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BOOK REVIEW

Reviewing:

Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing, Oxford and Portland, Oregon, 2009), 244 pp., ISBN 9781841136301

Michael Bohlander, *The German Criminal Code – A Modern English Translation* (Hart Publishing, Oxford and Portland, Oregon, 2008), 216 pp., ISBN 9781841138312

Michael Bohlander, a former life-tenured German judge who has taught criminal law at Durham University since 2004, filled the gap for an English textbook on German criminal law with his 2009 volume *Principles of German Criminal Law*. In addition, his translation of the German criminal code from 2008 serves as a helpful resource for understanding the code-driven German law.

Bohlander did not intend to write a comprehensive study of German criminal law. He rather focuses on introducing the main principles to Anglophone readers. The emphasis (pp. 7–178) lies on the legal principles regulated in the so-called General Part (*Allgemeiner Teil*) of the German criminal code rather than on the individual offences (pp. 179–228) in the Special Part (*Besonderer Teil*). Throughout the book Bohlander compares the German 'top-down model of deductive logical reasoning, and the inductive, case-by-case pragmatic approach behind the common law' (p. 1). Frequently, Bohlander refers to common law cases that discuss similar legal problems as their German counterparts. Although the book is not a classical comparative law book, it is interesting to observe that many findings are *in conclusio* alike – notwithstanding the diverse underlying legal concepts.

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Bohlander begins with an overview of the basic concepts and terminology and outlines the differences between the German methods of interpretation and the common law approach. He shows the important function of German academics, who 'do not see academia as the mere handmaiden of the judges, but as a guiding light' (p. 9). Bohlander underlines the fact that German courts do not follow a doctrine of *stare decisis* (p. 15); indeed, lower courts generally tend to follow the standing judgments of their superior state courts and federal courts. He explains the tripartite structure of offences (*dreistufiger Verbrechensaufbau*) consisting of *Tatbestand*, *Rechtswidrigkeit* (unlawfulness) and *Schuld* (blameworthiness or guilt). Furthermore Bohlander covers the basic material tenets of German criminal policy, such as *Rechtsgüterlehre* (doctrine of protected legal interests) and *Schuldprinzip* (requirement of personal guilt and blameworthiness), rule-of-law-principles and the difference between felonies (*Verbrechen*) and misdemeanours (*Vergehen*). Contrary to English law, corporations cannot be liable under German criminal law; however, they can commit regulatory offences and may be fined. Indeed, due to *Schuldprinzip* Germany is reluctant to implement criminal sanctions on corporations.

Chapters 3 and 4 look at the structure of the *Tatbestand* and the 'typical Teutonic list' (p. 29), which divides it into subcategories. The *Tatbestand* 'defines a certain offence and has an impact on what elements the prosecution needs to prove, or what must be established by the judges before the court can convict a defendant' (p. 29). Thus, it serves a similar function as the concept of *actus reus* and *mens rea* in English law. After discussing different categories of individual offences (*Deliktskategorien*) Bohlander covers the terms act (*Handlung*) and omission (*Unterlassen*). With respect to genuine omission offences (*echte Unterlassungsdelikte*) he labels § 323c of the German criminal code a 'prime example (…) how wide the rift between systems can be', because anyone's duty under § 323c to render necessary assistance during accidents or a common danger or emergency 'is still unacceptable to most English lawyers because it is seen to constitute an intrusion into personal privacy' (p. 40).

Chapter 4 then deals with the subjective side of the *Tatbestand* and the German concept of negligence. The basic rule in § 15 of the German criminal code requires intent as to all objective elements of the *Tatbestand*; criminal liability in case of negligence is the exception that must be explicitly provided for by law. Bohlander shows that, unlike English law, criminal liability is not restricted to gross negligence in Germany. Bohlander discusses the basic problem of how to

determine intent (*Vorsatz*) if a perpetrator does not actually desire the victim's death and shows how German lawyers and courts created distinct categories to solve this problem on the substantive rather than the evidential or procedural level. It is particularly interesting, from a German point of view, to learn about the different concepts in missing-the-target cases. While English law solves these cases under the heading of transferred malice and does not affect the intent as long as the new victim or object are equal in nature, the prevailing opinion in Germany subscribes to the concept of *aberratio ictus* and argues that the perpetrator's intent is specifically attached to the person aimed at.[1]

Following the tripartite structure, Bohlander covers justificatory defences (*Rechtfertigungsgründe*) – the second tier – in Chapter 5. First, he explains general issues, such as the requirement of a subjective element and provocation as a means of defence. Second, Bohlander covers the various individual defences stemming from criminal and civil law as well as customary law. Due to the book's cursory nature, Bohlander underlines some of the more general issues and does not discuss every justificatory defence in great detail. With respect to necessity (*rechtfertigender Notstand*) pursuant to § 34 of the German criminal code Bohlander states 'according to the prevailing view and tradition, the balancing exercise required by § 34 does not, as the wording might suggest, demand that ''the protected interest *substantially* outweighs the one interfered with'' in the meaning of a high degree of substantial difference and importance, but merely that on the evaluation of all circumstances of the case it is *clearly* of higher importance, leaving no doubt in the mind of the average reasonable person' (p. 113). However, this statement is somewhat questionable, since many authors[2] demand – in accordance with the wording of § 34 – a substantial prevalence as to the protected interest. Bohlander correctly opposes the standing opinion among German lawyers – which is similar to the findings in *Dudley and Stephens*[3] – that in 9/11 scenarios killing of innocent people cannot be justified. He draws a

[1] See also M. Bohlander, 'Problems of Transferred Malice in Multiple-actor Scenarios' (2010) *Journal of Criminal Law* 145–162.

[2] T. Fischer, *Strafgesetzbuch* (58th edn., 2011), § 34 Mn. 7; U. Neumann, in *NomosKommentar Strafgesetzbuch, Band 1* (3rd edn., 2010), § 34 Mn. 67; H. Rosenau, in Satzger, Schmitt & Widmaier (eds.), *Strafgesetzbuch* (1st edn., 2009), § 34 Mn. 31; F. Zieschang, in *Strafgesetzbuch, Leipziger Kommentar, Band 2* (12th edn., 2006), § 34 Mn. 76.

[3] (1884) 14 QBD 273.

comparison to collision rules and argues that the 'special status granted to human life is logically of little help, as all of the potential victims enjoy that special status and are thus, as far as balancing their interests goes, on an equal footing' (p. 113).[4]

Bohlander turns to the third tier of the tripartite ladder, guilt, in Chapter 6. He emphasizes the differences between the English concept of insanity and the German terminology *Schuldunfähigkeit* and *verminderte Schuldfähigkeit* (diminished responsibility) and then turns to individual grounds for lack of guilt. For example, Bohlander shows that § 17 of the German criminal code is based on a 'more relaxed attitude' towards mistakes of law in comparison to the extremely strict standards set out in *Lim Chin Aik*[5] (p. 119 f.). In the remaining two chapters on the General Part, Bohlander covers attempts (Chapter 8 is missing in the chapter overview on p. 5) and forms of participation. It might be surprising to English readers that German criminal law permits the perpetrator to withdraw from an attempted offence with full acquittal as long as the withdrawal is voluntarily and no lesser offences were committed (pp. 146–152). Finally, Chapters 9–11 introduce the reader to selected individual offences, namely homicide as well as sexual and property offences.

Bohlander's *Principles* is a must-read for any English speaker looking for a comprehensive introduction to German criminal law. Although one has to accept, that some subjects are only touched on, Bohlander goes into detail where appropriate. Both books are also helpful for German lawyers looking for translations of German terms and definitions. One can look forward to Bohlander's forthcoming volume *Principles of German Criminal Procedure*.

[4] See *in extenso* M. Ladiges, *Die notstandsbedingte Tötung von Unbeteiligten im Fall des § 14 Abs. 3 LuftSiG – ein Plädoyer für die Rechtfertigungslösung*, ZIS 2008, 129–140.

[5] [1963] AC 160.