# Jurisprudence

## Theories of private law

by Dr N E Simmonds

In the last 20 years there has been a great upsurge of interest, amongst British and American legal scholars, in the construction of general theories of private law. The purpose of this note is simply to draw this development to the attention of a wider legal community.

### LOOKING AT PRIVATE LAW

Theories of private law attempt a systematic articulation of the values and conceptions of justice underpinning the doctrines of private law. The objectives of such articulation are threefold:

- a philosophical extension of traditional concerns for doctrinal systematisation;
- the utilisation of the theory in the interpretation and development of the law; and
- a reflective understanding of the relationship between the peculiar concerns of private law (seemingly focused upon justice between individual litigants) and the wider distributive or aggregative policies which characterise the public or regulatory aspects of law.

One of the major watersheds within the debate divides two broad schools of thought. On the one hand are those who view private law as an instrument of policy, differing from public law in form and technique but not in substance and goal (exponents of law-and-economics fall, for the most part, into this camp). On the other hand are theorists who emphasise the distinctive values and concerns of private law, and its relative autonomy from the broader social policy objectives of public law.

### COMMON LAW STRUCTURE

The growth of this literature in common law jurisdictions is somewhat surprising, since it seems to conflict with traditional perceptions of the common law as essentially pragmatic and a theoretical. Still more surprising is the fact that some influential general theories of private law resurrect versions of Kantian formalism that played a central role in nineteenth century German legal scholarship, and that formed a principal focus for the attacks of twentieth century legal scholars such as Oliver Wendell Holmes. Such resurrections may be found in, for example, Ernest Weinribb's book, *The Idea of Private Law* (Harvard, 1995) and in Richard Wright's article, 'Right Justice and Tort Law' in David G Owen's collection *Philosophical Foundations of Tort Law* (Clarendon Press, 1995). How then is the rise of this theoretical literature to be explained?

It is, of course, true that the conventional portrait of the common law as devoid of theory has its limitations. Modern lawyers work for the most part within categories that were invented by the great Victorian treatise writers. The modern common law is not the mass of disorderly erudition that was familiar to Coke, but is structured by a limited number of fairly abstract ideas and categorial distinctions: contract and tort; duty and negligence; breach and causation; and so forth. However, the theoretical enterprise that was implicit in the construction of such categories was in large part a matter of marshalling and giving precision to ideas drawn from the our ordinary moral discourse. Indeed, it was in part the familiarity of the basic ideas that gave them a seemingly self-explanatory quality, and made them appear a suitable basis for the rationalisation of the common law's generous multiplicity. The enterprise in which writers such as Pollack and Anson engaged was unquestionably a theoretical engagement and not just a task of systematic commentary; but it did not require (as do the modern debates) a full-blooded engagement with political or economic theory.

### WHY THEORIES ARISE

Many diverse explanations could be offered for the growing interest in theoretically sophisticated approaches to private law. In this brief note, I will mention only one such explanation: the erosion of familiar moral and social baselines for legal thought.

In the first place, and most obviously, a sceptical and pluralistic age renders problematic the invocation of moral values in adjudication: for such values might be said to be simply those of the judge, and to possess no further or deeper legitimacy. Within the common law, appeals to what is 'fair' and 'reasonable' play an important and integral part in most aspects of adjudication (the task of distinguishing cases, for example, is inseparable from the question of which distinctions would be fair and reasonable as grounds for differential treatment).

Secondly, and somewhat less obviously, judgments of causal responsibility can be shown to depend upon the assumption of a taken-for-granted background against which the cause operates as an intervention on a stage already set (such dependence was ably demonstrated by Hart and Honoré in their classic work *Causation in the Law* (Oxford, 1985). Increasing social fluidity and an awareness of the plasticity of human arrangements seems to render the identification of such causal baselines increasingly problematic.

It is therefore significant that by far the most influential school of theoretical reflection upon private law builds directly upon these twin problems of moral pluralism and causal indeterminacy. I refer, of course, to the chief manifestations of the law-and-economics movement which received its main impetus from a single brilliant article, 'The Problem of Social Cost' by Robert Coase, *Journal of Law and Economics* 1960, volume 3 page 1.

### LAW AND ECONOMICS

Whatever the precise criterion of efficiency favoured by an economic approach to the law, the criterion will work from some conception of revealed preference. The attraction of this for a fundamentally prescriptive theory is that it endeavours to accommodate the moral pluralism of modern society by treating all such diverse moral judgments as mere preferences, thereby giving them a role within the aims of the theory, but requiring no choice between conflicting moral demands. One could, of course, point out that this does not overcome the philosophical problem of grounding a set of prescriptions, since the injunction to maximise overall preference-attainment is simply another prescription on a par with those being treated by the theory as mere preferences. Nevertheless, the economic approach appears on the face of things to embody a powerful conception of legitimacy, whereby outcomes will be shaped by the distribution of preferences across the population.

Similarly, the economic approach attaches no importance to the conventional causal judgments studied by Hart and Honoré, treating only 'but for' causation as raising a genuine causal issue. This 'causal minimalism', as Hart and Honoré style it, flows from the aggregative approach of the economist, wherein every legal dispute involves a conflict about the allocation of resources, rather than a dispute about responsibility. Hence the economic approach seeks to avoid the seeming arbitrariness of the need to identify taken-for-granted baselines as a foundation for judgments of causal responsibility.

The most striking feature of law-and-economics to the outside observer, however, is its radical departure from the ordinary language and conceptual structures of private law. Traditional legal concepts such as those of fault, responsibility, and causation have focused upon the rights and wrongs of past transactions between the plaintiff and defendant. All such backward-looking conceptions are abandoned by the economic approach, or are treated as entirely secondary to forward-looking aggregative questions of economic efficiency. This abandonment of traditional legal ideas has been the principal feature of economic analysis provoking (by negative reaction) the emergence of rival, non-economic, theories of private law.

## CORRECTIVE JUSTICE

Economic theories of law attach little importance to the distinction between private and public law: the forms of private law are regarded as specific instrumentalities, differing from those of public law, but to be justified ultimately by reference to their consequences. By contrast, some of the currently influential non-economic theories attach great importance to the distinction: indeed, they take the demarcation of a distinct realm of private law as central to their whole enterprise. Private law is conceived of as a body of principles regulating justice between individual citizens and embodying a conception of corrective justice; while public law is regarded as an implementation of the state's distributive and aggregative projects. Consequently, it is suggested, political and moral disagreements find expression in public law, while private law is the manifestation of an apolitical and relatively uncontested conception of human agency and responsibility. In this way the theories seek to overcome the problem of moral pluralism.

The problem of causal indeterminacy has been less explicitly addressed by non-economic theorists, and this omission poses some serious problems. For example, many such theorists analyse private law in terms of a model of corrective justice drawn from Aristotle. Their general concern is to present corrective justice as more than the simple restoration of a distributively just situation upset by a wrong of some sort: corrective justice, it is suggested, has a status that is autonomous and independent of distributive justice. Corrective justice expresses certain conceptions of agency and responsibility that are neutral between distributive schemes. Such theorists might reasonably point out that the common sense judgments of causal responsibility analysed by Hart and Honoré are, as the authors themselves explain, fundamental to our whole notion of human identity and agency. Specific problems arising from our awareness of the plasticity of human arrangements should not, therefore, be too lightly confused with a fundamental erosion of notions of causal responsibility.

**DEMARCATION OF PRIVATE LAW**

Private law is conceived of as a body of principles regulating justice between individual citizens and embodying a conception of corrective justice; while public law is regarded as an implementation of the state's distributive and aggregative projects.

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# Criminal Law

## Criminal Procedure & Investigations Bill – for better or for worse?

by Sheilagh Davies

The *Criminal Justice Act* 1987 (CJA 1987) hailed a new era. Obligations were imposed on prosecution and defence to collaborate at an early stage to identify issues, serve documents, prepare schedules and deal with points of law. The preparatory hearing was introduced. The intention was better case management, to smooth the path towards the presentation of trial and make the system generally more efficient.

## INCREASE IN APPEALS

As an idea, this was a good one but its operation was at variance with what Parliament intended. The Act made provision that the party who lost on a particular point at a preparatory hearing could take that point on appeal. This caused a rush of applications to the Court of Appeal with counsel doubtless feeling that they had to take the point so as not to be disadvantaged later. In a number of decisions the court ruled that the legal arguments did not form part of the preparatory hearing. Arguably, the Court of Appeal was looking for clarification, but the reality is that there have been a number of inconsistent decisions that have defeated Parliament's intention for smoother case management. If the Court of Appeal was looking for an administrative way of lowering the number of appeals they had to force the ball back into the court of the Executive.