Book Review


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The relationship between tort/delict and crime is complex within a legal system. When we seek to compare this relationship across legal systems it becomes even more complex, but also extremely illuminating as we see connections that we never thought could happen in our legal system have a different life and energy in another legal system. In the foreword to Comparing Tort and Crime: Learning from across and within Legal Systems,1 Antoine Garapon notes that ‘having read it, the reader will doubt what they previously took for granted. This destabilisation is the first step in the training of the comparative lawyer’.2 For example, as a common lawyer, I was shocked to discover that criminal law in France is regarded as part of private law!3 My shock is indicative of how deeply immersed I am in the common law division of substantive law.

Comparing Tort and Crime takes two areas of law — often seen as completely distinct, even though they very often operate on the same set of facts — and shows us how to compare them. The book is the product of workshops held at the Cambridge Private Law Centre that gave the authors the opportunity to discuss the issues and learn from each other. This helps to unify the book; it is further aided in its unity by the fact that a single questionnaire and a case study were used to guide the development of each chapter. The questionnaire and the case study are laid out in Chapter 1, the introduction, in which editor Matthew Dyson introduces the book’s aims. Those aims include exploring the impact of the tort/crime interface on each other and the law in general, both across legal systems and within them.

Eight jurisdictions are covered: England and Wales, France, Germany, Sweden, Spain, Scotland, the Netherlands and Australia. Thus, common law, civil law, hybrid systems and a Scandinavian system are covered. It is a pity that the book’s focus is so strongly European. It would have been terrific also to have had at least one Islamic law based country and an Asian or Pacific one to round out the

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2 Ibid xii.
collection. It would have been even better to consider some kind of chthonic or Indigenous customary law system as well. That said, this is a good mix of different legal systems, going well beyond the frequent civil law/common law divide. The usual difficulties for comparativists of legal transplant and interpretation of terms are not ignored by the authors, and language is carefully used and considered. Functionalism is treated as the starting point of analysis, and structuralism adds another dimension. A legal culture approach to comparative analysis is used. Finally, there is recognition that legal systems change and develop, and each chapter contains some history so that we can see how the system developed. This four-way theoretical framework gives a powerful impetus to the analysis we see in each chapter.

Chapters that particularly emphasise the cross-over of tort and crime includes the chapters on France, Spain and Sweden. This cross-over contrasts starkly with the clearer separation of tort and crime in England. But what becomes more and more evident as the book progresses is that even where tort and crime are notionally separate, the fact that they often arise out of the same facts means that their connections for the humans involved remain profound. What has to be done by every single legal system is to balance the notions of crime and tort. Certain issues remain pertinent in every system, so that capacity must be grappled with by every system, defences must be thought about, consent is significant, and vicarious or accessory liability must be dealt with in every jurisdiction.

Procedural differences are also significant. Some jurisdictions, such as France, have the civil and criminal matters heard in the same court. England, Scotland and Australia separate them. In Germany, they are separated and in a civil matter, the court can only consider the facts brought by the parties, but in a criminal matter, the prosecution should produce not only evidence that supports conviction, but also any evidence in favour of the accused. There are other fundamental differences as well. The victim in German proceedings can also prosecute, as in France, and they can also claim compensation within criminal proceedings, but unlike in France such compensation claims are very rare in Germany.

The Swedish system allows crime victims to participate in the criminal trial and its Criminal Code of 1864 had a chapter on damages. This history creates an emphasis on civil law claims based on criminal acts. Punishment and payment of damages are determined by the same court, at the same time. Where they are separate, tort cases are prepared before the court through exchanging documents and hearings and heard only by a legally trained judge; criminal cases are heard by a legally trained judge and three lay judges. The burden of proof (beyond reasonable doubt) in a Swedish criminal case is on the prosecutor; in a tort case, the party able to get the evidence most cheaply and most easily bears the burden of

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proof, which is expressed as the facts must be ‘shown’ — this seems to mean somewhere between ‘clear and convincing’ and ‘beyond reasonable doubt’.

The authors of the chapter on Spain assert that ‘the Spanish legal system positively fosters the eradication of any clear divide between tort and crime’.

The Criminal Code (Spain) lays down provisions on tort deriving from crime — where that is the case, the civil judge must apply the Criminal Code (Spain). The victim may choose whether to bring a separate tort liability claim or to let the criminal judge deal with both crime and tort. This means tort lawyers have to be ready to file a criminal law claim should their client wish to proceed that way. The civil courts have systematically reversed the burden of proof in tort law, so that even slight negligence will establish liability. But overall, the most striking thing about the Spanish system is the extent of blurring of the division between tort and crime so that many things that would be torts in other places become criminal or at least criminal-law-managed in the Spanish context.

The Dutch Civil Code (Civil Code of the Netherlands) defines an unlawful act as ‘an act or omission in violation of a duty imposed by written law’. This automatically brings in all criminal offences as torts. Many torts may also be crimes, so there is significant overlap between tort and crime in the Dutch system. The criminal court deciding on the crime may also decide the tort case if the victim wishes, as long as this does not excessively burden the criminal trial. A criminal court can order a wrongdoer to pay compensation to the state for the benefit of the victim of the crime, and the police can then be used to enforce the payment. Criminal offences are generally described in an Act or Regulation and then interpreted by the courts. Standards of proof are different between civil and criminal law. The civil standard of ‘a reasonable degree of certainty’ seems higher than ‘on the balance of probabilities’. The criminal law standard is ‘legally and convincingly proven’.

The Australian chapter is surprising in the extent to which it differs from the chapter on England and Wales. The complexity of the law of tort and crime in Australia is immense, partly because of federation, but also because in criminal law there are common law states and code states. There has been a proliferation of procedural legislation, and tort law is governed by a mixture of common law and statute in a situation where statute is piecemeal. Perceptions of increasing litigation and crime have created political will for legislating for law and order and for tort

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9 Ibid 358.
reform. This has led to increasing numbers of crimes enacted in statutes and limitations on liability and damages for tort.

The final chapter, by the editor, is called ‘Tortious Apples and Criminal Oranges’ and draws together all the chapters.\textsuperscript{11} It asks where, how, why and when tort and crime have interacted. What seems clear is that, despite Dyson’s strong attempts to have frameworks in the form of indicia for comparison of various kinds, each legal system is so distinct, so unique that the discerning of patterns across different kinds of legal traditions becomes almost impossible. France and Germany, both civil law systems, treat tort and crime and their interactions quite differently from each other. England and Wales, and Australia, both common law systems are now very different in the way they treat tort and crime as well. Why the jurisdictions have interacted is one of the most fascinating questions. Dyson considers a range of reasons from internal and external to political, institutional and psychological. But what seems to really matter is how they balance each other. We are left with a powerful sense of each jurisdiction’s uniqueness.

It is difficult to do justice to such a complex book in a review such as this. \textit{Comparing Tort and Crime} is an extremely valuable book that, in its conception and execution, meets the highest standards. Each time I read a chapter, I thought: ‘This is the best one’. What is particularly fine is that, although each chapter was originally conceived in response to a questionnaire, each chapter answers the questions uniquely, in its own voice, and therefore adds to the nuanced understanding of the tradition from which the tort/crime relationship being discussed comes. Although this book is probably aimed at comparative lawyers, it should be on the shelves of all tort and criminal lawyers.