COMPARING TORT AND CRIME

The fields of tort and crime have much in common in practice, particularly in how they both try to respond to wrongs and regulate future behaviour. However, despite this commonality in fact, fascinating difficulties have hitherto not been resolved 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? Are there points of overlap? When, how and why do tort and crime interact? This volume systematically answers these and other questions for eight legal systems: England, France, Germany, Sweden, Spain, Scotland, the Netherlands and Australia.

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COMPARING TORT AND CRIME

Learning from across and within Legal Systems

Edited by

MATTHEW DYSON

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FOREWORD

Is there any better way to compare the practices of different legal systems than to look at how they deal with tort and crime? That is exactly what this fascinating book sets out to do. All legal systems share a common problem: how should they react when human behaviour harms another – intentionally or otherwise? Where should the line be drawn between the repression of anti-social behaviour that threatens social order and the compensation of victims? The harm suffered by the victim gives rise to a desire for natural justice. A part of their strength has been taken without justification; it must be given back, and if that is not possible, compensated for. This works as a negative form of the gift and counter-gift (*don contre-don*) logic: just as a gift creates obligations, counter-gift, in return, so does taking from or diminishing an individual create an obligation to restore or compensate.

Who is this victim? In Swedish, the aggrieved party is called '*målsägande*', which means 'the person who *owns* the case'.[1] The victim has to be paid off, otherwise he or she will try to get revenge for the damage – which means violence and risk to social order. There may thus be several victims, different 'bodies' whose interests have been injured. Who is the major victim: the aggrieved party, a public body or the sovereign? According to the old Swedish legal system – all of them! Compensation was divided into three parts – for the king, for the county and for the injured party. That appears to be a most wise solution!

Each legal system has to mark out its own border between tort and crime. All draw a different line – and sometimes no line at all. In England, these two types of law exist in 'splendid isolation' from each other. Sometimes the border is unclear as in France and even more so in Spain – where, as the authors explain, the boundary has been intentionally blurred.

Borders like these have long vexed great minds. Perhaps the border between tort and crime can best be seen in the light of the ancient Greek

[1] Chapter 5.3.A.5.

distinction between inter-family law (*díkē*), and intra-family law (*thémis*). *Díkē* was the goddess of human justice based on immemorial custom and social norms, as opposed to her mother, *Thémis*, who ruled over divine justice. *Díkē* is often translated into English as 'justice'. However, that is only one of the roles of justice, aimed at *balancing* social relationships. Justice, as a concept and as belonging to many levels of existence, is a wider concept.

For example, punishment through criminal law is another way to deal with wrongs, and in some cases, thereby compensate the victim (so much so that in the Spanish system the search for compensation distorts criminal justice). In the long term, criminal justice also aims to *pacify* social relations. However, it has a dimension which embodies *thémis*: a divine touch. In medieval Sweden, a '*bot*', that is, a fine, was both a kind of punishment and a type of compensation because, at that time, no difference was made between criminal and civil law.[2] Therefore, the distinction between criminal and civil law is quite modern for some.

This book sets out for the reader, in great detail, the different aspects of the tensions that arise due to the different approaches of civil and criminal law. Some general trends include:

- criminal law is defendant-centred whereas civil law is victim-centred;
- the starting point for legal intervention is different: the deed in criminal law, as opposed to the consequences of human conduct in civil;
- the criminal law approach focuses on a person and on antisocial behaviour that must fit into a category ('*kategoresthai*' in Ancient Greek: to charge with, to indict). Criminal justice must remain over-shadowed by the Decalogue, a wrongful act in defiance of their terms. Civil justice does not. Being more pragmatic, civil justice aims to put right acts, which are not necessarily unlawful acts.

This difference is reflected in German by two different words: '*Verschulden*' (a human cause which is not necessarily a mistake) and '*Schuld*' (a misdeed leading to a criminal guilt).

All of the contributions to the book are in English, which is now the easiest way to proceed and disseminate the work of a project like this. However, it can result in a possible flaw – mistranslation. Therefore, the reader must pay special attention to the original words. A crucial word such as 'damages' in English does not have an equivalent in Swedish, where it simply means any payment of money. The terms 'tort' and

[2] Chapter 5.2.B.1–5.

'crime' themselves have no direct equivalent in each legal culture: 'crime' and 'delict' in Scotland (with the wonderful expression 'art and part' for expressing aiding and abetting); delictual and criminal liability in Germany; '*faute civile*' (negligence) and '*faute pénal*' (misdeed) in France as in Spain. The French word '*faute*' carries a greater moral weight than 'unlawful behaviour' in the Netherlands. 'Fraud' which is a false friend in French (where it means 'cheating') has different meanings in English in tort and in criminal law. The reader should therefore tread carefully, and pay attention to the specific words used.[3]

One of the first steps, after describing the law, is to see its underlying tensions. For example, in some countries, the distinction between criminal law and civil law is clear-cut, and, in others, less so. In England, tort and crime look like separate countries. This gap perhaps stems from the very nature of the English trial that remains so different from the *procès* on the Continent. The English (and the common law) criminal trial pertains to a 'form of truth' which excludes a joint civil party. In other words, it offers fewer opportunities for *liaison* between tort and crime. In France, as in many countries, the difference between criminal and civil trials not only concerns the standard of proof but the nature of the proceedings. In France, the criminal trial is inquisitorial while a civil hearing is adversarial; and yet it allows for a civil party to join those criminal proceedings, indeed, the state doing most of the work is often why the civil party wishes to join.

However, it is not enough to identify tension. It also has to be analysed: how can these differences be accounted for? Comparative law cannot be confined to listing differences. It has to offer at least tentative explanations. This book also demonstrates common features that encourage legal systems to converge. Tensions exist not only within the systems – between criminal and civil law – but also in their history and legal tradition, and in the evolution of liberal democracies. All of their traditions differ, but all developed societies face common challenges, that are very salient in these chapters.

The national reports do not just focus on doctrinal law but also on culture: historical background, legal professions and general categories. This book therefore gives both the legal solutions and the cultural dynamism that explains them. Every chapter begins with a general presentation of the legal system, which usefully grounds the reader and helps to flag differences early. They then proceed through different perspectives on the

[3] See further, Chapter 1.3.

material: institutional, reasoning, substance and procedure before turning to how and why tort and crime interact in the way they do. There is much of interest for many there, and a specific section at the end of the book which will interest legal practitioners, giving a brief case study where tort and crime might interact in practice.

The explanations of these differences are to be found in history: the common law tradition or the influence of Napoleonic codes, doctrinal tradition or pragmatism (which is perfectly illustrated by the excellent table in the Dutch chapter[4]). It also depends on the importance of fundamental rights, such as in the German case. Perhaps civil justice plays a more important role in a society in which there is no welfare system (at least such as those developed in France and the UK).

The conclusion of the chapter on the English legal system speaks harshly of the separation of tort and crime, calling it 'complex, under-theorised and at times counter-intuitive (to foreign and, at times, even modern English eyes)'. On the other hand, England's 'overriding objective' within its procedural rules may be a useful organisational tool for courts to deal with cases at proportionate costs. In England, reducing the cost of civil litigation has become almost an obsession since the Woolf reforms in 1996. However, this concern could also be a major driver for making systems converge. In many Continental countries, including compensation for the victim in criminal sentences is proving very efficient. Efficiency is the key to understanding the Dutch system, as illustrated by the 'ten minute rule'. According to this, 'if the court is of the opinion that handling the claim will take more than ten minutes, it will be ruled inadmissible."

A successful book is one in which we learn something and which calls into question what we have learnt before. This is just such a book. Before opening it, the distinction between civil and criminal justice was probably obvious in the minds of lawyers in all these countries (obvious, but slightly different in each case); having read it, the reader will doubt what they previously took for granted. This destabilisation is the first step in the training of a comparative lawyer, and this book gives plenty in that respect.

All of the countries analysed have the following in common:

- private insurance is an incredibly significant factor in any form of compensation, and its importance is only increasing. In many cases, it is the primary (and often the only) means for the victims to get

[4] Chapter 8.3.B.

compensation. However, the insurance industry lobby varies in the different legal systems and cultures: it is not as powerful in Spain or France as it is in Australia. Perhaps this is because access to justice is easier in those countries. The intervention of the state is no longer mainly through courts – either criminal or civil – but through victims' compensation schemes. All the countries examined in this book have such schemes.

- the growing importance of victims. Several years ago in France, a wrongful birth claim resulted in an enormous public debate (the case, *Perruche*, has certainly caused much academic, political and medical ink to be spilt). The case is a good example of why there is a perception that the number of tort claims brought to justice is also on the increase. And that injured people are very likely to sue professionals who were previously immune (such as doctors). Is this true? More empirical research is needed.
- over-criminalisation of acts in order to protect victims, except in Germany where the victims' rights movement is less influential. Victims play a major role in all of our societies and all chapters mention that trend.
- criminal offences are growing and criminal sanctions becoming harsher – driven by law and order politics.

Where there is a choice, for the victim, for the legislator, how should that choice be made? Most obviously, the choice between tort and crime may be influenced by the outcome sought, in particular, money. This book does not opt for the simpler law and economics approach as to which is most economically efficient. It does not do so in order not to lose sight of other important considerations, considerations law and economics can sometimes miss. For instance, does money meet all the expectations of victims? Can money do everything? Certainly answering such questions is outside the scope of this book. However, the book does show that the quest for justice goes beyond money. Money is too indeterminate a thing to meet the quest for justice. Today, many victims – and sometimes public opinion – demand more from courts than money.

In this way, the book reveals that tort and crime are not enemies but allies – producing what has been called a 'judicialisation' of liberal democracies.

There is still room for lawyers – and comparative law studies!

Antoine Garapon

PREFACE

This volume is the second outcome of a project to promote scholarship on tort and crime. The first, *Unravelling Tort and Crime*, a collection of essays on English law, was published by Cambridge University Press in July 2014. *Comparing Tort and Crime* is also the first volume dedicated to understanding both areas of law from a comparative perspective, both nationally and across jurisdictions; it will hopefully not be the last. The Chapters in the volume are the evolved states of papers presented at two workshops held at the Faculty of Law and Trinity College, Cambridge, in September 2013 and April 2014. These were wonderful occasions and it was a privilege to work with such a warm, interesting and academically rigorous group of scholars. In particular, national teams were partnered with each other to develop even stronger links between the papers and the teams: England–Sweden, Scotland–France, Australia–The Netherlands, Germany–Spain. It is fitting to recognise here the special assistance each partner team received from working together.

The endeavour has benefitted from being under the aegis of the Cambridge Centre for Private Law, and its Directors, Sarah Worthington and Graham Virgo. The conception of the project owes much to the formative years spent working with David Ibbetson and John Bell. Particular thanks go to Miquel Martín Casals, Jean–Sébastian Borghetti, Reinhard Zimmermann, Michele Graziadei, Demetrio Maltese and Jessica Hudson. In addition, its completion was achieved thanks to the unending support of Janet Thomasson, Michael Dyson and Oliver Dyson as well as colleagues and friends like Catherine Barnard, Jo Miles and Louise Merrett.

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