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Edited by Matthew Dyson

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Introduction

MATTHEW DYSON

The fields of tort and crime have much in common in practice, particularly in how they try to regulate future behaviour and respond to wrongs that have already happened. However, despite this commonality in fact, fascinating questions remain about how legal systems co-ordinate, or leave wild, the border between tort and crime. What is the purpose of tort law and criminal law, and how do you tell the difference between them? Do criminal lawyers and civil lawyers reason and argue in the same way? Are the rules on capacity, consent, fault, causation, secondary liability or defences the same in tort as in crime? How do the rules of procedure operate for each area, and are there points of overlap? Can a criminal court award compensation to a victim and can a victim force a prosecution in order to get it? When tort and crime interact, how and why do they do so? Are there patterns in how legal systems respond to the pressures on tort and crime over time? These questions, and others like them, are what prompted this volume.

Comparing Tort and Crime sets out to do six things. First, it will sketch an outline of the field of tort and crime by cataloguing how tort and crime interact in theory and in practice. Second, the intricate detail on the most significant interactions of tort and crime will be explored. Both these aims are enhanced by the volume's method. Each chapter will present a national story, but all the chapters will cover certain key material to aid in comparative analysis; furthermore, each chapter is co-authored, each is a blending of the perspectives and knowledge of specialists in civil, criminal and, in some cases, procedural law. Third, it will draw out lessons for the application and interpretation of legal rules and doctrine of tort law and criminal law. Fourth, it will discuss the impact of the tort/crime interfaces on the wider content of tort, crime and the law more generally. Fifth, it is the first exploration of how comparative law might shed light not only across legal systems, but also within legal

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systems.¹ The project's membership has offered the perfect opportunity to test how much lawyers relate across fields of law: such as how much civil lawyers across jurisdictions start from the same approach, and whether that approach is the same as the criminal lawyers, or the procedural specialists. This is then contrasted with how the different specialists from within a legal system relate their law to those outside it. Finally, since the field is vast and under-explored, further lines of research for the future are suggested throughout the book. This introduction will focus on the method underpinning the volume.

The volume is also the second in a series: the first, *Unravelling Tort and Crime*, contained a series of chapters about specific issues, primarily within the law of England and Wales. The preparation of that volume informed the investigations for this.

1. Outline

The book engages in two dimensions of comparative law. On the simplest level, it compares the law connecting tort and crime across eight legal systems. On a more subtle level, it compares, within each legal system, the field of tort and the field of crime. The purpose has been to go beyond one internal (civil, criminal or procedural) perspective on national law just as much as to go beyond one national legal perspective.

Now is not the place for a detailed discussion of the debates within comparative law methodology. However, a brief explanation of the theory, and how the book has attempted to apply that theory, is set out below. The four methodological areas to examine are: the legal systems selected, terminology, the method in theory and the way that theory was put into practice.

2. Legal systems in this work

Comparing Tort and Crime examines the law in eight jurisdictions: England and Wales, France, Germany, Sweden, Spain, Scotland, the Netherlands and Australia. These jurisdictions have been chosen to give

¹ For more detail on this approach, see M. Dyson, 'Litigations Divide and Conquer: Using Legal Domains in Comparative Legal Studies' in G. Helleringer and K. Purnhagen (eds.) *Towards a European Legal Culture* (Baden-Baden: C. H. Beck, Hart and Nomos, 2014). Cf. the discussion in M. Dyson *et al.* 'Symposium on Legal Domains and Comparative Law. Wheels Within Wheels: Using Legal Domains for Domestic Comparative Law' (2013) 17(3) *Edinburgh Law Review* 420.

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breadth and depth to the project. There are many reasons why these countries were chosen, but three key reasons about their interaction of tort and crime are particularly important.

First, the systems studied have each structured the institutions of their law very differently. The difference in structure may well represent different theories and value judgments. These differences shape the law generally as well as specifically the overlap between tort and crime. Obviously, amongst the jurisdictions selected are a range of primary sources of law, from the Napoleonic Code or its children (France, Spain), to (more) recent or reformed codes (Germany and the Netherlands) through to a common law system (England and Australia) and a mixed jurisdiction without a code but with a strong link to Roman law (Scotland) as well as a representative of the Nordic systems (Sweden). In fact, while representing that tradition more broadly, Sweden also has a particularly fascinating and individual history to its rules on tort and crime. The work also includes a system, Australia, which is descended from English law but which has evolved differently, particularly by its federal structure and range of regimes, including full and partial codification in different areas of law and in different states.

Second, there is a range of approaches to substantive and normative overlap of tort and crime in the selected jurisdictions: from French law's historic doctrine of unity of civil and criminal fault, through German law's auxiliary or 'adhesion' process and England and Australia's lack of co-ordination even through to the very slight distinction made until recently between the two in Scotland. These arrangements represent different theories and value judgments about the law and the logic of its divisions. The book examines how much these differences affect the law in action. In addition, the work will analyse the impact of such historical frameworks on how legal actors shape the law into the future: how much the patterns of thought and possible legal techniques are conditioned by the framework within which the actor operates.

Third, the jurisdictions selected vary on how much doctrine impacts on how legal actors behave. For instance, the jurisdictions differ on how practically certain their tort/crime rules are and on the extent of the state's involvement (put roughly, high in France, Spain and Sweden, medium in the Netherlands, low in England, Australia, Germany and Scotland). Even once a litigant can gauge the likely effects of a given rule, enforced to whatever extent by the state, its impact can only be understood in connection with a range of other factors. These factors include other legal rules through to cultural approaches to dispute resolution, the

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extent of state support outside of the legal system, the nature of the insurance market and the wealth of the parties. These practical factors affecting how legal rules play out are particularly important for analysing law falling across significant organisational categories (such as tort and crime).

3. Terminology

In any comparative endeavour, terminology and language more broadly, hold many hidden risks.

To begin with, the volume takes a wide approach to what material is worth comparative study. To express this, certain system-neutral language is required, most particularly the term ‘object’ for any part of a legal system that is to be examined comparatively. In any given instance, it could be, for instance, a legal rule, a theory, a practice of legal actors, a belief about what the law is doing or should do.

Turning to language more generally, the contributions in this book are all in English, which is not the national language for five of the legal systems covered. Where possible the national reports have included explanations and the vernacular, to keep as much meaning as possible. One example is that many reports refer to ‘tort law’ even though they do not do so in their national languages. This is obviously useful and the cost may not be too high, but it should be acknowledged that there is in fact a cost in lost nuance. For instance, French and Spanish law tends to refer structurally to this area, describing it as *responsabilité délictuelle* or *extra-contractuelle* (France) or *responsabilidad civil* or *extracontractual* or, slightly more recently, *derecho de daños*, the law relating to harm or loss (Spain). Swedish law also focuses on the outcome, compensation or damages, though translated as ‘tort’: thus, the skadeståndslag of 1972 is often known as the Tort Liability Act. The Dutch phrase the matter more like the French, talking of ‘liability law’ as the closest translation of *Aansprakelijkheid*, but the Dutch Civil Code refers more generally in its tort provisions to *onrechtmatige daad*, unlawful act(s). For the Scottish and German chapters, the term ‘delict’ is preferred, derived from the past participle of *delinquere*, meaning ‘to be at fault, offend’. *Delict* is indeed the common term in Scotland, while in Germany, the cognate is *Delikt*, which is used along with more specific references, such as to *Schuldrecht*, the law of obligations, or even more specifically, the fault accompanying the act, such as *Fahrlässigkeit*, negligence.

By comparison, references to criminal law seem rather simple. While ‘criminal’ might be replaced with ‘penal’ in some countries, the terms

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are synonyms with a slight difference in emphasis: the first focuses on the wrong, the second on the consequence of it. However, even here we face some difficulties of nuance. For instance, common law criminal practitioners tend not to refer to 'liability' in the abstract, preferring instead the procedural phase, 'guilty of an offence'; criminal law academics readily refer to 'liability'. For common lawyers, 'accountability' tends to be viewed as a term for abstract theorists, or laypeople, while for German and Dutch lawyers, it is a vital term for everyone for the functions of the criminal law. At times the term also is used more procedurally there, to mean a process of attaching a wrong to an individual (in tort as well),² perhaps akin to the term 'imputation', such as discussing when German lawyers hold a child accountable.³

Once we move onto more specific terms describing the relationship between tort and crime, we find further difficulties. To begin with, what is the right term for the person who suffers loss through a criminal or tortious action? Most legal systems give hints about how they treat such persons within the criminal justice system by the terms they use. 'Victim' is a substantive statement that a person has suffered recognised harm; until a judicial process has convicted a defendant, technically there is only an *alleged* victim, but most systems gloss over that step, for evident political reasons. On the other hand, claimant (or plaintiff) is a procedural term which describes the person bringing a civil claim. Put another way, the terms 'bookend' proceedings: a 'claimant' *is the starting point of a* civil claim while a 'victim' *is one of the outcomes of a* criminal conviction. While there are crimes which do not need a victim, there are far fewer civil wrongs without there being potential claimants.⁴ Indeed, for many systems, a victim must make a complaint or assent to a prosecution for certain crimes, such as some involving personal honour. If a neutral term were sought, perhaps 'person aggrieved' might be used. Something like this has been used in a number of jurisdictions over time,⁵ and has the merit of describing this legal actor in more neutral terms, focusing on the perception of the actor as having been wronged. Given the difficulties of nuance in the term, the authors have used whichever term has fitted their

² See, especially, Chapter 8.3.A, n. 5. The Dutch Civil Code uses a word best translated as 'accountable' in connection with tort liability, see, e.g., 6:162(3), noted Chapter 8.3.A.

³ Chapter 4.6.B.3.(c).

⁴ A further more neutral claim, 'complainant', is also used in England, particularly for sexual offences.

⁵ E.g., cf. Chapter 4.7.B and 4.8 in Germany with Chapter 2.2.C in England and throughout Chapter 5 in Sweden. Spanish law seems to equate 'aggrieved party' with directly damaged party': Chapter 6.3.D.3.

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law best depending on the context, having been made aware of the range of implications. As such the term ‘victim’ or ‘aggrieved party’ should be offset against more specific terms. For instance, the *partie civile* in France, is a procedural description of the civil party to criminal proceedings, but it includes a range of other parties who it might be difficult to call victims, such as family members, unions defending the collective interests of their members and most recently, even associations.⁶ On the other hand, ‘damaged party’ in Spanish law,⁷ is a wide term including at least the victim, his family and some third parties. In the Swedish chapter, the term ‘aggrieved party’ is used in English, the term is actually *målsägande*, literally translated as ‘the person who owns the case’, since the *målsägande* has extensive powers.

Other terms of art appear throughout the book, and careful attention to the English used is required. For instance, it is vital in France to distinguish between *civil proceedings*, seeking compensation and which can be joined to a criminal prosecution by a *partie civile*; and *actions with civil ends* (*actions à fins civiles*) such as an action for recovering stolen property which cannot be joined.⁸ In Sweden in 2009, payments in response to discrimination were renamed in order to free them from the calculations of quantum that were associated with the traditional term ‘damages’. The new payments are called *diskrimineringsersättning*, something like ‘discrimination compensation’. However, in Swedish ‘damages’ does not exist as a term of art in the same way: one word for ‘damages’, *ersättning*, simply means any payment of money, whilst another similar word, *skadestånd*, could be used equally for a payment of damages based on a contractual relationship as much as a result of criminal or negligent acts.⁹

Even more generally, many common terms hide some difficulties. Each of our systems would use the term ‘practical’ or ‘pragmatic’ to describe itself, though not in precisely the same way that other systems use the term. It is important to know what is regarded as practical, or principled, and why it is perceived as such. The particular examples of ‘unity’ and ‘coherence’ will be discussed in Chapter 10’s conclusion.

4. Method in theory

In theoretical terms, there are four particular techniques that the work uses: functionalism and structuralism on the one hand, and on the other, an understanding of legal culture and legal change or development.

⁶ Chapter 3.3.A.2.⁷ Chapter 6.3.D.1.⁸ Chapter 3.3.A.1.⁹ Chapter 5.3.B.5.

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Functionalism is a methodology for identifying what should be compared. It is perhaps now the traditional starting point of comparative legal studies, first used by Rabel who was probably inspired by the literature on sociology.¹⁰ In functionalism, an object, such as a legal rule, is compared with whatever performs the same function in the other jurisdiction. This method focuses on action, on the role the rule performs; it does not focus on other conceptualisations of the legal system, like structure, culture and even the names used for rules. It encourages the study of parts of objects which may appear different, revealing any unity of function. This approach has much to commend it, at least in the sense that function is important in working out what to compare. There is, in a sense, a range of functions in each system: any function should be identified first and then, second, the ways different systems use to perform it can be compared. As Zweigert and Kötz influentially put it:

[T]he legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system.¹¹

The risk is that if taken too far, too much can be assumed. What is not useful is to move from stating an assumption, to using the assumption as a ground to select material to fulfil it.¹² Therefore this volume did not assume a *praesumptio similitudinis*,¹³ or presumption of similarity, especially since the area like the relationship between tort and crime is under-researched.

Functionalism remains the classic starting point for identifying what to compare, particularly in terms of what *rules* to compare. For that reason, many of the questions asked by authors in this volume have searched

¹⁰ E. Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (Munich: M. Heuber, 1925), 4, E. Rabel, *Das Rechts des Warenkaufs*, vol. 1 (Berlin: de Gruyter, 1938) 67. For more detail on Rabel, see A. Riles, *Rethinking the Masters of Comparative Law* (Hart: Oxford, 2001). On a possible borrowing from sociology, see M. Rheinstein, 'Teaching Comparative Law' (1938) 5 *U Chi L Rev* 617 and R. Cotterell, 'Comparatists and Sociology' in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003).

¹¹ K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd edn, transl. by T. Weir (Oxford: Clarendon, 1992), 34.

¹² For a similar point, see J. Hill, 'Comparative Law, Law Reform, and Legal Theory' (1989) 9 *OJLS* 101, 107–11.

¹³ Zweigert and Kötz, *Introduction*, 40.

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for how functions are carried out and avoided national preconceptions. However, the issues functionalism focuses on less should not be forgotten. Key issues like *structure* (what the relationship of one rule to another is, *legal culture*, the way law is perceived and carried out by legal actors or *legal development* (how the rule came to be, why it has remained in place and what its doctrinal or moral significance is), are best explored using other mechanisms.¹⁴

Structuralism is another way to understand, and thus compare, objects, by considering their position relative to each other within one of a number of larger frameworks. It has been defined as the process ‘whereby one fact (A) results from a system of relations with other facts (facts B, C and so on) in which the fact A is not only an element in the structure but is also defined by its relation with the other facts (A, B, etc)’.¹⁵ It requires an understanding of how and why the structures that exist within a legal system have been created. It drives the researcher to understand the importance both of the role of that object within a structure, but also its relation to other objects there. In the context of the relationship between tort and crime, this particular method highlights two key points. First, it highlights that some objects within a legal system have associations with other objects which can strongly affect how both operate. Thus, once an object has been defined as being ‘of’ tort, or ‘of’ crime, its relationship with further objects is defined and conditioned. Second, and relatedly, structuralism reminds us that legal actors themselves associate objects within the system and at times even do so without reference to their function. Functionalism is an excellent way to frame certain questions without the constraints of names or associations; however, that narrow focus may miss how functions and objects are bound together. Structuralism can supply some of that understanding. To complete the picture, the action, and nexus, of objects must be understood through the minds and actions of the legal actors who create, sustain and develop the system.

The term ‘legal culture’ describes the training, mindset and human dimension to the operation of the law. Culture has been described as ‘the framework of intangibles within which individuals operate in a given society’, with legal culture being a sub-culture constituted within the community of lawyers.¹⁶ It is closer to anthropology than some of the

¹⁴ Cf. Lawrence Rosen, ‘Beyond Compare’ in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003).

¹⁵ G. Samuel, ‘Can Legal Reasoning be Demystified?’ (2009) 29 *LS* 181, 194.

¹⁶ P. Legrand, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58 *MLR* 262, 263.

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other ideas in comparative law.¹⁷ It opens the perspective that law exists through the action of legal actors, those legal actors act within a culture and that culture will affect the law's existence.

Legal cultures vary but there is an expectation that within a legal system there is some similarity in approach to law and legal problems. 'Legal culture', like 'legal system', does not have just one meaning. It is typically used to describe the collection of attitudes, practices and approaches to law which are borne by those who deal with the law.¹⁸ As Bell has argued:

The role that an individual occupies, and the role of other actors, arise from perceptions of the task and from the cultural traditions associated with it. Furthermore, the regularity of any such practice gives rise to professions, which in turn develop their own understandings . . . Although the participant has a personal perspective on legal events, culture is a collective phenomenon where groups use the same language and have a common identity despite other differences.¹⁹

Bell combines this with a more subtle point. He argues that there are many different legal cultures in France, not just one, seen clearly in the title of his 2001 book *French Legal Cultures*. The possibility that there are different legal cultures within tort law and within criminal law is one of the aspects of the relationship between tort and crime which this volume explores.

The final methodological technique is to appreciate how legal systems change and develop. This is an emerging field. Many individual instances of legal change are tightly bound up with their contexts: the wider questions of how and why law changes are beyond the scope of this work, though interesting examples are littered throughout the book. Two often divergent aspects merit particular attention: the concept of path dependence and how an object might move between different legal systems, or areas of law, commonly known as a 'legal transplant'.

Path dependence is the idea that legal actors, faced with a new problem, avoid the cost and risk of innovative thinking by adapting ideas and techniques they already have.²⁰ This phenomenon limits creativity. It suggests that the cost of change may be greater than the benefits of change or may only shape the perception that the cost is greater. It can operate both

¹⁷ For a collection of some interesting references on this, see P. Legrand, 'How to Compare Now' (1996) 16 *LS* 232, 233 n. 4.

¹⁸ This is the internal sense of legal culture though arguably there is also an external dimension to it.

¹⁹ J. Bell, *French Legal Cultures* (London: Butterworths, 2001), 5.

²⁰ See, generally, J. Bell and D. Ibbetson, *European Legal Development: The Case of Tort* (Cambridge University Press, 2012), 24–32.

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consciously and sub-consciously. That is, sometimes legal actors know they are restricting their possible choices and approaches, but do so for explicit reasons. At other times, they take for granted certain assumptions about how to deal with legal problems. They tend then to develop the law incrementally, and, in particular, through the use of analogy. By reasoning from a past object to a future one, legal actors will tend to conceive of a new problem in terms of past problems, often without realising it. Many of the issues within path dependence have been explored particularly by social scientists and philosophers for different purposes, and more recently by lawyers:²¹ a related term is ‘bricolage’,²² meaning ‘tinkering’ or the ‘artful use of what’s at hand’.

Path dependence and legal transplants have a complex relationship. In its most common form, a ‘legal transplant’ is movement from one legal system to another and thus the importation of a new object, rather than the use of an established one. However, using a legal transplant is in fact a method of legal change and our focus could be on the method, rather than the particular object in a given instance. In other words, path dependence may apply to that legal method: legal actors turn to foreign transplants because they typically have in the past. In addition, there is an important difference when considering path dependence and legal transplants *within* a legal system. Within the system it can be harder to distinguish between transplant and more simply drawing from a common source of ideas, techniques and rules. For present purposes, the idea of legal transplants has arisen particularly strongly in the context of tort and crime: both because they share a common root and because there have been exchanges between them right up to the present day. An example of an exchange includes rules on causation in Spain,²³ and an example of a rejection of such exchanges is found in rules of self-defence in England.²⁴ Three approaches to this are particularly useful for present purposes: legal transplants, legal irritants and legal formants.

The term ‘legal transplant’ has become the dominant way to express the attempt to adopt an object, most commonly a legal rule, from one legal system to another.²⁵ Watson has forcefully argued that legal transplants

²¹ See, e.g., J. Bell, ‘Path Dependence and Legal Development’ (2013) 87 *Tul L Rev* 787.

²² Simone Glanert, ‘Method?’ in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (Cheltenham: Edward Elgar, 2012), 78–81.

²³ Chapter 6.4.C. ²⁴ Chapter 2.2.D.10.

²⁵ See, generally, David Nelken, ‘Legal Transplants and Beyond: Of Disciplines and Metaphors’ in Andrew Harding and E. Özücü (eds.), *Comparative Law in the 21st Century* (London: Kluwer, 2002).