

BOOK REVIEWS

COMPARATIVE CRIMINAL LAW: A CRITICAL ANALYSIS (2023). By Sukumar Ray. Published by Eastern Law House, Kolkata, Pp. 591. Price INR 1295/-, ISBN:978-817-17-73770.

COMPARATIVE CRIMINAL law (CCL) examines various legal systems, employing comparative repertoire to enhance both local and international comprehension of criminal law. It is different from compiling criminal law doctrines of different jurisdictions.¹In fact, it goes beyond the tired discussions of standard topics in criminal law—by realigning perspectives and contexts from a comparative feel. Amongst the learners, it “involves exchange of ideas in a spirit of mutual curiosity”²that reveals different points of similarity and contrast. Simply put, the subject tries to answer issues, which in turn shape the development of the criminal justice system; and therefore, the study of CCL has been given a high priority by the legislators, legal luminaries and academicians alike, who argue how much can be learned from comparing the way in which the world’s leading legal systems approach important questions of criminal theory. Explaining the potential importance of CCL, Feuerbach, who is considered as leading figures of Enlightenment criminal law, writes:³

Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most nearly related to us and those farther removed, create universal legal science, *i.e.*, legal science without qualification, which alone can infuse real and vigorous life into the specific legal science of any particular country.

Similarly, Dubber writes:⁴

Comparative criminal law [CCL] has the potential to make an important contribution to criminal law, a subject that is both more parochial and more in need of critical analysis than any other form of state action through law. That potential remains as yet unrealized.

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- 1 Luis E. Chiesa, “Comparative Criminal Law”, in Markus Dubber & Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* 1089-1114 (Oxford University Press, Oxford, 2014). In order to bring the distinction, the author writes, “comparing criminal laws is, by definition, the essence of comparative criminal law [CCL]. Compiling criminal laws is useful to doing comparative criminal law, but is not synonymous with actually engaging in comparative analysis of substantive criminal law.” *Id.* at 1090.
 - 2 Markus D. Dubber, “Comparative Criminal Law,” in Mathias Reimann & Reinhard Zimmermann (eds.), *Oxford Handbook of Comparative Law* 1287 (Oxford University Press, Oxford, 2006).
 - 3 P. J.A. Feuerbach, *Anselm Feuerbachs kleine Schriften vermischten Inhalts* 163 (Verlag, Nürnberg, 1833).
 - 4 *Id.* at 1325.

Indeed, despite the significance of CCL, the topic receives minimal attention with particular focus on critique of state power in general, and of state penal power in particular. In fact, until late 1980's, any study of comparative law did not cover criminal law—while virtually every other aspect and variety of civil, commercial and economic law was given preference.⁵ There were many factors including: persistent peculiar parochialism of criminal law; lack of historical curiosity to the discipline; language barrier; importance to imperialist comparative law; Common law *versus* Civil law approaches, *etc.* which somehow derailed the project of CCL. Nevertheless, comparative studies have since evolved significantly and moved beyond over generalisations. In fact, many subsequent developments led to the opening up of newer opportunities for comparative work. These can be summed up as: *first*, the decolonisation process of the criminal law (wherein certain features of the existing criminal laws are retained, while rejecting others in an effort to render State specific criminal law as a whole more consistent with what is regarded as the basic functions of a modern system of criminal law); *secondly*, the internationalisation of the criminal law (resulting in the adoption of rules of international criminal law); *thirdly*, development of critically assessment of the domestic criminal law and thereafter seeking reform (by looking into what other countries are doing in an effort to find novel solutions to existing problems); and *fourthly*, reference of comparative laws influences the judicial decision-making process (particularly in construing constitutional provisions related to substantive criminal law). Surely, these developments have encouraged comparatists to re-orientate *what* and *why* part of CCL and this process undergo period of refinement. At the same time, there remain many unrealised lines of empirical and theoretical potential in comparative repertoires too.

5 See for instance, the International Encyclopedia of Comparative Law (IECL), which was conceived in the early 1960s by a group of comparative law scholars within the UNESCO-sponsored International Association of Legal Science, under the leadership of Professor Konrad Zweigert, Hamburg, the idea of a world-wide compendium on comparative law was transformed into a working and viable project, involving hundreds of legal scholars from all corners of the globe participated. Until 1980's, primary subjects of the IECL were civil, commercial and economic law, see Adolf Sprudz, "The International Encyclopedia of Comparative Law: A Bibliographical Status Report" 28(1) *American Journal of Comparative Law* 94 (1980). Although in Germany, references to comparative notes were available until 1972 in the seminal work titled *Strafgesetzbuch*, which owing to increase in literature got omitted later, see Adolf Schönke and Horst Schröder, *Strafgesetzbuch: Kommentar* (C.H. Beck, Munich, 16th edn., 1972). In India, it is only since 2018 that criminal law found space in comparative volumes, see B.B. Pande, "The Immutability of the Marital Exemption Clause in the Indian Rape Law", in M.P. Singh and Niraj Kuamr (eds.), *The Indian Yearbook of Comparative Law* 2018 365-382 (Springer, Singapore, 2019).

From this viewpoint, it is startling to recognise the minimal progress made in India regarding CCL. Only few scholars, including Professor B.B. Pande⁶ and Professor K.N. Chandrasekharan Pillai⁷ have made any effort to incorporate comparative studies into their research. As a matter of fact, there has been hardly any significant effort made by the Indian scholars to study Macaulay's Indian Penal Code,⁸ which was inspired by English criminal law, the French Penal Code, and Louisiana Penal Code,⁹ and had contributed tremendously to the evolution of larger body of 'common law' (or a system which was unique on its own, since Macaulay's Indian Penal Code eliminated all the inconsistencies and illogicalities of then prevailing English criminal law) in South-Asia and parts of Africa.¹⁰ Indeed, as on today, there is no dearth of available western literature on the subject, however, what is desired is an urgent need for a comprehensive work which unfolds in an easily comprehensible manner, locates and point out the important aspects of laws of other countries, and accordingly intrigues into the mind of a curious reader.

In this context, the book¹¹ under review is a welcome effort. The book comprises of 18 chapters and is mainly intended as a guide to the study of CCL. It indicates the broad outlines of the legal system of adversarial as well as inquisitorial model and offers an insightful perspective into why we should study crime and criminal justice

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- 6 See B.B. Pande, *Criminal Law and Criminal Justice: Advanced Legal Writings* (Eastern Book Company, Lucknow, 2022). See also B.B. Pande, "Heralding a Paradigm Shift in the Consensus Model of Criminalisation", in Krishnadeva Rao (ed.), *Reclaiming Dignity, Rights and Justice* 39-49 (Thomson Reuters, Gurgaon, 2019).
 - 7 See K.N. Chandrasekharan Pillai, *General Principles of Criminal Law* (Eastern Book Company, Lucknow, 2nd Edn., 2020).
 - 8 Although in 1962, Indian Law Institute made an effort by publishing a remarkable work, see S. Govindarajulu (ed.), *Essays on Indian Penal Code* (Indian Law Institute, New Delhi, 1962). This seminal work was a later revised, see K.N. Chandrasekharan Pillai & Sabistan Aquil (revised), *Essays on Indian Penal Code* (Indian Law Institute, New Delhi, 2005). See also B.B. Pande, "Context, Method and Contents of the Indian Penal Code Reforms", unpublished paper published in the International Symposium at the National University of Singapore on the theme *A Model Indian Penal Code: Adhering to the Philosophy of Macaulay*, in June 2010.
 - 9 See Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles," in Wing-Cheong Chan, Barry Wright, and Stanley Yeao (eds.), *Codification, Macaulay, and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* 19-55 (Ashgate, Surrey, 2011). See also Nick Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* 37-62 (Cambridge University Press, Cambridge, 2015).
 - 10 For instance, States like Malaysia, Singapore, Kenya, Uganda, Sudan, Pakistan, and Bangladesh have reflections of Macaulay's Indian Penal Code. In fact, the existing penal law in India i.e. Bharatiya Nyaya Sanhita (2023), retains (even after overhaul) majority of Macaulay's Indian Penal Code provisions. See Mira Patel, "The Colonial History of the Indian Penal Code and How its Influence Extends to the BNS", *The Indian Express* (July 12, 2024).
 - 11 Sukumar Ray, *Comparative Criminal Law: A Critical Analysis* (Eastern Law House, Kolkata, 2023) [hereinafter *Comparative Criminal Law*].

in a comparative and international context.¹² It also addresses pressing issues of criminal justice that will help the law-makers as well as scholars of contemporary society to enrich their own system by making a comparative study.¹³

The 'Introduction' of the book comprises of 13 pages and is a simple narration of what is crime, its characteristics, and factors responsible for criminal behaviour. The second chapter refers to various schools of criminology.¹⁴ The next chapter formally introduces readers with need, purpose, and object of CCL.¹⁵ The following chapters covers various comparative aspects of criminal justice system, including: investigation,¹⁶ functionaries,¹⁷ arrest,¹⁸ bail,¹⁹ jury system,²⁰ probation,²¹ plea bargaining,²² parole,²³ sentencing,²⁴ trial,²⁵ punishment,²⁶ and compensation.²⁷ The final chapter reveals major issues/problems witnessed by the Indian judiciary in executing reforms in criminal justice system.²⁸

CCL is a fascinating subject and it must gain recognition as a discipline both in research and teaching.²⁹ What can vigorously be understood by now is the fact that there is appreciable prudence in approaching criminal law from a comparative perspective. Considering these aspects, the language and narration of the book appears simple. The book is also successful in claiming that meaningful comparisons of criminal laws are possible. For these reasons, there is no doubt that the book will be helpful to the students, especially to the undergraduate, who at the beginning find it difficult to

12 *Id.* at 5. The author opines that the study of CCL is "at once fascinating, bewitching, charming, and intriguing."

13 *Id.* at 6. The author gives reasoning behind such an observation and writes that since law is dynamic, the "dynamism of law can best be understood by an initiation into the study of foreign laws and the technique of the comparative method."

14 *Id.* at 14-43.

15 *Id.* at 44-65.

16 *Id.* at 66-84.

17 *Id.* at 85-124.

18 *Id.* at 125-163.

19 *Id.* at 164-200.

20 *Id.* at 201-209.

21 *Id.* at 218-240.

22 *Id.* at 241-302.

23 *Id.* at 303-331

24 *Id.* at 372-405

25 *Id.* at 406-471.

26 *Id.* at 472-502.

27 *Id.* at 503-530.

28 *Id.* at 531-546.

29 Markus D. Dubber, "Criminal Law in Comparative Context", 56(3) *Journal of Legal Education* 433-443 (2006).

appreciate the meaning and interrelation of variety of concepts relating to criminal justice system. Having said this, the book has many short comings. It fails to carefully examine and acknowledge the pathbreaking work of established comparatists,³⁰ like Cesare Beccaria (in chapter 2 at page 19 reference is made, however the name is misspelled as Baccaria),³¹ Immanuel Kant,³² Paul Johann Anselm Feuerbach,³³ Carl Joseph Anton Mittermaier,³⁴ Edward Livingston,³⁵ George P. Fletcher,³⁶ *etc.* The book gives reader a feel of compilation of various available information, rather than an engagement of meaningful comparative analysis.³⁷ There are instances where footnotes are deliberately skipped,³⁸ or in instances where a specific footnote is referenced, its citation is thereafter reiterated in the ensuing footnotes (which could have been easily avoided by referring *Id.*).³⁹ At places the placement of few chapters also does not make sense.⁴⁰ The work is devoid of a requisite bibliography. Further,

30 Although references of standard criminal law books of Jerome Hall, Nigel Walker, Edwin Sutherland *et al.*, Cyndi Banks, David Dressler, John Lewis Gillin, *etc.* is duly acknowledged. *Id.* at 6. Some notable references were made in chapter 2, these are: Cesare Lombroso, Raffaele Garofalo, Gabriel Tarde, and Enrico Ferri.

31 Cesare Beccaria, *On Crimes and Punishments* (Bobbs-Merrill, New York, 1963, first published in 1764).

32 Immanuel Kant, *Metaphysical Elements of Justice* (Bobbs-Merrill, Indianapolis, 1965, first published in 1797).

33 P. J.A. Feuerbach, *supra* note 3. Feuerbach was of the opinion that universal principles of law require careful study of each society's laws and legal customs. See Gustav Radbruch, *Paul Johann Anselm Feuerbach: Ein Juristenleben* 190 (Springer, Göttingen, 3rd edn., 1956).

34 Carl Joseph Anton Mittermaier, *Das deutsche Strafverfahren in der Fortbildung durch Gerichtsgebrauch und Particulargesetzgebung* (Kessinger Publishing, Montana, 2010, originally published in 1827).

35 Salmon P. Chase, *The Complete Works of Edward Livingston on Criminal Jurisprudence: Consisting of Systems of Penal Law for the State of Louisiana and for the United States of America* (National Prison Association of the United States of America, New York, 1873).

36 George P. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, Oxford, 1998). See also George P. Fletcher, *Rethinking Criminal Law* (Little Brown and Co., Toronto, 1978).

37 For instance, the selection of countries on various aspects of criminal law was neither uniformly done nor a reason for their selection is clearly spelled out. In chapter dedicated to functionaries there are 9 countries quoted while for Bail there are 7 countries.

38 *Comparative Criminal Law*, *supra* note 11 at Ch.2. For instance, while some notable references of comparatists were made in chapter 2, however no proper citation of their referred work is clearly mentioned. For the sake of readers of this book review, I am quoting those notable work. These are: Cesare Lombroso, *Criminal Man* (G.P. Putnam's Son's, New York, 1911, first published in 1764); Raffaele Garofalo, *Criminology* (Little Brown and Co., Boston, 1914, first published in 1885); Gabriel Tarde, *Comparative Criminology* (Felix Alcan, Paris, 1907, first published in 1886); and Enrico Ferri, *Criminal Sociology* (Little, Brown, and Co., Boston, 1917).

39 *Id.* at 3 (Introduction).

40 *Id.* at 210-217 (Ch. 9, Theories of Punishment). Further two chapters convey similar meaning yet they are named differently, *see id.* at 332-371 (ch. 13, Types of Criminal Liability and Punishment) with (Ch. 16, Punishment of Offences in Different Countries), *id.* at 472-502.

although there has been some effort made to draw few compelling arguments, yet they do not appear to be attractive, thus revealing lack of rigorous thinking. Considering dearth of Indian literature on CCL, the book with all omissions/shortcomings, is moderately priced and deserves to be part of the collection of law school libraries.

*Prakash Sharma**

* Assistant Professor Grade I, Rajiv Gandhi School of Intellectual Property Law (RGSoIPL), IIT Kharagpur, West Bengal.