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978-0-521-55320-9 - Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present

Lindsay Farmer

Frontmatter

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This book is a critical and historical study of the theory of criminal law which examines, in particular, the relationship between legal tradition and national identity, while developing a radically new approach to questions of responsibility and subjectivity. Previous studies have focused either on the philosophical bases of the criminal law or on the sociology and social history of crime, but there has been little exchange between the two. Lindsay Farmer's is one of the first extended attempts to draw on both fields in order to analyse the body of theorising about the criminal law as a whole. It displays a rare knowledge of the legal, institutional and historical contexts in which criminal law is practised, in combination with an informed understanding of the law itself. Dr Farmer uses contemporary social theory to develop an account of the relationship between legal practice and national culture in Scotland, analysing the belief in the distinctive spirit or 'genius' of Scots law. An exploration of the boundary between national limits and the universal aspirations of criminal law theory reveals the specifically modern characteristics of the criminal law and exposes how contemporary criminal law theory fundamentally misrepresents the character of modern criminal justice.

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*Crime and the genius of Scots law,
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Published by the Press Syndicate of the University of Cambridge
The Pitt Building, Trumpington Street, Cambridge CB2 1RP
40 West 20th Street, New York, NY 10011-4211, USA
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

© Lindsay Farmer 1997

First published 1997

Printed in Great Britain at the University Press, Cambridge

A catalogue record for this book is available from the British Library

Library of Congress cataloguing in publication data

Farmer, Lindsay, 1963–

Criminal law, tradition and legal order: crime and the genius of Scots law, 1747 to the present / Lindsay Farmer.

p. cm.

Includes bibliographical references.

ISBN 0 521 55320 2 (hb)

1. Criminal law – Scotland – History. 2. Criminal justice, Administration of – Scotland – History. 3. Crime – Scotland – History
I. Title.

KDC910.F37 1997 345.411 – dc20 [344.1105] 96-15170 CIP

ISBN 0 521 55320 2 hardback

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To my family

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‘The genius of our law rests on a principle diametrically opposite to that of England; the Courts of criminal jurisdiction being authorised to punish crimes without any positive enactment’.

Lord Justice-Clerk Hope in *Rachel Wright* (1809) in Burnett 1811, app. VII, p. xxix.

‘And having only designed to establish solidly the Principles of the Criminal Law, I wanted room for treating learnedly each particular case, or even for hinting at all such cases as may be necessary; And without wearying my Readers with Citations, (which was very easie) I have furnished the Book with as much reason as is ordinarily to be found in legal treatises’.

Mackenzie 1678 (The Design).

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Acknowledgements

In the all too lengthy process of writing and re-writing I have incurred an enormous number of debts, intellectual, emotional and (more often than I would have wished) financial. I cannot easily repay these, but by their acknowledgement I can formally record my gratitude to some of the people who have responded to my many requests for assistance.

The book is based on work done in three institutions, and owes much to the enduring influence of a fourth. It has its specific origins in my initial attempts at teaching criminal law at Strathclyde University. Knowing very little indeed about the criminal law, I none the less took great liberties in the teaching of it. That anything survived from this at all is due to the forbearance of both students and colleagues. While it is difficult to single out particular people, Joe Thomson and Kenny Miller are owed special thanks for their confidence in me and their encouragement, and both contributed substantially to my enjoyment of my time at Strathclyde. I was then extremely fortunate to be given the opportunity to work on the Scottish criminal law in the unlikely setting of the European University Institute in Florence. My supervisor there, Gunther Teubner, must frequently have wondered what he had let himself in for as I presented him with another chapter on the arcaneries of nineteenth-century Scottish criminal procedure! I owe much to him for allowing me to define the project in my own way while also contributing through pushing me to tackle unfamiliar ideas. Catherine Barnard, John Donaldson, Klaus Eder, Paul McAleavey, Sally Sheldon, Steven Simblett and Arpad Szakolczai, amongst others, contributed in different ways at various times.

The last stages of research and rewriting have been carried out at Birkbeck College. Peter Goodrich has been an excellent Head of Department, as well as being extraordinarily generous in reading and commenting on different versions of the manuscript. Matthew Weait has been a good colleague and friend throughout a difficult period, to say nothing of his invaluable knowledge of the criminal law. It also gives me great pleasure to thank Nicola Lacey, now a colleague, whose assistance has gone well beyond the elucidation and defence of the different types of

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reductivism. Valerie Hoare, Anton Schütz and Costas Douzinas have all helped in different ways.

Finally, I would like to record a long-standing debt to the Centre for Criminology and the Philosophical and Sociological Study of Law at the University of Edinburgh. My interest in research was first stimulated while an undergraduate there, and members of the Centre and the Law Faculty encouraged me to continue to study and eventually to undertake this research. Their willingness to read and comment on pieces of work, often at very short notice, and more generally to discuss historical and theoretical ideas has continually exceeded what I would have been entitled to expect. I would particularly like to thank John Cairns for sharing his unparalleled knowledge of early Scots law. To mention Beverley Brown's contribution in reading and commenting on the manuscript in various forms alone would not begin to do justice to the generosity and encouragement she has shown towards me for many years. Peter Young has been encouraging and generous over a long period of time. His advice on research and writing greatly simplified the process. He was co-supervisor of the original thesis and helped enormously in the project at all stages from the original proposal through to the final versions of the manuscript. He was trusting in allowing me to define the project in my own way, and encouraging at the times when I was stuck. More recently he has helped with invaluable advice on publication. I would never have reached this point without him.

There are two other people who deserve special mention. Sean Smith has been a good friend for a number of years, and many of the ideas in the book have their origins in conversations with him. I would thank him for his interest and his friendship. Paula Cardoso made the book in many other ways. She suffered with me, and because of me, throughout the process of writing. She taught me the meaning of *saudades*. I thank her now for everything that she gave.

I would like to record my gratitude to the Trustees of the National Library of Scotland for their permission to use the print of James McKean at the Bar on the cover of the book.