] I would like to restrict and to concentrate my considerations on the influence of philosophy, especially of philosophical insights into crime, punishment and procedure. This influence is enormous: It is essentially the result of philosophical reflections on crime and punishment that there are certain common characteristics in the criminal laws of European countries today, basic characteristics in the form of common principles as well as in the form of common institutions. On the other side, differences can be found particularly in fields where philosophical insights did not and do not lead to a single acceptable solution – here pragmatic aspects, traditions and other forces can work.

I. Uniformity created by Philosophy

1. Philosophical Reflections on Basic Questions of Criminal Law

The enormous influence of philosophical insights on European criminal justice systems becomes already visible if you look at the basic questions of criminal law.

a) Legitimation of Criminal Law

One of the central topics of criminal law is the question of legitimation: What justifies to punish a person because of a certain behaviour and where are the limits of justifiable punishment?

To answer this question, in particular the philosophy of natural rights and of rational law (Naturrecht, Vernunftrecht) and the philosophy of enlightenment have worked out fundamental and pathbreaking insights – philosophers like *Hobbes*, *Grotius*, *Locke* and *Pufendorf*, later on *Montesquieu*, *Rousseau*, *Voltaire*, *Beccaria*, *Kant* and *Hegel* stand exemplarily for that. Their reflections on the foundation, the legitimation and the raison d'être of the state had broken with

long accepted theocratical foundations justifying the state as an institution to realize an order willed by God. Such conceptions were replaced by foundations taking their origin from the human being, his needs and his reason.[3] In this sight, the state is a rationally grounded association firmly pursuing earthly objectives – above all the protection of its citizens against harm to their individual and collective goods. Criminal law is now conceived accordingly: Punishment and criminal law, increasingly judged as grave interventions in human rights, are restricted to these objectives of an earthly legitimated state – and therefore can only be justified in order to protect against harm to rights and goods of individuals and society.[4]

Later on jurists and philosophers have elaborated this basic approach and put it into concrete form,[5] so that we can already find the first legal enactments at the end of the eighteenth century – for instance in article 5 of the French Declaration of Human Rights: "La loi n'a le droit de défendre que les actions nuisibles à la société."[6] Nowadays, this approach is common good of criminal law in all European states, even though expressed through different terms and principles like the principle of "Rechtsgüterschutz" or the harm principle, etc.[7] Punishment of merely immoral or dishonourable behaviour, of breaking with the contents of a religion or of blasphemy has vanished, at least on the whole. Attempts to re-enact those crimes, like the reintroduction of parts of the Sharia in some Islamic States, will cause storms of indignation in the European public – a proof of the effectiveness of the philosophical ideas just mentioned.

b) Theory of Punishment

There is a second central issue of criminal law on which philosophical reflections had a clarifying, forming and – at the end – standardizing effect: the question of the rationale of punishment.

Inspite of some reflections on this topic already in the philosophy of ancient world,[8] the fundamentals are formulated by the philosophy of rational and natural law,[9] the philosophy of enlightenment[10] and philosophers and jurists elaborating the insights found out in these periods. To those philosophical approaches we do not only owe the insight that the real problem of punishment is the reason for its imposition – because the threat of punishment prior to the incriminated act can hardly intend something different than prevention of offences by dissuading potential offenders. The philosophy of enlightenment and the following discussion have also precisely marked the conceivable rationales concerning just this imposition of punishment. Although most of the philosophers of enlightenment justified punishment with its benefit, they also pointed out the dangers especially of gen-

eral deterrence and of a punishment purely oriented towards the needs of individual prevention.[11] At the same time, the philosophy of enlightenment, above all *Montesquieu* and *Beccaria*, emphasized the necessity of some proportion between crime and punishment.[12] *Kant* completed these reflections with his famous closing remark: It is not enough that punishment is useful for the public, it has to be, above all, just and justified with regard to the convicted person.[13] These philosophical approaches and the following discussions have worked out the fundamentals of today's view of punishment – a view of punishment which might be seen as common basis of European criminal justice systems, if you leave aside some details.

From this perspective, punishment is – firstly – a response to the offence committed. It is, secondly, oriented towards the severity of the offence committed and its importance for the violated legal order. And it is, thirdly, imposed on an offender to demonstrate that the threat of punishment is serious, to show the validity of the legal order and thereby to prevent, as far as possible, in this way crime in future. This moderate view of things has meanwhile succeeded also in those states which were not spared from relapses into general preventive conceptions of deterrence or did sympathize for some time with conceptions of punishment oriented above all towards the idea of reforming the offender.

2. *Philosophical Reflections on the Theory of Crime and the General Principles*

Beyond the questions of legitimation of criminal law and the rationale of punishment, philosophical thinking has influenced, above all, the general part of criminal law, and here especially the general theory of crime.

a) *Theory of Crime – General Requirements*

In the ancient folk laws we can only find descriptions of those unwanted events or of behaviour that should be avenged by punishment or other sanctions – in other words, the catalogue of offences or the special part of criminal law today. Reflections on general requirements of crime almost lacked completely in those times – such issues were discussed, if at all, ad hoc and casuistically, especially in the context of manslaughter and bodily harm.[14] It had been again, above all, philosophers and philosophically educated jurists,[15] also theologians, who specifically asked the question why it is legitimate at all to hold a person responsible for an unwanted event – and: which principal requirements have to be fulfilled to do so. The results of these reflections found expression in the so-called principles of imputation, ascription or attribution – for instance, *Pufendorf's* famous theory of

imputation[16] – and have directly or via processes of reception (or adaption) coined today's general theory and principles of crime.

Theories of imputation have, for instance, worked out the act requirement as a reason and a limit to hold a person responsible for an unwanted event (caused by such acts). They have, secondly, shown that only certain persons can be held accountable for unwanted acts and events: Only those persons who are able to decide reasonably can be held responsible for what they have done – this ability is, in other words, a central general requirement for qualifying harm to others (or other bad events) as the work of a person and to attribute (impute) it to her. Thirdly, theories of imputation contain first specific reflections on facts or situations which exclude qualifying an act or an event as a crime – like acting to protect against unlawful attacks, acting to save threatened goods in emergency situations or the circumstance that the affected person has consented to the affecting act. All that can be found already in *Pufendorf's* eight volumes "De jure naturae et gentium" (1672).[17]

The philosophy of enlightenment has continued and deepened these approaches, and in the last two centuries philosophers and jurists have developed them further and put them into a concrete form by clarifying them against the background of an extensive illustrating material.[18] Being the result of unprejudiced philosophical reflections, the pillars of that theory of crime, especially of its general requirements, endured and were suitable to show the way for further development. So today's theories of crime in European countries coincide in most general requirements of crime and its essential institutions, if you leave aside once more some particular developments,[19] especially in details.

b) General Principles of Substantive Law

Not only the theory of crime has philosophical roots, especially concerning the requirements and exclusions of crime. Important general principles of criminal law go back to philosophical reflections, too, or have been given a philosophical foundation.

An example of that is the maxim "nullum crimen sine lege", gaining strength in the age of enlightenment, meaning that a person must not be punished unless the conduct was, prior to the act, defined as criminal (that is: forbidden and threatened by punishment). You can already find this principle in *Hobbes'* "Leviathan"; later on *Bentham's* "Principles of Penal Law" and *Feuerbach's* famous "System of Common Penal Law" gave reasons for the principle.[20]

Another example of principles with philosophical roots is the principles governing the treatment of different kinds of mistake (error), for instance mistake of

fact and mistake of law. Being roughly known already in Roman and Canon Law,[21] the distinction and the principles building on it got a deeper foundation and were further developed above all by philosophers like *Pufendorf*, *Hegel* and others.[22] Their reflections on the treatment of different types of error contain already the most essential aspects of today's theories.

A further instance of those principles and insights with obviously philosophical background is the distinction between grounds only excluding punishment and grounds giving rights and revoking the quality of wrongdoing. *Pufendorf* and his contemporaries did not yet know this distinction exactly.[23] We owe it to the critical philosophy and its thirst for knowledge and can find it there in the famous dispute over a so-called right of necessity between *Kant* and *Hegel*. *Hegel* tried to give reasons for such a right, though it had to be strongly restricted in his opinion, too.[24] *Kant* denied a right of necessity emphatically: How, he asked, should a situation of danger or need give you a right to use and damage the goods of a person who has done nothing bad to you? In his opinion, such behaviour was not justified. There were only good reasons not to punish it.[25, 26] This distinction between grounds revoking wrongdoing by giving rights and those which only excuse or exclude punishment was increasingly accepted in the course of the nineteenth and the twentieth century; nowadays it is a pillar of most European criminal laws.

It is not possible to give further examples of the influence of philosophical thinking on general theory of crime here. Instead, we should also take a look at the catalogue of offences, that means the so-called special part of criminal law, and criminal procedure – not least to counter the objection that the connections between philosophy and general theory of crime have no equivalent in other parts of the criminal law.

3. *Philosophical Reflections on the Catalogue of Offences*

Just like the general theory of crime, the catalogues of crimes in European criminal codes have a philosophical foundation and owe their common core essentially to philosophical reflections – although it is true that the influence of philosophy is weaker here, and much has to do with tradition.

The appreciation of fundamental human rights and the restriction of the power of the state on ensuring these rights and goods and protecting them from infringement had made untenable a series of offences of medieval and early modern times criminal law, especially offences against God, church and religion. *Thomasius* in Germany, *Montesquieu* and *Voltaire* in France and *Beccaria* in Italy were the most famous critics of such offences.[27] According to that criticism, these offences vanished in the course of time. At the same time, the programmat-

ic restriction of the authority of the state and of criminal law onto the guarantee of rights and goods of individuals and the community and onto their protection from harm and intervention contained a clear guideline for building up a legitimate criminal law: It was only necessary to connect this program with insights of philosophy concerning both, the catalogue of individuals' rights in need of protection and the goods of community which are indispensable to ensure and to preserve such rights. These insights made it clear what criminal law had to protect and, on the other hand, what it was restricted to: the guarantee and protection of life, of bodily integrity, of freedom and property, alongside with the guarantee of important community goods like the existence of state as such, the integrity of the authority of the state, a functioning administration and jurisdiction and some other indispensable goods and functions. The criminal codes of European states have accordingly acted and concentrated on this in a long and differently running development.

But there is not only conformity regarding a certain core of offences and the limitation of goods which can be protected by means of criminal law. Uniformly judged are today, at least on the whole, also the ranks of these goods, their hierarchy, and what is following from that for the question how harm to these goods should be punished. In these fields the philosophy of enlightenment has – in turning from divinely ordained conceptions of law to human beings and their needs – also provided decisive standards and thus ensured the transition; *Montesquieu* and *Beccaria* were pioneers here, too.[28] Finally, there is conformity also with regard to another important point in European criminal codes: Not all behaviour touching goods is worth to be prevented by punishment and justifies its use. Punishment as a serious intervention into individual rights has to be confined to severe intrusions into rights of others. This "ultima ratio" function, again a central postulate of enlightenment, has been formulated very clearly by *Beccaria*, *Montesquieu* and *Voltaire*.[29]

For a long time, enlightened criminal law did correspond to these postulates by restricting criminal law to offences requiring both, a real harm to a legally protected good and a specific mental relation of the offender to his wrongdoing – the latter in form of intent or specific types of knowledge. It is true that today's criminal codes are reaching further – they contain more and more offences requiring only negligence, and modern legislators increasingly penalize also kinds of conduct even though there is no real harm, for instance dangerous or risky actions. However, there is proof showing that the idea of restricting criminal law to grave harmful behaviour is still felt to be an obligation. Exemplary for that are intensive efforts to justify such extensions of criminal law, especially into the field of risky

or preparatory behaviour – the argument, for instance, that an efficient protection of rights and goods could not be ensured without forbidding and punishing such behaviour in various fields.[30]

4. Philosophical Reflections on Criminal Procedure

The philosophy of rational law and of enlightenment brought also a real transition in the field of criminal procedure, and at the same time, provided a common European stock of procedural institutions and principles.

a) Status of the Accused – Restricting the Power of the State

Not only torture was incompatible with the recognition of each individual as a person with inalienable fundamental rights and the restriction of the authority of the state – passionately criticized by philosophers like *Thomasius*, *Beccaria* and *Voltaire*.[31] It was already incompatible with such positions to treat the accused as a mere object of investigations. Regarded as a person with fundamental rights, the accused had to become an autonomous subject of procedure whose rights had to be respected in all phases of proceedings. Hence certain methods of investigation were rejected by philosophers, and procedural forms were claimed by them to preserve the rights of the defendant[32] and to bring them in line with the interest of the community in convicting and sentencing the real perpetrator. At the same time, coercive measures like custody, search or seizure were considered to be legitimate only when certain conditions are observed.[33] Other reform claims and institutes of law to restrict and control the power of the state were the demand for judicial independence,[34] the demand for public court proceedings (hearings) and for participation of people in criminal jurisdiction.[35] The principles and consequences of this enlightened thinking found expression in important codifications at the end of the eighteenth and the beginning nineteenth century (like the Code pénal and the Code d'instruction criminelle) the spirit of which spread all over Europe and partially even found its way into constitutions of the nineteenth century. According to this, most of the European codes of criminal procedure had been adapted to the new ideas and principles at the end of the nineteenth century.[36]

b) Institutions and Principles to find out the Truth

But philosophy did not only provide a new status for the accused. It also influenced the way to find or better: to reconstruct truth in criminal proceedings. Critical philosophy trying to analyse "what can I know?" and "how can I recognize what is (and what was)?" had also sensitized to reflect the methods of finding out

the truth in criminal proceedings. Against this critical background, the methods and rules that had been applied to find out the truth in criminal proceedings until the end of the eighteenth century in most European countries appeared obviously unsuitable. The role of the judge as investigator, prosecutor and judge in one person made prejudiced, and the rules of evidence were incompatible with insights of epistemology and the methods of natural and empirical sciences. A further main evil of the ancient criminal proceedings consisted in the fact that the court often knew the case only from the records. Sensational wrong judgements confirmed the unsuitability of those proceedings. So it was only a question of time until these pillars and parts of ancient criminal proceedings were replaced by institutions, methods and principles which were better suited to find out the truth and to ensure a fair judgement. The institutions we owe to philosophical reflections on these topics are well-known: Role allocations, especially the distinction between prosecutor and judge,[37] are to be mentioned here as well as the principle of oral proceedings and of immediacy[38] that obliges the judge to see evidence directly and not only by hearsay.

Besides these aspects, some other well-known principles and institutions belong to this firm stock of criminal procedure in Europe having its roots in philosophical reflections. I only mention the presumption of innocence,[39] the right of defence and to a fair trial or institutes like "res judicata" or the right to appeal.[40] This philosophically rooted common European stock of criminal procedural law[41] is most impressively symbolized today by the guarantees enshrined in the European Convention of Human Rights supervised and ensured by the European Court of Human Rights.[42]

II. Variety beyond Philosophical Guidance

Of course, the criminal codes of European states do not only contain common institutions and common philosophical ground. There exist also a lot of differences, and this not only in unimportant details.

1. Some Examples

Differences can already be found in the field of general doctrines of crime. The central categories to qualify behaviour to be a crime, for instance, differ in the countries of common law from the categories used in continental European criminal codes. The inner or mental side of crime, the mens-rea component, is also seen quite differently in both these legal systems.[43] Self-defence, necessity and other legal grounds of justification or excuse coincide in a common core, but the width of rights or excuses differs considerably.[44] Further divergences exist in

treatment of mistakes and in cases when more than merely one person may be held accountable for a crime. Here, different basic conceptions compete – namely the qualification of all involved persons as perpetrators (so called "Einheitstäter") and those conceptions distinguishing between perpetrators (or principals) and participants (secondary participation). Moreover, there are considerable divergences between those criminal codes which distinguish in the mentioned way, because they are using partially different subdivisions.[45] Looking at the treatment of attempt, one can see that there are different national answers how to treat the cases of impossibility ("untauglicher Versuch") or of withdrawal – not everywhere withdrawal is acknowledged to exclude punishment. Just as different are national answers to the punishability of omissions. Finally, sentences provided for in national codes of criminal law are partially also very different, and not less different are the guidelines for sentencing – some criminal laws contain precise rules destining the punishment almost in a mathematically exact way,[46] others give their judges wide ranges of discretion.

The differences are rather increasing in the field of particular offences. Of course, there is a common catalogue of rights and goods being protected against grave harm in all European criminal codes. But even this common ground becomes relative since the protection even of these rights and goods is effected by differently shaped types of crime. Where harm to a certain good (for instance life or freedom of bodily harm) is distributed among several offences, the *internal* distribution is often different – for instance, aggravations and mitigations are constructed and arranged differently. Further differences concern the *external* limits of conduct forbidden and punished to protect certain goods. Differences exist here especially in the fields of offences against property and against common goods or values, for instance concerning fraud or forgery of documents.[47] Moreover, there are, especially in the fields of middle and petty criminality, offences that are known only in some of European crime codes – for instance failure to render aid (or to give assistance).[48] Considerable are the differences, finally, concerning the height of punishment threatened in the national criminal codes. Not only the general level of punishment is differing here, the threat of punishment for particular offences and the statutory range of punishment differs as well.

The codes of criminal procedure confirm the impression of uniformity and variety. The common stock already mentioned is faced by a multitude of differences – actually not only in details, but also in important and principal questions.[49] I will only mention four issues of divergence. Firstly, in some states prosecution and bringing a charge are governed by the principle of compulsory prosecution whereas other states prefer the idea of discretion; but in most instances both prin-

ciples are simply the starting point, in reality divergent mixtures are predominant. Secondly, fact-finding and taking of evidence sometimes lie in the hands of parties with contrasting roles, prosecutor, accused and defence; other codes of procedure provide for an official duty of the court to find the facts and to take evidence. Thirdly, the final decision lies predominantly in the hands of a court staffed solely or at least partly with professional judges; but there are still some countries where, at least in certain cases, a jury decides whether the accused is guilty or not. Fourthly, the judgement closing the instance can normally be appealed against, but, again, there are considerable differences concerning the number and the details of appeals.

2. *Reasons: Limited Guidance of Philosophical Insights*

Where do all these and a couple of further differences come from? And where do they arise especially? – It is not difficult to answer these questions.

Differences are always possible where a rational or philosophical reflection on problems, though acknowledging certain common values and starting points, obviously leads to more than only one answer. When reason and sense of justice allow different solutions, other issues can get influence and are, strictly speaking, even needed to come to a final decision. Issues taking influence in those cases are above all pragmatic aspects and the greater compatibility of a solution with tradition, with national preferences or other parts of the national law.[50] Experience, including the experience gained in other countries, plays an important role in this context, too. The legal solution, finally found in this way, not seldom shows features of an experiment – especially when experience is lacking or contradictory and the legal solution is determined by preferences of the legislators. Nonetheless, if it stands the test in the course of time it will become part of the well known stock of national law which will be only reluctantly given up again.

Let me illustrate this by means of the question how to deal with the offences committed by several participants: Justice and reason and with that philosophical reflections forbid, of course, to impose equal sentences on persons which have been involved in the offence in a quite different way. But whether, in cases with several involved persons, all of them should be called perpetrators (and only get different sentences) or whether only a part of them should be called perpetrators and the others participants is not a question about which reason and justice allow only one answer; this applies even more to the question how detailed these main figures should be subdivided. Accordingly, different answers can be found in European criminal codes[51] – depending on, among other aspects, how desirable it seems to be for a national community to make symbolic distinctions already in

the conviction and to which extent those special figures are already available and rooted in general thinking.

Another example for different solutions is the legislative decision for fact-finding and taking evidence either by means of an adversarial procedure or ex officio investigation.[52] Both conceptions have advantages and disadvantages; it is not possible to say that one is definitely better. Whether a legislator will decide for one or the other model depends above all on how he weighs advantages and disadvantages, which status he concedes to these aspects and if he thinks it would be possible to sufficiently compensate the disadvantages of a model.[53]

III. Prospects: Variety and Uniformity as an Object of Philosophy

With these reflections I have reached the end of my sketch on the importance of philosophy for the common stock of the criminal law of the European states. The considerations might have shown how much today's criminal codes in Europe have been influenced and coined by philosophical reflections on law and particularly on criminal law. A second aspect might also have become clear, however. Philosophical reflections do not determine legal solutions and institutions in all details; their field and their strength is the rational decision of fundamental questions, the proof that certain principles and institutions are necessary and reasonable. Within this frame, space remains for different solutions in detail – space for tradition, national or regional law culture and pragmatism.

What are the consequences of that for the role of philosophy in the discussion about the future of law and particularly of criminal law in Europe? Can philosophy be an advisor in answering the questions whether, and if it should be done, to which extent and into which direction it is sensible to harmonize or even standardize criminal law in Europe?

At first glance, the correct answer seems to be "no": How shall the philosophy of law be able to tell us how to deal sensibly with divergences of national law when these divergences are just the consequence of the limited guidance of philosophical reflections concerning the content of good law?

But we should not be rash in our judgement. The insights of philosophical thinking about law don't amount to telling us which *material* contents and principles of law could reasonably have to be called good law. Philosophy of law also tells us something about conditions of effectiveness and validity of law and about the status which knowledge and acceptance of law as well as culture of application do have for observance and effectiveness of law.[54] These recognitions are to be considered when one wants to give a reasonable answer to the question of "whether" partially differing laws should be harmonized or standardized. Partial-

ly differing, but in their field of application well known, accepted and well functioning codes might be better law than highly harmonized or even standardized codes which come for parts of the people partially unexpected, are only little known and accepted and therefore badly observed and applied.[55]

If it is – taking this also into consideration – after all reasonable to harmonize the law in certain fields, something further should be observed: The harmonized or standardized law coming out at the end should also correspond to certain rules of procedure and specific conditions – namely those rules of procedure and those formal conditions that are to be followed to get well accepted law when the participants of legal discourse have diverging starting points. Insofar philosophy of law can give a series of insights that should be observed.[56]

We have to leave it with these brief comments. It would be a new topic and it would need an own contribution to clarify the importance of philosophical insights into law for harmonization or standardization of criminal law in Europe in detail.

Notes

1. Wolfgang Frisch is Full Professor for Criminal Law, Criminal Procedural Law and Philosophy of Law at the University of Freiburg where he was Director of the Institute of Criminal Law and Legal Philosophy until September 2011. He also is Scientific Member of the Max Planck Institute for Foreign and International Criminal Law in Freiburg and Full Member of the Heidelberg Academy of Sciences and Humanities.

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2. For the influence of Roman Law, see, e.g., *E. Schmidt*, Einführung in die Geschichte der deutschen Strafrechtspflege (3rd edn. 1965), §§ 86 ff., 129, 132 ff., 134-136; *Seagle*, Weltgeschichte des Rechts (3rd edn. 1967), pp. 231 ff.; *P. G. Stein*, Römisches Recht und Europa (3rd edn. 1999), pp. 112 f., 172 f., 183 f., 195 f. – For the influence of Canon Law *St. Kuttner*, Kanonistische Schuldlehre (1935).
3. See, e.g., (with considerable differences in detail) *Grotius*, De jure belli ac pacis (1625), Book II ch. 20; *Hobbes*, Leviathan (1651, engl. Version) esp. part I ch. 13-15, part II ch. 17 and 28; *Locke*, Two Treatises of Government (1690), part II §§ 123 ff.; *Pufendorf*, De officio hominis et civis (1673), Book II ch. 5 §§ 7 ff.; *Montesquieu*, De l'esprit des lois (1748), Book XI ch. 6; *Rousseau*, Du Contrat social ou Principes du Droit Politique (1763), Book I, esp. ch. 6-8, Book II ch. 4-6 ; see also *K. F. Hommel*, Des Herrn Marquis von Beccaria unsterbliches Werk von Verbrechen und Strafen (1778), Vorrede pp. 2 f., 15 f., 19, 22.
4. See the references in note 2 (e.g. *Grotius*, ibid., Book II ch. 20 sect. 20; *Pufendorf*, De officio, Book I ch. 2 § 15), esp. *Beccaria*, Dei delitti e delle pene (1764), §§ II, III and VI; *Montesquieu*, De l'esprit des lois (n. 2), Book XII ch. 4-6, Book XV ch. 12; *Voltaire*,

Commentaire sur le livre des délits et des peines (1766), III and IV; *idem*, Prix de la justice et de l'humanité (1777), art. VIII and X.

5. See, e.g., *Amelung*, Rechtsgüterschutz und Schutz der Gesellschaft (1972), pp. 16 ff.; detailed account of the development in *Fischl*, Der Einfluss der Aufklärungsphilosophie auf die Entwicklung des Strafrechts (1913), pp. 25 ff.
6. See article 5 of the French Declaration of Human Rights of 26.8.1789.
7. For more information *A. v. Hirsch*, 2002 GA, pp. 2, 7 ff.; *Manes*, 2002 (114) ZStW, pp. 720 ff.
8. See esp. *Plato*, Protagoras, nn. 324 a-c; *idem*, The Laws, Book V n. 728; Book IX nn. 854, 862 f, 933 d, 934; *Aristotle*, Nicomachean Ethics, Book V ch. 8 n. 1132 b, ch. 15 n. 1138.
9. Fundamentally *Grotius*, De jure belli ac pacis (n. 2); *Hobbes*, Leviathan, part II ch. 28; *Pufendorf*, De officio (n. 2), Book II ch. 7 § 12; on Pufendorf see *Welzel*, Die Naturrechtslehre Samuel Pufendorfs (1958), pp. 93 ff.
10. Cf. *Montesquieu*, De l'esprit des lois (n. 2), Book VI ch. 9, 12, 13 and 17; *Beccaria*, Dei delitti e delle pene (n. 3), XII; *Voltaire*, Prix de la justice (n. 3), art. I; for a comprehensive account, see *Fischl*, Der Einfluss der Aufklärungsphilosophie (n. 4), pp. 63 ff., 73 ff., 85 ff.
11. On the dangers esp. of harsh general preventive punishment, e.g., *Montesquieu*, De l'esprit des lois (n. 2), Book VI ch. 12 and 13; *Beccaria*, Dei delitti e delle pene (n. 3), XXVII.
12. See, e.g., *Montesquieu*, De l'esprit des lois (n. 2), Book VI ch. 10, Book XII ch. 4; *Beccaria*, Dei delitti e delle pene (n. 3), VI and VIII; *Voltaire*, Prix de la justice (n. 3), art. I ff.
13. See *Kant*, Die Metaphysik der Sitten (1797), part II, sec. 1, E; see also *Hegel*, Grundlinien der Philosophie des Rechts, 1821, §§ 99 ff.
14. See *Schaffstein*, Die allgemeinen Lehren vom Verbrechen in der Entwicklung durch die Wissenschaft vom gemeinen Recht (1930), pp. 11 ff.; *E. Schmidt*, Einführung (n. 1), §§ 16 ff., 57 ff., 95 ff.
15. See esp. *Grotius*, De jure belli ac pacis (n. 2), Book II ch. 20; *Pufendorf*, De jure naturae et gentium (1672), Book I ch. 5 §§ 5 ff.
16. About *Pufendorf*'s influence on the development of the general theory of crime, see esp. *Loening*, Geschichte der strafrechtlichen Zurechnungslehre, vol. I (1903), p. XI; *Schaffstein*, Die allgemeinen Lehren (n. 13), pp. 14 ff., 31 f.; *Jerome Hall*, General Principles of Criminal Law (2nd edn. 1960), pp. 9 ff.
17. See esp. Book I §§ 5 ff.; a short abstract in *Pufendorf*, De officio (n. 2), Book I ch. 1.
18. See for that in detail, e.g., *Schaffstein*, Die allgemeinen Lehren (n. 13), pp. 11 ff.; *Moos*, Der Verbrechensbegriff in Österreich im 18. und 19. Jahrhundert (1968), pp. 78 ff.; see also *Blackstone*, Commentaries of the Laws of England (1803), vol. IV pp. 1 ff., 7 ff.; *Hall*, General Principles (n. 15), pp. 9 ff.
19. See below II. 1.
20. See e.g., *Hobbes*, Leviathan (1651), part II ch. 27 and 28; *J. Bentham*, The Principles of Penal Law, in: The Works of Jeremy Bentham (J. Bowring ed. 1838-43), pp. 396 ff.; *Feuerbach*, Lehrbuch des peinlichen Rechts (1801), §§ 17 ff., 24 ff.; see further *Locke*, Two Treatises of Government, II, §§ 134, 137 and 88.
21. See esp. *Kuttner*, Kanonistische Schuldlehre (1935), pp. 138 ff.

22. See, e.g., *Pufendorf*, De jure naturae (n. 14), Book I ch. 3 §§ 10, 16; *Hegel*, Grundlinien der Philosophie des Rechts, §§ 116-118, 132; see further *Grotius*, De jure belli ac pacis (n. 2), Book II ch. 20 sec. L.
23. Cf. e.g., *Welzel*, Die Naturrechtslehre Samuel Pufendorfs (1958), p. 90 (n. 31); but also *Pufendorf*, De jure naturae (n. 14), Book II ch. 6 § 7.
24. Cf. *Hegel*, Grundlinien der Philosophie des Rechts, §§ 127 f.
25. See *Kant*, Die Metaphysik der Sitten (1797), Einleitung in die Rechtslehre II ("ius necessitatis").
26. The question was discussed controversial throughout the nineteenth and the first decades of the twentieth century. Today's philosophers discuss the problem against the background of solidarity as a possible principle of law.
27. See, e.g., *Thomasius*, Problema juridicum an haeresis sit crimen? (1697); *Montesquieu*, De l'esprit des lois (n. 2) Book XII ch. 4, Book XXV ch. 12; *Beccaria*, Dei delitti e delle pene (n. 3), II.
28. Cf. in this context, e.g., *Montesquieu*, De l'esprit des lois (n. 2) Book VI ch. 16 and Book XII ch. IV ff.; *Beccaria*, Dei delitti e delle pene (n. 3), VI and VIII; *K. F. Hommel*, Philosophische Gedanken über das Criminalrecht (1784), § 68.
29. Cf. *Montesquieu*, De l'esprit des lois (n. 2) Book XII ch. 4; *Beccaria*, Dei delitti e delle pene (n. 3), II, XII; *Voltaire*, Prix de la justice (n. 3), art. I.
30. See, e.g., *Kratzsch*, Verhaltenssteuerung und Organisation im Strafrecht (1985), pp. 277; *Kuhlen* (1994) GA, pp. 347, 363 ff.; *Wohlers*, Deliktstypen des Präventionsstrafrechts (2000), esp. pp. 338 ff.
31. Exemplary for the criticism on torture and "Inquisitionsprozess" *Thomasius*, De origine ac progressa processus inquisitorii contra sagas (1717); *Beccaria*, Dei delitti e delle pene (n. 3), XVI; *Voltaire*, Prix de la justice (n. 3), art. XXIV.
32. Pleading for them, e.g., *Montesquieu*, De l'esprit des lois (n. 2) Book VI ch. 2.
33. See, e.g., *Beccaria*, Dei delitti e delle pene (n. 3), XXIX.
34. Cf. *Montesquieu*, De l'esprit des lois (n. 2) Book XI ch. 6 and Book V ch. 5 and 6; see further *E. Schmidt*, Einführung (n. 1), §§ 205 ff., 210 ff.
35. Cf. *Feuerbach*, Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege (1821 vol. I, 1825 vol. II).
36. For a comprehensive account, see *Fischl*, Aufklärungsphilosophie (n. 4), pp. 181 ff.; *Eb. Schmidt*, Einführung (n. 1), §§ 252 ff., 295 ff.
37. See already *Montesquieu*, De l'esprit des lois (n. 2) Book VI ch. 8 and Book XI ch. 6; for a comprehensive account *Küper*, Die Richteridee der Strafprozessordnung und ihre Grundlagen (1967), pp. 118 ff.
38. Cf. *Feuerbach*, Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege (1821, 1825); *Zachariä*, Die Gebrechen und die Reform des deutschen Strafverfahrens (1845); see further *Ignor*, Geschichte des Strafprozesses in Deutschland 1532-1846 (2002), S. 232 ff.
39. See *Beccaria*, Dei delitti e delle pene, XVI; Art. 9 of the French Declaration of the Human Rights of 1789; see further *Stuckenberg*, Untersuchungen zur Unschuldsvermutung (1998), pp. 11 ff.
40. References in *Frisch* (2007) GA, pp. 250, 260 f.

41. See for that the comprehensive country reports in *Ch. van den Wyngaert* (ed.), Criminal Procedure Systems in the European Community (1993); see further *Kühne*, Strafprozessrecht (8th edn. 2010), pp. 673 ff.
42. Comprehensive accounts in *Esser*, Auf dem Weg zu einem europäischen Strafverfahrensrecht (2002) and *Gaede*, Fairness als Teilhabe – das Recht auf konkrete und wirksame Teilhabe durch Verteidigung gemäß Art. 6 EMRK (2007).
43. See, e.g., Bräutigam-Ernst, in: *Mansdörfer* (ed.), Die allgemeine Straftatlehre des Common Law (2005), § 3; *Vogel* (1998) GA, pp. 127, 140 ff.
44. See, e.g., *Watzek*, Rechtfertigung und Entschuldigung im englischen Strafrecht (1997); *Perron*, Rechtfertigung und Entschuldigung im deutschen und spanischen Strafrecht (1988).
45. See, e.g., *Stein*, Die Regelungen zu Täterschaft und Teilnahme im europäischen Strafrecht am Beispiel Deutschlands, Frankreichs, Spaniens, Österreichs und Englands (2002); *Vogel* 2002 (114) ZStW, pp. 403 ff.
46. Exemplary for that Spain and Italy.
47. Cf. the overview in *Tiedemann*, in: Leipziger Kommentar zum StGB (11th edn. 2000), vor § 263 nn. 51-92.
48. Punishable in Germany and Finland, but not in Sweden or countries of common law.
49. For a comprehensive account, also on the following issues, see *Ch. van den Wyngaert*, Criminal Procedure Systems in the European Community (1993), passim; see further *Hörnle* 2005 (117) ZStW, pp. 801, 807 ff.
50. See esp. *Hörnle* 2005 (117) ZStW, pp. 801, 807 ff.
51. For an overview on the (arguments for) different models and subdivisions, see, e.g., *Jescheck/Weigend*, Lehrbuch des Strafrechts, Allgemeiner Teil (5th edn. 1996), § 61 VII; *Ambos*, Der Allgemeine Teil des Völkerstrafrechts (2002), pp. 543 ff.; *Vogel* 2002 (114) ZStW, pp. 403 ff.
52. Cf. *Perron*, Das Beweisantragsrecht des Beschuldigten im deutschen Strafprozeß (1995), pp. 124 ff., 131 ff., 485 ff.; *Hörnle* 2005 (117) ZStW, pp. 801, 803 ff.
53. For further aspects, see *Hörnle* 2005 (117) ZStW, pp. 801, 803 ff.
54. For further information and details, see *Frisch* (2007) GA, pp. 250, 263 ff.
55. See *Frisch* (2007) GA, pp. 250, 264 ff.
56. For more information *Frisch* (2007) GA, pp. 250, 263 ff.; *Meyer*, Demokratieprinzip und Europäisches Strafrecht (2009), GA, pp. 48 ff., 73 ff.; *Kubiciel* (2010), GA, pp. 99 ff.; *Pastor Muñoz* (2010), GA, pp. 84, 95 ff.