PERSONAL AUTONOMY, THE PRIVATE SPHERE AND THE CRIMINAL LAW

Personal Autonomy, the Private Sphere and the Criminal Law

A Comparative Study

edited by
PETER ALLDRIDGE
and
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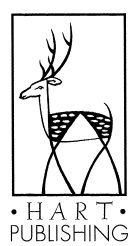

OXFORD – PORTLAND OREGON
2001

Hart Publishing
Oxford and Portland, Oregon

Published in North America (US and Canada) by
Hart Publishing c/o
International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

Distributed in the Netherlands, Belgium and Luxembourg by
Intersentia, Churchillaan 108
B2900 Schoten
Antwerpen
Belgium

Hart Publishing Ltd is a specialist legal publisher based in Oxford, England.
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Folly Bridge, Abingdon Road, Oxford OX1 4LB
Telephone: +44 (0)1865 245533 or Fax: +44 (0)1865 794882
e-mail: mail@hartpub.co.uk
WEBSITE: http//www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available
ISBN 1–901362–82–5 (hardback)

Typeset by Hope Services (Abingdon) Ltd.
Printed and bound in Great Britain by
Biddles Ltd, www.biddles.co.uk

Preface

This book is the result of long-standing collaboration between Cardiff Law School, University of Wales, and the Willem Pompe Institute for Criminal Law and Criminology of the University of Utrecht. It is the fifth book to appear since our first research contacts in 1986.[1] Since those early days, our field of collaborators has broadened considerably. Some of the original group have moved on to work elsewhere, but have nevertheless remained sufficiently involved to want to contribute to this volume. We have also sought to interest researchers from other universities and institutes, both in and outside the United Kingdom and The Netherlands, in our continuing and widening comparative studies.

Our thanks to the British Council, the Departments of Law at Cardiff and Utrecht, Hart Publishing and the University of Wales facility at Gregynog itself for help in putting on a weekend-colloquium at Gregynog, during which we were able to discuss the first versions of the contributions that appear in this book.

Finally, a short note on our system of case law citation: for cases in the European Court of Human Rights we have given the EHRR citation, the name and the date of the decision plus the application number; this should allow anyone accessing the website of the Council of Europe at <http://www.dhcour.coe.fr>, which has an excellent search engine, easy access to all of the case law. For decisions by national courts, we have used the method of citation usual in the jurisdiction in point.

[1] See also Phil Fennell *et al.* (eds), *Criminal Justice in Europe. A Comparative Study* (Oxford: Clarendon Press, 1995; Christopher Harding and Bert Swart (eds), *Enforcing European Community Rules. Criminal Proceedings, Administrative Procedures and Harmonization* (Aldershot: Dartmouth, 1996); Chrisje Brants and Stewart Field, *Participation Rights and Proactive Policing. Convergence and drift in European criminal process* (Deventer: Kluwer, 1995); S.A. Field and C.M. Pelser (eds), *Invading the Private: State Accountability and New Investigative Methods in Europe* (Aldershot: Dartmouth, 1998).

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Introduction

PETER ALLDRIDGE AND CHRISJE BRANTS

THE COMPARATIVE EXERCISE

AT THE MOST general level, this book will attempt to highlight a number of differences in legal cultures and underlying assumptions with regard to the private sphere, personal autonomy and the supposed justifications for state interference by means of (the implementation of) substantive criminal law. The essays in this volume are mainly concerned with England and Wales on the one hand and continental Europe – notably, although not exclusively, the Netherlands – on the other. The major differences between the common law and civil law systems that these countries exemplify, are often simply accepted as the inevitable and everlasting result of the forces of history. And yet, in theory at least, Europe as a whole increasingly shares a common culture of basic individual rights and of standards against which to measure the legitimacy of state interference with them, expressed in and reinforced by the European Convention on Human Rights and Fundamental Freedoms. At the same time, the development of a supra-national European economic and social order is pushing national criminal justice systems ever further in the direction of a shared instrumentalist perception of criminal law. An important issue in comparative studies therefore becomes to what extent such developments will lead, or have perhaps already led, to convergence or even harmonisation of legal systems and legal culture.

This immediately raises questions as to the nature of the comparative exercise which is contemplated here. Comparative studies of common law and civil law systems, and of the legal culture that derives from and sustains them, have usually concerned the most visible differences, which are to be found in styles of criminal procedure (most commonly distinguished as adversarial and inquisitorial respectively).[1] In our view, however, this often fails to take into consideration the more fundamental cultural, political and social context within which legal traditions and practice develop. Moreover, comparisons of procedural traditions and practices are usually made against the background of a broad consensus as to substantive law, although it is in the area under consideration –

[1] And see Mirjan Damaska, *The Faces of Justice and State Authority* (New Haven, CT: Yale University Press, 1986).

intervention in the private sphere and the limits of personal autonomy – that some of the most interesting differences between legal cultures could be expected to arise, and where we have assumed that common and civil law countries might, or indeed do, attempt to find different solutions for similar problems.

A first step to tracing such differences is through questioning the assumptions that justify the right of the state *per se* to intervene by means of criminal law in individual behaviour. A second is to examine the actual provisions of substantive law with regard to issues of privacy and autonomy in jurisdictions from the different traditions. A third, and by far most interesting, step is to compare the findings against each other and against a more general background of difference in cultural and legal tradition, economic and social arrangements, and possible harmonising supra-national effects. A truly comparative study requires that we take all of these steps. We have, in any event, attempted to go further than what David Nelken[2] calls comparison by mere juxtaposition, although close examination of the provisions of law that actually apply in different jurisdictions is an indispensable pre-condition of understanding how exactly they differ, and why that should be so. At the same time, it is important that we keep an open mind as to the implications of the findings.

Comparative studies sometimes include attempts to prove that, although the rules in different jurisdictions appear to be different, they are really the same and embody some deep truth about the human condition.[3] In our case, for example, it could well be that what appear at first sight to be major differences in substantive law, are in fact not attributable to essential differences in the underlying norm or moral standards in given jurisdictions, but to differing styles of, and (historically conditioned) social expectations with regard to law enforcement. Another approach, that formed the backbone of classical comparative law, is to compare with a view to saying that the rules of one system are better than those of the other, and that their adoption should be considered in the other jurisdiction. This approach is fraught with the dangers now known to attach to "transplants", but nevertheless, if that is borne in mind, can be helpful, if only because it requires that we explicitly justify what we consider to be "the better rule", and why.

Conversely, while different jurisdictions may share norms and values and yet have widely divergent solutions in positive law, it is by no means certain that harmonisation of law in a wider context such as the European Union rests on shared perceptions of normative issues. This is not to deny the discursive power of law over a long period of time, but harmonising mechanisms – for example the Maastricht and Amsterdam Conventions (especially with regard to the so-

[2] David Nelken, "Understanding Criminal Justice Comparatively" in Mike Maguire, Rod Morgan, Robert Reiner, *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2nd edn, 1997) 599.

[3] Joseph M. Perillo, "Abuse of Rights: A Pervasive Legal Concept" (1995) 27 *Pacific Law Journal* 37.

called third pillar of the European Union) and the case law of the European Court of Human Rights – may actually leave so much room for difference that their practical effect can be overstated.

The very problems inherent in comparative work[4] have meant that in this volume we have sometimes been unable to progress further than the second step of examining differences in substantive law in a number of countries. To identify common problems and at the same time to rise above our own legal culture in tracing essential differences, is a process that advances by stages. It will take many joint studies of the problems of privacy and autonomy in different jurisdictions, before we can say that we are really able to draw conclusions as to the fundamental differences and similarities between the legal systems and cultures in which such concepts function.

Above all it takes time and repeated attempts to find a common language that is truly mutually understood. It is, of course, necessary to be conscious that notions of autonomy and privacy have widely divergent values and meanings in different (legal) cultures. Similarly, the word "right" may have connotations that derive from our own legal cultural tradition, yet it is possible to continue a discussion at cross purposes for quite some time without realising that the one is referring to a cultural heritage of negative freedom and the other to a positive and legally entrenched demand that may be made upon the state – to say nothing of the implicit judgments as to the value of rights that we automatically make in the wake of connotative assumptions.

And finally, the use of the English language as a common means of communication has its own specific problems. Even if all concerned are equally fluent in English, the very fact that legal concepts from very different traditions are expressed in the same English words will mean that English readers and listeners will assume them to be used in the sense that they have in the common law tradition. One important example is the term "adversarial", often used by continental lawyers to denote oral proceedings in open court, which however, on the continent, fall far short of what a lawyer from the UK or USA understands by it. Another is the German word *Rechtstaat*, which English speakers are inclined to translate as "rule of law". Given that there is, in the common law tradition, no such legal concept as that embodied by the word *Rechtstaat*, the translation is at best an approximation, at worst a serious handicap to understanding.[5]

These are formidable hurdles and we have no doubt that we have failed to clear any number of them in the course of compiling this volume. While it is certainly not our first joint comparative exercise, it is the first time that we have

[4] See on the many pitfalls of comparative legal work: David Nelken (ed.),*Contrasting Criminal Justice. Getting from here to there* (Aldershot: Ashgate, 2000), esp. chapters 1 and 2.

[5] See for an attempt to overcome the difficulties inherent in the cultural contingency of meanings of particular legal concepts and notions: Chrisje Brants and Stewart Field, "Legal Cultures, Political Cultures and Procedural Traditions: Towards a Comparative Interpretation of Covert and Proactive Policing in England and Wales and The Netherlands" in David Nelken (ed.), *op.cit.* n 4.

compared substantive law in general and the issues of privacy and autonomy in particular. Moreover, comparisons of substantive criminal law upon which to build or take further comparative theory or empirical knowledge are few and far between. That is no excuse, but the reader will, we hope, forgive us that, as a first attempt, this book too is far from comprehensive.

WHY PRIVACY NOW?

There are several reasons why privacy takes on particular significance now. First, the ***effect of technology*** in providing challenges to the relationship between privacy and criminal law is not restricted to dealing with new mechanisms for surveillance.[6] In the areas of genetic and information technology, the questions which have arisen are whether the classical doctrines of the criminal law (homicide and assault law in the case of genetic technology, criminal property law in the case of computer crime) are sufficient, or whether a new *corpus* of law is appropriate to either case. In either event, there are significant privacy implications.

Developments in information technology make it far easier to obtain and disseminate information about peoples' pasts. Moreover, the Internet has radically altered the force of "the public domain" by allowing the collection and dissemination of materials that, while formally public, were not widely available. It has given rise to claims to privacy of information. It has now also generated claims from law enforcement agencies to encryption keys to decode encrypted emails and prohibitions upon anonymous and pseudonymous Internet use.

The second important precipitation has arisen from concern for the ***legality of police behaviour*** in combination with a ***move from reactive to proactive policing***,[7] striking most specifically at drugs but more generally, increasingly, at "organised crime". Reactive policing takes place in response to reports of crime. It involves the traditional policing techniques of interrogation, searches, seizures and so on of which the suspect is immediately aware, and by police officers whose status and identity the suspect knows. In a system of reactive policing the traditional guarantees of rights to the suspect may or may not in fact be available, but it is fairly clear what they would involve. In adversarial systems, due process provides an argument for the right to be informed of one's rights, for access to legal advice, some knowledge of the prosecution case, the right to have interviews recorded and the right to know when an interview is taking place and when it is being recorded. In inquisitorial systems too, the suspect has the right to remain silent, although legal aid may not be immediately available (in the Netherlands, for example, a suspect has no automatic right to have a lawyer present during police interrogation). Nevertheless, there are guarantees

[6] And see Roberts, *infra* at 52 *et seq*.

[7] And see S.A. Field and C.M. Pelser (eds), *Invading the Private: State Accountability and New Investigative Methods in Europe* (Aldershot: Dartmouth, 1998) 253–75.