Review

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The Division of Wrongs: A Historical Comparative Study. By Eric Descheemaeker. Oxford: Oxford University Press, 2009. xxv + 300 pp. ISBN 9780199562794.

In his article "The Roman Division of Wrongs"[1] Eric Descheemaeker courageously placed himself among those historians who, following the line developed by Professor Zimmermann in particular, try to use their knowledge of the past as a means of "enabling us to take stock, and to comprehend, our present legal condition" since they are convinced that "[t]hat knowledge, in itself, will not determine where we have to go. But an understanding of the past is the first and essential prerequisite for devising appropriate solutions for the present day and for the future."[2]

In the book under review Descheemaeker, as he writes in his Preface, follows and develops a subject earlier explored by Peter Birks, who outlined the basic lines of inquiry on this topic, underlining the essential connection between the common law classification of wrongs and "the Roman analysis in which it had its origin."[3] The aim of this book, as Descheemaeker states in his Introduction, is to reason about the subject of "wrongs" in the English common law system, a subject which is characteristically scattered under many different categories but also commonly unified into just one class.

The weak point (if we can speak of it in these terms) of this system lies in a lack of orderliness and leads Descheemaeker to

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1 See E. Descheemaeker, "The Roman Division of Wrongs: A New Hypothesis," *RLT*, 5 (2009), 1–23.

2 R. Zimmermann, "Legal History and Comparative Law," in A. Vaquer, ed., *European Private Law Beyond the Common Frame of Reference: Essays in Honour of Reinhard Zimmermann* (Groningen 2008), 13.

3 P. Birks, "The Concept of a Civil Wrong," in D. G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford 1995), 29–52.

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work from the perspective of comparative legal history. A deep reflection on the juxtaposed civil law model, with its traditional division of wrongs into two categories ("proper" and "quasi" wrongs) could be helpful: on the one hand, to better understand the concept of wrong and its origins in the common law, and on the other, *de iure condendo*, to see if English law can be enriched by the civilian perspective, at least from the point of view of taxonomy.

To pursue this aim, Descheemaeker, after a preliminary chapter in which he declares his choice (and the correlated reasons) of definition for "wrong," begins with a close examination of the category of wrongs in the Roman legal system (Part I), both because "it came first" and also because it represents the basis on which all modern civilian systems built their law of wrongs. To really understand the reasons for divisions such as the one between *delicta* and *quasi delicta*, still present in some (but not I should specify, for example, in the Italian Civil Code of 1942 or in the BGB)[4] contemporary legal systems, we need to look at its roots in the thinking of those who conceived them first, that is, the Roman jurists.

Part II is devoted to the examination of the present French legal system. It preserved, in the Code Napoléon, the distinction between *délits* and *quasi-délits*. This is the model of the civilian tradition that Descheemaeker, acknowledging the incompleteness of any legal comparison, has chosen to analyze in order to reflect on the possible reasons for and significance of the distinction between the two categories.

Lastly, in Part III Descheemaeker returns to the English law of wrongs and its "unsatisfactory taxonomies" (III.7.II). In this part, Descheemaeker highlights problems arising from concurrent liability (e.g. the intersection of negligence and defamation, or negligence and trespass) thus engendering self-contradictory results. In Descheemaeker's analysis, this kind of problem originates mainly in the overbearing presence of the wrong of negligence which intersects almost the entire body of the English law of wrongs and creates confusion in the area of liability-creating events. Moving from his reflection on the civilian approach and

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[4] Although Descheemaeker honestly declares his decision to circumscribe his survey within the French experience, as the first and exemplar one, this decision and the diverse stances on the late-Roman division of wrongs assumed by legislators in the different countries of the civil law tradition during the nineteenth and twentieth centuries during the age of the main codifications remains a not depreciable fact and would have been perhaps worth considering.

its reasons and roots, Descheemaeker suggests as a remedy a structural revision of the law of wrongs itself in terms of grouping these events following the partition *dolus – culpa – casus* as standards of liability, namely, basing the reorganization on the degrees of fault.

After a short introduction in which he describes the framework for his work and states the two main questions he intends to answer ("how and why did the civilian tradition split up its law of wrongs, and what did it make of this division?" and "what, if anything, can the common law learn from the civilian experience on this point?"), Descheemaeker prepares the ground with a second chapter which is committed to defining the concept of "wrong" and narrowing down the scope of the law of wrongs. He pointedly states the definition of "wrong" as the violation of a right, that is to say, from the complementary point of view, a breach of duty, irrespective of a loss. From this point of view, a deep and careful consideration of recent and less recent opinion on the juridical category of wrong, especially in the common law world,[5] shines through Descheemaeker's work; and, even if his resort to definitions and dogmatic categories sometimes seems to be rather presumptive,[6] his attention to the topic of definitions is, from a methodological point of view, one of the most appreciable traits of this book.

Nevertheless, Descheemaker Descheemaeker sometimes takes positions in defining and choosing his starting points that are not entirely convincing. This could be due either to a less than mature consideration of the entire philosophical thought on these topics or to the necessity of containing the scope of his research. The reader partially misses this philosophical background when reasoning about a topic like this. Descheemaeker is not completely persuasive when, moving along the axis *wrong – breach of duty – violation of right*, he excludes criminal wrongs from the category of wrongs on the basis of a lack of a specific right which could be considered to be infringed upon.[7] In this case, it would have been perhaps interesting to discuss this topic,

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[5] Especially those of Peter Birks, Nils Jansen, and John Austin, to which Descheemaeker mainly refers.

[6] On the other hand, it must be said that Descheemaeker commendably and courageously sometimes takes a different position, contrary to the prevailing one, e.g. on the correspondence between the concepts of violation of a right and breach of duty, affirming that, in his opinion, they do not correspond completely, since "any violation of a right entails a breach of duty, but the reverse is not true" (page 17, n.6).

[7] Pages 22–28.

which Descheemaeker strongly patterns on the substantially imperativistic paradigm whose matrix can be found in Austin's thought (and from there to Kelsen and Bobbio), in the light of other philosophical points of view. In particular, for instance, W. N. Hohfeld's[8] concept of subjective rights could be helpful. Descheemaeker seems here to consider only those rights that Hohfeld calls *rights-claims*. These are just one of the four main elementary juridical positions in which the concept of subjective right can be broken up.

The same limitation should be highlighted about the decision to exclude breach of contract from the analysis. Although this is understandable in light of the necessity of limiting the investigation, the choice does not seem to have been based on solid arguments exactly because of the functional premises Descheemaeker has established. Breach of contract could indeed rationally be considered as a breach of duty (the duty of fulfilling the obligations arising from the contract) and should therefore be regarded as a civil wrong. The matter is thorny because of the very different choices taken on this topic from country to country: a situation regarded as a wrong in one nation may be sketched from the contractual point of view in another. The consequences are significant and a work mainly centered on taxonomy should perhaps have allowed for them.

Going specifically to the three "cores" of the reviewed book, the first, concerning the Roman roots of the division of wrongs in *delicta* and *quasi delicta*, even if perhaps rather elementary for Roman law scholars, is quite interesting in its first half (Chapter 3, concerning the rise of quasi-delicts). It is clear that Descheemaeker does not want here to write an essay on wrongs in ancient Roman law, since his main aim is to go through the ancient and contemporary parallel experiences to better understand the English legal system of wrongs and, hopefully, to contribute to its enhancement.

For a civilian scholar, accustomed to swimming in the *mare nostrum* of Roman law, in any case, this part of the book turns out to be interesting, not because of the well-known basics described in it but because of the way in which they are here efficaciously

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[8] Including all the following literature based on his fundamental intuitions. See W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," in *Yale L.J.*, 23 (1913), 16, 28–59; "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26 *Yale L.J.* (1917) 8, 710–70. See also his collected works, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven 1919).

expounded, with a correct method, both from the point of view of the historian of law and from that of the legal-historical comparativist. Descheemaeker's perspective, in this sense, aims at helping common law systems by using the Roman roots of the modern categories but also has the merit of reminding civilian scholars of the freshness of these Roman roots when released from all of their dogmatic stratifications.[9] This double nature of the book, inspired by Descheemaeker's ability to combine the gazes of common lawyer and a civilian, is one of its main virtues.

There is only one criticism on the first part of the book, tempered by an awareness of the role here reserved to Roman law, which is secondary to a functional perspective. A more complete and recent bibliography could perhaps have been quoted and discussed, especially (without fear of being charged of parochialism) with reference to the copious (but not only) Italian literature on the topic of the emergence of the notion of delict and of the dialectic between *delicta* and *quasi delicta*.[10] This criticism pertains, even more, to the subject of the degrees of fault and liability analyzed in Chapter 4. More in-depth preparatory work on the theories proposed by Roman law scholars about the origin of the Roman category of *quasi delicta,* on the role played in it by the *lex Aquilia* and, in particular, an investigation that, moving

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[9] I point out, in particular, § 3 C (pp. 54–57).

[10] Without any claim to completeness, I mention here only the most important and latest works: W. Wołodkiewicz, *Obligationes ex variis causarum figuris. Ricerche sulla classificazione delle fonti delle obbligazioni nel dirittto romano classico* (Milan 1970); W. Wołodkiewicz, "Sulla cosiddetta responsabilità dei "quasi delitti" nel diritto romano ed il suo influsso sulla responsabilità civile moderna," in *La formazione storica del diritto moderno in Europa. Atti del III Congresso internazionale della Società Italiana di storia del Diritto (Firenze 25–29 aprile 1973)* (Florence 1977), 1277 f.; F. Gallo, "Per la ricostruzione e utilizzazione della dottrina di Gaio sulle 'obligationes ex variis causarum figuris,'" in *BIDR*, 76 (1973), 171 f.; L. Vacca, "Delitti privati e azioni penali nel Principato," in *ANRW*, II/14 (1982), 682 f.; G. Longo, "I Quasi delicta — actio de effusis vel deiectis — actio de positis et suspensis," in *Studi in onore di C. Sanfilippo*, 4 (Milan 1983), 401 f.; J. Paricio, *Los cuasidelitos: Observaciones sobre su fundamento historico* (Madrid 1987); A. Burdese, Review of Paricio, *Los cuasidelitos* (1987), *SDHI*, 56 (1990), 443 f.; T. Giménez-Candela, *Los llamados cuasidelitos* (Madrid 1990); A. Burdese, Review of Giménez-Candela, *Los llamados cuasidelitos* (1990), *SDHI*, 57 (1991), 443 f.; M. Talamanca, "Pubblicazioni pervenute alla Direzione (a proposito di Giménez-Candela, Los llamados cuasidelitos [Madrid 1990])," *BIDR*, 94/95 (1991/1992), 618 f.; C. A. Cannata, *Sul problema della responsabilità nel diritto privato romano: Materiali per un corso di diritto Romano* (Catania 1996); R. Fercia, *La responsabilità per fatto di ausiliari nel diritto romano* (Padova 2008).

from the single *actiones* provided in each case of *quasi delictum* and an analysis of these institutions "in action," could have thrown light on a topic still partially ambiguous in Roman Law, thereby providing an easier field for introducing a dialogue between the civilian and common law traditions.

The second part, concerning the development of the Roman model in the civilian tradition of France through the medieval reflection up to the view of Pothier and the current presence of the dichotomy *délits/quasi-délits* in the civil code, is, in my opinion, the best part of this book. Descheemaeker reveals a deep knowledge of the French legal system and of its history and contribution to our understanding of one the most important aspects of the legal history of continental Europe. The French sources are deeply examined with a correct preeminence ascribed to the role of Pothier in reinterpreting the Roman tradition: Descheemaeker proves, here more than in other parts of the book, his skill as a discerning researcher.

The French modern and contemporary civil experience, based on a code dated 1804, notoriously often moves on a double track. The solutions chosen in the Code — the doctrinal positions — sometimes refer to prior debates. At times the positions remain ambiguous while the debates fluctuate. Descheemaeker clearly highlights how Pothier's choice (in his treatise § 116) to restructure Justinian's taxonomy of wrongs by characterizing the circumstances as delict or quasi-delict according to the presence of *dolus* or *culpa* respectively (with the consequent problems mainly about the *casus*) cannot be positively detected in the Code. However, Zachariae von Lingenthal returned to the Roman tradition in his *Textbook on French Civil Law* by ascribing to delicts all those situations in which both intention and negligence could be recognized and to quasi-delicts the situations in which the obligation derived from a special law and was connected to a loss caused by someone or a thing under the responsibility of another.

Moving from this doctrinal dichotomy, Descheemaeker takes stock of the situation on the concept of *faute* in French law and doctrine and its consequent role in the related taxonomy, emphasizing through a very lucid analysis the contradictions in contemporary doctrine. The result is very interesting, exhibiting the historical comparativistic method at its best and foretelling a new "map" of the French law of wrongs, grounded on the conservation of the distinction, renewed in fault-based delicts and quasi-delicts based on strict liability.

Also commendable, though one might doubt its reception in the English legal community, is Descheemaeker's proposal con-

cerning the English system of wrongs. Close examination of the actual context, from a historian's point of view, is significant and Descheemaeker goes carefully through a complete analysis of the division of wrongs in the Anglo-Saxon experience, from its first appearance to the present, through an in-depth survey of Blackstone's thought (along with the ideas of other authors). Blackstone's taxonomy and his successful classifications could in effect represent a solid example (and base) for the recovery of the Roman roots (from which substantially Blackstone's work often moves) of the common law system and for a proposal to remap it in relation to the topic at issue as Descheemaeker suggests.

Descheemaeker's approach is clear and honest. When he recommends using categories of the civilian taxonomy, he is not pretending to distort the nature of the common law systems nor to improve them by using extraneous categories. He sharply stresses the concept that, through comparison, potential overlaps and critical points can always be highlighted. This is a first step at moving towards a possible solution inspired by the principles of a specific legal system.

On the other hand, the most critical point (among others) is that in dealing with the English catalog of wrongs one confronts the genetic role that trespass and the writs of trespass performed in the history of this — even to this day —unitary legal category. Descheemaeker clearly recognizes this obstacle and will have succeeded sufficiently if he gets the English legal community to think about categories which seemingly have nothing to do with their own legal tradition.

In conclusion, Descheemaeker's purpose is praiseworthy in the particular manner indicated by Blackstone, who wrote in 1756 that the duty of the "academical expounder of the laws" was to make clear how the various parts of the law fitted together. Descheemaeker clearly appreciates his role as an academic, and this is a great virtue. It is not only that Descheemaeker's proposal (pp. 217–18) is sound; the reader also recognizes his diligence in carrying it out. He does not pretend to give simple or neat solutions, going through the motions or performing a useless self-referential academic exercise on taxonomy. He knows his task exactly. This is where the view is wider and points – as he writes – towards justice in the service of which all those working in the area of rights should honestly put all their efforts. This is why Descheemaeker's book is broadly a good point of departure: useful for those who search for a common legal language through the sharing of experiences, a good gymnasium for the education of high-level practitioners, and an incentive for the advancement

and in-depth analysis of a topic important to scholars, both of the common law as well as of the civilian tradition.