Comparative Tort Law

Global Perspectives

Edited by

Mauro Bussani

Professor, University of Trieste, Italy and Adjunct Professor, University of Macao, S.A.R. of the P.R. of China

Anthony J. Sebok

Professor, Cardozo School of Law, Yeshiva University, New York, USA and Distinguished Research Professor, College of Law, Swansea University, UK

RESEARCH HANDBOOKS IN COMPARATIVE LAW

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

2. The many cultures of tort liability

Mauro Bussani and Marta Infantino

1. INTRODUCTION

There can be little doubt that tort law is at the same time a product and a constituent of the very cultural framework in which it is embedded. Yet, as of now tort law's cultural dimensions have gone largely unexplored.[1] Legal anthropologists' work on wrongs and compensation has mostly focused on traditional societies[2] in which tort law, as practiced in the West, either plays a minor role or is indistinguishable from what we would dub criminal law. Socio-legal scholars, on their part, have mostly investigated selected Western jurisdictions, seldom venturing beyond the reasons which shape people's propensity to sue and trust in legal institutions. Other lines of research – such as legal history, law and economics, critical legal studies, and comparative law itself – have helped highlight particular aspects of the historical and cultural embeddedness of tort law adjudication. Most of the time, however, their contributions have remained confined to geographical and/or substantive areas of law, or have addressed, through methodologies specifically tailored to reflect the approaches just mentioned, the current state-of-the-art of knowledge in our field.

Combining insights from legal anthropology, socio-legal literature, legal history, and comparative law, we will try to understand the role that, in Western and non-Western legal traditions, tort law plays in responding to and managing social conflicts. We will start by highlighting how the bearing of this role on the functioning of a society goes beyond what official law says (section 2) and encompasses a multiplicity of legal layers not enshrined in positive law (section 3). The analysis of the cultural framework that sustains the out-of-court adjudication processes (section 4) will enable us to follow tort law claims inside the courtroom, and to see how notions, practices, and remedies of tort law 'in action' vary across different social and cultural settings. We will review in detail

[1] This holds true, it should incidentally be noted, also for the related valuable contributions that cognitive and neuro-scientific studies have made available to the understanding of this field of law. In tort law cognitive sciences are especially promising in illuminating the psychological biases affecting our way of reading and giving meaning to world events, while neurosciences are of the utmost usefulness in challenging our understanding of intention, knowledge, and control, and of the effects they have on tort liability. See J.D. Hanson and M. McCann, Situationist Torts, 41 Lo. L. Rev. 1345, 1359 f., 1370 f. (2008); J.M. Eggen and E.J. Laury, Toward a Neuroscience Model of Tort Law: How Functional Neuroimaging Will Transform Tort Doctrine, 13 Columbia Science & Technology L. Rev. 235, 253 ff. (2012).

[2] There are of course major exceptions, such as the studies conducted by Laura Nader and Sarah S. Lochlann Jain on tort law in U.S. society: see, for instance, L. Nader, The Life of the Law. Anthropological Projects, U. California P., 2002, esp. 172–215, and S.S. Lochlann Jain, Injury: The Politics of Product Design and Safety Law in the United States, Princeton U.P., 2006.

the notion of injury (section 5), the ideas circulating about causation and force majeure (section 6), the concept of fault and the standard of the 'reasonable person' (section 7), current categorizations of victims and wrongdoers (section 8), and perceptions of what constitutes an adequate remedy (section 9). The survey will allow us to frame some conclusions about the extent to which tort law notions, ideas, categorizations, and perceptions influence, and reciprocally are influenced by, the cultural framework in which they live (section 10).

2. BEYOND FAÇADES

Perceptions of what social order is, of when it is disturbed, of how it can be maintained or restored, differ widely across societies and time.[3] What is considered injurious in some place and at some time may become acceptable after the passing of a few years, or may be traditionally acceptable somewhere else. Variable across time and across places is the range of subjects who are entitled to react to the injury, as well as the range of subjects against whom the reaction may be directed. And equally variable through history and across cultures are the means, rituals, and procedures to which societies resort in order to handle disruptions of the social order. Sanctions, for instance, may include or exclude: force and threat of force, apologies, compensation (pecuniary and/or in kind), retaliation, ostracism, seclusion, denial of favors, and restitutory or maintenance duties. Remedies may be administered by the victims themselves, by the community as a whole, or by third parties entrusted to solve disputes in a socially acceptable manner.[4]

Tort law is one of the institutional devices whose aim is to settle societal conflicts in case of disruptions of social harmony. Patterns of tort law may of course vary according to the liability regimes designed by official and unofficial law and according to the different features of the dispute resolution systems – with the presence or absence, for example, of professional lawyers, contingent fees, collective actions, pro bono representation, jury trials, punitive damages, and so forth.[5] But variances of tort law's practices may also stem from the stratification of, and interrelationship between,

---

[3] Among the many, R. Sacco, Anthropologie juridique. Apport à une macro-histoire du droit, Dalloz, 2008, 245–255; S. Falk Moore, Selection for Failure in a Small Social Field: Ritual Concord and Fraternal Strife among the Chagga, Kilimanjaro, 1968–1969, in B.G. Myerhoff and S. Falk Moore (eds.), Symbols and Politics in Communal Ideology, Cornell U.P., 1975, 109, esp. 140–141; B. Malinowski, Crime and Custom in Savage Society, Routledge, 1926, 100–129.

[4] On all the above, see, e.g., R. Verdier, Le système vindicatoire. Esquisse théorique, in id. (ed.), La vengeance, Cujas, 1980, I, 13, 22–24; C. Geertz, Local Knowledge. Further Essays in Interpretive Anthropology, Basic Books, 1983, 176, 187–195, 200–207; O. Chase, Law, Culture and Ritual. Disputing Systems in Cross-Cultural Context, NYU P., 2005, 33.

[5] V.V. Palmer and M. Bussani, Pure Economic Loss. New Horizons in Comparative Law, Routledge-Cavendish, 2008, 7, 46–66; and M. Bussani and V.V. Palmer, Pure Economic Loss in Europe, CUP, 2003, 120–158.

tort law and other remedies, such as unofficial traditional dispute resolution mechanisms, criminal sanctions, insurance payments, and alternative compensation programs.[6] At the bottom of all this, it goes without saying, one finds the different ideas, attitudes, trust, and beliefs that people in society hold with regard to litigation, institutions, and social relationships in general.[7]

These factors are key to understanding also why tort law systems whose exterior, official wrappings are apparently identical or fairly similar may nevertheless produce different applications. We will offer a few examples chosen not for their overall implications but because they are easy-to-grasp illustrations of the jigsaw puzzle we are trying to assemble.

Both English and New Zealand tort laws are grounded in the common law tradition. In New Zealand, however, the common law of torts plays a quite marginal role in providing compensation for personal injuries. This is because New Zealand enacted, in 1972, a no-fault accident compensation scheme covering injuries by accident, injuries resulting from medical misadventure, and injuries resulting from work-related diseases[8]. The scheme's core principle of social responsibility represents a decisive and radical break from the ideology of individual responsibility traditionally underpinning Western law, including tort law. The effects of such a break have been far-reaching. Although New Zealand is still formally premised on a common law-style tort law, even victims of personal injuries which do not fall under the compensation scheme (such as, for instance, diseases unrelated to work) tend to resort to the general social security and social welfare systems that sit alongside the accident compensation scheme, rather than resorting to tort law remedies.[9]

The United States' and India's legal systems are grounded in common law, and are characterized by highly visible judicial intervention in public life and a widespread

---

[6] Among others, R. Sacco, Anthropologie juridique, 246; see also J.-S. Borghetti, The Culture of Tort Law in France, 3 J. Eur. Tort L. 158, 170–172 (2012); J. Fedtke, The Culture of German Tort Law, 3 J. Eur. Tort L. 183, 200–202 (2012); H. Andersson, Tort Law Culture(s) of Scandinavia, 3 J. Eur. Tort L. 210, 216–221 (2012); R. Lewis and A. Morris, Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation, 3 J. Eur. Tort L. 230, 232–234 (2012); T. Baker, Liability Insurance at the Tort-Crime Boundary, in D.M. Engel and M. McCann (eds.), Tort Law as a Cultural Practice, Stanford U.P., 2009, 66 f.; A. Tunc, La responsabilité civile, Economica, 1981, 2nd ed., 59–83.

[7] See for instance A.J. Sebok and L. Trägårdh, Adversarial Legalism and the Emergence of a New European Legality: A Comparative Perspective, in A. Sarat, L. Douglas, and M. Merrill Umphrey (eds.), Imagining New Legalities: Privacy and Its Possibilities in the 21st Century, Stanford U.P., 2012, 154, 157, 162–163; R. Sacco, Anthropologie juridique, 246; G. Calabresi, Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem, Syracuse U.P., 1985, xiii–xv.

[8] The scheme is administered by a public corporation, and is a hybrid of social insurance and social welfare, being funded partly by levies on risk-creating activities and partly by general taxation: P. Cane, Searching for United States Tort Law in the Antipodes, Pepperdine L. Rev. 257, 262 (2011); C. Brown, Deterrence in Tort and No-Fault: The New Zealand Experience, 73 Cal. L. Rev. 976–1002 (1985).

[9] P. Cane, Searching for United States Tort Law in the Antipodes, 262 (also for the analysis of the differences underpinning – despite many similarities – United States and Australian tort law systems: id., at 265–282).

sense of the inherent litigiousness of their societies.[10] Nonetheless, the two systems have different rates of tort-claiming, with the Indian rates being dramatically lower than the United States' ones.[11] The discrepancy may be explained, it has been suggested, when one considers that Indian plaintiffs, as compared with their United States counterparts, have much less incentive to go to court. Indians place less confidence than Americans in courts' ability to settle private disputes, and prefer relying on unofficial practices and criminal penalties to do much of the legal work that tort law does in the U.S.[12]

Japanese tort law provisions in the 1895 Civil Code reflect the influence of German legal doctrines on late nineteenth century Japanese legal developments.[13] Yet, in spite of these common roots, very few accident cases are brought to court in Japan as compared with Germany. The Japanese legal system tends to create incentive to divert litigants from the courts towards non-adversarial settings.[14] Actually, litigation in a given field is understood by ruling elites as a sort of alert to the need to create new institutional responses to an important social issue, thus leading to alternative compensation schemes that may remove cases from judicial control. Litigation, in other words, is perceived as a social signal that compensation has to be made available without litigation.[15]

Ethiopian tort law rules are contained in the 1960 Ethiopian Civil Code (Articles 2027–2161). These rules were inspired by René David and incorporated many Western ideas, combining general rules of liability along the lines of the French and Italian models with some detailed (Anglo-American-style) provisions on specific causes of action.[16] However, under the veil of such Westernized modern tort law, customary law

---

[10] M. Galanter, India's Tort Deficit. Sketch for a Historical Portrait, in D.M. Engel and M. McCann (eds.), Tort Law as a Cultural Practice, 44, 47; A. Perry-Kessaris, Global Business, Local Law. The Indian Legal System as a Communal Resource in Foreign Investment Relations, MPG Books Ltd, 2008, 110–114.

[11] M. Galanter, India's Tort Deficit. Sketch for a Historical Portrait, 52.

[12] T.J. O'Neill, Through a Glass Darkly: Western Tort Law from a South and East Asian Perspective, 11 Rutgers Race & L. Rev. 1–2, 6, 9–13 (2009–2010); M. Galanter, India's Tort Deficit. Sketch for a Historical Portrait, 47 f.

[13] V.V. Palmer and M. Bussani, Pure Economic Loss. New Horizons in Comparative Law, 46–47. German influences supplanted the French-inspired legal culture that had up to that time dominated Japanese legal thought: see, in addition to Chapter 16 in this volume, H.P. Glenn, Legal Traditions of the World, OUP, 2007, 3rd ed., 329; M. Ishimoto, L'influence du Code civil français sur le droit civil japonais, 6 Rev. int. dr. comp. 744, 749–752 (1954).

[14] N. Koyama and I. Kitamura, La conciliation en matière civile et commerciale au Japon, in Etudes de droit japonais, Société de législation comparée, 1989, 225 f.; E. Dubois, Étude socio-légale de la résolution des conflits au Japon, in Rev. int. dr. comp. 383 (2009). As to the specifics of tort law, see R.B. Leflar, The Law of Medical Misadventure in Japan, 87 Chi.-Kent L. Rev. 79, 98–99 (2012); H. Wagatsuma and A. Rosett, The Implications of Apology: Law and Culture in Japan and in the United States, 20 L. & Soc. Rev. 461, 484 (1986).

[15] E.A. Feldman, Suing Doctors in Japan: Structure, Culture, and the Rise of Malpractice Litigation, in D.M. Engel and M. McCann (eds.), Tort Law as a Cultural Practice, 211 f.; T. Tanase, The Role of the Judiciary in Asbestos Injury Compensation in Japan, ibid., 233 f.

[16] F.F. Russell, The New Ethiopian Civil Code, Brooklyn L. Rev. 236, 239–241 (1963).

and customary means of dispute resolution continued to flourish.[17] Much tort litigation is still managed as a collective enterprise involving the active participation of the whole community of people involved. Of course, the last word belongs to the chief, and the most authoritative points of view are those of the elderly. But every community member has the right and the duty to participate in the process and to propose solutions to the conflict – and it is the consent of the community that provides the main legitimation of the decision.[18]

The lesson to be learnt from the foregoing is nothing but a caveat. Authoritative, official rules (as well as institutions and procedures) may or may not be in one-to-one correspondence with the values and the legal culture of the whole, or the vast majority of the members of the societies concerned. This is why often times official law may be best understood only in the light of the unofficial environment which surrounds and deeply affects its functioning. But this is also why the set of rules, notions, and procedures which are produced by official legal actors may only provide the starting point of research about the disputes managed by tort law mechanisms, and the ways in which these mechanisms actually work. The rest lies somewhere else, before and beyond the façade of official rules and official adjudication mechanisms.

3. THE INNER STRUCTURE OF LEGAL SYSTEMS

Dissonance between official and unofficial tort law remedies and procedures is evident outside the West, where positive law is frequently challenged by the relevance that societies assign to other, remarkably vital legal layers. The pervasive presence of non-State[19] legal layers helps explain the comparatively slight reliance that non-Western legal systems usually place on officially posited tort law and official mechanisms of adjudication. In non-Western contexts, the role that State law and dispute settlement systems play in Western jurisdictions is often absorbed and performed by layers which have no relationship with the State. Good examples come from some of the legal systems mentioned in the previous section. Today, as in the past, the traditional Indian vision of the law does not blend sources of law as different as

---

[17] M. Bussani, Tort Law and Development: Insights into the Case of Ethiopia and Eritrea, 40 J. African L. 43, 46–48; see also Chapter 18 in this volume.

[18] Cf. D. Haile, Law and Social Change in Africa: Preliminary Look at the Ethiopian Experience, 9 J. Ethiopian L. 380 ff. (1973); T. Geraghty, People, Practice, Attitudes and Problems in the Lower Courts of Ethiopia, 6 J. Ethiopian L. 426 ff. (1969). See also H.P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law, OUP, 2007, 3rd ed., 68 (on the Dinka, Southern Sudan); T.W. Bennett, Customary Law in South Africa, Juta, 2004, 164–165 (on the Shona, Zimbabwa, and the Barotse, Zambia); M.R. Bartolomei, Giustizia tradizionale e mutamento sociale. Il processo tradizionale Abron nella Costa d'Avorio, Giuffrè, 2001, XII–XIII, 180–187 (on the Abron, Ivory Coast).

[19] A useful reminder to some readers is that the expression 'State' will be used throughout this chapter to refer also to States which are described by their national law as federal and/or regional, as well as to these States' federal and/or regional constituencies.

secular customs, State law, and the various bodies of religious law.[20] Equally, the Japanese traditional perspective demarcates State rules from those stratified in popular customs, the nature of which mixes moral principles of religious as well as secular origin.[21] In Sub-Saharan Africa, traditional rules linked to the sacred control large parts of the legal reality, including the distinction between acceptable and prohibited conduct. These traditional rules coexist with prescriptions about compensation and redress imposed by the other legal layers, which have stratified one upon the other in the course of history: religious law (be it syncretic, or Islamic), the laws of the colonizers, the laws adopted by the modern independent States.[22]

However, the presence of legal stratification is discernible also within Western jurisdictions. It is only in the last two centuries that the Western positivist attitude has been able to obscure the multi-layered structure of the legal systems in treatises and books, as well as in teaching methods and syllabi and, consequently, in the judicial culture and judicial decisions.[23] Yet multiple legal layers have always coexisted, and still coexist in the West, where many non-official legal layers produce rules that flourish aside from the official law and take the settlement of disputes outside the ordinary circuits of adjudication[24]. The phenomenon is still easy to observe, especially

---

[20] W. Menski, Hindu Law: Beyond Tradition and Modernity, OUP, 2003, esp. 121, 247; U. Baxi, People's Law in India. The Hindu Society, in M. Chiba (ed.), Asian Indigenous Law in Interaction with Received Law, KPI, 1986, 216 ff. For similar observations about Nepali tort law, see L. Heckendorn Urscheler, Innovation in a Hybrid System: The Example of Nepal, 15 Potchefstroom Elec. L. J. 98, 109–113 (2012).

[21] E. Dubois, Étude socio-légale de la résolution des conflits au Japon, 61 Rev. int. dr. comp. 383 (2009); K. Rokumoto, Law and Culture in Transition, 49 Am. J. Comp. L. 545 (2001); E.A. Feldman, The Ritual of Rights in Japan. Law, Society, and Health Policy, CUP, 2000, 6, 34. Similar is the traditional Chinese conception, which does not mix the *fa*, the rule imposed by the authority, with the *su*, the popular and secular custom, nor with the *li* (conventionally translated as: "rite"), the ensemble of rules suggested by the traditional wisdom steeped in Confucianism. On this point see, besides Chapter 17 in this volume, R. Peerenboom, China's Long March Toward the Rule of Law, CUP, 2002, 288; D. Bodde, Authority and Law in Ancient China, 17 J. Am. Or. Soc. 54 (1954); see also I. Castellucci, Rule of Law with Chinese Characteristics, 13 Ann. Surv. Int'l & Comp. L. 58 (2007).

[22] R. Sacco, Il diritto africano, Utet, 1995, 199 ff.; see also Chapter 18 in this volume, and A. Rochegude, Ubi societas ibi jus: ubi jus, ibi societas, in C. Kuyu (ed.), A la recherche du droit africain du XXIe siècle, Connaissances et savoirs, 2005, 115 f.

[23] M. Bussani, A Pluralist Approach to Mixed Jurisdictions, 6 J. Comp. L. 161, 163 (2011); with specific regard to tort law, J. Fedtke, The Culture of German Tort Law, 184–187; J.D. Hanson and M. McCann, Situationist Torts, 41 Loy. L.A. L. Rev. 1403, 1406–1415, 1418–1432 (2008); H. Wagatsuma and A. Rosett, The Implications of Apology, 464, 494.

[24] On the presence, in the West, of "multiple normative orders" that "push litigation to the periphery of dispute processing", S. Macaulay, Elegant Models, Empirical Pictures and the Complexities of Contract, 11 L. & Soc. Rev. 507 (1977); see also E. Örücü, What is a Mixed Legal System: Exclusion or Expansion, in E. Örücü (ed.), Mixed Legal Systems at New Frontiers, Wildy, 2010, 53 f.; S.P. Donlan, Histories of Hybridity: A Problem, a Primer, a Plea and a Plan (of Sorts), in E. Cashin Ritaine, S.P. Donlan, and M. Sychold (eds.), Comparative Law and Hybrid Legal Traditions, Schulthess, 2008, 21; R.A. Macdonald, Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism, 15 Ariz. J. Int'l & Comp. L. 69 (1998); H. Jacob, The Elusive Shadow of the Law, 26 L. & Soc. Rev. 565 (1992). With regard to

outside urban contexts, in the solution of controversies arising from the exercise of property rights and small incidents of everyday life. Many of these conflicts are governed through unofficial systems of social control, in which participants of the same community (no matter what the size and the nature of it[25]) act as an informal cooperative club of enforcers, and help ensure that members and non-members honor the group's rules through a variety of remedies, ranging from the issue of warnings to the obligation of apology or compensatory relief, from negative gossip to forceful destruction and self-enforced seizure of assets.[26] Since these systems of social control exist alongside the official layer, people are often subject to multiple overlapping (and not so rarely conflicting) systems of tort law.

Special rules often apply also within Western personal (e.g., family, friends, neighbors) and/or professional communities. Within such communities, unwritten codes of conduct determine what a wrong is, and what remedies are available against it, creating more or less stringent inhibitions against using formal law.[27] For instance, the practices of personal communities, such as families and religious congregations, accomplish most of the goals performed by tort law on the basis of their own rules, choosing their own set of remedies, which include issuances of apology or personal services. Through such rules and remedies, personal communities provide a solution to the dispute that is perceived as the most appropriate by the community and the individuals involved.[28] If the above articulation and relevance of unofficial law upholding "personal" communities are fairly well known,[29] a different example of how the same kind of law (i.e., of unofficial mold) can control professional activities is given by the diamond industry. In this industry, one of the world's largest trading centers is the New York Diamond Dealers Club (DDC),[30] and in principle activities

---

international legal spheres, see W.M. Reisman, Systems of Control in International Adjudication and Arbitration, Duke U.P., 1992, passim.

[25] W.M. Reisman, Lining Up: The Microlegal System of Queues, 54 U. Cin. L. Rev. 417, esp. 418–420 (1985); M. Bussani, Il diritto dell'Occidente. Geopolitica delle regole globali, Einaudi, 2010, esp. 6–15.

[26] On this point Robert Ellickson's accounts are quite instructive. See R.C. Ellickson, Order without Law: How Neighbors Settle Disputes, Harvard U.P., 1991, 50, 87, 185, 209–219; see also id., The Household. Informal Order around the Hearth, Princeton U.P., 2008, 92–125.

[27] L.M. Friedman, Total Justice, Russell Sage Foundation, 1994, 90–91.

[28] R.F. Cochran Jr. and R.M. Ackerman, Law and Community: The Case of Torts, Rowman & Littlefield Publishers, Inc., 2004, 48–49.

[29] P. Shah (ed.), Law and Ethnic Plurality: Socio-legal Perspectives, Koninklijke Brill NV, 2007; B. de Sousa Santos, Toward a New Common Sense. Law, Globalization, and Emancipation, Butterworths, 2002, 2nd ed., 426 f.; J.H. Murphy (ed.), Ethnic Minorities, Their Families and the Law, Hart, 2000; L.L. Fuller, Human Interaction and the Law, 14 Am. J. Juris. 1 (1969); W.G. Sumner, Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals, Ginn & Co., 1906.

[30] L. Bernstein, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Leg. Stud. 115, 119 (1992). The same observations made in the text on the DDC in New York City apply to other diamond trading centers in and outside the West, insofar as they are dominated by small ethnic minorities with close community ties – such as the community of ultra-Orthodox Jews in Antwerp, Belgium, or that of the Jains of Palanpur (a religious minority from a village in Northern Gujarat) in Mumbai, India: see B.D. Richman,

conducted by members of the DDC fall under the jurisdiction of New York courts. Yet, while in principle there is no prohibition to going to court, DDC bylaws provide that any member that lodges a lawsuit to be adjudicated in state courts will be fined, or suspended from the club.[31] The DDC's own arbitration system, to which any member may resort if he has a claim arising out of, or related to, the diamond business, actually replaces any opportunity to seek redress from a state court (around 150 disputes per year are submitted to the DDC arbitration system, and an estimated 85 percent of these disputes are settled during the mandatory pre-arbitration conciliation procedure[32]). This is testimony, as has been highlighted by the literature concerned, to the fact that the industry has a strong preference for the "voluntary" resolution of disputes, outside any adjudication mechanism run by third parties. This comes as no surprise. In a market based on repeat transactions among members of small professionally (if not ethnically) homogeneous groups, where dissemination of information about reputation is rapid and low cost, the enforcement of private settlements is backed by reputational sanctions. Therefore, under the threat of social ostracism, intra-industry disputes are usually resolved cooperatively and with no need to have recourse (even) to an intra-community arbitration mechanism.[33]

Another illustration of the multi-layered structure of Western legal systems is that provided by Robert Ellickson in his seminal socio-legal study of the behavior of ranchers and farmers in Shasta County, California.[34] Among other things, Ellickson found that ranchers who let their cattle stray, although not legally liable under Californian law, are informally liable for trespass damage according to the customary rules applied by the members of the county's community. When a rancher violates these rules, the injured party may respond, first, by issuing a warning; secondly, by disseminating truthful negative gossip; and thirdly, by using force. The contrast between the rules of the state and those of the local community on cattle trespass – no liability vs. strict liability – is resolved by unwritten rules on conflicts of law giving priority, in these cases, to the informal control system over the formal one. Not all disputes, however, are amenable to resolution at the local level. In controversies over scarce water resources, for instance, the stakes tend to be high and the relevant technical issues complex. For these reasons, that are well known in the "tragedy of the commons" perspective and related debate,[35] the official legal system has a comparative advantage over local communities as an agent of social control. In case of differences

---

How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York, 31 L. & Soc. Inq. 383, 410–412 (2006).

[31] B.D. Richman, How Community Institutions Create Economic Advantage, 395–396.

[32] L. Bernstein, Opting out of the Legal System, 124.

[33] L. Bernstein, Opting out of the Legal System, 135–143.

[34] R.C. Ellickson, Order Without Law: How Neighbors Settle Disputes.

[35] We are obviously referring to G. Hardin, The Tragedy of the Commons, 162 Science 1243 (1968); for further specifications and refinements of the same theory, cf., among many others, M. Heller, The Tragedy of Anticommons: Property in Transition from Marx to Markets, 111 Harv. L. Rev. 621 (1998); J.M. Buchanan and Y.J. Yoon, Symmetric Tragedies: Commons and Anticommons, 43 J. L. & Econ. 1 (2000); S. Vanneste, A. Van Hiel, F. Parisi, and B. Depoorter, From Tragedy to "Disaster": Welfare Effects of Commons and Anticommons Dilemmas, 26 Int'l Rev. L. & Econ. 104 (2006).

over water use, therefore, the unwritten rules on conflicts of law drive the disputants out of the informal system and permit the parties to assert their formal legal rights and entitlements in courts.[36] What counts, however, is that in the rural region of Shasta County the state-posited legal layer ends up disciplining a limited portion of societal conflicts. A substantial number of tort law disputes do not get into official legal proceedings, being settled informally or otherwise regulated outside the courts. As we will see in the next section, such a division of labor among legal layers is far from being exceptional, or limited to a California county.

4. THE CONFLICTS PYRAMID

Interactions between legal layers in tort law adjudication are best understood and assessed by resorting to the standard methodological tool hinged on the "pyramid" of tort law disputes.[37] The pyramid metaphor teaches us that, whatever the subject matter or the setting of the dispute, most tort law cases in the West do not reach the judicial stage. As we will see, the image of the pyramid, though proposed for Western settings only, may be used to describe the lives of claims in the non-Western world as well.

The pyramid analysis takes for granted that in every legal system some injuries are considered recoverable.[38] At its base, the pyramid encompasses only those injuries that are perceived as an adverse event by the victim – the so-called *perceived injuries*.[39] This starting level excludes unperceived injuries: people may not perceive injuries as such, because victims may be unaware that the injuries they suffered give way to a legal remedy, or because they may blame themselves or ascribe the injury to fate or chance.[40] Amidst the persons who do perceive an injury, only a small fraction actually

---

[36] R.C. Ellickson, Order Without Law, 240, 257.

[37] The urtext of this line of research is the articles of W.L.F. Felstiner, R.L. Abel, and A. Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming …, 15 L. & Soc. Rev. 631–654, esp. 633–637, 641 (1980–1981) and of R.E. Miller and A. Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 L. & Soc. Rev. 525, esp. 543–545 (1980–1981). Among later studies, see H.M. Kritzer, Claiming Behavior as Legal Mobilization, in P. Cane and H.M. Kritzer (eds.), Oxford Handbook of Empirical Legal Studies, OUP, 2012, 625, 627; A. Sarat, Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture, DePaul L. Rev. 425, 426–428 (2000); M. Galanter, Real World Torts: An Antidote to Anecdote, 55 Md L. Rev. 1093, 1099–1100 (1996); H.M. Kritzer, W.A. Bogart, and N. Vidmar, The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States, 25 L. & Soc. Rev. 499, 501 (1991); H.M. Kritzer, Propensity to Sue in England and in the United States of America: Blaming and Claiming in Tort Cases, 18 J. L. & Soc. 400, 401–402 (1991).

[38] In the literature mentioned in the previous footnote, this level is usually called that of *injuries* (M. Galanter, Real World Torts, 1099) or *perceived injurious experiences* (W.L.F. Felstiner, R.L. Abel, and A. Sarat, The Emergence and Transformation of Disputes, 633).

[39] See W.L.F. Felstiner, R.L. Abel, and A. Sarat, The Emergence and Transformation of Disputes, 635; M. Galanter, Real World Torts, 1099 (dubbing them *perceived injuries*).

[40] W.L.F. Felstiner, R.L. Abel, and A. Sarat, The Emergence and Transformation of Disputes, 633–637, 641; R.E. Miller and A. Sarat, Grievances, Claims, and Disputes, 532. Moreover, people may think that they have suffered an injury when in fact nothing happened to

blame some human agency. Such blaming creates a further level – that of *grievances*.[41] Grievances may lead nowhere. People may think that their perceived injury is *de minimis*, or that it is not socially acceptable for them to pursue further their interests. For instance, victims with ongoing human/social/economic relationships with their tortfeasors might not be at ease with the idea of vindicating publicly their rights against their counterparts.[42] Or people may be suspicious as to the fairness of the judicial system, or lack the resources necessary to fight back. Some, however, do complain, typically to the human agency they think is responsible for the injury. We are now at the level of *claims*.[43] Many of these claims are satisfied in whole or in part, because the human agency concerned straightforwardly assumes the responsibility for what happened, issues an apology, voluntarily pays compensation or restores the situation existing prior to the wrong – either personally or through her insurer.[44] In all these cases, the matter may be resolved without ever reaching a courthouse. But if the claims are not satisfied, they become *disputes*.[45] Disputes may get into the hands of *lawyers*, or of any other actor the given legal system considers an appropriate legal broker.[46] Among the disputes that get to these actors, some are abandoned, and some end up in a Western or Western-like courtroom. Many filed cases eventually result in settlement, and only a small fraction of them reach the next layer of *trials*, and become, sometimes after appellate and last-resort rulings, *decided cases* (and possibly binding precedents for future cases).[47]

Such a picture prompts several considerations. First, it makes clear that, even in the West, many disputes which might fall under the umbrella of positive tort law ultimately remain out of it. The reasons are manifold, but at least in part they are to be found in the circumstance that a great many potential tort disputes are caught by official or

---

them. This is why this level includes also mistaken attributions of injury: M. Galanter, Real World Torts, 1099.

[41] W.L.F. Felstiner, R.L. Abel, and A. Sarat, The Emergence and Transformation of Disputes, 632, 635.

[42] R.A. MacDonald, Access to Civil Justice, in P. Cane and H.M. Kritzer (eds.), Oxford Handbook of Empirical Legal Studies, 492, 510–515; A. Sarat, Access to Justice, 94 Harv. L. Rev. 1911, 1916–1917 (1981); see also G. Parchomovsky and A. Stein, The Relational Contingency of Rights, 98 Va. L. Rev. 1313, 1352–1355 (2012); R. Lewis and A. Morris, Tort Law Culture in the United Kingdom, 256–257. To illustrate: victims belonging to minority communities may for instance distrust the fairness of the judicial system because of their unfamiliarity with the courts' mode of adjudication, the fear of being discriminated against, the lack of financial resources, and/or the availability of more reliable intra-community mechanisms of dispute resolution. See, with regard to gipsy and Muslim communities in Europe, Open Society Institute, Monitoring the EU Accession Process: Minority Protection, Open Society Institute, 2002, 49, 53–54; see also the considerations made on the same point below, at fn. 54.

[43] M. Galanter, Real World Torts, 1099–1100.

[44] R. Lewis and A. Morris, Tort Law Culture in the United Kingdom, 238–240; M. Galanter, Real World Torts, 1099; H.M. Kritzer, W.A. Bogart, and N. Vidmar, The Aftermath of Injury, 502–503; H.M. Kritzer, Propensity to Sue in England and in the United States of America, 402.

[45] W.L.F. Felstiner, R.L. Abel, and A. Sarat, The Emergence and Transformation of Disputes, 637–639.

[46] M. Galanter, Real World Torts, 1100.

[47] Id., at 1100.

unofficial mechanisms of conflict avoidance and dispute settlements, mechanisms that are daily administered out of court. Insurance companies alone absorb a substantial fraction of potential tort law controversies, providing routinized and widely available procedures for dealing with compensation problems.[48] But many cases do not even reach insurance companies. Even when an insurance coverage is available, claims may not mature, or disputes may be abandoned or settled (before they enter into any formal level of complaint) according to unofficial rules and mechanisms about how to redress injuries.[49]

Secondly, that a limited number of controversies get to court does not imply that official adjudication serves little or no purpose. Courts not only directly resolve a significant minority of disputes, including the most complex ones, but they also produce rules and standards which work as a backdrop upon which parties, insurers, and lawyers may rely when bargaining outside the dispute resolution system, or straightforwardly in the shadow of the law. Thus – wherever State-posited law is the controlling layer for the disputes concerned – these rules and standards matter in disputes actually brought before the courts, as well as in conflicts that never reach the litigation stage, influencing actors' behavior and expectations throughout society.[50]

It is not a one-way street, though. Equally true – and here is the third observation – is that the pyramid metaphor makes clear how, in the West as well as in the Rest, factors determining the origin and development of a conflict lie largely outside the domain of official legal rules and procedures. Behind or aside from the tort law system, people's disputing choices are affected by the nature of the perceived injury (including its size and the availability of the evidence) and by the parties' personal features – their being more or less knowledgeable, contentious, risk-prone, or resourceful. Moreover, people's responses to injuries are shaped by their own adverse expectations and social beliefs about entitlements – about whether the parties concerned should receive or offer apologies, engage in or avoid conflict interactions, give or get compensation. These beliefs and expectations are part of the social fabric of the communities of which disputants are members. In the real world, there are of course many communities, and many people may be members of a multiplicity of them simultaneously. But all communities express their own, dynamic networks of rules whose interactions govern official and unofficial systems of social control, and determine the selection of cases

---

[48] See, among many others, G. Parchomovsky and A. Stein, The Relational Contingency of Rights, 1352–1355; R. Lewis, Insurance and the Tort System, 25 Leg. Stud. 85, 88 (2005); M.J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?, 140 U. Pa. L. Rev. 1147, 1213 f., 1222 f. (1992); B.S. Markesinis, La perversion des notions de responsabilité civile délictuelle par la pratique de l'assurance, 35 Rev. int. dr. comp. 301 ff. (1983).

[49] R.E. Miller and A. Sarat, Grievances, Claims, and Disputes, 542, 563 (finding that, comparatively, "tort claims are least likely to be contested [therefore reaching the judicial stage]. This reflects, we believe, a highly institutionalized and routinized system of remedies provided by insurance companies, and the well-established customary and legal principles governing behavior in this area").

[50] M. Galanter, Real World Torts, 1101–1102.

which ultimately will proceed up to the top of the pyramid.[51] On the one hand, as we have said, the availability of official law and judicial adjudication impinges on the dynamics of these networks, and the layers in which they unfold. On the other hand, the backbone of values and legal cultures forges unofficial rules and means of dispute resolution, which in turn influence the way in which official legal layers are accessed, interpreted, and administered, as the following sections aim to show.

5. INJURY

We have repeatedly stressed in this chapter that tort law notions and practices vary across different social and cultural settings. We are going to further illustrate this statement with some observations about causation (section 6), fault (section 7), victims and wrongdoers (section 8), as well as on compensation and possible remedies (section 9). But first in order comes the diversified notion of injury.

At the basis of the dispute pyramid, and at the core of any tort law system, there is the injury, the harm entailing the violation or deprivation of something to which one feels one is entitled. Some maintain that injuries can be seen as cultural constructions.[52] One can agree or not. What seems clear is that it is sufficient to extend the time horizon, or widen the view beyond the boundaries of a given legal tradition, to appreciate how the notion of injury is bound up with theories of justice, images of personal wholeness, and visions of social bonds.[53]

We all know, for example, that what for one person may be an injury for which another is liable may appear to somebody else as a little accident of life, a part of the great sea of troubles, discomfort, and losses that regularly affect human beings, and that one should handle by oneself.[54] Differences in reaction are often related to people's culture. Social sensitivity to interpret situations, as well as membership of a particular class, group, race, or gender, may shape the existence, nature, and perception of the harm. At the same time, injuries cannot be disentangled from the economic, political, and social forces at work in the cultural context against which wrongs are perceived. These factors, attaching a sense of harm to certain events and not to others, play a

---

[51] M. Bussani, Il diritto dell'Occidente, 144–146; R.E. Miller and A. Sarat, Grievances, Claims, and Disputes, 529, 531.

[52] See, for instance, M. Galanter, The Dialectic of Injury and Remedy, 44 Loy. L.A. L. Rev. 1, 2 (2010).

[53] M. Galanter, The Dialectic of Injury and Remedy, 2; D.M. Engel, The Cultural Interpretation of Injury and Causation, 44 Loy. L.A. L. Rev. 33, 37–40 (2010); D.N. Scott, Body Polluted: Questions of Scale, Gender, and Remedy, 44 Loy. L.A. L. Rev. 121, 133 (2010); J. Conaghan, Law, Harm, and Redress: A Feminist Perspective, 22 Leg. Stud. 319, 321 (2002).

[54] M. Galanter, Real World Torts, 1099. Think of people's reactions to (what would objectively amount to) ethnic, religious, or sexual discrimination. Many victims of discrimination speak up against the party responsible for the perceived harm but many others may feel no sense of entitlement vis-à-vis that party. To the contrary, they may respond to the violations of their dignity with passive acceptance and resignation, or may be guided by an ethic of tolerance, or of survival that encourages either endurance or self-sacrifice, rather than complaint: R.E. Miller and A. Sarat, Grievances, Claims, and Disputes, 549, 556, 561.

crucial role in determining social and individual perceptions of injuries and in providing the connection between the modification of one's conditions and the subjective response to that modification. Evolution of these elements often results in changing perceptions of injuries. Other factors that may further influence the way in which injuries are understood are advances in science, technology, and the ability to prevent the harm, as well as shifts in the framework of social meanings attached to certain events, interests, and behaviors.[55]

A series of examples will help illustrate what we mean.

1. *The relevance of time.* Let us take the easiest of the possible Western-based examples. Think of how discoveries of medical science have altered our knowledge of human health and pathology, and moved the line between unavoidable adversity and remediable medical injury. Diseases that have always been considered as mere misfortunes or as the capricious acts of a malevolent God may cease to be seen as such, and appear as the result of an act or an omission of some external agent, who could have prevented or cured the disease itself.[56] Further, and in broader terms, one may think of how our understandings of the relationship between people and things, and of the nature and scope of property rights, impact on our appreciation of harms and losses. In many societies, such as Ancient Rome or the antebellum Southern states of the United States, slavery was legally accepted. In these contexts, slaves were regarded as physical objects, and personal injuries to slaves were treated as property damage to the slaveholder, rather than injury to the slaves themselves.[57] Both under Roman law and in antebellum America (Northern and Southern states alike), the same idea according to which individuals may hold property interests in the body of others applied to women. A man was thus allowed (that is to say, was the only one allowed) to sue his daughter's or female servant's seducer for the damage that the latter caused to his honor or social status. Then, especially when seduction resulted in pregnancy, the claim could be for the loss of service and household labor that followed the "wrong."[58]
2. *The relevance of space.* Even setting the historical perspective aside, the cultural nature of injury clearly emerges from current cross-cultural comparisons. Let us take the case of a car accident caused by a driver's negligence, in which another blameless driver suffers a bodily injury. In the West, one would usually expect the victim of such an accident either to sue the tortfeasor, or to settle with her own or the other driver's insurance company, and to get compensation for the economic

---

[55] R.E. Miller and A. Sarat, Grievances, Claims, and Disputes, 562; see also J. Sanders and V.L. Hamilton, Is There a "Common Law" of Responsibility? The Effect of Demographic Variables on Judgments of Wrongdoing, 11 L. & Hum. Behavior 277–297 (1987).

[56] M. Galanter, The Dialectic of Injury and Remedy, 4–5.

[57] J. Gordley and A.T. von Mehren, An Introduction to the Comparative Study of Private Law, CUP, 2006, 383 (Roman law); M. Chamallas and J.B. Wriggins, The Measure of Injury: Race, Gender, and Tort Law, NYU P., 2010, 35 (United States).

[58] M. Galanter, The Dialectic of Injury and Remedy, 6; D.M. Engel, The Cultural Interpretation of Injury and Causation, 49; K.A. Sloan, Runaway Daughters. Seduction, Elopement, and Honor, U. New Mexico P., 2008, 39–42.

and/or non-economic losses she sustained as a consequence of her bodily impairment.[59] As said above in section 3, such expectation may sometimes prove unfounded, especially where unofficial rules and practices may deeply affect people's reaction to injuries.[60]

Outside the West, what is remarkable is how differently the same events may be perceived, not to mention dealt with. For instance, some empirical studies have shown that, in rural zones of Northern Thailand, innocent victims of car accidents will believe that, if they get injured (even seriously[61]), "it was just their time to be injured," and will therefore tend to blame their own *karma* rather than the other driver's negligent behavior.[62] This is not to say that Thai people do not conceive the accident as an injurious experience. They do. Yet, the emphasis of their concerns is placed on the disruption the accident has caused to the spiritual elements which accompany every human being rather than on the harm done to their body. Their personal injuries are thus not relevant per se, but as a symptom of some disturbances in the flow of spiritual forces[63] – and it is such disturbances that the wrongdoer is expected to address.

Cultural variances in the understanding of the notion of injury are pronounced within the Western hemisphere as well. Giving birth to a healthy child because of a doctor's negligence in performing either an abortion or a sterilization procedure, or in advising the parents after the procedure is carried out, may be seen as no injury at all in largely Catholic countries such as France, Italy, and Austria. In these jurisdictions, the birth of a child cannot, in and of itself, be conceived as a harm that can be legally compensated.[64] The same event, however, would be considered a harm, and would open the door to compensation of non-economic damages in non (majoritarian) Catholic countries, such as Germany, England, and most of the States in the U.S. Yet, in England and in the United States, where damages for pain and suffering are awarded in these cases, the unwanted pregnancy is conceived of as harmful because of the doctor's infringement of the autonomy and freedom of choice of the unwilling mother,[65] while in Germany the

---

[59] D.M. Engel, The Cultural Interpretation of Injury and Causation, 44–45.

[60] D.M. Engel, The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community, 18 L. & Soc. Rev. 551–582 (1984) (presenting findings from a study of official and unofficial resolution of injury cases in a small community in the American Midwest).

[61] D.M. Engel, The Cultural Interpretation of Injury and Causation, 46.

[62] D.M. Engel, The Cultural Interpretation of Injury and Causation, 44.

[63] D.M. Engel, The Cultural Interpretation of Injury and Causation, 49. For the role that ancestral spirits may play in African tribal societies, see M. Gluckman, Politics, Law and Ritual in Tribal Society, Basic Blackwell, 1971, 226–229.

[64] Compare Cass., 25 June 1991, in D., 1991, Jur., 566; Cass., 8 July 1994, n. 6464, in NGCC, 1995, I, 1111; OGH 14 September 2006, 6Ob101/06f, in ÖJZ, 2006, 171.

[65] Compare McFarlane v. Tayside Health Board Appellants [2000] 2 AC 59, and M.A. v. United States, 951 P.2d 851 (Alaska 1998).

pregnancy is relevant because it counts as an injury to the woman's health and body under § 253(2) BGB.[66]

As the above mentioned examples show, differences in the economic, cultural, and religious contexts against which injurious events take place may influence how those events are perceived and dealt with, by impacting the understanding of what injuries are and what causes them. From this point of view, the notion of injury appears to be inextricably intertwined with that of causation and attribution of responsibility, to which we now turn our attention.

6. THE VARIABILITY OF CAUSATION

Under any legal system, for the plaintiff to prevail in a tort law claim, she has to demonstrate that there exists a sufficiently close, but-for causal relationship between the wrongdoer's behavior/activity and the damage she suffered. Typically causation cannot be established when a force majeure event, that is to say, a factor beyond the defendant's control, which she could neither foresee nor avoid, contributed to the production of the harm. In the latter case the causal link between the wrongdoer's behavior/activity and the victim's harm is deemed broken.[67]

On the surface it may seem that causation and force majeure imply purely objective assessments of facts. Such impression, however, would be misleading. Psychologists and neuroscientists have long demonstrated that judgments about causation and impossibility are not so much determined by the underlying, allegedly "objective" sequence of events to be evaluated, as they are by the constraints in the evaluator's knowledge structure.[68] These constraints may lead us to accept intuitions about causation that are affected by cognitive biases. For example, without being aware of it, people tend to react with heightened negativity towards individuals associated with an injury when these individuals are not members of the same group, or to modify their sympathy towards the victim depending upon the total number of victims, or to alter their "attributions" in light of the "attributions" that others make against the same facts.[69] From this perspective, judgments about causation tend to reflect our cognitive

---

[66] See e.g. BGH 8 July 2008, Case VI ZR 259/06, NJW, 2008, 2846. To be noted is that in Germany – differently from England and the U.S. – the plaintiff may recover also the costs of bringing up the child: compare BGH, 16 November 1993, NJW 1994, 788, with McFarlane v. Tayside Health Board Appellants [2000] 2 AC 59; Rees v. Darlington Memorial Hospital [2003] UKHL 52, and M.A. v. United States, 951 P.2d 851 (Alaska 1998).

[67] The possible citations are endless. In the comparative perspective, suffice it to refer to A.M. Honoré, Causation and Remoteness of Damage, in International Encyclopedia of Comparative Law, vol. XI, ch. 7, Mohr Siebeck, 1971, 3, 7, as well as Chapter 13 in this volume.

[68] J.D. Hanson and M. McCann, Situationist Torts, 1369–1375; M. Chamallas and J.B. Wriggins, The Measure of Injury, 125, 128; J.K. Robbennolt, Apologies and Reasonableness: Some Implications of Psychology for Torts, 59 DePaul L. Rev. 489, 492, 511 (2010); J.D. Hanson and D. Yosifon, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics and Deep Capture, 152 U. Pa. L. Rev. 129, 136–139 (2003).

[69] See J.D. Hanson and M. McCann, Situationist Torts, 1370.

and meta-cognitive errors, our own implicit motives, that is, our need to defend, bolster, and rationalize the interests of our self, and of the group(s) to which we belong.[70]

This is not all. In many quarters it has been argued that notions of causation and force majeure remain nothing more than cultural constructs. Like the perception of injuries, understandings of causation and force majeure will depend upon people's considerations for their, and others' behavior, upon their apprehension of the dividing line between natural and social phenomena, upon their visions of justice, and of the society in which they live. From this point of view, our convictions about the forces shaping the world, and our assumptions about the distinction between nature and human agency, between what is beyond and what is within human control, are all inherently flexible, and entirely context-dependent.[71]

Let us take the example of traditional Southeastern Asian theories of illness causation. When the victim of a negligently caused accident develops a mental illness, traditional Asian accounts for the impairment of mental health tend not to look at the impairment as a physiological consequence of some traumatic experience sustained by the victim, but rather attribute the illness to supernatural factors. The latter can stem from some asymmetry in the forces governing the natural world – such as imbalances in the qualities of *yin* and *yang* in Chinese culture, or of *am* and *duong* in Vietnamese culture[72] – or the heavy burden of *karma* that the Thai victim may carry because of non-meritorious acts she had committed in the past or in her previous lives.[73] When a victim blames those forces or her *karma* for her mental harm, she is reconstructing the etiology of the events in light of her traditional knowledge about human affairs. Against such a picture, the fault of the person who caused the accident may appear an event of minor importance, and may not even look like the "real" cause of the damage.[74]

Similarly, it has been noted that in some Sub-Saharan communities it is the beliefs in witchcraft that explain why a man gets injured or dies. In these cases it may be clear that the man was hit or killed by somebody else, but what is deemed to be more important is the internal enemy, the witch, which caused that particular injury or death:[75]

---

[70] Id., at 1370.

[71] See the authors quoted in the following footnotes, 72–77.

[72] L. Andary, Y. Stock, and S. Klimidis, Assessing Mental Health Across Cultures, Australian Academic P., 2003, 104–105.

[73] As it may be the belief in Thailand: D.M. Engel, The Cultural Interpretation of Injury and Causation, 47–49, 55–59.

[74] D.M. Engel, The Cultural Interpretation of Injury and Causation, 47–49, 55–59; L. Andary, Y. Stock, and S. Klimidis, Assessing Mental Health Across Cultures, 105. For other possible examples outside Asia, compare J. Peoples and G. Bailey, Humanity. An Introduction to Cultural Anthropology, Wadsworth, 2012, 9th ed., 414–416 (Navajo culture); G.M. Foster, Disease Etiologies in Non-Western Medical Systems, in S. van der Geest and A. Rienks (eds.), The Art of Medical Anthropology. Readings, Het Spinhuis Publishers, 1998, 145–146 (Latin America); J. Vanderlinden, Anthropologie juridique, Dalloz, 1996, 111 (Azande); R. Pool, Dialogue and the Interpretation of Illness. Conversations in a Cameroon Village, Berg Publishers, 1994, 108–135 (Cameroon); J.P.S. McLaren, The Origin of Tortious Liability: Insights from Contemporary Tribal Societies, 25 U. Tor. L.J. 42, 69–90 (1975) (Azande, Nuer, Zulu).

[75] M. Gluckman, Politics, Law and Ritual in Tribal Society, 216–223. See also id., Custom and Conflict in Africa, Basic Blackwell, 1973, 81–108.

> In the first place, if the spirits or God have been moved to wrath it will often be in response to some offence or breach of morality which the dead or injured person has himself committed. … Secondly, where the spirit is seen as operating through a human medium, this does not imply that the individual physically responsible is the witting partner in the enterprise. … The random selection of a human being as an agent for supernatural caprice does not have much appeal as a basis for finding that person liable for any harm which is caused.[76]

The witch being the sole cause of the victim's injury or death, there is no reason to blame as its real author the individual who actually produced the accident.

To lift the veil of alleged objectivity surrounding assessments of causation and force majeure is equally easy and telling in Western settings. Passing of time provides us, as always, with good examples of diversity. Suffice it to think – again – of how changes in knowledge and technology have influenced our conception of the notion of justice by including once considered "natural," uncontrollable events among the circumstances that someone is supposed to prevent or regulate. Because of the improved human capability in understanding and controlling diseases, hurricanes, earthquakes, and climate changes, these events may cease to appear as inalterable fates, and may come to be seen as having their origins in human action or inaction, as the product of inappropriate policy or interventions. Growth of human knowledge, advances in technical feasibility, and rising expectations of amenity and safety may thus expand the sphere of what is considered an injury caused by a human agent, propelling so-called "natural" events from the realm of fate into the realm of what we have named "grievances."[77]

Among the many possible instances, a good case in point is given by the development of remedies for wrongful birth in the United States and in France. Prior to the 1960s, claims in which a woman alleged that a doctor's negligence in providing her with adequate prenatal treatment or advice resulted in the birth of a child with serious genetic disorders were virtually unknown anywhere. Things had changed by the 1970s. On the technological side, scientific developments around genetic risks to fetuses made it possible to predict higher risks of congenital anomalies. On the cultural side, a shift in women's social status fostered the idea that women could assert (in tort, too) a right to control their own reproduction, and to address complaints against those who interfered with such right.[78]

In 1973 the United States Supreme Court deemed abortion a fundamental right under the U.S. Constitution[79] and in 1975 abortion was legalized by law in France.[80] In the United States, as in France, initial battles over recognition of a cause of action for wrongful birth were largely fought over the terrain of causation. Although acknowledging the doctor's negligence towards the patient, courts generally dismissed these claims for lack of but-for causation. According to them, there was nothing that the defendants

---

[76] J.P.S. McLaren, The Origin of Tortious Liability, 80–81.

[77] See above, n. 4; compare also M. Galanter, The Dialectic of Injury and Remedy, 5–6; J.M. Fraley, Re-examining Acts of God, 27 Pace Envtl. L. Rev. 669, 683–689 (2010).

[78] M. Chamallas and J.B. Wriggins, The Measure of Injury, 129.

[79] Roe v. Wade, 410 U.S. 113 (1973).

[80] Law no. 75-17 of 18 January 1975.

could have done that would have decreased the likelihood that the infant would be born with defects. As a consequence, the conduct of defendants could not be considered the cause of the baby's condition.[81] By the end of the 1980s in the United States, and the end of the 1990s in France, however, changes in available medical technologies and in social practices relating to abortion and reproductive choices ended up determining a shift in the notion of injury and causal attribution. In both countries, courts commenced regarding reproduction not as a normal, inexorable process leading to a child's birth, but rather as a mutable process, subject to human intervention. Judges became able to attribute the injury to sources beyond the body of the woman herself, to conceive the injury as a dignitary harm to the woman, and to place some responsibility on the treating physician. At this point, proof of but-for causation was no more considered as an insuperable obstacle to compensation. Courts started reasoning that had the doctor made a careful use of diagnostic techniques, or had he properly counseled the mother, she could have secured an abortion and would not have incurred the emotional and financial expense of raising an impaired child.[82]

The above illustrations show how tort law conflicts fuel a continual process of experimentation, monitoring, and adjustment in light of ever-changing scientific, economic, social, and cultural paradigms. Through decentralized, overlapping, and continually evolving interventions of private actors, each operating at different levels and from different spheres of authority, tort law adjudication constantly reshapes social ideas and practices about injuries, causal attribution, and responsibility, and pushes law to move in response to its challenges.[83]

7. LIABILITY REGIMES

As far as liability regimes are concerned, one may at first sight observe two macro-alternatives. The wrongdoer might bear liability irrespective of her state of mind; or there may be liability only if she acted wrongfully, that is to say, acted negligently or with the intention to cause the harm. However, since theories of blame and expectations about what a reasonable behavior is reflect a society's views about what is subjectively

---

[81] Compare, for instance, Azzolino v. Dingfelder, 337 S.E 2d 528 (N.C. 1985) and Conseil d'Etat, 14 February 1997, in JCP G 1997, II, 22828. On these lines of case law, see M. Chamallas and J.B. Wriggins, The Measure of Injury, 135–137.

[82] In the United States, see, for instance, Smith v. Cote, 513 A.2d 341 (N.H. 1986); in France, see the well-known Perruche case Cass., Ass. Plén., 17 November 2000, in JCP, II, 10438. The compensation rule established by the Perruche judgment, however, was some years later reversed by the legislator (see Art. 1, law 2002-303 of 4 March 2002).

From the perspective of this chapter, the reversal of the Perruche ruling in France, and the rise of anti-abortion culture in the United States (and elsewhere in the West: see, e.g., J. Outshoorn, The Stability of Compromise: Abortion Politics in Western Europe, in M. Githens and D. McBride Stetson (eds.), Abortion Politics: Public Policy in Cross-Cultural Perspective, Routledge, 2013, 145 f.), are further evidence of how relentless is the dynamics of social and legal change.

[83] Among others, see D.A. Kysar, What Climate Change Can Do about Tort Law, 41 Envtl. L. 1, 5–7 (2011).

possible, ordinary, and approved by its members,[84] the breadth and content of the negligent and/or intentional tort liability rules may vary considerably across cultures.[85]

In the West, it is well known that legal scholars, historians, and anthropologists disagree on the role of fault and no-fault models in the development of tort law. Many hold that liability was historically based on causation and damage alone. According to this view, "primitive" legal cultures disregarded, in the process of allocation of responsibility, the subjective, individual, "moral" aspects of conduct, which by contrast underlie the very idea of accountability in modern societies.[86] Others emphasize the historical inaccuracy and over-simplifying analysis underpinning this "evolutionary" scheme, from strict liability to negligence, from collective to individual responsibility, from "uncivilized" to "civilized" tort law systems.[87] This is not the place to survey in detail the contents of the debate. What is worth doing, however, is to briefly investigate its basic assumptions, according to which strict liability rules and fault liability rules could always be distinguished and opposed as the extreme ends of the liability spectrum.

In the judicial adjudication of tort claims, there is no doubt that, whatever the forms taken by official liability rules, lawyers and courts have at their disposal a range of different techniques to produce complex amalgams of the two types of liability, thus making any binary classification scheme too simplistic.[88] In many cases, it is sufficient to interpret the "reasonable person" standard for negligence liability in objective terms, to hold people liable for accidents that they could not have avoided even if they did

---

[84] That the "reasonable person" standard is a culturally biased model is clearly shown by the way it was historically conceived of in Western jurisdictions until the late twentieth century. The "reasonable person" was embodied by a "reasonable man" in common law countries and a "bonus pater familias" (i.e., a "good father of the family") in the civil law tradition, a male who was an idealized, stereotypical white, adult, middle-class, and healthy person (G. Calabresi, Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem, 22–25; M. Bussani, La colpa soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale, Cedam, 1991; see also M. Chamallas and J.B. Wriggins, The Measure of Injury, 89–117; C.A. Forell and D.M. Matthews, A Law of Her Own: The Reasonable Woman as a Measure of Man, NYU P., 2000, esp. 3–7). Moreover, basic psychology tells us that there are many cognitive and meta-cognitive biases affecting our judgments on the reasonableness of our and others' behavior: for a review of the most common amidst these biases, see J.K. Robbennolt, Apologies and Reasonableness, 498–499, 501–502, 504–505.

[85] D.M. Engel and M. McCann, Introduction, in id. (eds.), Tort Law as a Cultural Practice, 2; D.M. Engel, The Cultural Interpretation of Injury and Causation, 46.

[86] E.g.: R. von Jhering, Das Shuldmoment in römischen Privatrecht, Giessen, 1867, 8–9, 20; R. Pound, The Spirit of the Common Law, Beacon P., 1963 (orig. ed. 1921), 5, 140–141.

[87] See for instance S.G. Gilles, Inevitable Accident in Classical English Tort Law, 43 Emory L.J. 575, 576 (1994); R.L. Rabin, The Historical Development of the Fault Principle: A Reinterpretation, 15 Ga. L. Rev. 925, 959–961 (1981).

[88] Compare, for instance, F. Werro and V.V. Palmer (eds.), The Boundaries of Strict Liability in European Tort Law, Carolina Academic P., 2004, 7, 13; P. Cane, Fault and Strict Liability for Harm in Tort Law, in W. Swadling and G. Jones (eds.), The Search For Principle: Essays in Honour of Lord Goff of Chieveley, OUP, 1999, 171, 172.

their best.[89] Presumptions of fault may be construed so strictly as to make it impossible to rebut them.[90] Conversely, a person whose actions were blameless may escape strict liability simply because, in the judge's eyes, the kind of damages that she caused did not result from the risks typically associated with her activity.[91]

The contrast between strict and fault liability rules is overdrawn also with regard to settings where official legal layers, if not absent, are largely weakened. As many legal anthropologists have stressed, close studies of nominally strict liability systems in non-Western societies show how much room is left, in those very settings, for consideration of the wrongdoer's state of mind.[92] Indonesian Dou Donggo law, for instance, imposes "stricter than strict" liability on people for accidents that they "might" have provoked, regardless of whether or not they actually caused them. In other words, Dou Donggo tort law is less concerned with what actually happened than it is with what could have happened. Potential might-have-been tortfeasors may be held liable as well as real ones (i.e., those who actually caused the damage). So, for instance, when a Dou Donggo man swings a stick at a goat to scare it off, and the goat is later found beaten to death in the bush, the man is liable for the animal's death even if his stick never hit the animal. Among the Dou Donggo, causation and intentionality may be irrelevant; a potentially harmful behavior may be sufficient for tort liability.[93] But the Dou Donggo operate such a "stricter than strict" system without sacrificing equity. Societal judgments about the liability of might-have-been tortfeasors are based on the latter's capacity to control their tempers, passions, and emotions, and on the respect they showed for the Dou Donggo's moral and social values about the proper relationship between members of society and human nature. From this point of view, Dou Donggo judgments are grounded upon a precise and deep sense of culpability, and are much more akin to the values undergirding the Western notion of negligence than to what is usually implied by reference to strict liability.[94]

Under Melanesian Kwaio tort law, when a person's actions result in another's death, the general rule is that compensation must be paid to the deceased's family regardless of the intent or negligence of those who are required to make the payment. In a classic Kwaio example, if a person suffers a fatal fall on her way to a feast, the sponsor of the feast must pay death compensation. The argument is that, had the host not held the

---

[89] M. Bussani, Negligence and Fault: Underneath the Veil, in Essays in Honour of Professor Konstantinos Kerameus, Ant. N. Sakkoulas-Bruylant, 2009, 183, 190 f.; id., La responsabilité des sujets atteints de troubles mentaux en Italie et en common law, in Gaz. Pal., n. 45/46, 1997, 11 f.

[90] F. Werro and V.V. Palmer (eds.), The Boundaries of Strict Liability, 6.

[91] F. Werro and V.V. Palmer (eds.), The Boundaries of Strict Liability, 7.

[92] See, among others, P. Just, Dou Donggo Justice. Conflict and Morality in an Indonesian Society, Rowman and Littlefield, 2001, esp. 210 ff.; J.P.S. McLaren, The Origin of Tortious Liability, 50–78 (providing many examples of absolute, strict, and fault liability rules in contemporary tribal cultures). See also Gluckman's The Ideas in Barotse Jurisprudence, Institute for African Studies, 1965, where the author argues that Sub-Saharan traditional law of injury is based on strict liability, and yet the mental element of wrongs is always taken into account, as "what a reasonable man in those social circumstances would have felt" (id., 213).

[93] P. Just, Dead Goats and Broken Betrothals: Liability and Equity in Dou Donggo Law, 17 Am. Ethn. 75, 81–82 (1990).

[94] P. Just, Dou Donggo Justice, 210 f.

event, the victim would not have been walking where the accident occurred.[95] The solution, however, cannot be viewed as a sheer application of strict liability rules (or even of some negligence doctrines that impose liability on hosts, such as 'dram-shop' liability[96]). Anthropological studies have shown that Kwaio legal culture never disregards the consideration of the wrongdoer's state of mind. On the one hand, the latter's intention to harm may be taken into account to heighten the amount of death compensation. On the other hand, an absence of fault on the part of who, under (what we would name) strict liability rules, should be liable for the accident, does not free her from the obligation to pay the death compensation, but obliges the deceased's family to give back to the blameless killer all or part of the payment received. A common practice is that the family asks the killer to afford the costs of burying the deceased, for which service they would give a payment in return.[97]

8. LOSS-SUFFERERS AND LOSS-MAKERS

Across time and legal cultures, what is evident is the wide differences concerning not only the addressees and beneficiaries of liability regimes, but also the relevance of social relationships to tort liability.[98] Any society develops sets of notions, concepts, and practices about people's status within that society. The same holds true as to the manufacturing of the sense of identity and group-belonging,[99] the views on the bonds tying people together, and, consequently, as to who can be regarded as the victim of a tort, who is entitled to claim compensation, and against whom.

Western tort law teachings, for instance, traditionally focus on individuals – whether persons or entities – both as agents of wrongs and as the bearers of injury.[100] In contrast, as we have said above, in section 4, many cultures regard injurious experiences as wrongs to the group in which victims and harmdoers hold membership. In these societies, committing a tort sets up a status relationship between the parties and their groups, a relationship which has to be adjusted through some form of remedy. Thus – it has been noted[101] – an accident involving two persons may, rather than giving

---

[95] Hosts are also responsible for any other misfortunes that occur at, or in consequence of, the feast. See D. Akin, Compensation and the Melanesian State: Why the Kwaio Keep Claiming, 11 The Contemporary Pacific 35, 45 (1999).

[96] As is well known, especially in the U.S., dram-shops may be held liable for the torts committed by their intoxicated clients: see for instance F.A. Sloan, Drinkers, Drivers, and Bartenders: Balancing Private Choices and Public Accountability, U. Chicago P., 2000, 91 f.

[97] D. Akin, Compensation and the Melanesian State, 45.

[98] S. Falk Moore, Law as Process: An Anthropological Approach, International African Institute, 1978, 91.

[99] M. Bussani, Il diritto dell'Occidente144–148, and further references therein.

[100] M. Cappelletti and B. Garth, An Introduction, in M. Cappelletti (ed.), Access to Justice and the Welfare State, EUI, 1981, 13–14; L. Friedman, Claims, Disputes, Conflicts and the Modern Welfare State, ibid., 251, 259–261.

[101] M. Gluckman, Politics, Law, and Ritual in Tribal Society, 183–196; S. Falk Moore, Law as Process: An Anthropological Approach, 91; see also J.M. Diamond, The World until Yesterday. What Can We Learn from Traditional Societies?, Allen Lane, 2012, 79–95.

rise to a "private" dispute between these subjects, expand to the group and become a "public" dispute, with a wide range of potential political and social consequences for the communities involved.

The latter pattern is manifest in traditions where tort law obligations and injuries are assessed in terms of breach of the supernatural or intra-group harmony. When liability is linked to the sacred, as happens, for example, under traditional customary law of Sub-Saharan Africa,[102] harm done to a member of a community is believed to injure all the other members of the same community. This is because personhood among villagers is traditionally understood to be relational. Similarly, in rural Northern Thailand[103] – to give another example – each member of the close-knit farming community is connected to others by the *khwan*, an essential life force found in all living beings. When a person suffers a trauma, the *khwan* may fly out of her body, causing her physical or psychological malaise and rendering her a dysfunctional and potentially harmful member of the community. Since the escape of the *khwan* affects the entire network of villagers, customary law provides that the entire community has a stake in seeing that the injurer pays compensation by sustaining the costs of the rituals to recall the fleeing *khwan*.[104]

A similar "collective" understanding of victims and wrongdoers prevails in many other societies, where torts are usually seen as rupturing the bonds among the members of the community and their families, threatening the essence of families' identity and their place within society. Going back to Sub-Saharan Africa, if a member of a family is insulted, or a woman is abducted against her will or the consent of her relatives, it is on the victim's family that the burden of the harm falls – and, conversely, it is up to the wrongdoer's family to remedy the situation. Initiating a complaint is thus not a matter of individual interest only. At the forefront there is always the collective interest in addressing conduct that may disrupt the harmony of the society. Consequently, compensation is most often paid to the kin of the victim by that of the wrongdoer, rather than to the victim by the wrongdoer herself. This way, collective responsibility rules function as instruments of peacekeeping, providing an efficient tool to spread the loss among the group, and encouraging groups to police themselves to prevent their members from committing wrongs that might put the subsistence of the group at risk.[105] It is a corollary to such conception that no "tort" devices apply when both the offender and the victim are members of the same group, because those who would be obliged to pay are the same people who would receive the payment.[106]

All the above may look foreign to Western legal cultures, but only at first sight. Still now, in the West, there are special "group" liability rules for children and mentally handicapped or mentally ill people. Moreover, Western tort law has for centuries taken

---

[102] R. Sacco, Anthropologie juridique, 203, 247.

[103] D.M. Engel, The Cultural Interpretation of Injury and Causation, 46–48.

[104] Ibid.

[105] J.A. Davies and D.N. Dabganja, The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective, 26 Ariz. J. Int'l & Comp. L. 303, 308–309 (2009) (Ghana); M. Bussani, Tort Law and Development, 48 (Ethiopia and Eritrea); more in general, R. Sacco, Anthropologie juridique, 203, 247; J.M. Diamond, The World Until Yesterday, 81–91.

[106] M. Gluckman, The Ideas in Barotse Jurisprudence, 235–238; R. Sacco, Anthropologie juridique, 249.

little or no account of the harm done to, and received by, individuals such as servants, slaves, women, elders, minors, and people with disabilities. As we have already reminded the reader (see above, section 5), when harm done to these subjects was relevant, it was because injuries were perceived essentially as an offense against the social group (family or lordship) to which the victim belonged. It was the head of the family, or the lord, who was entitled to receive compensation for the victim's loss, not the victim herself. And, conversely, it was the head of the family, or the lord, who was obliged to pay compensation for the harm caused by the persons subjected to his authority.[107]

The point is that this shift – from the level of individuals to that of the group – is not confined to our past. Today's tort lawsuits are mostly about getting monetary compensation. Despite claims that Western tort law is premised on the notion of individual autonomy, in most of these conflicts the real wrongdoer is not the subject who bears the economic consequences of her acts or omissions. The one who foots the bill for the wrongdoer (besides families, employers, and other vicariously liable defendants) most often is her public insurance scheme or private insurance company. Public insurers pay damages out of the public pocket filled with (national) taxpayers' money, and private insurers do the same out of the pool companies have built up out of premiums paid by (the group of) all their customers, including the defendant. Thus, insurance operates as a form of collective responsibility, in which taxpayers and/or the group of customers of the same insurer participate in the pool of assets that serves as a resource out of which to pay legal claims.[108] As should be clear, the substitution of the insurer for the actual tortfeasor is made possible by our notion of injury, according to which every interest and value can be commodified and monetized for tort law purposes. In other terms, as we said above (section 5), our ideas about what liability is, are interconnected with the way in which we frame the notion of injury.[109] These ideas and frameworks deeply affect our understanding of the subjects who should be obliged to redress the injury, and how they should do it. This straightforwardly brings our journey to its last stop, in the realm of remedies.

9. MAKING GOOD THE LOSS

Like the notions of injury, wrongdoer, victim, or of tort itself, the notion of remedy is a cultural construct. What satisfies our sense of an appropriate and adequate response to the wrong clearly depends upon the cultural presuppositions that we bring to the fore, and primarily upon how we conceive injuries, and the goals of tort law mechanisms – amidst compensation, deterrence/punishment, efficiency, restoration of social harmony,

---

[107] See the authors quoted above, fn. 106.

[108] T. Baker, Blood Money, New Money and the Moral Economy of Tort Law in Action, 35 L. & Soc. Rev. 275–319 (2001) (also discussing the residual role that compensation paid by the actual tortfeasor plays within the U.S. system); see also R. Lewis and A. Morris, Tort Law Culture in the United Kingdom, 234–236; P. Cane, The Anatomy of Tort Law, Hart, 1997, 219–220; S. Falk Moore, Law as Process, 115–116.

[109] See above, section 5.

maintenance of honor, and social and economic development.[110] Further, there is a mutually constitutive relationship between injuries and remedies, insofar as the remedy itself, or the process of seeking the remedy, or the negotiation of an alternative to the remedy, may ultimately transform the victim's perception of the injury itself.[111]

For instance, Western tort law cultures underscore personal autonomy, individual rights, and the adjudication of rights through litigation as means to vindicate and protect interests, values, and prerogatives that are deemed as socially relevant. Injuries can be, and ought to be (mainly) replaced by money.[112] The emphasis placed by Western tort laws on the monetization of losses' compensation deeply influences the selection and the framing of tort law actions. To take but one illustration, the opportunity to ensure collectability of the damages award often leads victims to shape their tort law claims to match some insurance coverage. Since intentional injuries are usually excluded from liability insurance, victims of intentional torts are incentivized to mold their claims to find better candidates for liability. In practice, what could be brought as an intentional tort claim against the actual wrongdoer can be filed in as a negligence tort claim against those – usually insured corporate entities – who allegedly had the duty to refrain or prevent the intentional wrongdoer from injuring the victim (or who can be held responsible under *respondeat superior* for their agent's negligence). The transformation of the complaint thus helps victims to blame a defendant with a deep pocket behind her.[113]

The above beliefs – that money can replace persons, losses, and pain, and that compensation may result from pursuing aggressively a remedy against the wrongdoer through litigation – are alien, or even offensive, to other legal cultures.

We do not find those beliefs, for instance, in societies where the very idea that money can be used as a depersonalized toll for bad behavior, to be quantified by courts, is completely foreign to the local legal tradition. This is the case of societies in which remedying the tort implies rebuilding the spiritual harmony of the community to which the victim belongs.[114] Indeed, in many tribal cultures, when a person is injured, her (matri- or patri-)clan may claim the transfer of cattle and/or women from the injurer's clan.[115] But monetization and depersonalization of tort law claims are also repugnant to

---

[110] M. Galanter, The Dialectic of Injury and Remedy, 2; D.N. Scott, Body Polluted, 24.

[111] M. Galanter, The Dialectic of Injury and Remedy, 3.

[112] D.N. Scott, Body Polluted, 123–124, 141–146; S.S. Lochlann Jain, Injury, esp. 34–36.

[113] T. Baker, Insurance in Sociolegal Research, 6 Ann. Rev. L. & Soc. Sci. 433, 435–436 (2010); see also R. Lewis and A. Morris, Tort Law Culture in the United Kingdom, 242–243; R. Cotterell, Law, Culture and Society. Legal Ideas in the Mirror of Social Theory, Ashgate, 2006, 163–164.

[114] Thus, in rural villages of Northern Thailand, compensation for personal injuries, though it may be monetary, aims to the performance of ceremonies propitiating the ghosts who have been involved in the wrong: D.M. Engel, The Cultural Interpretation of Injury and Causation, 47–49; id., Globalization and the Decline of Legal Consciousness. Torts, Ghosts, and Karma in Thailand, in L.M. Friedman, R. Pérez-Perdomo, and M.A. Gómez (eds.), Law in Many Societies. A Reader, Stanford U.P., 2011, 292–299; D.M. Engel and J.S. Engel, Tort, Custom, and Karma, Stanford U.P., 2010, esp. 47–76; in similar terms, but with regard to African tribal societies, M. Gluckman, Politics, Law and Ritual in Tribal Society, 108.

[115] R. Sacco, Anthropologie juridique, 249; see also C.D. Forde, Double Descent Among the Yako, in A.R. Radcliffe-Brown and C.D. Forde (eds.), African Systems of Kinship and Marriage,

societies whose remedial tort law rules emphasize the restoration of the victim's (or her family's) honor. For instance, under the customary law of Northern Somali tribes, as well as in that of the Albanian mountains, the only satisfactory reparation for killings, injuries, and offenses of someone's honor, is murder.[116] In these contexts, acceptance of blood money as a way of settling the blood feud is seldom accepted (and customary laws of some Albanian regions do not even authorize it[117]), for it is considered an inadequate way to retrieve what is seen as lost for good.[118] Of course, blood, money, and living beings are not the only ways to vindicate a wrong. Other cultures, such as that of Ghana, conceive of tort law rules as a means to restore the plaintiff's and her group's standing within the community. Tribal laws of Ghana often repute that public admission and retraction of the tort are a sufficient remedy. The offender's confession of her disgraceful behavior before her peers provokes jeers and sneers that are often satisfactory to the victim, at least as far as less serious offenses are concerned.[119]

Elsewhere, like in China, cleansing a dishonored reputation through tort law requires the wrongdoer to issue an apology to restore the victim's personality rights in the public eye, and (in recent times) in that of the ruling political party.[120] Apologies are also at the core of the compensation system in the Japanese cultural framework. In Japan, even outside cases of defamation, remedying a tort entails – in addition to or in substitution of the payment of an appropriate sum – a duty to apologize to the victim. The offender should display her willingness to maintain a positive relationship with the

---

Taylor & Francis, 1987, 285, 313–314 (Yako of Nigeria); and S.E. Merry, Relating to the Subjects of Human Rights: The Culture of Agency in Human Rights Discourse, in M. Freeman and D. Napier (eds.), Law and Anthropology. Current Legal Issues, OUP, 2009, 385, 386–387 (Papua New Guinea). In both cases it is the matriclan, and not the patriclan, who is entitled to compensation.

[116] See, respectively, R. Sacco, Il diritto africano, 42, and R.F. Burton, First Footsteps in East Africa, Praeger, 1966 (orig. ed. 1856), 174 (on Somali law); D. Mackenzie Wallace, A Short History of Russia and the Balkan States, Elibron, 2006 (orig. ed. 1914), 89; S. Capra, Albania proibita: il sangue, l'onore e il codice delle montagne, Mimesis, 2000, 188, 194, 199 (on Albanian law).

[117] I. Whitaker, Tribal Structure and National Politics in Albania, 1910–1950, in Association of Social Anthropologists of the Commonwealth (ed.), History and Social Anthropology, Routledge, 1968, 253, 268.

[118] See R. Burton, First Footsteps in East Africa, 174 (Somalia), and I. Whitaker, Tribal Structure and National Politics in Albania, 253, 264–270 (Albania). On blood money under Islamic tort law, see Chapter 19in this volume.

[119] See Chapter 18 in this volume, as well as J.A. Davies and D.N. Dabganja, The Role and Future of Customary Tort Law in Ghana, 314–315.

[120] M. Zhang, Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon, 10 Rich. J. Global L. & Bus. 415, 467–470 (2011); X. Hu, When American Law Meets Chinese Law Eye to Eye: How Two Legal Systems Approach the Duty to Protect, Global Jurist, vol. 10, iss. 2, art. 5, Advances, 2010, 8–13; B. Liebman, Innovation through Intimidation: An Empirical Account of Defamation Litigation in China, 47 Harvard Int'l L. J. 69, 90–93 (2006). Apologies are expressly included in the statutory list of possible remedies for civil wrongs: see Art. 17, no. (8), of the 2009 Tort Liability Law, promulgated on 26 December 2009. Plaintiffs who sue in court usually require monetary damages as well, and there is some evidence that they do not seek to compel enforcement of a judgment directing the defendant to apologize if the defendant pays the damages: B. Liebman, Innovation through Intimidation, 92.

injured person and express feelings of deep regret for what happened. While formal or written apologies are often deemed a sufficient form of reparation, and may relieve the wrongdoer of (both unofficial and official) legal consequences of her misbehavior,[121] an offer of compensation without an apology would unlikely satisfy the victim's needs or expectations.[122]

Notwithstanding the absence of an "official," state-driven enforcement mechanism, unofficial enforcement measures – from the blame of the community to the fear of supernatural reaction – operate well enough to ensure that injurers and victims follow customary procedures.[123] But the point is that, as the above examples show, in the field of remedies there exists a variety of legal solutions, which may combine, sustain, compete, and conflict with one another, across and within the legal systems. To be sure, there are instances in which the mere existence of official (state-posited) law can work as an actual threat upon the injurer in order to have her comply with traditional obligations.[124] Yet, other times, positive legal rules and courts' administration of justice may challenge the authority of customary law. States' tort law procedures may offer remedies unknown or denied under other legal layers,[125] or they may ban the performance of traditional or customary law's rituals and form of redress,[126] thus

---

[121] H. Wagatsuma and A. Rosett, The Implications of Apology, 488. Under Japanese official law, offering an apology, and particularly letters of apology (*shimatsusho*), is an important "condition subsequent to the commission of the offence" which, according to Art. 248 of the Japanese Code of Criminal Procedure, may authorize the prosecutor to choose not to institute official proceedings against the author of a crime (id., 482). For similar observations with regard to Fiji, see L. Hickson, Hierarchy, Conflict, and Apology in Fiji, in K.-F. Koch (ed.), Access to Justice. Anthropological Perspective, Giuffrè-Sijthoff, 1979, 17, 23–24, 27–31. On the role apology may play in Western jurisdictions, and in the United States in particular, see B. Ho and E. Liu, Does Sorry Work? The Impact of Apology Laws on Medical Malpractice, 43 J. Risk & Uncert. 141 (2011); J.K. Robbennolt, Apologies and Reasonableness, 492–494.

[122] H. Wagatsuma and A. Rosett, The Implications of Apology, 462.

[123] L. Heckendorn Urscheler, Innovation in a Hybrid System, 109–111 (Nepal); D.M. Engel, The Cultural Interpretation of Injury and Causation, 65 (Thailand); M. Bussani, Tort Law and Development, 48 (Ethiopia and Eritrea).

[124] D.M. Engel, The Cultural Interpretation of Injury and Causation, 65 (citing the example of the enforcement of Thai customary rules of compensation through the threat of bringing claim before courts under official Thai law).

[125] M.O. Hinz, Traditional Authorities: Custodians of Customary Law Development, in J. Fenrich, P. Galizzi, and T.E. Higgins (eds.), The Future of African Customary Law, CUP, 2011, 153, 164 (suggesting that judicial administration of criminal law penalties under official Namibian law has propelled changes in Ukwangali customary law – the customary law of the Western part of the Kavango region –, leading traditional courts to take into account the existence of these penalties in assessing damages); A. Blecher-Prigat and B. Shmueli, The Interplay Between Tort Law and Religious Family Law: The Israeli Case, 26 Ariz. J. Int'l & Comp. L. 279, 285–288 (2009) (stating that Israeli judicial administration of tort law remedies in family matters is eroding the jurisdiction of rabbinical courts on family law issues, traditionally regulated by religious law).

[126] M. Strathern, Losing (Out On) Intellectual Resources, in A. Pottage and M. Mundy (eds.), Law, Anthropology, and the Constitution of the Social: Making Persons and Things, CUP, 2004, 201, 204–209 (referring judicial judgments in Papua New Guinea refraining local tribes from transferring women as blood money in case of a killing); D. Akin, Compensation and the

initiating complex, mutually constitutive processes of erosion, adaptation, and resistance, which may involve the transformation of all the legal layers concerned (both official and unofficial ones).[127]

10. CONCLUSIONS

Within and outside the legal discourse, Western understandings of tort law usually represent tort law as a mix of rules, institutions, and procedures, administered and governed by official legal actors – parliaments, courts, lawyers, and legal scholars. Similar accounts of tort law are widespread and uncontested, yet – as we have seen – they fail to do justice to the overall role that tort law plays in societies. What these accounts miss is that tort law does not only live in parliaments, law firms, courts, and law books. It also lives "in the shadow" of the official system of adjudication. It lives in the offices of insurance companies, which provide coverage for damages caused by the insured or third parties. It lives in people's notions about injury and risk, responsibility, and justice, determining people's conduct in day-to-day activities and their litigation/non-litigation choices once a wrong has occurred. Tort law lives in the languages, concepts, and images associated with law in mass-generated popular culture – newspapers, television, movies, novels –, as well as in public debates about what values should be protected and promoted, at what cost, and at the expense of whom. In this perspective, tort law can be seen as a "set of cultural responses to the broader challenges of addressing risk and assignments of responsibility, compensation, valuation, and obligation related to injury that may be shared with or addressed by a range of other social institutions".[128] This is exactly what mainstreaming accounts of tort law tend to overlook: that is, that, inside and outside the West, tort law is built up, and continually altered, by cultural attitudes, technological frameworks, and the organization of power.[129]

Ideas about what is a harm, who may cause or suffer it, and how it could be compensated or canceled, stem from never-ending, dynamic processes. The latter are relentlessly triggered by accumulation, crystallization, and contestation of knowledge, beliefs, stories, representations, conceptions of justice, social interactions, rituals, and practices of giving and taking – all this involving victims, injurers, and the wider groups and social networks to which they belong. Some of these features endure over time, across people, and throughout different cultures; others do not. Some of them

---

Melanesian State, 47–50 (describing how British colonizers prohibited killing as a form of punishment for serious moral transgression, such as adultery).

[127] On these phenomena in general, see the observations of R.L. Abel, Introduction, in id. (ed.), The Politics of Informal Justice, II, Comparative Studies, Academic Press, 1982, 1–13.

[128] D.M. Engel and M. McCann, Introduction, 7. See also, with regard to the American context, M.S. Shapo, An Injury Constitution, New York, 2012; id., Tort Law and Culture, Carolina Academic P., 2003; focusing on European tort law culture(s), K. Oliphant, Cultures of Tort Law in Europe, 3 J. Eur. Tort L. 147–157 (2012).

[129] L. Nader, The Life of the Law: Anthropological Projects, U. California P., 2002, 209–211.

operate overtly; others work in the shadow of the State and its positive law; many live in a fluid space in-between official and unofficial layers.

This is one more reason why a multi-layered, pluralistic, comparative perspective on tort law is much needed. Such a perspective would help challenge traditional understandings of tort law, connect these visions with the broader social contexts producing them, and unveil the cultural assumptions which underlie and support the variety of tort law mechanisms.