

COURTS AS PUBLIC AUTHORITIES, PRIVATE LAW AS INSTRUMENT OF GOVERNMENT

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... One more word about giving instruction as to what the world ought to be. Philosophy in any case always comes on the scene too late to give it. As the thought of the world, it appears only when actuality has completed its process of formation and attained its finished state ... When philosophy paints its grey in grey, then has a shape of life grown old. By philosophy's grey in grey it cannot be rejuvenated but only understood. The owl of Minerva begins its flight only with the falling of dusk.¹

This is my introduction to the issues before this conference, and to the various papers which will be given – and an interesting and varied bunch they look. Two issues as I start. First, public and private; and secondly, why academics write on this at all.

Public and private

The conference title – “Private and public law, intersections in law and method” – presupposes a good deal: that there are such things as private law and public law, that these two are at least in some ways distinct from one another, but equally that each has something to do with the other – at the very least, in some sense they overlap, or at least intersect – whatever that means, no doubt we’ll discover. It’s obvious enough, perhaps, why they might be thought distinct – public law is (roughly) about how government agencies interact with private people, whereas private law is (roughly) about those private people interact with one another. So it’s clear enough why we might think of those two bodies of law as separate, even though they occasionally rub shoulders with one another.

I’d like to complicate that picture a little. You can think of private law as just being between private individuals, if you like. But when private law gets serious a court is involved, and courts are most definitely not private individuals. Courts are public authorities, they are part of the machinery of government – they are usually reckoned as the third branch of government, after the Parliament and the Executive Government. Can we say that the law itself is private, that it’s just between the parties? In a limited sense, it is – it settles what’s mine and what’s yours, it says how certain disputes between us should be resolved, it keeps each of us to our side of the line. But who drew that line, why did they draw it there and not elsewhere, and what are the assigned legal consequences of crossing it? Those are public questions, as they necessarily bring in public officials such as judges and legislatures.

¹ GWF Hegel, *Outlines of the Philosophy of Right* (1820), preface, T M Knox and S Houlgate (trans) (Oxford: Oxford University Press, 2008), 16.

So this is my starting point: we can talk of private law, and much of the time we're clear what we mean when we do, but the public is never *not there*. Courts, whatever else they are, are public authorities, and private law, whatever else it is, is a technique or instrument used by those authorities. That's not to say that the "publicness" or "privateness" of some issues doesn't shout louder in some cases than others. To say that courts are public authorities doesn't begin to exhaust what there is to say about them. And to say that private law is an instrument isn't to endorse all the uses that are made of it – on the contrary, recognising how it's being used, and who is responsible for that use, can often be the start of demanding that it be used differently. What I'm doing here is laying down a marker in relation to conference issues generally. *Courts are public authorities; they have been very much involved in putting private law in the state it is now in; and where there are problems with private law, the courts have to be part of the solution.* We should have no NIMBYism, by which courts, and the lawyers and academics who help them, say that they are not involved, on the ground that any solution would amount to "making law" or "usurping the place of the legislature", or something of that sort. They are always involved. *Whatever* they do involves "making law" at some level. And the proper place of the legislature is always a matter of negotiation.

On academic motivation

As my other introductory matter, I'd like to comment briefly on the role of irritation in legal scholarship. (And if that sounds like a random diversion – keep reading.) I was particularly struck recently on listening to a brief talk by Charles Fried, at a conference to celebrate his (justly famous) *Contract as Promise*², and especially by one of the major factors which drove him to write it³. This, he explained, was in large measure down to Patrick Atiyah, passages of whose equally seminal *Rise and Fall of Freedom of Contract*⁴ irritated Fried sufficiently that he felt some sort of refutation was necessary. So Atiyah's writings, one theme of which was to downplay the importance of promise in contract law, stimulated Fried to re-assert its fundamental place. Both books were of course excellent contributions to the scholarship of the time, and neither from any point of view disproves the argument of the other, though obviously enough the two are somewhat opposed in their approaches.

Various things struck me as I listened to Fried's description of his feelings here, and where they led him – I should perhaps add that I knew the passages of *Rise and Fall* Fried was complaining at⁵, and have rather more sympathy with Atiyah's general thesis than Fried has. One thing is that this sort of irritation, while no doubt partly due to the relevant professor having got out of the bed on the wrong side, nonetheless is more profound than that – the irritation we are talking about is not a mere passing annoyance, but is the culmination of a more involved process, of feeling that something is very wrong with the opposing approach, and that somebody ought to say so. Another is that the chain of irritation is substantially lengthened when we look at *all* of those involved. Atiyah, with others who wrote and still

² Charles Fried, *Contract as Promise, A theory of contractual obligation* (Cambridge: Harvard University Press, 1981).

³ *Contract as Promise at 30: Charles Fried – Opening remarks* (Suffolk University) – at the time of writing, this is available from Suffolk on iTunes U as a free download (13 mins), the relevant passage starting around 7:15.

⁴ Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

⁵ *Rise and Fall* (above) at p 5.

write in the area, was no doubt in his turn irritated by the lack of substance in much of the writing which had based contract on promise. And no doubt Fried's book, too, irritated others in turn, present company most definitely not excluded. Each generation of scholars irritates the next into denouncing their core views, and from the resulting hubbub new legal theory emerges. So this sort of reaction can, in its way, be a spur to great academic productivity⁶.

But perhaps the main conclusion I reached was about how this sort of irritation can make academic writers overshoot the mark. The wish to prove the other guy wrong, to show up nonsense for what it is, is often a useful spur. But it can also freeze the terms of the argument in unproductive ways – you are so determined to prove the other guy wrong that you lose track of the good there may be in the argument you're attacking, or of why anyone else might think it a useful approach. And that's not good. Not usually, anyway.

Weinrib's *The Idea of private law*

All of which leads me fairly directly to Ernest Weinrib's *The Idea of private law*. I'm not sure that my annoyance is with Professor Weinrib as such, a man I don't know, and have no reason to doubt I'd find perfectly pleasant if I did – as well as a renowned scholar in his field. Rather, perhaps, annoyance with the place his book occupies in the current scholarship. Anyone who asks why private law is as it is, why it approaches matters the way it does and not in some other way, is almost bound to be referred to Weinrib's book sooner or later. Yet what answer does he give to the question of what private law is for, why is it there, why is the universe a better place for its being here (if it is)? His answer is a Zen-like insistence that private law has no purpose, no goal. It isn't *for* anything. It just *is*.

Private law, I will claim, is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law⁷.

From my own perspective – which includes a fair amount of study in 19th and 20th century legal history – the idea that private law has *no purpose at all* goes beyond absurdity. Private law reached the state it is in because of the efforts of a great many people – judges, lawyers, reformers, politicians, academics – over a considerable period of time. Of course, not all the results can be said to be intentional – compromises had to be made between competing goals, mistakes were made, circumstances changed, and the behaviour of complex legal systems is hard to predict – but private law is a human product, and much of it is intelligible in terms of human purposes. To abstract away all of those purposes, to ignore what the law is for and to consider it as a purposeless intellectual exercise, seems a bizarre thing to do,

⁶ For another psychological factor possibly at work here see Patrick O'Callaghan, "Monologism and dialogism in private law" (SSRN, 2010) <http://ssrn.com/abstract=1678507>.

⁷ Ernest Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995), 5. For other critiques of Weinrib's key ideas see eg: George Brencher IV, "Formalism, positivism and natural law in Ernest Weinrib's tort theory" (1992) 42 *University of Toronto Law Journal* 318; Joanna Perkins, book review (1997) 17 *Legal Studies* 204; John Gardner, "What is tort law for? Part 1: The place of corrective justice" (SSRN, 2010) <http://ssrn.com/abstract=1538342>.

and is the more bizarre for Weinrib's insistence that it is an exercise in *understanding* private law, as distinct from a deliberate attempt to remove any hope of understanding.

In trying, in my turn, to make coherent sense of *The Idea of Private Law*, the only way I have is to treat it as a thought-experiment, asking: If we had never encountered private law before, and set aside all other concerns in the attempt to render it intelligible, what would we make of it? This seems to me the best way to avoid a total rejection of Weinrib's work, to see what is good in it. And there clearly are some good things in it. Weinrib's description of the internal intelligibility of private law undoubtedly resonates at some level – lawyers do indeed try to make sense of private law as a closed system, which runs best when we forget that private law was made, by human beings, for reasons that seemed good to them and which to some extent we still share. Where Weinrib goes wrong is in over-egging the pudding – in saying that private law “is to be grasped only from within”⁸. Weinrib is setting up false alternatives – that we either try to understand private law from within or we try to understand it from without – when in fact we need to do both, each perspective having something valuable to say. We need to understand it from both within and without if we are to understand it at all. And to assert what is important to each of us shouldn't entail the further step, of denying importance to what other people think – we are all in this together.

Argument of this paper

In short, then, the aim of the paper is to establish the public nature of much of what goes on in so-called “private law”. Private law is the product of public officials working as part of the commonwealth's legal system, and like other public officials they should be improving what they do as part of the ordinary process of doing it. If I seem unduly insistent or monomaniacal on the point, it is because many have denied it, and I will discuss the reasons they give in due course. Some academics – Weinrib is a prime example – have denied it because they seek to make private law a closed system, administered in such a way as to be internally coherent, but without wider social responsibilities. Others – academics, lawyers, judges – have denied it on the rather different ground that tackling the problems of private law constitutes “making law”, which they take to be fundamentally different from what they are engaged in – they do not deny that reform might be needed, their argument is that it is not their problem. I will refer to both points of view in the body of the paper.

The bogey of “pure instrumentalism”

A final introductory point, on what this paper is *not* arguing for. In reviewing the literature for this paper, I noticed an odd thing. There were a number of writers arguing in a vein similar to mine, but they seemed curiously diffident about it. We don't believe that private law makes any sense as a closed system, they say, but we don't believe in a “pure instrumentalism” either. By this they seem to mean, that they don't want to get to the stage where *everything* in private law is clearly labelled with a public purpose divorced from what serves the cause of justice between the parties. Seeing private law as all

⁸ *Idea 5*.

about justice between the parties won't do – it is about other things as well – but it's not all about serving the public interest either⁹.

I agree. And if that is really the choice, then I also agree that the middle course, between the extremes, is best. But I'm puzzled. I know a number of people on the first extreme, the Weinrib extreme. That's a real point of view, held by real people. But who, precisely, has argued for a "pure instrumentalism"? This seems to me a bogeyman, a made-up point of view to terrify intellectual innocents into paying more respect to legal doctrine – "Read your law reports, or the bogeyman will get you!". While Weinrib refers to various other writers as pure instrumentalists, none of those mentioned seem to hold this extreme view¹⁰. There's a long history of legal thinkers worrying that instrumentalists will make them obsolete – most famously Oliver Wendell Holmes in 1897, saying that while the lawyer is "the man of the present", "the man of the future is the man of statistics and the master of economics"¹¹. Well, this is the future – Holmes' future, anyway – and it hasn't happened. So much for prediction.

While there may someone, somewhere, who believes in "pure instrumentalism", they are keeping their view to themselves. You won't find such a person in a law school, since such a pure instrumentalism would have no place for law; indeed, this supposed point of view seems to harbour a huge naivety as to how easy it is to define the public interest, and how ready people would be to accept it without argument, especially if it conflicted with their private interest. I rather suspect that you won't find a "pure instrumentalist" anywhere, because anyone who has thought through the problems of the legal system will see that the system *has* to give weight to fairness between the parties, at some level. No political system can survive long if it deliberately and ostentatiously ignores what those involved in it think is fair; and differing views on fairness is the very stuff of politics. Or to put it another way, "pure instrumentalists" who are also practical politicians would have *no option* but to concern themselves with fairness. Maintaining the legitimacy of the system in the eyes of those involved with it is always a concern, which can only be addressed by appeals to what is fair.

The academic dispute, then, is *not* between those who want to achieve fairness between private parties and those who don't care for fairness, with people like me weaving a delicate course between. It isn't even a dispute between those who think there are instrumentalist or functional elements in the legal system and those who don't, because I am sure that (with sufficiently attention to definitions) all would admit that there are. The issue is over whether the two can usefully be separated. To this I now turn.

⁹ Eg Hanoch Dagan, "The Limited Autonomy of Private Law" (SSRN, 2007) <http://ssrn.com/abstract=1019430> (criticising both "autonomist theory" and "unlimited instrumentalism") and Alan Calnan, "The Instrumental Justice of Private Law" (SSRN, 2009) <http://ssrn.com/abstract=1370383> (criticising both "instrumentalists" and "deontologists"). Dagan's recent writings seem more assertive – see especially "Pluralism and Perfectionism in Private Law" (SSRN, 2011) <http://ssrn.com/abstract=1868198>.

¹⁰ Weinrib's antagonists (from *Idea* 4-6) seem to include Robert Bush, Guido Calabresi, Richard Epstein, Owen Fiss, and Richard Posner.

¹¹ Oliver Wendell Holmes, Jr, "The Path of the Law" (1897) 10 *Harvard Law Review* 457, 469.

The past

In one way, the argument here is over the distinction between public law and private law. But it is not really an argument about whether that distinction exists, or even (particularly) about where you draw it. Of course we *can* distinguish private from public, and while we wouldn't always agree on where the line should be drawn, that incoherence doesn't make the distinction meaningless. The argument is over what significance the distinction has. In a sentence, Weinrib takes this distinction, and other logically related ones, much more seriously than I do. Some aspects of this are obvious, but I think the full extent of it needs a bit more emphasis, because the difference is as much one of method as anything else. Lawyers don't always reason in the same way as philosophers, even when they (think they) are discussing the same topic.

The primary argument Weinrib is making is asserted directly in the text – private law is distinct from other areas with which it might be confused. But it's a sore point, because Weinrib is a bit careless about what those other areas are – they obviously include public law but also politics (which he takes to be lawless), and some backs have been put up by casual references that seem to equate the two, suggesting that public law isn't law at all. But it's kinder, and probably more accurate, to assume that he is praying in aid the traditional set of distinctions here: that law is different from non-law; that substantive law is different from procedure; and that public law is different from private law. These distinctions together give a sort of map of what the world of law is like, with a big “You are here!” sign hanging over private law. He focuses on this discrete and, to his mind, tightly-defined region, where he thinks the barriers are less important – yes, it may be traditional or convenient to distinguish property from contract from tort, but it's all private law, governed by the same fundamental concerns.

Seeing all of this with lawyers' eyes, I would say – Certainly, it's always possible to draw maps, and they are sometimes useful. And in every generation, there are some accepted ideas about what a good map of the system would look like, and some people who work hard to make the map more detailed – or as they think, to perfect it. But what are the rest of us up to? We are mostly working on projects with the potential to sabotage the map, to give arguments why particular lines should be drawn in a slightly different place, or even a *very* different place, or perhaps erased entirely. And these things are always the product of particular circumstances. A barrister in court may well put up a stout defence of traditional doctrine – if traditional doctrine favours their client and there is no better argument at hand. Their opponent may well deride traditional doctrine and insist on modern law for the modern age, or they might say that traditional doctrine really favours *their* client once it is properly understood, or they might change the subject and say that the real issue is quite different – and while it's not my area of expertise, I would hazard a guess that the identity of the judge they are trying to convince might be a factor here. The point is that these maps are used as *arguments*, as *rhetoric*, as *attempts to persuade*. And because there are many forums and many opportunities for persuasion, the argument is perpetually modified to meet new circumstances.

Any one map or system for viewing the law, then, is a continually shifting body of arguments and rhetorical resources. And much of the more traditional sort of legal history is concerned with tracing the fortunes of these bodies of thought, watching the activities of courts and parliaments as they continually

stretch or compress exiting notions to get the results that they want. In the course of that history, you often come across people who seem genuinely interested in the map for itself – people whose main motivation is simply to clarify existing notions, and who seek no further reward. You meet all sorts. But legal historians have no business giving such clarifiers any special place, or taking them any more seriously than their contemporaries did. The changes in attitude between succeeding generations are often profound – what seems at one point a promising idea for making the law clearer may seem like old hat within a short time indeed. And when I say that ideas shift, I didn't mean that they would always be small shifts. Sometimes whole systems of thought, really big ideas for organising the law, sink so thoroughly out of favour that they might seem to have died.

How we got here – mediaeval

To give some kind of perspective on this, it's worth pointing out that Weinrib's attempt to give order to common law – distinguishing public from private, substance from procedure, and so on – is ancient, but was not the first such attempt but the second. In its early days – and, measured by the calendar, for most of its history – the common law was ordered on a quite different principle, usually called the system of the forms of action.

That system was logical enough in its essentials. If you had a grievance which you thought the royal courts ought to be interested in, you applied to the relevant government officer – a Chancery clerk, as he was known – and bought a writ. The writ would spell out your story in a stereotyped way, and ordered that if what you were saying was proved to be true, then you should have the remedy you were asking for. The 64-groat question was, of course, what sort of accusations this could be applied to – What sort of facts were the ones which, if proved, should lead to a remedy. There was an early, seat-of-the-pantaloons phase where the clerks could just answer this one as they thought best, but in 1258 it was settled that new writs usually had to be based on an existing established writ, so that novel forms of action could not spring into life merely at the whim of an inventive Chancery clerk¹². The rules governing each form were usually clear, and were applied with some rigour. All legal complaints either had to be on a pattern already recognised as giving rise to legal consequences, or some very good reason had to be given why the system should be extended to cover it – by either a novel form being recognised, or an existing one stretched a little to accommodate the new claim, or establishing a new tribunal to deal with problems the existing ones couldn't solve.

That was the system, and it proved quite durable – in the order of six centuries from the establishment of the Register of Writs to the final abolition of the system¹³. Was it a good system? It's rather late to be asking that question, of course, but most of the modern objections to it would have made little sense in the system's heyday. A more intellectually robust system would have been hideously wasteful in an age where most people couldn't read or write. To modern eyes the old system seems to put all the emphasis on procedure, not substance, but that's not accurate. The apparent lack of substance is as much an

¹² Provisions of Oxford 42 Hen. 3 (1258). For the forms of action see *eg* John Baker, *An introduction to English Legal History* (Oxford: Oxford University Press, 4th ed, 2002) ch 4.

¹³ What counts as "final abolition" may be a matter of opinion – by some criteria, the forms are not dead yet – but the key legislative move is usually regarded as the Common Law Procedure Act 1852 (England and Wales).

artefact of record-keeping as anything else – the place to argue substance was usually before a jury, whose reasons would never have been written down. And if it sometimes seemed to outsiders that there were too many tribunals with overlapping remits, or that cases were won or lost on outrageous technicalities, or that the system made too many concessions to the convenience of the officials and practitioners who profited from it – well, they say the same today.

My point is not whether the system of forms of action was a good system, but merely that it was a system. It let lawyers know where they stood, it told them how to frame their claims and what sort of arguments they might have to meet in reply. And of course the legal history of that period is precisely concerned with the fate of particular forms: the ways in which forms were stretched, bent or compressed to achieve useful results. Anyone who's studied this will remember the slow growth of new forms of action, and the outrageous legal fictions that were often employed to achieve this – one generation of judges would pretend that A was B (because B was within the form of action but A wasn't), and it would take a later generation to admit that the two were different but that A was just as bad as B and so deserved recognition in its own right. Legal fictions are perennial, though it's only human nature that we always say it is *earlier* generations that used fictions whereas we don't – a view that perhaps deserves recognition as a legal fiction in itself.

In time, the forms of action lost most of their attraction as a system: the legal system had become so large and so varied in its operations that the list of possible actions seemed endless; the number of distinct tribunals seemed inconveniently large; and the piling of legal fiction on legal fiction compromised the system's intelligibility. And so the newer idea of doctrinal law, of separating substance from procedure and dividing substance into ordered categories, came to seem preferable: and this second wave of common law systematisation achieved great things over the 19th and 20th centuries. But consider briefly the end of the mediaeval system, bearing in mind that we may now be coming to the end of the second, doctrinal, wave too. Three morals from the mediaeval story, if you like.

Firstly, that systemisation only goes so far. Acknowledging a system is one thing, deciding how much importance you are going to attach to it is another. As lawyers, we put up mental walls to make life easier for ourselves by dividing up the law – but those walls are always porous to some degree, something always seeps through them, and sometimes what seeps through is more important than what does not. Lawyers of earlier centuries would argue furiously over whether the right action in certain circumstances was trespass or an action on the case; well, perhaps our modern arguments over whether a particular decision was a bold use of doctrine or an illegitimate exercise in judicial activism are not so different.

Secondly, that while we can talk of the life and death of the forms of action, we mustn't allow our metaphors to confuse us. The mediaeval system never died entirely. The various distinct torts are, for the most part, simply re-labelled common law forms of action: trespass in all its forms is still a vital part of tort. And of course the great counterweight within the mediaeval system – that common law courts were supplemented by a Court of Equity, to rub the harsher edges off the rigid forms of action – is still a force to be reckoned with. I well remember the 2004 conference in Sydney at UNSW, focussing on the

(relatively recent) fusion of law and equity in that jurisdiction. A wake, it most definitely was not¹⁴. The old reason for separating out equity has long gone – there was no Court of Equity. But both professionally and intellectually it is still a distinct system in rude health. Was everyone at the conference happy with that state of affairs? Of course not. And leading the charge against equity were exactly the people you would expect – those who are still fighting the 19th century battle, trying to assert their doctrinal version of order against the mediaeval version. How many people did they convince? I don't know, though I certainly don't recall the conference ending on any great note of unanimity. The struggle continues. No legal idea ever truly dies, though at any one time some look fitter than others.

My third conclusion – which again I suggest is relevant not simply to the fate of the forms of action but also to the likely fate of doctrinal law – is that the rise and fall of such intellectual systems is never *just* about internal technical arguments. Political arguments also play a role. No doubt a purely technical case could have been made for abandoning the forms of action, but it would not have been a very strong one. Those in the best position to argue about it would have been the more skilled common law practitioners, who knew the existing system very well indeed, and would have been very hard to convince either that it was incoherent, or that some other system, not yet invented, would be better. We know that good doctrinal writing would quickly take off given the chance – that up-and-coming lawyers would find it a useful way of occupying quiet periods and advertising their expertise, and that law teachers in the newly-established or newly-invigorated law faculties would also see personal and career benefits in writing clear and logical doctrine. But it's hard to see how a typical 19th century observer could have foreseen that. And of course overhanging that whole period would have been the issue of whether to codify the law – would-be codifiers were employing to the max their usual double-bind argument, that either the common law is chaotic (in which case it should be swept away and replaced with a code), or it is well-ordered under the apparent chaos (in which case we should extract the ordered rules and put them in a code). But it was never just a technical argument – for every code there is a codifier, and for most common lawyers, codes were pretty much tied up with that 19th-century hate figure, Napoleon Bonaparte. Over the 19th century there always were excellent technical arguments for codifying the law, but none powerful enough to counter the disgust at being seen to copy the *Code Napoléon*.

Replacing one system with another is a *process*, which only happens slowly; and often it is not obvious to those going through the process where it will end. We do not know how long the traditional doctrinal category of “private law” will last – it is a fair bet, however, that one major factor that will determine this is the strength of the arguments either way aired at conferences like this.

How we got here – 19th and 20th centuries

In retrospect, and given what a vast change it was in the common law mindset, the shift to thinking about law primarily in terms of doctrine happened rather quickly, over the latter part of the 19th century. Private law was no longer something that emerged as a by-product when considering a wild array of different possible legal procedures, but was considered as a rather limited set of doctrines in

¹⁴ The conference proceedings volume is Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Sydney: Lawbook Co, 2005).

their own right – often wild and disorderly doctrines, but doctrines nonetheless. Much of this relied on putting up stout intellectual barriers against confusing inroads by the rest of the legal system: it became axiomatic that procedure was separate from law – not simply that it wasn't the same, but that it was possible to write whole books, or even spend whole university careers, discussing law without mentioning procedure once – and that similarly that cases involving public or state interests were utterly separate from cases involving private parties. In short, a significant intellectual space was made in which (say) torts could be discussed as self-standing entities, almost as if they were laboratory specimens, without referring to the processes by which they came to public attention or the reasons why they were thought to merit that attention. The world of private law had come into its own¹⁵.

The change was, as I say, rather sudden. Key points of the process would appear to be:

- Creation of a relatively rigid and internally controlling hierarchy of courts. Old, rival jurisdictions were merged into unitary courts. Even law and equity were made to share a court, with the proviso (on which various views were held) that equity was to prevail in any conflict between them. The doctrine of precedent transmuted from the old idea that a general climate of opinion in the courts is part of the law, to a new view that a single authoritative judgment binds all judges, perhaps for all time. Judgments became more careful, more focussed on domestic precedents to the exclusion of all else, and longer. Jury trial slowly declined – private law became more and more the field of the legal specialist¹⁶.
- Establishment of university law schools as serious intellectual forces. Old universities were secularised, new universities established, and Law managed to establish at least a toe-hold in most of them. It is always a tough fight for a new field of knowledge to win a place as a respectable academic discipline, and Law in the late 19th century had at least as much trouble as Media Studies was to have in the late 20th. But it made it, and at least part of the reason was the intellectual clarity of the brave new private law, illustrated by (for example), Anson on *Contract*¹⁷ or Pollock on *Torts*¹⁸ – both bold attempts to state aspects of private law without undue reference to procedure, policy or regulation.
- A sweep-out of obsolete mediaeval regulation, so that (for a rather brief period) it seemed progressive and responsible to argue that most parts of the economy to be unregulated. A pure *laissez-faire* attitude was in fashion. As Atiyah notes, this was a *very* brief period, barely a single human lifetime¹⁹. The mid-Victorian faith in *laissez-faire*, with its apparently naïve faith that

¹⁵ Of course, these developments affected much else in the law in addition to the matters here under consideration. See *eg* Simon Stern, “The Analytical Turn in Nineteenth-Century Legal Thought” (SSRN, 2011) <http://ssrn.com/abstract=1856146>.

¹⁶ See generally Steve Hedley, “Words, words, words: Making sense of legal judgments 1875-1940” in Chantal Stebbings (ed), *Law Reporting in England* (London: Hambledon Press, 1995), 169. Which of the matters mentioned in this paragraph are Cause and which Effect is not the subject of this paper.

¹⁷ William Anson, *Principles of the English law of contract* (Oxford: Oxford University Press, 1879).

¹⁸ Frederick Pollock, *The law of torts* (London: Stevens and Sons, 1887).

¹⁹ When George Bramwell (b. 1808) was a young man, his support for *laissez-faire* would have marked him out as a progressive, even a radical; by the time he was a judge (1856), his was an established if rather old-school view; by

economic actors could be nearly always trusted to do the right thing even when their economic interests plainly clashed with everyone else's, did not last long – it was right to abolish the remnants of mediaeval regulatory systems that had long since ceased to do anything useful, but inevitably it was merely a precursor to more modern forms of regulation with which we are all familiar. But the age of *laissez-faire* was also the age in which private law doctrine was established in its current form, and the absence of regulation from it is an important constituent element.

It is only too clear, then, why the great Victorian doctrinalists wrote as they did. Of course they would ignore procedure as much as possible – to do otherwise would have seemed an unhealthy reversion to their past. Of course they plagiarised their major doctrinal ideas from continental European sources – those ideas were the most systematic on offer – but of course, as patriotic common lawyers, they would place very little emphasis on the point. And of course they would be innocent of any idea that common law doctrine might act as regulation – they would have been aware that mediaeval common law often did precisely that, but would have regarded those ancient practices as a failed experiment in government that should on no account be repeated. That government would try again, that that regulation would grow and that the common law would be part of it, was not an idea that seems to have occurred to them.

Of course, we should not overestimate how much was done in that formative period, especially as many of our current problems represent unfinished intellectual work left over from it. Different jurisdictions were fused into unitary entities, but very often the differences lived on as distinct professional specialisms (equity as a leading example). Many local or extraordinary courts were abolished, but those who regretted that abolition quietly renamed their judges as “arbitrators”, allowing the old institution to continue under a new banner²⁰. The old forms of action did not go quietly – in 1909 Maitland was still protesting that “[t]he forms of action we have buried, but they still rule us from their graves”²¹. And while the form of the doctrinal law of contract – with its offer-and-acceptance and consideration as key doctrines – took form very early in the process, tort evaded any consensus on its structure well into the 20th century.

So while the essentials of the doctrinalist mode of thought were well established in many minds significantly before 1900, the implementation of those ideas necessarily took rather longer. Over the 20th century, much of what we see in the law journals and the law reports can be read as attempts to expound the law within the confines of that vision. But the world outside did not cease to turn, and many of the elements which the doctrinal writers of the 20th century had to deal with would have been alien to those in the previous century. There was more and more litigation, and so more and more case law to fit into the doctrinal structure. Juries became less and less common, meaning that judges and

the time he died (1892) such views were only held by the deepest of conservatives. See generally Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) 329ff.

²⁰ See Harry Arthurs, *Without the law: Administrative Justice and Legal Pluralism in 19th century England* (Toronto: University of Toronto Press, 1985) ch 3.

²¹ Frederic Maitland, *The Forms of Action at Common Law* (1909; reprinted Cambridge: Cambridge University Press, 1936), Lecture 1, 1.

doctrinal writers had to concern themselves more and more with factual complications. Filling out the doctrinal structure of the law was perhaps an even bigger task than the most pessimistic Victorian might have guessed.

Another confounding thing happened as well. 19th century doctrinal writers concerned themselves with the legal rights and responsibilities of individuals. What else, indeed, could they do. When they talked of what reasonable people were obliged to do or could reasonably be expected to do, they meant just that. What happened from the late 19th century on, however, was the quiet growth of the body corporate, the organisation masquerading for legal purposes as an individual. This occurred both on the public side and the private side. The private business corporation rapidly became the main legal form of business organisation, largely supplanting more individualistic forms such as the trust business, the partnership or the sole trader. The idea that the business of government was done by discrete corporations or agencies was a rather older one, but making those corporations responsible for their actions took a little longer – legislation was necessary to subject them to the law. Well before the close of the 20th century, of course, this process was complete. Yet private law doctrine continued as if nothing much had happened. It is very hard to imagine many modern negligence actions that don't have a corporation as the *real* defendant (by which I mean, the entity that pays the bill if the action is won) – though that corporation is sometimes an insurer, sometimes another sort of business or non-profit, sometimes a public body. The public world has become a world of organisations, while private law still talks of individuals – a modern legal fiction.

Where we are

What had happened is that while the world of the 19th century doctrinalist is long gone, it is another question whether it was convenient to sweep away the 19th century doctrine. In some cases, the legislature has indeed disposed of it. In others, the legislature has chosen to work with it, often in the process transforming it into something quite different. A doctrine devised for a world without proper regulation, workable business structures, or adequate liability insurance is made to work in a world with all three – but of course its significance is now entirely different.

As an example, take the liability of a road driver to pedestrians injured by their bad driving. This makes good 19th century doctrinal sense: the misbehaving driver is made to compensate those injured by the misbehaviour: it would seem that justice is being done. From a 20th century governmental point of view, by contrast, this initially seems to have no attraction at all, and indeed to present a failure of proper government. Is the fate of the injured pedestrian to turn on the sheer chance of whether the driver's fault can be established, and whether the driver has sufficient assets to compensate? That would indeed make a lottery of the law. But the preferred solution to the problem was not to sweep away the common law, but to tweak it a little, by insisting that all drivers carry liability insurance. Problem solved, sort of. The solution isn't perfect – the administration of this system is not cheap – but it turns out that rival solutions aren't all that easy to administer either. The requirement of fault on the part of the driver begins to look odd, but removing it would cost more than voters are prepared to pay, so it remains. So the form of the 19th century solution is retained and has survived into the 21st century. Of course, the heart is ripped from the original 19th century idea. The bad driver is not the one who pays the cost of the

accident, and his/her theoretical liability to compensate is an embarrassment rather than (as it would originally have been) the whole point of the law. But we pass over all that.

Accordingly, attempting to make sense of, or to justify, the common law rules *in their own terms* misses much of their point. No responsible legislator or administrator would seek to justify them in those terms. Such common law rules as we still have were developed and modified at the same time as modern regulation was being developed and modified. Common law and statute are not in different worlds but in constant dialogue, as each seeks to accommodate the other.

Contract

The law of contract was the most prominent early product of the late 19th century doctrinal movement, and that law, with its insistence on agreement, has remained relatively stable since then. Yet the apparent commitment to freedom of contract was never quite what it seemed, because while the insistence on agreement *to contracts* was genuine enough, the insistence on agreement *to contract terms* was a more sketchy or surface affair, with much of the contents of contracts bearing only a passing resemblance to what the parties may have agreed. The (largely instrumental) convenience of lawyers and courts strongly inclined them to oust orally agreed terms in favour of any document drawn up purporting to contain the terms; and it was soon established that written terms would form part of the parties' contract, regardless of whether they were in any normal sense agreed, so long as their author had given notice of them to the other – “notice” usually meaning no more than that they had afforded the other party a (purely theoretical) opportunity to read them. This lawyerly loophole, when added to the material interest of business corporations in reducing their legal liabilities whenever possible, led by the 1930s to a situation where any business corporation could be free of any contractual liability it did not wish to assume, at least when dealing with parties weaker or less legally sophisticated than themselves.

In the period that followed, there was a fight-back by both legal and regulatory authorities – through consumer protection legislation, through prohibitions on certain specific terms, through competition law, and by a general judicial tightening-up on contractual rules that inconvenience the weaker party. This has culminated (for now) in general legislation on standard forms in consumer contracts, which attempt to outlaw contract terms which are unbalanced to the detriment of consumers. The techniques used enlist both the judiciary and regulatory agencies: unfair terms may be tackled either by the relevant regulatory body, or they may be struck down as encountered by judges in ordinary litigation. The law of contract has therefore, in one major area at least, embraced the doctrine that contracts will be upheld only when they are fair; yet the formal common law doctrine in the books still repeats the 19th dogma, that contracts will be upheld whether fair or not, except of course (of course!) when statute forbids it. Someone who looks at the common law alone cannot be made to admit that a fundamental change has taken place; but someone who looks at the common law alone has ceased to describe the legal system as it actually is.

Tort

The law of tort was not so precisely defined by the 19th century doctrinalists; indeed, well into the 20th century a reasonable observer might well have doubted that it formed a doctrinal subject in its own right. And it has never attained the apparent unity and clarity of contract. Given the distinctness and rigidity of each of the individual torts – a legacy of the forms of action – it would not have been surprising if it had remained as a mere archipelago of isolated liabilities, with obvious family resemblances to one another but without much potential for more general theorising. What saved it from this fate was the very substantial impetus given by overall regulatory policy, which encouraged potential plaintiffs to look to the tortfeasor for compensation, and encouraged potential defendants to insure against such claims. In employment, in road traffic, and in medical care contexts the same solution was adopted. From a regulatory perspective, a measure of compensation was provided for the victims of accidents, and an incentive of sorts provided to deter them. From a doctrinal perspective, the relevance and significance of torts was assured, though at the price of blowing the doctrinal project onto a different course, one in which “negligence” gradually ceased to be a mode of committing torts and became a tort in its own right – increasingly, *the* tort, as it began to absorb the more ancient torts into its increasingly unruly theory.

Again, we see the stark contrast between the individualistic, almost Victorian language of doctrinal theory, and the regulatory reality of the doctrine in action. Negligence liability directs defendants to act as a reasonable person does, doing no less than the ordinary decent woman or man would do (though no more either), and they must compensate their victims if they turn out to have fallen below that standard. But in reality tort defendants aren’t people. They are corporations, under a number of legal obligations, the reasonableness of which they do not have the luxury of assessing, but which must be borne as unavoidable business risks. As for paying compensation, they will long before the accident have decided whether to insure against such claims, influenced both by the size of likely claims and any relevant legal obligation to insure.

As to the personal liabilities involved, which doctrinal theory treats as central, they are in most contexts an irrelevance. In road traffic cases, the nominal plaintiff and defendant play as little a part in any legal claim as they can manage, leaving the way clear for the real issue, namely which insurer should pay the costs of the accident. In cases involving vicarious liability, the actual wrongdoer may not be sued at all – after all, no-one imagines that s/he is in a position to pay the claim – and their theoretical liability is allowed to remain in theory. Sometimes, rarely, the employer’s insurer plays the doctrinalist card, claiming to enforce the wrongdoer’s personal liability via the doctrine of subrogation. But this is poor industrial relations, as few employees are in a position to pay such damages, and make their employers aware of this in no uncertain terms. As a result, some jurisdictions have actually outlawed such subrogation²². Does this mean that personal liability in negligence is an irrelevance today? That is not my argument, and there are some types of claim where it is still significant – in the healthcare context, for example, the personal liability of a careless nurse midwife or doctor is a force to be reckoned with

²² This embarrassing personal liability, which cannot be abolished but cannot be enforced either, is accommodated in different ways by different legal systems. For an international survey see Paula Giliker, *Vicarious liability in tort – a comparative perspective* (Cambridge: Cambridge University Press, 2011) ch 2.

(though of course arguments focus on the level of insurance premiums, it being taken for granted that no-one would assume such a personal liability without cover). My argument is rather that the true significance of the doctrinal rules cannot be understood merely by looking at those rules – we must also look to the regulatory context which determines how such claims are made, how they are paid for, and what alternatives are afforded to those who might be considering an action. An “understanding” of the law that leaves out that context does not give us much insight.

Restitution

Doctrinalism's last significant gift was a gap, a non-subject. A large number of case law liabilities had been seen in the mediaeval period as quasi-contractual – not contractual, but sufficiently analogous to attract the same remedies. But with the new precise doctrinalism of the 19th century, this seemed unsatisfactory; much of the point of a sharp line between the contractual and the non-contractual was lost if contract law could be applied by analogy. But with the traditional justification for these cases now being dismissed as ridiculous, and none other being to hand, these cases languished in obscurity. It was not until the 1960s that a serious and sustained attempt was made to rescue them for doctrinal law, by the elaboration of a theory of unjust enrichment, a theory which reached its most elaborate exposition in the writings of Peter Birks, which in many ways replicated the earlier rise of contract law by drawing heavily on continental legal theory.

It is, however, the obscurity of restitution that is limiting its chances for growth. Restitutionary cases are rare and (almost by definition) odd-ball cases, and there will always be a number of theories available to explain each of them. Significantly, much support for unjust enrichment was based on the premise that equitable principles no longer served as any kind of justification – a premise which large numbers of theorists do not share. And while everyone agrees that there are limits to what “contract” can explain, there is little agreement on what those limits are. Interestingly, the leading cases in restitution seem to be largely in the twilight zone of regulatory law or public law, where the issue faced by the parties is caused by the legislature but not resolved by it – whether the legislation in question is tax law, control of local government²³, or regulation of private companies²⁴. Whether such cases can properly be resolved by a theory which is so resolutely “private” must be doubted.

While this theorising initially seemed to have appeal across a number of legal systems – at least, common law legal systems - it has now fallen foul of more nationalistic imperatives. Something like a Birksian pattern for unjust enrichment law has survived in both England and Canada, though differences are many, and Birks' last major restatement of the law withdrew any claim to describe the law of any jurisdiction outside England. Australia has – much to the chagrin of its unjust enrichment academics - retreated from its earlier support for unjust enrichment, the High Court now declaring that it was not “a

²³ Eg the “swaps cases”, on which see Peter Birks and Frank Rose, *Lessons of the swaps litigation* (London: Mansfield Press, 2000).

²⁴ Eg *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 CLR 221, which was occasioned by non-compliance with the Builders Licensing Act 1971 (NSW), s 45.

principle which can be taken as a sufficient premise for direct application in particular cases”²⁵, but must be confined to higher realms of thought. In the US the principle has received support from a number of academics, as allowing them to focus on pure doctrine, a preoccupation which most US academics seem to think of as bordering on the antiquarian. The national differences show no sign of diminishing. Restitution and unjust enrichment are always gap-fillers and scavengers, trying to make sense of liabilities that other theories have discarded, and so the many differences in the laws of differing nations result in a very different law of restitution in each.

“Private law”

In summary, therefore, the idea of private law can be seen as an intellectual project, stretching over decades or even centuries. The aim of the project is to state or restate the law as a coherent set of liabilities between individuals. Doctrinal achievements of this project are all around us when we look at the law. But at no point was it the only societal project of importance within the legal system. Even though it is often treated as a “traditional” approach, it is not particularly ancient; and when we confine ourselves to aspects of it that we recognise (such as “the law of contract” and “tort”) it is no older than the overtly regulatory projects with which it might be regarded as competing. Our modern doctrine has always had to develop itself in a world that includes regulation, and has had to accommodate itself to that reality.

It seems clear to me that this doctrinal private law project is in serious decline. Analytically, nearly all of the juice has been squeezed out of this particular mango, and while there may be a little more to come, the academic community seems at the end of what good is there. We know its good features and its bad features, and are anxious to look elsewhere for new inspiration. Politically, the public/private distinction has no traction at all – the argument that new reforms might imperil traditional private law categories carries no weight; government might be held back by the charge that they are threatening *fundamental freedoms* or *human rights*, but those new categories only partially overlap with the traditional domain of private law – the appeal to private liberties remains a powerful one, but the conception of those liberties has changed substantially. It also seems to me that the clarity with which so many writers can discern it may well presage its end: Minerva’s owl begins its flight only at dusk, and the lack of certainty about what will replace it in the legal consciousness is not likely to save it. But it may take a long time in fading away – we have, after all, not *wholly* disposed of the forms of action, so it would be premature to suspect that their successors will disappear soon.

“Private law”

Re-assertions of the value of the “private law” approach, while late in the day, cannot be dismissed out of hand. Nonetheless, I am entirely unpersuaded by such re-assertions as I have seen, and of which Weinrib’s *The Idea of Private Law* may serve as leading example.

²⁵ *Lumbers v. W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27 (18 June 2008), 85, per Gummow, Hayne, Crennan and Kiefel JJ.

Do we, indeed, even know what “private law” is any more, or what sub-units like “tort” or “restitution” are meant to mean? In an 18th- or 19th-century legal system, it would have been unambiguously clear what was meant. In a modern system, where minute regulation is commonplace and the legislature is both entitled and willing to amend any aspect of the system, it is far from clear which areas of law are properly to be regarded as “private”; for those who care to define them at all, there are multiple definitions available. For example, which of the various legal mechanisms for raising an issue of product safety are “private” ones, and which “public”? I will not pursue this further here, not least because it would intrude on William Lucy’s paper following this. Suffice it to say that confident assertions of the importance, rigour and distinct nature of “private law” are unlikely to convince when their area of application is left up to the imagination of individual readers.

But however private law is to be defined, does it make sense to justify it in isolation from the remainder of the legal system? This would need some solid argument which Weinrib has not provided. Private law did not evolve in isolation from the rest of the system, and the continuing pressures to change are equally part of the wider system. This is not, of course, to argue that *all* the forces for change can be labelled as external to private law. To what extent private law evolves under its own dynamic and to what extent change is externally driven, is an interesting question. But it is hard to pursue such questions if the efficacy of external forces is denied in principle, or if admitting that some changes are externally driven is seen as somehow denying that there really is such a thing as private law. As it is, an “explanation” of private law that leaves out the main thing about it – that it is part of the legal system – cannot explain very much.

A difficulty is sometimes suggested, that it is very hard to list all purposes that private law serves, so much so that the very idea of its “purposes” lapses into incoherence. But pointing out that a problem is a hard one does not show that it has no coherent answer; and pointing out that not *all* of the purposes can be achieved in full does not show that it is wrong to pursue them all. Human are needy creatures, and listing all the purposes they seek to achieve does indeed lead to a rather unruly list. Indeed, such lists are for most purposes *too* long: when law reform is contemplated, it usually looks at much smaller units, and even then the list of purposes implicated can be unmanageable. For present purposes, it is, I think, sufficient to point out that the purposes embodied in private law are many and various. Private law is *not* a museum or a symphony – while it is certainly possible (particularly from within a law school) to contemplate it simply for itself, and to admire or criticise it “in itself”, that cannot be the main criterion of its worth. We may judge a cathedral by its ability to inspire awe or to invoke the deeper emotions in those who enter it, but if we judge a railway station by the same criteria we have lost the plot. Law is a practical science. That does not exclude aesthetic considerations, but they cannot be centre-stage.

As a coda, and to hint at what might be in issue if the “purposes” of private law are pursued further, I throw in a recent statement of what private law is for. This is purely as a talking-point. I have little sympathy with the project from which it emanates – the ongoing attempt to state a European private law, over and above the diverse private laws of the individual member states – but whether or not the work should be done, its execution is of high quality, and so can be given as an example of what one team of academic private lawyers think its purposes are. This version lists four principal purposes -

freedom, security, justice and efficiency – and with sub-divisions within those²⁶. Naturally, different groups would have produced different lists; there has been some discussion of how this list differs from earlier drafts, and the influence of different national ideologies on that question²⁷. I do not propose this list as a definitive answer to the question, what private law is for. But it is a clue as to which answers are currently plausible.

Less ambitious arguments?

Lawyers are literal creatures. Faced with a particular argument, they tend to take it in its own terms and either accept it or reject it. Even when it is made very obvious that the argument is deliberately exaggerated, there is only rarely any effort to read it in that spirit – after all, it is for the person making the argument to explain why it is plausible, and making your audience pare the argument down to reasonableness seems like passing the buck. In Weinrib’s case, however, I suspect this is a mistake, as much of its plausibility is more properly aimed at lesser propositions. Some of them are considered here.

Some would be making the simple plea that the most basic of private law issues – whether a contract debt is owing, whether the victim of a wrong can recover from the wrongdoer – still exist and should receive adequate attention from the legal system. It should not be forgotten, in all the attention to the role of the state, that in many respects the economy operates on capitalist lines, and cannot work at all unless the essentials are respected. And on some particular, precise issues of law, this may be right. The argument cannot, however, be scaled up very far. The broader a look we take at economic law, the clearer the state intervention becomes – and the more obvious it is that any traditional common law left alone has been so left *because* it satisfies modern economic purposes, rather than out of any respect for old law. If it is the health of the economy we are considering, then a minute concentration on law would constitute looking at the issue through the wrong end of the telescope. The need for an efficient economy strikes at a more basic level, and if it could not be achieved through law then it would be achieved by other means. As a way of separating legal concerns from wider societal concerns, it seems inept.

Others would favour Weinrib’s approach because on a quick reading it seems to favour what we might call *private law values*, embodying respect for promise-keeping and other values of self-responsibility, coupled with suspicion of the state when it claims to have a better solution to such essentially private matters. It must be stressed that, whatever Weinrib thinks about “private law values”, this is *not* his argument in *The Idea of Private Law*: he is not seeking to win the political battle of ideas between private and public values, but to insulate private law from politics altogether²⁸. Nonetheless, I suspect that many who find Weinrib’s views persuasive are really motivated by concerns of that sort – and while it is absolutely true that Weinrib’s argument is not an argument from values, many would subscribe to both arguments. From my perspective, all this seems confused. Private law values are perennial, and to

²⁶ See appendix, where the heads are reproduced.

²⁷ Martijn Hesselink, “If You Don’t Like our Principles We Have Others’; On Core Values and Underlying Principles in European Private Law” (SSRN, 2009) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514449.

²⁸ On this point see Allan Beever, “Corrective justice and personal responsibility in tort law” (2008) 28 OJLS 475.

emphasise the link to common law doctrine actually weakens the case for them – policy discourse allows for private law values along with others, and disdain for policy means a failure to use a whole battery of arguments that might favour those values. It labels supporters of those values as looking backwards rather than forwards. The argument will not be won by disdain for policy; it can only be won by advocating a policy viewpoint superior to all others on offer.

Finally, some lawyers might support at least a limited version of Weinrib's view for reasons of self-image. Excessive concentration on policy makes many lawyers uncomfortable, not necessarily because they think policy argument misguided, but because they know it is not the exclusive property of the law – they wonder whether they have ceased to be lawyers and have become something else entirely. Either they are ceasing to be lawyers, they fear, or law is ceasing to be law²⁹. This is certainly a genuine concern; but it has never been convincing to regard Law as unchanging. No doubt Law is evolving into something new³⁰, but it seems premature to conclude that that something will not equally be a form of law. And if lawyers wish to counter trends that might make law less relevant to modern society, they will not achieve this by ignoring those very trends. If there is a danger here, it should be identified and countered head-on.

Conclusion

The first great system for organising the common law – the forms of action – lasted for over six centuries, and to the last it had its defenders. We are now living through the decline of its successor, the doctrinal system which we now think of as “traditional”. Whether that decline is to accelerate or even become terminal, or whether it will outlive us all, is in large measure down to whether it satisfies the needs of all relevant parties in their attempts to pin down the detail of the law and to make it fulfil the functions which we mean it to satisfy.

²⁹ See especially Nigel Simmonds, *The decline of juridical reason* (Manchester: Manchester University Press, 1984) esp. chs 2 and 9; Allan Beever, *Rediscovering the law of negligence* (Oxford: Hart Publishing, 2007) pp 1-19.

³⁰ Cf especially Richard A Posner, “The decline of law as an autonomous discipline: 1962-1987” (1987) 100 *Harvard Law Review* 761.

Appendix - What is private law for?

"Private law", however defined, is today an entity of considerable breadth, and seeking a definitive answer to the question "what it is for" is quixotic at best. Nonetheless, it is interesting to see how one group of European academics have answered that question. The following text is the statement of the principles underlying the multi-volume *Draft Common Frame of Reference* ("DCFR"), which is a recent product of attempts to harmonise (and possibly, eventually, codify) European private law.

While the production of the DCFR involved wide consultation, it is nonetheless overwhelmingly academic in its inspiration and writing. The status of the DCFR - what it is, what authority it has, what it might lead to - is in itself a matter of lively debate. For those interested in a general introduction to the issues, I recommend Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge: Cambridge University Press, 2010).

Reproduced here are the heads of the principles (in effect, a contents page for the "principles" section of the DCFR). The "principles" section is an interesting text in its own right. The DCFR is a largely descriptive work, though of course it does not conceal its normative premise of the desirability of a Europe-wide private law, in place of the 27 national systems that already exist. To give context, it must be borne in mind that the rationale for any harmonisation - to what extent it is economic, to what extent it is designed to implement particular policies - has important procedural implications for debates over implementation. In the crazy-quilt of treaties defining whether, when and how individual nations can object to proposed EU action, the public aim of that action is often key; the game of saying what the DCFR is "for" is therefore played for very high stakes indeed, and we can assume that every word of the "principles" section was chosen with care. The entire section (43 pages in all) carries the signatures of 4 noted professors: Christian von Bar, Hugh Beale, Eric Clive, and Hans Schulte-Nölke.

For discussion of the "principles", see: Nils Jansen, "The Authority of the DCFR" (SSRN, 2008) <http://ssrn.com/abstract=1264011>; Henning Grosse Ruse-Khan, "The European Draft Common Frame of Reference - A Source of Comparative Law" (SSRN, 2008) <http://ssrn.com/abstract=1319247>; Martijn Hesselink, "'If You Don't Like our Principles We Have Others': On Core Values and Underlying Principles in European Private Law" (SSRN, 2009) <http://ssrn.com/abstract=1514449>; Antoni Vaquer, "Farewell to Windscheid? Legal Concepts Present and Absent from the Draft CFR" (SSRN, 2009) <http://ssrn.com/abstract=1372139>; Horst Eidenmueller, "Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR" (SSRN, 2009) <http://ssrn.com/abstract=1334648>; and Filomena Chirico, Eric Van Damme and Pierre Larouche, "A Giant with Feet of Clay: A First Law and Economics Analysis of the Draft Common Frame of Reference" (SSRN, 2010) <http://ssrn.com/abstract=1628558>.

"The underlying principles of freedom, security, justice and efficiency"

1. The four principles

∴

Freedom

2. General remarks

Contractual freedom

3. Freedom of contract the starting point
4. Limitations with regard to third parties
5. Contracts harmful to third persons and society in general
6. Interventions when consent defective
7. Restrictions on freedom to choose contracting party
8. Restrictions on freedom to withhold information at pre-contractual stage

9. Information as to the terms of the contract
10. Correcting inequality of bargaining power
11. Minimum intervention

Non-contractual obligations

12. Emphasis on obligations rather than freedom
13. Freedom respected so far as consistent with policy objectives

Property

14. Limited scope for party autonomy
15. Recognition and enhancement of freedom in some respects

∴

Security

16. General remarks

Contractual security

17. The main ingredients
18. Third party respect and reliance
19. Protection of reasonable reliance and expectations
20. The principle of binding force
21. Exceptional change of circumstances
22. Certainty or flexibility
23. Good faith and fair dealing
24. Co-operation
25. Inconsistent behaviour
26. Enforcement of performance
27. Other remedies
28. Maintaining the contractual relationship
29. Other rules promoting security

Non-contractual obligations

30. Security a core aim and value in the law on non-contractual obligations
31. Protection of the status quo: non-contractual liability arising out of damage caused to another
32. Protection of the person
33. Protection of human rights
34. Protection of other rights and interests
35. Protection of security by the law on unjustified enrichment

Property

36. Security a core aim
37. Protection of reasonable reliance and expectations
38. The provision of effective remedies
39. Protection of the status quo

∴

Justice

40. General remarks

Contract

41. Treating like alike
42. Not allowing people to rely on their own unlawful, dishonest or unreasonable conduct
43. No taking of undue advantage
44. No grossly excessive demands

- 45. Responsibility for consequences
- 46. Protecting the vulnerable

Non-contractual obligations

- 47. General
- 48. Not allowing people to gain an advantage from their own unlawful, dishonest or unreasonable conduct
- 49. No taking of undue advantage
- 50. No grossly excessive demands
- 51. Responsibility for consequences
- 52. Protecting the vulnerable

Property

- 53. Importance of certainty

∴

Efficiency

- 54. General remarks

Efficiency for the purposes of the parties

- 55. Minimal formal and procedural restrictions
- 56. Minimal substantive restrictions
- 57. Provision of efficient default rules

Efficiency for wider public purposes

- 58. General
- 59. Information duties
- 60. Remedies for non-performance
- 61. Other rules

Conclusion

- 62. Stability

(from *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (ed. Christian von Bar and others) (Outline Edition, Munich: Sellier, 2009, pp57-59). The full text of the DCFR (Outline edition) is online as a free download at: http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf.)