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Change Across Criminal and Civil Legal History

# 1. Course Information

## 1.1 Course objectives

The purpose of this course is to explore how and why legal change happens, with case studies drawn particularly from the civil and criminal law and their interactions, in the English legal tradition. The course presents a collection of examples of legal change, tools for analysing them, and offers further avenues for experimentation and research.

## 1.2 Learning outcomes

Students will able to understand different key aspects of the relationship between criminal law and tort law, how legal systems change over time, and what methodologies can effectively be employed for those purposes.

## 1.3 Timetable

The purpose of this course April 29 to May 3, 2019 (from 16:00 to 18:30)

1. (29 April): Understanding Tort/Crime and comparative method
2. (30 April): Procedure
3. (1 May): Substance
4. (3 May): Exploring Legal Change

## 1.4 Teaching format

Attendance at the seminars is compulsory. In exceptional circumstances, a student may apply to the Erasmus Office for permission to miss one seminar.

## 1.5 Assessment

The course is assessed by class participation (20%) and final examination (80%). The final examination will feature a choice from a small selection of essay questions, requiring knowledge of the course syllabus in full. The examination can be taken with a clean copy of the course handout available.

## 1.6 Materials

The core materials for the course will be updated, but for the key introductory material is Chapter 10 of M. Dyson (ed) *Comparing Tort and Crime* (2015, CUP). That chapter will be provided along with this syllabus to those who take the course.

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# Seminar 1: (29 April) Understanding Tort/Crime and comparative method

1. **Introduction**

2. **Where** tort and crime interact:
    a. Fact patterns
    b. Institutions
        i. Structures: how the law is arranged and what it looks like on the "law map".
        ii. Legal Actors: the positions, personnel, training and roles.
    c. Reasoning:
        i. Forms of legal logic: lawyers' arguments and intellectual work
        ii. Culture: the practices and values of actors affecting the law.
    d. Norms: principles and concepts at a high level of abstraction
    e. Substance: discrete legal rules
    f. Procedure: rules of jurisdiction, evidence and processes for dealing with disputes.
    g. Outcomes: results and how they affect legal actors

3. **How** tort and crime interact
    a. Axis of Equality/Hierarchy
        i. Equality, e.g., Functional equivalence
        ii. Hierarchy, e.g., Opportunistic Reliance and Priority
    b. Axis of Partition/Porosity:
        i. Partition
        ii. Porosity e.g., Referential reasoning and Passage
    c. Axis of Directness/Indirectness
        i. Directness: referring to the same component
        ii. Indirectness: cross-component

4. **Why** tort and crime interact
    a. *Internal norms*: shape of the legal system, e.g., homogeneity/coherence.
    b. *External norms*: calls to higher level principles in how specific interactions should take place. E.g., "fairness", "certainty" and "intellectual robustness".
    c. *Instrumental*: where the interaction is guided by the outcomes to be achieved. The most common forms of this are efficiency and regulation.
    d. *Institutional*: which legal actor or rule "fits" best, typically a question of competence.
    e. *Political*: impact of political implications, legislative and non-legislative.
    f. *Personal*: reasons concerning the preferences and attitudes of the legal actors involved, e.g., power and authority.

5. **When** tort and crime interact

6. **Methods**
    a. Is the knowledge acquired by examining tort and crime a particular kind of knowledge?
    b. Does examining the overlap between tort and crime require a different methodology from other areas of research? Is a comparative methodology appropriate?

7. **Conclusion**

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# Seminar 2: (30 April) Procedure

1. **Introduction**
2. **Victim's role in prosecutions**
3. **Compensation**
4. **Trial Process**
5. **Procedure**

The focus of this seminar is on how tort and crime have developed next to each other. The key points of procedural contact are explored. The procedural context is particularly important because even where a legal system has not explored the normative or substantive connections between civil and criminal law to any large degree in academic work or in cases before the courts, procedural questions seem always to have arisen and required some kind of response.

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# Seminar 3: (2 May) Substance

1. **Introduction**
2. **Unlawfulness and Wrongfulness**
3. **Capacity**
4. **General Integrative Techniques**
5. **Fault**

The focus of this seminar's material is on the substantive law. There are many examples we could draw on but we will focus on understanding something of the structure of liability, responsibility, and fault. In their historical context, the substance of the law has been more or less the focus of legal actors; famously said to be less the concern of common lawyers and more the concern of civil lawyers, there is in fact significant nuance in how and where we look for the content of the law.

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# Seminar 5: (3 May) Exploring Legal Change

1. **Introduction**
2. **Key examples of Legal Change**
3. **Patterns of development**
4. **Reasons for legal change**

The focus of this seminar will be how legal change happens. It will draw together the case studies and examples from earlier seminars to show how the development of legal systems can happen. It particularly challenges assumptions about society and law being a reflection of each other, and that legal systems necessarily move “upward” over time.

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## 2. Background

The relationship between criminal law and tort law can help us understand how the limits of criminal law play out across a legal system.

First, exploring where the border between crime and tort has been thought to be, and why it developed, suggests that only in specific circumstances is it actually limits of the criminal law which are determining the contours of liability. That is, lawyers think that it is punishment which requires limitation, but many aspects of the criminal law do not seem to engage that limitation. The key to English law seems to be that once criminal law has been procedurally identified, the most important limit is in justifying the imposition of punishment. That means that procedure both defines, and is limited by, criminal legal principles. The procedure and the outcome have been more important to English law's development so far than substantive law itself.

Second, there is a complex collection of instances where criminal and civil law overlap and are separated. Where, as is often the case, the same questions are being asked in criminal and civil law, there are many overlapping concepts and doctrines. In some cases, there is direct integration from one to the other. Yet in other cases, mostly questions of procedure, the ultimate outcome, the imposition of a penalty, has meant criminal forms have diverged

Finally, that the limits of the criminal law are sometimes circumvented by creating a hybrid institution, part criminal and part civil. Given the stronger effects on rules of procedure of the limits on punishment, it is not surprising that the most notable hybrids are found in questions of procedure. This chapter will look at criminal hybrids, like compensation and confiscation in criminal courts, and civil hybrids, like injunctions to prevent breaches of the criminal law and punitive damages.

In the early common law, "crime" and "tort", as we call them now, were equally valid ways for a victim to pursue justice for a wrongful act. The choice seems to have been between compensation and vengeance, and this choice was one for the victim. It is hard to be clear on when the need for a distinction, using the ideas behind "tort" and "crime", if not those terms, was recognised. Certainly by the end of the eighteenth century, Lord Mansfield felt confident enough of it to say "[T]here is no distinction better known, than the distinction between civil and criminal law". However, even if the need for a distinction was known by then, its edges were uncertain. Lord Mansfield's dictum provides just one such example. The case concerned whether testimony, admissible by statute in civil claims, but not in criminal prosecutions, could be received in an action of debt for the pecuniary penalty for bribery at an election of a member of Parliament. That bribery was in fact indictable as a crime. The testimony was held to be admissible by analogy with other civil claims for debts. The conclusion was certainly plausible, but was by no means foregone in advance as the result of a famous distinction.

The predominant approaches to defining the characteristics which make something criminal or civil can be generalised as five overlapping and contradictory indicia:

1. moral or natural description of the wrong;
2. characterisation of the process of remedying the wrong being of public concern rather than merely private;
3. a positivist approach of some kind, focusing on the process of creating the legal classifications and thus their resulting form.
4. Procedural statement of which court or other legal actor deals with the issue;
5. the presence of compensation or "penalty".

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Moral or natural wrongs provide potent but imprecise benchmarks. While, it may be sufficient, many of the well-known criminal offences comprise moral wrongs, mala in se; it is not necessary, since there are also mala prohibita, things prohibited for reasons other than their essential character, and which tend to be justified by legal positivism. In addition, this indicium says little about civil law: many serious wrongs are also remedied by tort, such as serious physical injury or death and sexual wrongs.

The public or private character of a wrong looks to the social or constitutional construction of that wrong. That analysis may include whether the wrong is morally or naturally prohibited and it can be hard to tell: for instance, in Australia, some of the leading theories of criminal liability turn on "public wrongs". Every legal system studied acknowledges the public character of the criminal law. In common law countries like England and Australia, perhaps as a throwback to the times when it was normally the victim who prosecuted, the title is merely "prosecutor".

A positivist indicium is a subset of wider positivist legal theory, identifying the rule by the formal process and label given to objects. It is often seen as a form of constitutional protection to the use of criminal law: that only those who are constitutionally appropriate should create criminal liability. Closely related, criminal liability is also often subject to a form of legal certainty, in the civil law typically expressed as nulla poena sine lege or a related form, requiring any criminal offence and sanction to be clearly expressed and, in most legal systems, to be in the form of legislation or a code. Certainly in the common law, and Scotland, such certainty was not always the case: in part because judges could, in the past, create new torts and crimes, and particularly because legislators did not take proper care to make clear of what kind some provisions were. They might refer only to a "penalty" for the breach of a statutory provision, rather than using an unambiguous term like "offence" or prescribing a specific criminal penalty like imprisonment, leaving it unclear whether this was really civil or criminal.

Fourth, it has been said at times that criminal law is what is done inside the criminal courts. That is, the rules of procedure and evidence, and the limits of dispositions, are key to deciding what is criminal. On its face, this is a useful test. It certainly has the most obvious connection to the limits of the criminal law, since it is axiomatic that something criminal should have criminal limits, whatever those are, applied to it. However, in practice there can certainly be things a criminal justice system does which seem civil, and vice versa. As will be discussed below, criminal courts award compensation, though some of ways they do so are either criminal, such as enforcement, or at least, hybrid. One possibility is that when a criminal court is performing civil functions it becomes a civil court or formally performs those functions as a matter of civil law, not criminal law. In either case, the apparently clear line from procedure gets blurred.

Another difficulty is how cleanly the jurisdiction of the criminal courts was demarcated. In fact, it used not to be clear on many statutory prohibitions whether they were civil or criminal, since the language, even in the nineteenth century, was somewhat unclear. There were and there were much more restricted rights to appeal in criminal cases until 1907 (and to this day, such rights remain on a separate track within the appeal process). For these reasons it has been the law for nearly 150 years that that no appeal should lie to the Court of Appeal "in any criminal cause or matter". A series of cases followed attempting to define what was included. In particular, the matter had to be "penal", and merely having a penalty was not "penal". Many rules have been enforced by penalties, the question is whether the object is punitive: if the payment of a fine or of imprisonment is possible then the matter is criminal. Thus, an arrest to return a conscript to the Netherlands was a criminal matter because prosecution could follow if deported and therefore a civil court could not hear the writ of habeas corpus to demand his release. This problem has largely disappeared through

the slow accumulation of case law on what is criminal and what is civil, combined with clearer legislative drafting. But it has disappeared as a matter of practice, rather than been resolved by systematic and intellectually rigorous discussion. Some jurisdictional issues remain relevant, such as private international law rules giving preference to the place where a civil action overlaps with a criminal matter.

Finally, and most importantly, is the question of compensation or penalty. Compensation is typically a marker of civil law. Sometimes known as reparation or restitution, compensation is generally agreed to be the paradigm activity of civil law. Sometimes a convicted criminal is colloquially said, by his wrong, to have created a "debt" to society, language reminiscent of the reparatory effect of damages; at the same time, criminal theory rarely expresses it in compensatory or reparative terms.

Penalties are usually within the realm of criminal law since most of our systems do not regard tort law as punitive. This is also where the limits of the criminal law are most keenly felt. Within the English legal discourse, the closest thing to overt limits all criminal lawyers would recognise are that the state must be demonstrably right to impose punishment on an individual. Hard treatment and censure might be imposed for different purposes, commonly listed as rehabilitation, retribution, incapacitation and deterrence, but whatever the purpose it is only legitimate if imposed based on a sufficiently valid decision on the facts. That involves sufficient evidential and procedural safeguards in order for the imposition of a penalty to be valid.

Interestingly, neither area of law makes a greater claim to be finding "the truth" in its adjudicative processes. Processes which only impose liability after extensive investigation and on a very high standard of proof might claim to have demonstrated more 'truth', indeed, that might be required in order to impose a penalty. However, this does not seem to be a discussion English courts engage in, nor do the majority of civil or criminal law commentators.

What can we learn from these indicia? These five indicators are quite clearly intellectually insufficient, but, at the same time, they are also what has sufficed for hundreds of years. This fact of practical sufficiency is particularly important in the relationship between criminal law and tort law. The workable, if imprecise, positioning of crime and tort never seemed to lead to sufficient difficulty in the courts for the legal system to need to refine it. Given that this underlying uncertainty seems to be common across legal systems, it is an interesting example of different structural basis for legal systems leading to the same outcome.

If English law offers one insight, it appears to be that different parts of the legal system seem to need the border between tort and crime to be harder or softer. Until the nineteenth century, English law was dominated by procedure, rather than substance, and it was only in the 1950s and 1960s that anything like the modern criminal law can be seen, with academics, textbooks, journals and some clarity on definitional issues like intention and recklessness. It seems primarily to have been that was the fate of procedural rules, in a system which until the middle of the nineteenth century was dominated by procedure, it is not surprising that substantive and normative questions received even less attention until recently. Even then, interest has largely been driven by cases throwing up practical difficulties, rather than by scholarly consideration of underlying issues or norms. It is just that the interest has not stopped at the borders of the case in issue, and has started to reach out further.