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Introduction

MICHAEL LOBBAN AND JULIA MOSES

This volume is concerned with the influence of ideas on the development of the law of torts in Europe between 1850 and 2000. It seeks to provide an intellectual context in which the developments described in the earlier volumes in this series took place. Like the other contributions to this series, this volume focuses on a number of illustrative national case studies, including England, France and Germany, in order to illuminate the factors that have influenced the way in which law develops in modern legal systems. It also stresses, however, the international connections, between social theorists, jurists and states, as well as within empires, that have characterised the development of tort law during this period.

Tort was not a particularly significant area of law in most jurisdictions at the start of the nineteenth century. Its importance grew during that century, as urbanisation and industrialisation created an ever-expanding range of risks of accidental damage. In this context, tort lawyers needed to adapt their law to new social problems. In doing so, they often moulded existing doctrine in a creative way in order to offer new remedies for new situations, adapting old legal ideas to new contexts. *Internal* doctrinal developments were, therefore, a vital motor of legal change. At the same time, even if judges and jurists in many jurisdictions seemed to speak only the language of doctrine, they were often strongly influenced by influences *external* to the law. Such influences could include wider social and political views about where liability should lie, as well as more practical considerations, such as the presence of insurance.

While legal doctrine developed, so other bodies of law began to evolve beyond the sphere of private law. The prevailing ideological mood in the middle of the nineteenth century, which was so closely associated with leaving social interaction to be regulated primarily by private law – individualism and *laissez-faire* – came under increasing attack later in the century from a variety of forces, including the growth of new collectivist ideas and pressure from organised working-class movements. In this

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context, politicians on both the left and the right turned to greater state intervention. The state now began to pass legislation to promote social welfare, creating special regimes of regulations and rules that would operate outside the sphere of traditional tort law. The growth of the state also saw the growth of experts, within and without government, who could identify or define new social problems, and suggest solutions. These new forms of regulation operated alongside, and, at times, in conjunction with, tort law. They also emerged at a time when tort was increasingly becoming a matter for international emulation, cooperation and standardisation.

1.1 Starting points

Let us begin with the question of how tort law was defined. In this volume, we focus in particular on three systems: France, Germany and England. At first glance, there are significant differences in the manner in which they came to define their law. France enacted a *Code civil* in 1804 while it was still a predominantly agrarian, and pre-industrial, country. Germany's *Bürgerliches Gesetzbuch* – which was much longer in the making than the French code – came into force in 1900, at a time when that country had already become a leading industrial power. By contrast, England never codified its law of tort. Although it was the earliest to industrialise and urbanise, it was not until the later nineteenth century that private treatise writers began to develop coherent theories of the law of tort, and not until the early twentieth century that the courts adopted the kind of generalised fault principle that lay behind much Continental thought. Three of our contributions, by Jean-Louis Halpérin, Nils Jansen and Alexandra Braun (Chapters 8, 9 and 10, respectively), consider the issues of the creation (or non-creation) of codes, and how judges reasoned within the code.

The *Code civil* was the final achievement of the French Revolution. It was the product of a political philosophy (embodied in the Declaration of the Rights of Man) that all individuals were free and equal and that legislative power belonged to the nation, united by a form of social contract into a single entity. Although this was a philosophy that allowed the state to recast the law, it was nevertheless not one of a strong interventionist state. The drafters did not seek to create all law from scratch but, rather, used the learning of the natural lawyers to draw together much of existing French law into a coherent whole.¹

¹ On the making of the code, see J.-L. Halpérin, *L'impossible Code civil* (Paris: Presses universitaires de France, 1992). See also J.-É.-M. Portalis, 'Discours préliminaire prononcé

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The natural lawyers of the seventeenth and eighteenth centuries had reformulated the Roman law of delict around the concept of fault. For Samuel von Pufendorf, harms were to be imputed only to those who had acted intentionally or negligently, since moral actions could be attributed only to those with the power and ability to perform them.² In his view, there was no reason to hold a man liable for an accident he had physically caused, if he had not been the moral cause of it.³ Pufendorf's approach was taken up by the French jurist Jean Domat:

All the losses, and all the damages which may happen by the act of any Person, whether out of Imprudence, Rashness, Ignorance of what one ought to know, or other Faults of the like Nature, however trivial they may be, ought to be repaired by him whose Imprudence, or other Fault, has given Occasion to it.⁴

Robert-Joseph Pothier distinguished between delicts ('when a person by fraud or malignity causes any damage or wrong to another') and quasi-delicts (when 'a person causes damages to another, without malignity, but by some inexcusable imprudence'),⁵ but also left no conceptual space for strict liabilities.

Domat's formulation was particularly influential on the formulation of the first two general provisions of the *Code civil* dealing with delicts – articles 1382 and 1383.⁶ Although this seemed to put fault at the heart

lors de la présentation du Projet de la Commission du Gouvernement,' in P.-A. Fenet (ed.), *Recueil complet des travaux préparatoires du Code civil* (15 vols.), vol. I (Paris: Ducessois, 1827), p. 467, quoted by J. Gordley, 'Myths of the French civil code' (1994) 42 *Am. J. Comp. L.* 459 ff., 460.

² S. von Pufendorf, *Of the Law of Nature and Nations*, trans. B. Kennett, 2nd edn (Oxford: A. & J. Churchill *et al.*, 1710), book 1, pp. 37–8 (ch. 5, sect. 5). For Pufendorf's role, see N. Jansen, 'Duties and rights in negligence: a comparative and historical perspective on the European law of extracontractual liability' (2004) 24 *Oxford Journal of Legal Studies* 443 ff., 458–60; and D. Ibbetson, 'Harmonisation of the law of tort and delict: a comparative and historical perspective', in R. Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts* (Baden-Baden: Nomos, 2003), pp. 83 ff.

³ Contrast C. Thomasius, *Larva Legis Aquiliae: The Mask of the Lex Aquilia Torn Off, the Action for Damage Done: A Legal Treatise*, trans. M. Hewett (Oxford: Hart, 2000).

⁴ J. Domat, *The Civil Law in Its Natural Order*, trans. W. Strahan (2 vols.), vol. I (London: E. Bell *et al.*, 1722), book 2, p. 326 (ch. 8, sect. 4, para. 1). According to E. Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford University Press, 2009), p. 143, Domat was the first noteworthy French writer to use the word *faute*.

⁵ R.-J. Pothier, *A Treatise on the Law of Obligations or Contracts*, trans. W. D. Evans (2 vols.), vol. I (London: J. Butterworth, 1806), pp. 70–1 (sect. 116).

⁶ Article 1382: 'Every act which causes damage to another obliges him, by whose fault it happened, to make reparation.' Article 1383: 'Everyone is liable for the damage he has caused, not only by his act, but also by his negligence or imprudence.'

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of the conception of delict, the code itself was not unambiguous, for the three following clauses (which completed the treatment of delictual liability) did not mention fault: article 1384 was on vicarious liability, article 1385 on liability for animals and article 1386 on liability for buildings. Moreover, the *travaux préparatoires* reveal that the makers of the *Code civil* had been far from having a settled view of how to formulate the principle of liability; indeed, the early draft by Jean-Jacques-Régis de Cambacérès made no mention of fault, stating only: ‘He who causes loss is bound to repair it, whatever the event which caused it.’⁷ When the draft of the code was presented to the *corps législatif*, however, it had become clear that all the provisions were to be interpreted in light of the fault-based principle of articles 1382–3, derived from Domat and Pothier. Early nineteenth-century commentators duly took this approach.⁸

In the French system, the code was supposed to be the definitive statement of the law, which the judges were strictly bound to apply. Applying the early principles of the Revolution, the *Code civil* in effect adopted the view of Montesquieu, that judges should be ‘the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or rigour’.⁹ In taking this view, the revolutionary legislators reacted against the powerful eighteenth-century *parlements*, which were perceived to have too much discretionary power to make rules. To curb the power of the judiciary, the judges were to follow the code, and to refer any question of doubt to the legislature. They were not to bind themselves to precedents or rules of their own making; only legislation could determine the outcome of a case.¹⁰

⁷ See, further, Descheemaeker, *The Division of Wrongs*, ch. 5.

⁸ Thus, Charles-Bonaventure-Marie Toullier said that a person was to be held liable for harms caused by things under his care, because the law presumed negligence or a failure to control on his part. An owner was liable for the harms done by his animals, since he who had the property had the power to control it. In his view, others’ actions were to be imputed to us when we concurred in them, or when we could and should have prevented them or directed them. C.-B.-M. Toullier, *Le Droit civil français suivant l’ordre du Code* (13 vols.), 4th edn, vol. XI (Paris: Warée, 1828), p. 138 (sect. 115), pp. 415–16 (sect. 306), pp. 322–3 (sect. 230).

⁹ C. de Secondat, Baron de Montesquieu, *The Spirit of Laws*, trans. T. Nugent (2 vols.), 3rd edn, vol. I (London: J. Nourse and P. Vaillant, 1758), book 11, p. 226 (ch. 6). The Law on Judicial Organisation of 1790 had declared that courts were not permitted directly or indirectly to take any part in the exercise of legislative power. Article 5 of the code added that ‘it is forbidden for judges to pronounce by way of general and regulatory provisions on the cases which are submitted to them’. At the same time, article 4 stated that the judge who refused to judge, under a pretext of the silence, obscurity or insufficiency of the law, should be prosecuted for denial of justice.

¹⁰ See E. A. Tomlinson, ‘Tort liability in France for the act of things: a study in judicial law-making’ (1988) 48 *Louisiana Law Review* 1299 ff., 1303.

Consequently, for much of the nineteenth century, judges and treatise writers both regarded the code as a complete system, which should be elaborated in a syllogistic way. The dominant form of treatise literature – practised by the ‘exegetical school’ – was formalist. The writers who produced commentaries on the code regarded it as complete. Any case could be resolved by a correct interpretation of the code. If a case could not be resolved by a simple grammatical interpretation of the text, then the interpreter was to make a ‘logical’ interpretation, by drawing analogies from other parts of the code, or make a ‘historical’ interpretation, looking at the purposes behind the text.¹¹

In interpreting the *Code civil*, the early writers of the exegetical school referred back to the natural lawyers whose works had so informed the code, and also discussed Roman law doctrines. Nevertheless, they did not make reference to social or political matters, nor did they seek to look outside the words of the code. They did develop a highly individualistic view, however, seeing property in terms of the will of the proprietor, seeing contractual obligations as products of the united wills of the parties and seeing tort as reflecting liability for fault. If the code was an enactment of the state, so that all law was related to this positive root, French writers of the early nineteenth century regarded private law as largely autonomous: the rules that governed interactions in civil society, as opposed to the public law concerned with the state.¹² Reflecting its natural law heritage, the code saw private law not as a matter of social engineering but as a means to empower individuals to conduct their own affairs.

The notion that private law was a sphere autonomous of the state was held even more powerfully in Germany. As in France, the legacy of the French Revolution was to undermine a society of estates and allow the growth of a modern civil society, based on equality of citizenship. But the Napoleonic and post-Napoleonic eras did not see the birth of a single code across the German states. At the end of the Napoleonic Wars a number of different legal systems existed in Germany. Besides the four codes – the *Allgemeines Bürgerliches Gesetzbuch* (ABGB) in Austrian lands, the *Allgemeines Landrecht* (ALR) in Prussia, the *Codex Maximilianus Bavaricus* (CMB) in Bavaria and the *Code civil* in the Rhineland – there was also the German ‘common law’, based on Roman law. In this context, Anton Friedrich Justus Thibaut argued in favour of

¹¹ See Tomlinson, ‘Tort liability in France’, 1305–7.

¹² See H. S. Jones, *The French State in Question: Public Law and Political Argument in the Third Republic* (Cambridge University Press, 1993), p. 19.

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a new code for Germany, in the style of the French code. Thibaut felt that German private law was in a state of chaos, and that it needed reform. It should be simple, it should be easily accessible and it should be the sole point of reference for judges, who would use only logical or grammatical interpretations. Thibaut's call famously elicited a sharp response from Friedrich Carl von Savigny, who denied that Germany was ready for a code.

Savigny's vision would prove highly influential on subsequent German legal scholarship. Like his mentor, Gustav Hugo, he rejected the deductivism of eighteenth-century German natural lawyers, such as Gottfried Leibniz and Christian Wolff, who had looked at private law as a manifestation of abstract reason. For Savigny, the subject of study was not to be an abstract or ideal form of law; rather, it was to be the existing positive law. As Savigny saw it, the law in Germany did not reflect a universal natural law. Instead, the source of law lay in the spirit of the people, in its *Volksgeist*. In his view, positive law originated in the custom of the people, and lived in the general consciousness of the people. Over time, however, it became the special preserve of jurists, whose expertise allowed them to understand and develop it.¹³ By imparting a new scientific form on the material, jurists could both describe the law that existed and develop it. In this vision, private law was the preserve of the scientific jurist: it was taught in scientific universities, in which the core curriculum was to be the *ius commune*, rather than the local law. Scientific judges educated in these schools would then become the guardians of private law. Savigny was highly sceptical of the ability of legislators to understand these complexities, and he felt that, in the divided Germany in which he lived, the development of private law should not be left to the arbitrary lawmaking of different states. Although Savigny's school stressed the need to look at the positive law as developed in history, his was not a sociological approach. Rather, the historical law that he and other 'Pandectists'¹⁴ examined was Roman law, which Savigny argued had a continuous history that needed to be recovered by the jurist.

By the middle of the nineteenth century hostility to the notion of codification had begun to wane in Germany. There were increasing calls

¹³ F. C. von Savigny, *System des heutigen Römischen Rechts* (8 vols.), vol. I [1840] (Berlin: Veit, 1940), pp. 13–18 (sect. 7), pp. 45–9 (sect. 14).

¹⁴ The aims of the nineteenth-century German legal scholars known as the Pandectists were to distil concepts from the Digest (or 'Pandects') of Justinian, to put them into a systematic form and to use these concepts to build a modern system of law. See M. Reimann, 'Nineteenth-century German legal science' (1990) 31 *Boston College Law Review* 842 ff.

for the law to be put into a code, albeit one that would be premised on the original theory of the historical school and that would build on that school's work. The proposal for codification now obtained support from conservatives who had previously been sceptical. They dropped Savigny's hostility to codification,¹⁵ perceiving that a code that had been thoroughly prepared and that reflected existing legal science would head off radical demands for a transformation of the German state system. By the 1850s the only obstacle to the creation of a national code came from Prussia, which sought to forestall any moves that might weaken its own influence in the movement towards unification.¹⁶ Until 1867 the debate over codification was complicated by the wider political debates over the nature of German unification; but once the question of German unification had been resolved, and Prussian dominance had been secured, the way was open for a code. Codification of the law would contribute to the creation of a nation state, with a national identity. It also represented the cementing of a notion that all law derived from the legislator, expressing the national will.

The code was not, however, seen to be the instrument of social legislation or reform. By 1873 it had been settled that the code would be a systematic compilation of the law of the German states, using the method of the Pandectist scholars, and following the settled doctrines and principles found in common law and juristic works. Savigny's student Bernhard Windscheid may have resigned from the first commission in 1883, but his was perhaps the most decisive influence in shaping the code, seeking formal precision and systematic rigour. The codifying commission was dominated by lawyers who felt that new law was developed by jurists through the study of existing legal concepts, which suggested that law developed independently of social changes. The code would be a coherent statement of juridical science. Legislation addressing particular social concerns would proceed outside the code.

¹⁵ Although he was hostile to the project of codification, Savigny played a major role in the Prussian legislation of 1838, which established a no-fault liability for railway accidents. See S. Lohsse, 'The development of traffic liability in Germany', in W. Ernst (ed.), *The Development of Traffic Liability* (Cambridge University Press, 2010), pp. 75 ff., pp. 82–92; and J. Scherpe, 'Technological change and the development of liability for fault in Germany', in M. Martin-Casals (ed.), *The Development of Liability in Relation to Technological Change* (Cambridge University Press, 2010), pp. 134 ff., pp. 160–70.

¹⁶ M. John, *Politics and the Law in Late Nineteenth-Century Germany* (Oxford: Clarendon Press, 1989), pp. 23–41. See also A. J. Kanning, 'The emergence of a European private law: lessons from nineteenth-century Germany' (2007) 27 *Oxford Journal of Legal Studies* 193 ff.

The vision of law produced by the Pandectists, and reflected in the code, was an individualistic one. As Georg Friedrich Puchta put it, private law was concerned with ‘the individual’s full and unconditional sovereignty’.¹⁷ For Windscheid, ‘[t]he law creates for every will an arena within which it is dominant and from which alien wills recoil. Law is, in the first place, not a restriction but a recognition of human freedom. The restrictive element is merely the other side of freedom thus guaranteed.’¹⁸ Private law was seen to be the framework set up and enforced by the state, within which private individuals exercised their autonomy. The Pandectist vision was therefore wedded to a strong notion of freedom of contract and private property rights. It was the unimpeded freedom of individual wills that was seen to lie at the root of the law of obligations. In the area of tort, fault became central to the notion of liability.

The unified German code, the *Bürgerliches Gesetzbuch* (BGB), may not have been enacted until 1900, but it owed its character to decisions taken in the 1870s, and to a legal science developed earlier. By the time the first draft appeared, in 1888, the German Chancellor, Otto von Bismarck, had already commenced his programme of social reform, which was created, in part, to draw the potential sting from socialism. The draft code came in for strong criticism, notably from Otto von Gierke. Rather than being a neutral expression of principles, he saw the draft as pro-capitalist and hostile to the community – and wholly out of step with the German legal tradition as well as with recent social legislation. Gierke sought to uncover the historical roots of German law and criticised the draft code for overemphasising Roman law, which he saw embodied in the draft’s individualism and its strong division between public and private law. It was the association, he said, rather than the individual that was the key form of modern life. For Gierke, there were social obligations that could limit the exercise of individual rights. He attacked the idea that there could be a pure, abstract, individualistic private law, which ignored the social needs of the people. He therefore criticised the exclusivity of the fault principle (given classic formulation by Rudolf von Jhering in his Pandectist mood), since it disregarded the social function of private law. Social justice, in Gierke’s view, demanded strict liability for employers or for dangerous activities.¹⁹

¹⁷ Quoted by H.-P. Haferkamp, ‘The science of private law and the state in nineteenth-century Germany’ (2008) 56 *Am. J. Comp. L.* 667 ff., 670.

¹⁸ Quoted by John, *Politics and the Law*, p. 86.

¹⁹ I. Englard, ‘Victor Mataja’s *Liability for Damages from an Economic Viewpoint*: a centennial to an ignored economic analysis of tort’ (1990) 10 *International Review of Law and Economics* 173 ff., 177.

Although the 1888 draft generated enormous debate in Germany, the subsequent discussions had very little effect on the final shape of the BGB. Men such as Gierke wanted the code to be an articulation of a set of ideological values reflecting Christian traditions that they believed were inherent to German culture. However, the codifiers had a less all-encompassing vision. The code would not be a statement of the whole legal order; it would be a statement of the basic rules of private law. Special interests would be dealt with separately. Given the wealth of private law scholarship that had grown up in the nineteenth century, the commissioners were able to consider in more detail the kinds of liability that should be included and those that should not. The BGB was, accordingly, much fuller than the *Code civil*, containing thirty-one articles on tort. Moreover, although the first draft had contained a general clause analogous to article 1382, the final version was more casuistic, setting out three general clauses and a number of more detailed ones, each of which could be applied to different cases.

In contrast to the German and French systems, England never codified its law of tort. As Alexandra Braun shows (Chapter 10), there were many debates in nineteenth-century England over codification, notably of the criminal law, with reformers seeking to create an accessible, simple and complete code. The movement failed, though there were some areas of commercial law that were codified in the later nineteenth and early twentieth centuries. These reforms were not the result of a wholesale recasting of the common law (such as was desired by Jeremy Bentham) but were, rather, the result of private initiatives by treatise writers who put the rules of the common law into a coherent, digested form. Moreover, these were areas in which the law was relatively settled, making it easier to digest the rules. By contrast, the law of torts remained very unsettled in the second half of the nineteenth century, which made projects to codify this area of law all the more difficult.²⁰ English thinking about tort was dominated, at least into the middle of the nineteenth century, by the structures imposed by the forms of action used in common law procedure. It was only in the aftermath of the mid-century reforms of procedure that writers such as Sir Frederick Pollock (in England) and Oliver Wendell Holmes (in the United States) began to look for broader principles around which to organise the law of tort. Even then, the English law of tort continued to be driven by the courts rather than by academic jurists, who had far less influence than

²⁰ Frederick Pollock did draft a code of tort law for India, while writing the first edition of his textbook on torts, but it was never enacted.

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their German counterparts.²¹ The common law was, and remained, the custom of the judges of the superior courts: it developed in a casuistic way, through their case law reasoning.

Treatise writers such as Pollock aimed to order the material found in these decisions in a coherent and systematic way, which would reveal the true foundational principles of the common law. At a time of increasing legislative intervention in social policy, they therefore turned away from writing textbooks designed to cover both the statutory and common law rules regulating particular activities to write general books focused on the common law. In some ways, their ambition reflected that of the German Pandectists: to create a formal, logical system of rules, teased out of the historical material of the common law – a law that reflected the culture and history of the English people, and that would not be infected by legislation.

The common lawyers' suspicion of legislation helps explain the considerable resistance put up by judges and jurists to projects of codification in the late nineteenth century. Those who were hostile to codification did not tire of pointing out that the common law was a developing body, which progressed with the growth of the nation. It was feared that, once these principles of common law had been cast in the form of a statute, emanating from a sovereign parliament, they would ossify. Moreover, as soon as private law became statutory in form, it would have to be treated simply as another form of legislation. Keeping the law uncodified was one way of keeping it private. This attitude contrasted with the Continental understanding of codification. Although French and German codifiers undoubtedly saw their codes as positive law emanating from the will of the state, they also regarded them essentially as statements of private law – the area that was not a matter for state interference or regulation.

Nonetheless, they struggled to find a coherent set of principles to explain English case law. Whereas the ordering of private law in France and Germany (and its codification) could build on an extensive academic literature, which was the product of a marriage of Roman law learning and medieval and early modern philosophy, English academic legal

²¹ In the era of Savigny, law professors were expected to develop doctrine that would be applied by the judges (who until the middle of the nineteenth century desisted from publishing the reasons for their decisions). In the later nineteenth century, however, although the legal texts were shaped by academics, the operation of the law, particularly in tort, was often driven by professional reaction to circumstances and especially to litigation. German academics did not write much about tort law in serious journals in the period up to 1920, but there was a great deal of case law; and it was this case law, rather than academic work, that was most cited in the Reichsgericht and Oberlandesgerichte.