Articles

Meditating the Different Concepts of Corporate Criminal Liability in England and Germany

By Susanne Beck[*]

A. Introduction

Today's world has been deeply affected by globalization. Different cultures have deepened their knowledge of each other and are forced to create common solutions to worldwide problems. This has led to an increasing interest in comparing different nations' approaches to common problems.

One area which has been neglected, at least in German jurisprudence, is the theory of comparative law, especially of comparative criminal law.[1] The discipline is affected by many unanswered questions: "What do lawyers do when they say that they engage in comparisons? What methods and approaches do they adopt? Does comparison (have to) focus on similarity or difference?"[2] In Germany, only a few attempts to find answers have been undertaken so far: Twenty-five years ago, Frankenberg published his "Critical Comparisons" which will be discussed later. Since then, theorists in other countries, especially Anglo-American legal theorists, have engaged in a detailed debate about "better" comparative law, influenced by postmodernism, postcolonialism, and poststructuralism.[3] They argue that the aims of comparative law are unclear, criticise the legocentrism and eurocentrism of traditional comparisons, and remind the reader of the cultural or social conditions that create different legal solutions in different countries. This theoretical debate has not yet reached the German discussion and most of practical comparative law. Many practical comparisons still use traditional or functional methods and do not question the objectivity of their intention, viewpoints or evaluation criteria.

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[1] *See* M. Reimann & R. Zimmermann, *Preface* to THE OXFORD HANDBOOK OF COMPARATIVE LAW, i, at v (M. Reimann & R. Zimmermann eds., 2006); A. Harding & E. Örücü, *Preface* to COMPARATIVE LAW IN THE 21ST CENTURY, i, at vii et seq. (A. Harding & E. Örücü eds., 2002).

[2] Reimann, *supra* note 1, at v *et seq*.

[3] *See* A. Peters & H. Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L.Q. 802 (2000) (presenting some labels for the views engaging in this debate: critical comparisons, new approach, cultural immersion approach, engaged comparativism, discourse analysts, Utah group).

The following article analyses this gap between theoretical discourse and practical undertaking, between the Anglo-American and German debate, based on the assumption, that one possible reason is the lack of dialogue between theorists and practitioners or between theorists of different countries. Some of the aspects of the theoretical debate might not be new for Anglo-American readers but are for German jurisprudence. Besides, as many practical comparisons suggest: even in other countries theoretical remarks about comparison are not as influential in practice as they should be.

To strengthen the dialogue between theory and practice, the flaws and possible improvements of comparative law will be discussed not just in theory, but on the practical example of the debate around corporate criminal liability (CCL). CCL serves as good example for practical and theoretical reasons. Practical reasons are the increasing importance of CCL on national, European,[4] and international levels. For example, the question of how to proceed if a German firm with offices in Britain violates British criminal law needs to be answered. On a theoretical level, CCL is an appropriate example for exploring theoretical aspects of comparative law: numerous traditional comparisons on the topic[5] provide a solid base for demonstrating the limitations of those comparisons. The topic is, furthermore, closely connected to cultural, social, economic and philosophical concepts, allowing an interesting engagement in the background of legal solutions and in possible ways for comparatists to embrace these differences between cultures and their laws.

The aim of this analysis is neither to elaborate on a completely new method nor to select the best method, as the best way to compare might be to follow different paths depending on the objective or audience of a certain comparison. It also does not attempt to give the only possible comparison of CCL, but instead is primarily aimed at highlighting some comparative facets that cannot be included in more theoretically oriented comparisons. Its main purpose is to strengthen the not yet sufficient dialogue between theory and practice. Therefore, this article will first discuss some of the failures of traditional comparative law, which will be clarified by using comparisons of CCL. In the second part, the transition towards a new comparative law will be shown from a theoretical perspective. Finally, the insights will be exemplified by sketches about the cultural background of CCL in England and Germany.

[4] *See* S. Beale & A. Safwat, *What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 126 *et seq*. (2005) (describing some European Transnational Proposals).

[5] *See infra* Part I.2.

B. Traditions: Pragmatic Comparisons

Comparative law shares the aims, methods, and difficulties of all comparative disciplines.[6] Many comparisons are biased, the methods are vague and evaluation criteria are subjective.[7]

I. Traditions in Comparative Law

In its beginnings, the possibility and usefulness of comparative law were undoubted; it even was argued that profound insight depends on comparison. Comparison intended to broaden knowledge, to improve or to harmonise legal systems. Methodology was simple: "Black letter laws" were described and evaluated. This approach claimed to be objective while the choice of targets of comparison, classifications and the assumption of the likeness of problems were necessarily subjective. Most traditional comparisons thus either overrated the solutions of their own law or were overwhelmed by the law of the other.[8] This method also suffered from legocentrism: "The implied adequacy of law to solve what appear to be universal and perennial problems of life in society betrays and underscores . . . how their [Western culture] notion of law is itself privileged."[9] Traditional comparisons often lacked adequate consideration of the cultural, political, social conditions of the countries whose laws they compared.

II. Traditional Comparative Analyses Regarding Corporate Criminal Liability

The following comparisons of CCL show the subjectivism of traditional comparison and indicate that in practice, the theoretical debate, which has criticised these points for over twenty years, is almost irrelevant. CCL is a legal construct for prosecuting and convicting collective entities under criminal law. By now, it has been implemented into the criminal laws of many countries, including Austria, France, and England. Other countries, such as

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[6] *See* N. Jansen, *Comparative Law and Comparative Knowledge, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 305, 306 (M. Reimann & R. Zimmermann eds., 2006).

[7] *See* G. Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 416 et seq. (1985); P. Legrand, *European Legal Systems are not Converging*, 45 INT'L & COMP. L.Q. 52 (1996). This also might have been a reason for its continuing neglect, already diagnosed. *See* HAROLD COOKE GUTTERIDGE, COMPARATIVE LAW—AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH (1946) (diagnosing the continuing neglect).

[8] *See* P. Zumbansen, *Comparative Law's Coming of Age?,* 6 GERMAN LAW JOURNAL 1073, 1075 (2005).

[9] Frankenberg, *supra* note 7, at 433.

Germany, refuse its implementation.[10] For corporations acting on international level, the resolution to this problem can no longer be decided by a single nation.[11]

Searching for the best international solution to corporate misbehaviour has led to numerous publications comparing the different legal solutions on this topic; some examples will be discussed later. As a starting point for comparison, one can simply state: in England, corporations can be convicted for different crimes, even if intent is required.[12] In Germany, only individuals are criminally liable[13] and collectives can only be fined for violations of administrative law, which excludes moral blame.[14]

In the original analyses in comparative law, these findings would have been the base for comparison, often followed by vague evaluation. In some recent comparisons on CCL this has not changed: Khanna merely summarizes the legal situation of CCL in the U.S., the UK, and Germany.[15] He observes, even before his comparative inquiry, that the "analysis indicates that corporate criminal liability in the United States is far more extensive and less restrictive than corporate criminal liability frameworks in other countries and raises the question of why these differences have developed."[16] As he claims to refrain from CCL, this comment seems to categorize his argument into the "the others do not do it as well" type. This overlooks that the solutions of the others could also be wrong or that all solutions

[10] *See* A. ASHWORTH, PRINCIPLES OF CRIMINAL LAW 113 et seq. (5th ed. 2006).

[11] *See* Beale & Safwat, *supra* note 4; C. C. Hartan, *Unternehmensstrafrecht in Deutschland und Frankreich—Ein Rechtsvergleich angesichts europäischer Harmonisierungsbestrebungen* (2006); Markus Wagner, *Corporate Criminal Liability: National and International Responses,* 25 COMMONWEALTH L. BULL. 600 (1999); Markus Wagner, *Commercial and Financial Fraud: A Comparative Perspective*, Background Paper for the International Society for the Reform of Criminal Law 13th International Conference, THE INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY (1999), *available at* http://www.icclr.law.ubc.ca/Publications/Reports/CorporateCriminal.pdf; Celia Wells, *Corporate Manslaughter: A Cultural and Legal Form*, 6 CRIM. L.F. 45 (1995); Celia Wells, *Corporate Criminal Liability in Europe and Beyond*, 39 NEW S. WALES L. SOC'Y J. 62 (2001).

[12] *See* Tesco Supermarkets v. Nattrass [1972] A.C. 153 (H.L.) (appeal from Divisional Court of the Queen's Bench Division).

[13] *See* A. Norrie, *The Limits of Justice: Finding the Fault in the Criminal Law,* 59 MOD. L. REV. 540, 543 (1996)(connecting this to the liberal "conception of the individual as an abstract, universal subject endowed with rational action, autonomy and self-determination."). Norrie continues by stating "[t]he individual is a unified, centred being who acts as the basis for legitimating the state, law and punishment. . . . The rational subject receives 'just deserts' from the state through law. The 'penal equation'—crime plus responsibility equals punishment—is founded on liberal bedrock." Norrie refers to Kant and Hegel.

[14] *See* W. MITSCH, RECHT DER ORDNUNGSWIDRIGKEITEN 41 (2005); Case No. 2 BvL 2/69, 16 July 1969, BVerfGE 27, 18 (33).

[15] *See* V. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1490 (1996) ("Even now, Germany does not impose criminal liability on corporations.").

[16] *Id*. at 1488.

could be right—in their individual culture. Without further analysis, the enumeration of facts is hollow and can speak neither for nor against any legal alternatives.

Stessens' analysis starts with subjective intent: "This article aims to examine the question of how to punish corporate criminality in a comparative perspective."[17] He assumes that corporate criminality should exist and strives towards harmonization. "It [comparing national systems] also creates a 'supranational,' European perspective: by highlighting the differences between the respective national solutions to the same question (i.e. how to punish corporate criminality), it may give some hints towards a (European) harmonisation of the legal solutions."[18] This disregards that there could be good reasons to refuse CCL. His evaluation criteria are unclear. "Comparing national law systems . . . enables us to get a clearer view of the advantages and disadvantages of corporate criminal liability,"[19] presupposes one worldwide normative system. His main normative criterion is efficacy, ignoring that several legal systems—like Germany—emphasise other, non-utilitarian evaluation criteria. Consequently his conclusion, "[t]he only effective way to combat corporate crime is to direct punitive sanctions against corporations,"[20] is biased.

Slightly more progressive is Beale's and Safwat's examination, contrasting the growing enactment of CCL-laws in Western Europe with the United States' increasing opposition. They admit: "We acknowledge that there are also other significant factors our article does not discuss—including differences in the history, traditions, and social conditions of the various Western European countries."[21] Despite this awareness, the analysis of German law remains subjective: the heading of the section is "Movement *Toward* Corporate Criminal Liability in Germany"[22] which shows that the German position is only seen in the light of a movement towards this right solution—and is a clear misinterpretation of Germany's legal reality. The authors state that Germany has not "overcome" its opposition to the imposition of criminal liability on artificial entities. The administrative fines imposed by the German government are called "quasi-criminal," a term that some German scholars would oppose, and the consideration of opposing arguments does not represent their influence in the German debate.[23] The German concern about the "purity" of "blame" and

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[17] G. Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMP. L.Q. 493, 496-497 (1994) (emphasis added).

[18] *Id*. at 493 (emphasis added).

[19] *Id*.

[20] *Id*. at 518.

[21] Beale & Safwat, *supra* note 4, at 162.

[22] *Id*. at 122 (emphasis added).

[23] *See* O. Lagodny, *The Case of Substantive Criminal Law Before the Bars of Constitutional Law—An Overview from the Perspective of the German Legal Order,* 7 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 277, 285 et seq. (1999).

"fault" in criminal law and the German law's emphasis on classifications are mentioned,[24] but not adequately discussed. The study argues that it is "questionable whether the hold-outs will continue to rely on civil or quasi-criminal sanctions."[25] As comparison should be used to learn from the other's, here the European, approach it should have given greater emphasis to the opponents.

A study by Wagner concludes, after describing legal situations in different countries, including Germany and England, that

> the field of corporate criminal liability is a multi-faceted issue. There are no simple solutions to the problem. . . . Another question is whether corporate liability should be criminal in nature, or whether the unique circumstances of punishing a corporate entity merits different approaches. . . . [I]t also seems to be clear that a singular approach will not be sufficient to deal with either the conviction of corporations, or the sanctioning of corporations.[26]

It is unclear how he reaches this conclusion: the fact that there are divergent conceptions in different countries could also mean that all of them are right in each country. Even if he means that there is not one right approach on international level—why does he conclude this from national situations?

All these comparisons show that theoretical concerns about questionable aims, subjectivism, methodology, integration of cultural and social background, problems of translation, etc., do not have a visible impact on practical comparisons. Instead, they make evaluation of different concepts, harmonising, and finding of common solutions more difficult. Of course, on the first view, the best way to evaluate a legal solution like CCL and finding common ground seems to be such a traditional comparison as undertaken by the researchers above. But can these writings really lead to finding the best solution? Can they really convince Germany to give up its position? If CCL were to be imposed on Germany, would this really solve the social conflict underneath or would it always be a foreign, unsuitable legal concept? These questions show that comparative law needs to be revised methodologically. A less biased way must be found in order to truly compare.

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[24] *See* Beale & Safwat, *supra* note 4, at 122 (referring to M. Pieth, *Commentary on: National and International Developments: An Overview*, *in* CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES, 113, 116 (A. Eser & G. Heine & B. Huber eds., 1999) ("[T]he fear [of German scholars] is that [the] essential safeguard of both substantive and procedural law would be put at risk from derogations of the "principle of personal guilt or blameworthiness.")

[25] *Id*. at 139.

[26] Wagner, *supra* note 11, at 10.

C. Transitions

The above-analysed flaws of traditional comparative law have led to the movement of Critical Comparisons, criticising, inter alia, monopolisation of certain types of rationality and universalism.[27]

I. Critical Comparisons

Using tools of critical theory, feminism, literary or postcolonial theory, Critical Comparisons state that reasoning, language and judgement are determined by cultural, moral, epistemic, linguistic frameworks.[28] In the first article,[29] Frankenberg argues that "because of comparative legal scholarship's faith in an objectivity that allows culturally biased perspectives to be represented as 'neutral' the practice of comparative law is inconsistent with the discipline's high principles and goals."[30] Comparison can provide a platform for learning only if one is prepared to become aware of one's assumptions. Frankenberg also addresses practical implementations of the "dialectical exchange between the self and the other."[31] The impossibility of comparison is dissolved by reference to dialecticism. Over the next 25 years, various points of criticisms as well as possible new approaches of comparison have been refined. The main focus of the "Utah Group"[32] was to "change the project of comparative law from a naive epistemological project . . . to a critical and interventionist project."[33] Practice-oriented[34] Legrand emphasises commitment to

[27] *See e.g.* Peters & Schwenke, *supra* note 3, at 802; T. Flessas, *Aphorisms, Objects, Culture, in* NIETZSCHE AND LEGAL THEORY, HALF-WRITTEN LAWS 105, 108 (P. Goodrich & M. Valverde eds., 2005) ("The emphasis on knowledge is intimately connected with the definition of 'culture' in modernity.")

[28] *See* Peters & Schwenke, *supra* note 3, at 802.

[29] On early methodology, *see* Gutteridge, *supra* note 7; O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (reminding that in case of "transplantation" of laws to a foreign system questions about adjustment and rejection have to be asked and the context taken into account).

[30] Frankenberg, *supra* note 7, at 411.

[31] The dialecticism of continental philosophy was heavily criticised by Popper (1937) for accommodating contradiction. This seems to be one of the crucial points: Is a contradiction resolvable or does the "aporia" have to be accepted?

[32] Named after the publications on this topic in the *Utah Law Review* (1997).

[33] N. Berman, *Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion,* 1997 UTAH L. REV. 281, 286 (1997) (claiming that "in face of exoticization, normalize, in the face of normalization, exoticize, in the face of the hermeneutic compulsion, formalize and fragment.").

[34] *See* P. Legrand, *Comparative Legal Studies and Commitment to Theory,* 58 MOD. L. REV. 262 (1995) (stating the observation that, following his claims will "naturally take the comparatist away from the traditional approaches to comparative legal studies which . . . do not accept the need for theory and obstinately pursue similarity and consensus as if confined to a groove" does not help to enter a constructive dialogue with practical comparatists).

interdisciplinarity. He questions how academics can forget the significance of theoretical concerns, and claims that the difficulty of comparative law is not an excuse to espouse credulity:[35] Comparatists should focus on difference, remain critical, open up the definition of law, and maintain distance.

The main counter-argument against Critical Comparisons is its impracticability. One cannot always deeply engage with "the history, economy, sociology, psychology and politics of law"[36] if one wants to find pragmatic solutions. The above-criticized comparisons mainly intend to improve the practical legal situation and the study of Beale and Safwat even admits the absence of a framework discussion. To argue that evaluative comparison is impossible and one should find other ways to improve law is unrealistic. Humans never fully understand the reasons and frameworks of their actions, and cannot know all the consequences,[37] but still they have to find solutions. But this does not justify to claim inherently subjective analyses being neutral, to evaluate on biased criteria, to reduce the understanding of the other's legal culture instead of broadening knowledge. There is a need for an increase of studies concerned with deepening knowledge, exploring legal cultures and normative frameworks. Additionally, more practice-oriented studies should at least be open about their limitations and minimize subjectivity.

II. Dialogue Between Theory and Practice

To answer the question "[h]ow could a radically different comparative law look like,"[38] the gap between theory and practice has to be approached. One has to concern oneself with the motivations, limitations, and playing fields of the other side. The different participants have to enter into a discourse.[39] As previously mentioned, it is not the aim of this article to provide a perfect method of comparison—different methods should be used with knowledge of their limitations. But following different paths of comparisons only is useful if a close connection to theoretical discussions is kept.

One reason for the gap between theory and practice could be that in the theoretical debate the starting point is often assumed to be clear to everyone. Practicing lawyers, on the other hand, are mostly unaware of these philosophical debates. Therefore, a reminder of the basis of this discourse, of rethinking knowledge, understanding, perceptions, and

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[35] *See id.*

[36] Frankenberg, *supra* note 7, at 439.

[37] *See* J. HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 92 *et seq.* (1990) (discussing Nietzsche's and Derrida's refusal of metaphysics).

[38] I. Stramignoni, *Meditating Comparisons or the Question of Comparative Law,* 4 SAN DIEGO INT'L L. J. 57, 77 (2003).

[39] J. DERRIDA, WRITING AND DIFFERENCE 360 (2006).

bias, could be a first step of entering the dialogue. This will be undertaken in the next section, by using Nietzsche, the first Western philosopher who exposed and criticised traditional, Enlightenment thinking, which practicing lawyers often still are educated in. Nietzsche's critique of knowledge can allow the practitioner to understand the base of the debate and to be aware of his own limits. Another way to enter dialogue, which will be taken in the third part of this analysis, is to show an example of another approach to comparisons.

III. Nietzsche—Breaking the Ground

To summarise Nietzsche's philosophy would miss the point, as Nietzsche has developed his opinions over time, sometimes apparently contradictory.[40] With the awareness that one will only represent a glimpse of his own thoughts, some ideas about "knowledge"[41] can be gained, as Nietzsche is specifically concerned with its limits.[42] He opposes the Enlightenment, its claim of a universal truth and values and the ability of human beings to understand reality. By stating that there is always a "will to power" to convince others about one's own value system, Nietzsche questions the base of science and philosophy and thus helps to improve the distant, critical reading of ideas or "neutral" scientific results.

Nietzsche questions not only the neutrality of the aim, but also the possibility of gaining objective knowledge. "There is only a perspective seeing, only a perspective 'knowing' and the more affects we allow to speak about one thing, the more complete will our 'concept' of this thing, our 'objectivity' be."[43] This statement is made in the context of the On the Genealogy of Morals (GM), an examination which starts with "We are unknown to ourselves."[44] That we cannot know ourselves, because we have not searched ourselves, is, according to Nietzsche, the basis of our false knowledge. Only by questioning ourselves we will broaden our understanding. GM is dedicated to an in-depth analysis of what we know, how we know, and how we perceive to know. The above stated relativism is not to be interpreted as claimed in relation to knowledge in general, as GM is primarily an

[40] *See generally* Tanner (1994).

[41] *See* Flessas, *supra* note 27, at 109 (stating that Nietzsche sees the "ground(s) of knowledge as flawed exactly because, instead of deriving self-knowledge through experiencing our own, individual lives, the space of knowledge is extra-life.").

[42] *See* F. NIETZSCHE, BEYOND GOOD AND EVIL, aphorism 464 (1898) ("He who fights monsters should look into it that he himself does not become a monster. When you gaze long into the Abyss, the Abyss also gazes into you.").

[43] F. NIETZSCHE, ON THE GENEALOGY OF MORALS III, in BASIC WRITINGS OF NIETZSCHE 12 (Walter Kaufmann & Peter Gay trans., 2000).

[44] NIETZSCHE, *supra* note 43, at ON THE GENEALOGY OF MORALS I, 1.

examination of moral values, their "origin"[45] and the interpretation of reality on which they are based. If these thoughts are transferable to other areas of reality is, for this article concerned with the value-based concept "law," irrelevant. Especially important in that context is the notion of "opposite values."[46] He argues that morality is merely a prejudice and categories such as "good and evil," "true and untrue," and "just and unjust" are created by humans and are bound to a certain cultural background. Nietzsche, as many others, also understands language as limit and framework of knowledge and recognition. Language is power, it disturbs and splits us as much as it organizes us.

This is not a nihilist view of the world. Nietzsche clears the way for a philosophy from the "perspective of life," recognizing the will to power, rebuilding morality on life's exuberance.[47] Even if one does not agree with his moral claims,[48] Nietzsche has broken ground for a new way to think about knowledge and understanding: a relativistic view, aware of one's determination, skeptical about general truths, realizing the conditions of language, culture,[49] genealogies, and will. We have to overcome our anxiety and explore, with open eyes, our origins,[50] as well as our future.

Returning to comparisons: they normally start with biased intention. A comparatist necessarily has a subjective, conditioned viewpoint he cannot leave. Before he can start understanding the "Other," he has to explore this viewpoint. To explore the "Other," it is not enough to analyse the actual legal situation; the conditions of his situation also have to be included. It has to be realised that the opposition set by engaging in comparison, the values used to find the "better" solution, are man-made and thus never neutral. All these aspects are premised in the debate around Critical Comparisons. To enter the dialogue with practitioners one has to open them up and allow understanding. The insights into

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[45] This is not in a strictly historical sense, as Nietzsche considers normal historians not to be concerned about history—what is relevant for him is the "real origin," the ahistorical but thus even more true narrative.

[46] NIETZSCHE, *supra* note 43, at ON THE GENEALOGY OF MORALS III, 27. "All great things bring about their own destruction through an act of self-overcoming in the nature of, life – the lawgiver himself eventually receives the call: Submit to the law you yourself proposed." *Id*.

[47] *Nietzsche*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *available at* http://plato.stanford.edu/entries/nietzsche/.

[48] *See* J. Yovel, *Gay Science as Law: An Outline for a Nietzschen Jurisprudence, in* NIETZSCHE AND LEGAL THEORY, HALF-WRITTEN LAWS 23, 25 (Peter Goodrich & Mariana Valverde eds., 2005) ("Nietzsche's prophecies, we must keep in mind, are untimely meditations. He is 'pregnant with future' [reference to GM II 16, not from the author].").

[49] *See Cross Cultural Perspectivism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (showing that it can rightly be questioned if cross-cultural perspectivism is an empirical fact or merely a plausible assumption), *available at* http://plato.stanford.edu/entries/relativism/supplement1.html#crosscultperception.

[50] One facet of a Nietzschean view onto the world is exploring the genealogy of concepts, truths, and realities. *See* D. Owen, *Nietzsche, Re-evaluation and the Turn to Genealogy*, 11 EUR. J. OF PHIL. 249 (2003) (providing the reasons for his genealogical approach).

Nietzsche's thoughts about knowledge and thought are not meant to lead to definite instructions for comparative law in the sense of telling practical comparatists what to do, how to compare or how to find the best legal solution to either improve or harmonise the law. They are meant to provide awareness, allow the practitioners to understand their biases and reconstruct practical comparisons in this awareness. This is the first step to opening the dialogue between theory and practice, to enter into a discourse about "how a radically different comparative law looks like."[51]

D. Transformations

The last section attempts to specify a possible dialogue between theoretical and practical comparatists. It does not aim at presenting the only possible way to compare the concepts of CCL in England and Germany. It merely clarifies that, although all social, legal, economic influences onto corporate criminal liability can never be discussed, some factors can clarify the reasons for differences between the legal solutions of England and Germany. The approach is consciously not a legal one, but includes sketches from different disciplines. The most plausible way to compare the legal solutions of different countries is to combine different methods and different viewpoints of law in various articles and analyses. Law does have a certain independence from culture, which should be recognised by distancing legal cultures and solutions from the melange of cultural specifics. On the other hand it still is in some ways a representation of its society and thus culture.[52] These aspects can be included in one analysis, but can also be done by seeking the truth through combination of different viewpoints. Still, in the following, the focus lies on the background factors to exemplify their relevance to the practitioners. Therefore, information on the premises, including cultural and economic facets of Germany and England, is given.

I. The Background

1. Society: Some Basic Facts On Germany and England

After the Nazi era, Germany established a federal, egalitarian[53] political system, based on a constitution.[54] Its boom in the 50's and the social market economy guaranteed a certain social harmony.[55] England has, in the recent history, not experienced any dictatorship.[56] Its

[51] Stramignoni, *supra* note 38, at 77.

[52] *See* G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

[53] *See* M. ALBERT, CAPITALISM AGAINST CAPITALISM 124 (1993) ("They are, first and foremost, egalitarian societies.").

[54] *See* T. W. Adorno & T. Y. Levin, *On the Question: "What Is German?"*, 36 NEW GERMAN CRITIQUE 121, 122 (1985).

[55] *See* ALBERT, *supra* note 53, at 110, 124.

[56] *See* C. POUNDER & F. KOSTEN, MANAGING DATA PROTECTION 1 (2nd ed., 1994).

liberal capitalism[57] is influenced by the industrial revolution, and still shows economically-based class structures.[58]

2. Philosophy: An Often Neglected Background Factor

To exercise comparative law one has to include philosophy.[59] A society is, inter alia, characterised by its philosophical, especially ethical, background. England is influenced by utilitarianism, a philosophy evaluating actions on consequences, on contribution to the utility of society.[60] German society, on the other hand, is shaped by deontological philosophy,[61] primarily concerned with the fulfillment of values and restricting the relevance of consequences for the judgment of an action by these values themselves. An example of the influence of this philosophy is Article 1 of the German Constitution: "Human dignity is inviolable."[62] This also leads to a different relevance of "rights":[63] as in England there is no set collection of rights, they are less important than in continental Europe.

Also relevant for the discussed example are the philosophical debates on conceptions like "person," "autonomy," and "responsibility": The essence of a person is a clue to understanding perceptions and treatment of corporations.[64] Personhood has been debated for centuries, metaphysically, normatively, conceptually,[65] with often recurring criteria: self-awareness, rationality and identity. In Germany, personhood is generally seen as a basic condition for moral and criminal "responsibility." Kant and Hegel, inter alia, have discussed these concepts extensively.[66] For Kant, autonomy is the expression of human

[57] *See* ALBERT, *supra* note 53, at 100.

[58] *See* E. ROYLE, MODERN BRITAIN: A SOCIAL HISTORY 1750–1985, 155 (1987).

[59] *See* W. Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995).

[60] *See* J. Midgley, *The Role of Legal History*, 2 BRIT. J. OF L. & SOC'Y 153 (1975).

[61] M. Dübber, *Book Review: Evans, Richard J., (1996) Rituals of Retribution: Capital Punishment in Germany, 1600–1987, New York,* 19 LAW & HIST. REV. 449, 452 (1996).

[62] *See* I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas Kingsmill Abbott trans., 2007) (showing the Kantian Interpretation of human dignity)

[63] Legrand, *supra* note 7, at 70 et seq.

[64] *See* K. Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).

[65] *See Personal Identity*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/identity-personal/.

[66] *See* Habermas, *supra* note 37, at 294 (calling the Kantian philosophy the "philosophy of the subject").

dignity, and thus of moral and legal responsibility.[67] English, utilitarian thinking necessarily leads to another concept of personhood. Without stating that this is the representation of all utilitarian perceptions of "person," one could look at the example of Singer's[68] concept: he does not start from certain a priori, but from the consequences of defining a 'person' and follows Lock in separating the concept of "person" from "human."[69] As personhood includes certain responsibilities and rights, it should only be used in the case that the conditions for being responsible or having this right, and being able to claim it, are given.[70] While Kant starts with an a priori conception of humans as persons, being responsible and having rights, Singer starts with the person, to which society subscribes rights and duties, and decides from this conception about possession of personhood.

II. Civil and Common Law: A Few Thoughts

1. Descriptive Overview

A German lawyer confronted with the common law system experiences scepticism: a judge who searches mystic sources for the "common law," judgments more concerned with facts than with logic, neutral argumentation, and lay persons deciding about the fate of offenders. All this seems mysterious, inexact. This strangeness is caused by a divergent legal mentalité:[71] common law has not left the inductive phase of methodological development and thus defies systematization.[72] English lawyers regard being illogical as a virtue and logic as an eccentric continental habit.[73] Systemizing is regarded as useless theoretical exercise; the real scope of legal work is searching for the most convincing pragmatic solution. Law is facts oriented and develops through analogies. Civil law, on the contrary, is based on a system of institution which allows discussion independently of factual immediacies. The ways the legal systems approach conflicts diverge: while civil law attempts to solve them beforehand through hierarchic organized norms, common law reacts to the conflict.[74] Coherence in a legal system is relevant for the question of

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[67] *See* P. Schaber, *Menschenwürde und Selbstachtung: Ein Vorschlag zum Verständnis der Menschenwürde,* 63 STUDIA PHILOSOPHICA, 93 (2004).

[68] *See* P. SINGER, PRACTICAL ETHICS (2nd ed., 1994).

[69] *See id*. at 90 et seq.

[70] *See* J. Hymers, *Not a Modest Proposal: Peter Singer and the Definition of Person*, 6 ETHICAL PERSP. 126 (1999).

[71] *See* Legrand, *supra* note 7, at 56.

[72] *See id*. at 65 (stating that Simpson said "the common law mind . . . is repelled by brevity, lucidity and system.").

[73] *See id.* at 67 (stating that Lord Macmillan said "the life of law has not been logic; it has been experience.").

[74] *See id*. (stating that Copper said "[t]he instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.").

corporate criminal law, particularly from the German perspective that this concept is incoherent with the system of criminal law is very important.

2. Connecting with the Background

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

III. Approaching Corporate Criminal Liability

Building upon this, the structures behind CCL will be looked at: criminal law and corporations.

1. Criminal Law: Development, Structures, New Perspectives

Criminal law is the state's means to forbid certain actions and punish the citizens who break these prohibitions. In both Germany and the United Kingdom there has been a long debate about the question of whether criminal law fulfills a retributive or a consequentialist function:[75] is the punishment retribution for the offender's morally wrong action, or does it intend to prevent from future crimes?

Although the retributive function has influenced the English debate, in public opinion and in the legislature, deterrence and rehabilitation were always the main reasons to enact criminal laws. In Germany, there is a strong academic opposition against purely consequentialist criminal laws,[76] and the German Supreme Court connects criminal law to the guilt and moral responsibility of the offender.[77] This connection is related to the German legal specialty of using "administrative sanction law" (*Ordnungswidrigkeitenrecht*)

[75] *See* N. LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 16 et seq. (1988).

[76] This is connected with Kant and Hegel defending a retribution theory. Also notable is also Feuerbach, who partly created German criminal law and follows an absolute justification of punishment, similar to Kant's. *See* O. Rosbach, *Strafrecht und Gesellschaft bei Anselm von Feuerbach*, FORUM HISTORIA IURIS, 1 Dec. 2000, http://www.forhistiur.de/index_de.htm.

[77] *See* Lagodny, *supra* note 23, at 279, 282 *et seq*. (providing the meaning of "criminalization" in German law).

to sanction actions that do violate certain regulations without being "morally wrong." Criminal law, on the other hand, expresses a moral judgment over the action of the offender. From a consequentialist view, this German difference is hard to understand and only becomes clear if one takes the discussed importance of deontology with its great emphasis on retribution, morality, and guilt into account. This indicates that criminal responsibility in Germany is closer connected to moral responsibility, personhood, and human dignity than the English concept.

This traditional view of criminal law is complemented by Nietzsche's thoughts on punishment: he states that criminal law can maybe "tame" man, but not make him better. Also to be considered is the theory about criminal laws, prosecutions, convictions, being expressions of the power structures of society, and oppressions to secure the power of the dominating class.[78]

2. The Corporation

Below, German and English corporations will be analysed. A corporation is a form of business organization, an entity separate from its owners, with its own legal rights and duties.[79]

2.1 Ordinary Language

The ordinary language approach[80] allows insights onto the perception of corporations by the English and German societies and legal cultures. The English "corporation" is derived from the Latin word "corpus" (body).[81] In Germany, ordinarily the word *Unternehmen* is used,[82] which has the literal meaning "undertaking." This difference irradiates divergent views: while the English emphasize the entity, the Germans focus on "activity."

[78] *See* J. REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON (2000).

[79] *See Corporation*, http://www.investorwords.com/1140/corporation.html.

[80] *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953).

[81] *See Corporation*, MERRIAM-WEBSTER'S DICTIONARY OF LAW, http://dictionary.reference.com/browse/corporation.

[82] *See* Wells, *supra* note 11 (stating that the debate in Germany is about *Unternehmensstrafbarkeit* and not about juristische Personen); H. J. Hirsch, *Strafrechtliche Verantwortlichkeit von Unternehmen,* 107 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 285 (1995) (describing the debate in Germany about *Unternehmensstrafbarkeit* instead of juristische Personen).

2.2 Structures

The German and English economies and corporation structures differ significantly:[83] Germany, as an example of the "other capitalism" represents a different vision of economic organisation. Its characteristic features produce a stable, dynamic system. In contrast to the English, German society has a tendency to avoid controversial issues and stick to consensus. Democracy and prosperity are too recent not to be fragile, therefore social discipline is important. This view, the search for social consensus is expressed in lesser differences between the highest and lowest wages than in England, direct taxes, and high taxes on capital. This leads to financial stability and long-term development.

The economic environment does have influence on the structure of corporations: in Germany, all parties of a corporation participate in decision-making (*Mitbestimmung*) and this industrial democracy is describable as "conflictual partnership,"[84] leading to a "company spirit" and loyalty. The salaries are high, as is the duration of the jobs within a certain company. The Anglo-American model is based on maximising profit by high competitiveness between employees; there is less participation, less connection to the employer, less sense of regarding the corporation as a community.

Corporations in the UK and U.S. have an independent structure or a personality character. A traditional view of this personality character is mirrored in the debate of "nominalism" against "realism":[85] is the construction of a legal person based on its real personality in society or only an abbreviated way of writing their names together for legal transitions? As Iwai rightly argues, this depends on what the law has created—and that it creates a more independent, economic powerful structure in the more utilitarian, less egalitarian English society, seems to be plausible. Thus it seems that in Germany corporations are transparent associations, communities of individuals, while in England corporations are created as independent, powerful structures standing more outside of civil society than being integrated into it.

2.3 History and Genealogy

This theory is complemented by a genealogical view. In the 16th and 17th centuries,[86] CCL was unthinkable, because the juristic fiction of a corporate personality and its blameworthiness was opposed. Later the concept of the legal fiction of a "corporation" of

[83] *See* ALBERT, *supra* note 53.

[84] C. Lane, *Changes in Corporate Governance of German Corporations: Convergence to the Anglo-American Model?*, 7 COMPETITION & CHANGE 79, 86 (2003).

[85] *See* Iwai, *supra* note 64.

[86] Thus this situation in England was the case before Bentham and his utilitarianism became influential.

an entity with own rights and duties became recognized[87] in both countries, although their structures evolved differently, as shown above.[88] Then, U.S. and English courts developed the concept of CCL, first for public nuisance by municipalities, later for actions of commercial corporations or crimes requiring intent.[89] In Germany, this conception was discussed but, as mentioned, never realized. A genealogical point of view clarifies that the "origin" of corporations lies in consciously limiting the liability of the powerful owners and managers. The more independent from the acting individuals this entity is, the less liable are these individuals. Corporations were funded to allow more people to associate for the fulfillment of greater undertakings, and the developing of an independent structure of these associations allowed them to restrict their liability. Although, as Midgley argues, it is wrong that "[o]bviously, any legal guarantee is directly at the services of economic interests to a very large extent," and in the case of restricted liability of corporations one can, according to Midgley, still argue: "When everyone is responsible, then no one is responsible, and the ethic of responsibility itself is imperiled." [90]

This genealogical interpretation is especially relevant for the criminal liability of corporations. No argument other than the argument that corporations comfort the powerful individuals behind them can really justify criminally punishing a corporation:[91] CCL is said to prevent harmful acts of the independent entities, "corporations," from polluting the environment, exploiting workers and third-world countries, and fooling shareholders. It is said to allow expressing the mixed feelings towards these economic giants whose structure seem uncontrollable by individual decisions, to blame them for their actions.[92] But these arguments are, in fact, wrong because the deterrent or rehabilitative effects are low,[93] inter alia because of the high standard of proof required in criminal law cases[94] and the typically low sanctions. Also the blaming effect is

[87] J. BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 6 et seq. (2004).

[88] There are wrong understandings of civil law. *See* T. J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3 (1984). He states that they never developed the concept of juristic persons. This does not mirror reality. ALBERT, *supra* note 53, at 103 ("In the neo-American model, a company is a negotiable good like any other, whereas for the Rhine economies it is not just a commodity, but a community.").

[89] *See* Khanna, *supra* note 15, at 1482 et seq.

[90] Midgley, *supra* note 60, at 154 (quoting Weber).

[91] *See* Bernard, *supra* note 88 (stating that CCL evolved, even though judges did not regard it as useful). This is a naïve view onto judgments. If the concept would be unwanted, judges could have argued otherwise.

[92] *See* Wells, *supra* note 11, at 45 et seq.

[93] *See* J. T. Scholz, *Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory,* 60 LAW AND CONTEMP. PROBS. 253, 255 (1997).

[94] *See* Khanna, *supra* note 15, at 1512, 1533 (showing that CCL does not lower this standard).

questionable, as messages about corporate behaviour can be sent in other ways[95] and the moral blameworthiness of corporations does not exist, as they balance "harms produced, costs imposed, and economic activities foregone."[96] Thus, it can be concluded that the real reasons for the existence of CCL could in fact lie in the power structures behind corporations. By punishing corporations one can prevent the shareholders, owners and managers from having to go to prison and receiving moral blame, as society has found someone else to be blamed—the entity of a corporation.

4. Pulling the Strings Together: Understanding Some Differences

These findings indicate why CCL has emerged in England, but not in Germany. These findings, of course, have to be further developed in future research on comparison of the situation in both countries, especially if it is intended to find a compromise on European level. But still, these findings make it easier to understand the "Other": as Parker observes, the blame of criminal law traditionally was an answer to individual fault.[97] Why these obstacles were easier to overcome by English than by German law becomes clear if one sums up the interpretations of England and Germany. As has been shown, CCL is an expression of the public skepticism towards the more and more uncontrollable corporate structures, but also is a shield for the acting individuals behind corporations.

The invention of a new legal concept, incoherent with the existing system, is easier in the English traditional society than in the German, more recent one. The English common law system, based on a utilitarian mindset, allows instant solution of the problem of corporations acting harmful, without the need for strict coherence.[98] Lesser dependency on written law, a decreased feeling of threat by the concepts of a powerful state and powerful judges, is the result of most citizens not experiencing a dictatorship or abuses of strength by the state in their lifetime.[99] This is particularly the case for criminal law, which is generally regarded as dangerous in Germany, while in England it is a welcome solution for social problems. The emphasis on egalitarianism, rights, deontological values in German criminal law is strongly built on a concept of personhood, human dignity, moral guilt, *Rechtssicherheit* (security of the law) and equality. From this emerges the need for coherence, for basing judgments onto existing laws, and for basing criminal convictions on moral responsibility. This last aspect is relevant for understanding the contrasting English

[95] *See* J. S. Parker, *Doctrine of Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL AND DECISION ECON. 381, 383 (1996).

[96] POUNDER, *supra* note 56, at 1.

[97] *See* Parker, *supra* note 95.

[98] See Bernard, *supra* note 88 (observing that the concept grew because of the judicial interpretation of common law).

[99] *See* POUNDER, *supra* note 56, at 1.

approach, starting from the problem of corporations causing harm, and the public wanting to blame them, and in a utilitarian way constructs the personhood from the rights and the duties of the entity. Thus blaming and treating corporations as persons can partly be understood based on the philosophical background.

Also the economic differences, the more egalitarian, socially harmonic, integrating approach of Germany in contrast to the more liberal, utilitarian approach of English capitalism, explains the structures of corporations as more powerful in England, more restraint and community-oriented in Germany. Already expressed in the name (*corporation/Unternehmen*) in Germany, the focus lies on economic action, on business activity, while in England corporations are an independent entity in a broader sense. This also has the consequence that the public perception could differ, as German workers and clients are more personally connected to corporations, and might not experience them as uncontrollable, blameworthy entities. Corporations are already restricted, by preventive, administrative laws, by the investing banks, and by the concept of *Mitbestimmung*, while Anglo-Saxon corporations are, although also controlled by the state, more focused on their shareholders and thus mainly controlled on the outcome, on the profit, less on the way to achieve this profit. Thus, not just the perception of corporations as threatening and independent differs, but also the feeling of their controllability and the need for the usage of criminal law.

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

These only are a few aspects of CCL, some short sketches on its background, its geneaology, and its structure. But already from these sketches a deeper understanding of the "Other" and thus oneself is possible. One has to be aware that these sketches are drawn from a German perspective, therefore are subjective and cannot give a "neutral" picture—if such a thing exists. They are more a cubistic painting of the situation than a scientific drawing, but they still give a picture. They allow understanding of the English solution from the German perspective and perhaps even the German solution from an English perspective, and give new light to the English solution for an English lawyer.

E. Conclusion

This analysis has engaged in answering the question: how can a new comparative law look like?[100] This question has already been discussed in theoretical comparative law, which is

[100] *See* Stramignoni, *supra* note 38, at 77.

why here the focus was directed on the aspect of practical comparisons that still follow traditional methodology. Thus, the precise question is: how could a new comparative law *in practice* look like?

The transfer of theoretical insights into practice should be approached by opening a dialogue between theory and practice. This article provides a first step. Theorists and practitioners have to understand the backgrounds, premises, aims, as well as the crucial arguments of the other. Here the dialogue is entered from the viewpoint of a theorist, thus the focus lies on the clarification of the philosophical roots and the actual theoretical debate of comparative law for the practitioner, using a practical example, and thus transferring theoretical insights into practice.

After demonstrating the failures of traditional comparative law, the development of Critical Comparison was clarified by discussing its philosophical background. By referring to Nietzsche's philosophy the theoretical debate of comparative law was clarified for the practitioner. Possible ways of engaging in comparison become clear: the relativism of knowledge and values, and the relevance of genealogies for understanding the man-made world are crucial beginnings of less biased comparison. To engage in a productive dialogue of a new comparative law, which can be transferred into practice, one has to enable a fresh view onto the ongoing theoretical debate. In the future, practitioners will have to provide an insight of their aims, backgrounds, and premises as well.

From the analysis of the chosen example, one can draw the conclusion that a broader approach does provide deeper understanding of both one's own and the "Other's" legal system: the English concept of CCL can, for example, be explained with the more traditional and more class-oriented structure, utilitarian background of English society, and the problem-solving design of common law systems. Because of this background, criminal law in England is enacted more on the base of its possible consequences and is less dependent on concepts such as moral responsibility or personhood. Corporations are perceived differently in the Anglo-Saxon, liberal capitalism in contrast to the social market economy of Germany. The English concept of CCL is an expression of public skepticism towards the powerful, uncontrollable identities that have developed their own character. It is an expression of a strong belief in criminal law. But it also is a measure to secure power, the power of the acting and deciding individuals, as their liability is limited by this concept. From a consequence-oriented viewpoint it is understandable to limit the criminal liability of individuals that invest and decide in big corporations because the acting individuals will be prepared to take more risks to create high economic profits.

This allows practical comparatists to base their undertaking on a deeper understanding of the differences and of their standpoint towards these differences. This analysis, for example, is written from a German viewpoint, and the analyst has necessarily, at the beginning of the comparison, a better understanding for the German way and the German society, while the English structures and origins remain strange. But by engaging in the

differences, one begins to understand the reasons for these differences, as well as one's own reasons for a certain evaluation of them.

The dialogue between theorists and practitioners can lead to a new comparative law. The practitioner has to accept that only by engaging in a broader undertaking than just comparing black-letter law, he will be able to truly compare. Such an approach does not exclude evaluation or harmonisation. On the contrary, it is thinkable that Germany at some point will adopt corporate criminal liability.[101] But how this change is to be evaluated, can only be discussed if the roots for the refusal are clear, if the possible disadvantages (incoherence of criminal law, for example) are known, and if the reasons are convincing in the value system of Germany. It also is thinkable that England at some points abandons this concept,[102] and this process as well becomes more transparent if all relevant aspects are included. A broad analysis can help find international solutions, because one can discuss every premise, every assumption, and every background condition in which one differs.

Comparative law today faces an enormous challenge,[103] as internationality of conflicts, economic crises and social problems require international solutions. Divergent legal systems have to engage with each other.[104] In the context of CCL, one has to find solutions how to deal with crimes committed by international corporations or international crimes committed by national corporations. Comparative law cannot face this challenge if theorists cannot convince practitioners of the need to consider their concerns, and practitioners cannot find theoretical answers that are realizable in practice. Thus, what is needed in an international community is dialogue between theorists and practitioners of comparison as well as between national legal systems. In order to fulfill this task, this dialogue first has to deconstruct—the background, the structures, the premises, and the values. Only then, a way to reconstruct, based on a deeper understanding of each other, can be found.

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[101] Recently Austria (*Verbandsverantwortlichkeitsgesetz*, since 2006) and France. *See* Hartan, *supra* note *11*, at 96 et seq.

[102] *See* Peters & Schwenke, *supra* note 3 (discussing the growing U.S. skepticism).

[103] *See* Reimann & Zimmermann, *supra* note 1, at v.

[104] *See* Hartan, *supra* note 11, at 12.