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Edited by Kit Barker and Darryn Jensen

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PART I

Introduction

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Private law

Key encounters with public law

KIT BARKER

1 Introduction

The relationship of private and public law is an immense topic – too large to be exhausted by a single collection of essays. Statements of the relationship are also notoriously complicated by a lack of terminological clarity. What is it that one intends to contrast with what, when one distinguishes private law from public law, and what is one's purpose in doing so? Is one's objective simply an interpretive, classificatory one – a process of sorting and better understanding legal material so as to bring to it some greater rational order – or is the purpose instead a normative one – to change the legal order for the better in some way or illuminate its deficiencies from a particular point of view? Is defining the relationship between private and public law intended to make the practical task of legal actors easier – to make it simpler, for example, for a court to dispose of a particular case before it? Is the aim to promote consistency in decision-making? None of this is very clear. The truth is that the nature and purpose of inquiries into the relationship between private and public law depends entirely on the inquirer and that there is a great deal of variation on such matters.

Such complexities make a clear opening statement of our own assumptions and purposes particularly important. The objective of this collection of essays is to re-examine the relationship between private law, on the one hand, and public law, public institutions and public values, on the other, through the lens of a selected range of 'key encounters'. The term 'private law' in the last sentence is taken to refer to that body of positive law which governs relationships between private individuals (natural or otherwise), as opposed to the relationship between individuals and the

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state¹ acting in its capacity as mediator of the public good. This is a very traditional conception and it is subject to the challenge of numerous alternative constructions, some of which are considered in this and the next chapter. Nonetheless, we must start somewhere and the definition I have just provided is at least relatively clear and well understood. It is also one that makes obvious sense in the context of contemporary Western society, where the contrast between the relationships of individual actors and the relationship between citizens and the state (*qua* state) is encountered every day.

The substantive fields of private law (as I have just defined it) upon which the book focuses comprise charity law, property law, corporate and commercial (finance) law, the law of torts and the law of private law remedies. The encounters between these fields and public law and public values are considered ‘key’, not in the sense that they are exhaustive or necessarily more important than any other examples, but simply in the sense that they help to unlock a fuller understanding of the relationship in question. Our purpose is to understand private law better, at a time when its normative foundations, capacities and limitations are increasingly contested. Nonetheless, we hope that by better understanding private law, we may also prompt a fuller appreciation of the nature, strengths and weaknesses of public law too. The lessons are not intended to proceed in just one direction. Indeed, many parts of this work point to strong mutual influences between the two spheres.

By way of contrast with its subject matter, the structure of the book is very simple. In this chapter (Part I), we set the project in its context, demonstrate its contemporary significance and provide a critical overview of the contributions that follow, drawing out a number of lessons from them. From this summative and contextual beginning, the work proceeds through general and theoretical issues to the more specific and substantive. Part II of the book hence addresses general definitional, theoretical and taxonomic questions about the relationship between ‘private’ and ‘public’. Its central concerns are: (1) the nature and utility of the various distinction(s) between private and public that are made by lawyers and others (economists, philosophers, sociologists), (2) the truth of the idea that private law is really ‘private’ to relationships between particular individuals and normatively isolated from broader social purposes and (3) different ways in which our legal categories might usefully be structured, in the light of what we know about the respective

¹ Or between states, as in the case of public international law.

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institutional capacities of public and private actors regarding law creation and enforcement. Part III then outlines key encounters between public and private in each of the substantive fields of law mentioned above, highlighting the importance of the encounter for particular doctrinal or theoretical questions within that particular legal field.

2 Public pressures on private law

Private law existed in one form or another long before the rise of the modern nation-state,² even if, in England, it finally disentangled itself from the formulary system and emerged as a distinct body of legal doctrine only during the latter half of the nineteenth century. Since that time, however, it has encountered increasingly persistent and well-documented pressures from the ‘public’ that have tended to undermine its institutional autonomy or ‘privateness’ in one way or another.³ One such twentieth-century pressure is the rise of the welfare state,⁴ which has brought with it an increased tendency towards political intervention in the substantive content of the law. In any such state, Mauro Zamboni has observed, law becomes the natural and first instrument of choice for instilling values into a community and the effect is inevitably to propel law closer to politics, even if the two remain institutionally distinct.⁵ As law increasingly claims its legitimacy from democracy, so democracy sets law to work in the delivery of its political ends.

A second, associated pressure stems from the dramatic increase in the volume and influence of legislation in private law matters since the nineteenth century. Not only is more private law now *created* and *expressed* ‘publicly’ through the democratic process, but courts are ever more inclined to mould common law doctrines so as respectfully to avoid

² Charles Donahue, Jr, ‘Private Law Without the State and During its Formation’ (2008) 56 *American Journal of Comparative Law* 541 (citing as examples Roman, Talmudic and Islamic law). The birth of the modern nation-state is generally set in the sixteenth century.

³ I should *not* be taken to suggest that, prior to the rise of the nation-state, private law had no ‘political’ aspect and was therefore somehow entirely isolated from the public. In so far as private law, as law, has links to public authority, power and force, it has always been susceptible to ‘public’ influence, even if that influence has not always been mediated through the devices of the modern state.

⁴ Ralf Michaels and Nils Jansen, ‘Private Law Beyond the State? Europeanization, Globalization, Privatization’ (2006) 54 *American Journal of Comparative Law* 843, 856.

⁵ Mauro Zamboni, *The Policy of Law: A Legal Theoretical Framework* (Oxford: Hart Publishing, 2007), pp. 2–3, 92–3.

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'conflict', or so as to 'cohere' with legislative policy.⁶ The full implications of legislative interventions in (and around) the modern law of tort are only now being considered in detail⁷ and the conclusions of contemporary studies seem set to challenge our conceptions of that field in the twenty-first century as fundamentally as root conceptions of the law of contract(s) were shaken by writers such as Hugh Collins⁸ in the twentieth century. More broadly, there is probably good reason to think that, where private law theory is concerned, legislation is still the proverbial elephant in the room – a matter of which writers are consciously and increasingly aware, but which they too regularly fail to address. It may even be that the reluctance of private law theorists to talk much about legislation is symptomatic of an entrenched suspicion that legislative interventions somehow adulterate the principled, long-term development of law with short-term political agendas.⁹ It is certainly not difficult to find examples of fragile interventionist expediences that bear this out on occasion,¹⁰ but whatever we think of such cases, we cannot provide an accurate picture of private law in the modern day while leaving legislation off the map. The sheer volume of legislative activity, both primary and secondary, makes it impossible to ignore in the modern age.

To the extent that codification represents a more comprehensive, definitive and exhaustive manifestation of the legislative impulse, the plethora of recent proposals to codify significant parts of private law¹¹

⁶ E.g. *Caparo Industries Plc v. Dickman* [1990] 2 AC 605; *Marcic v. Thames Water Utilities* [2004] 2 AC 42; *Graham Barclay Oysters Pty Ltd v. Ryan* (2002) 211 CLR 540 at [80]; *Equuscorp Pty Ltd v. Haxton & Ors* [2012] HCA 7 at [34]; *Koubi v. Mazda Canada Inc.* [2012] BCCA 310.

⁷ See T. T. Arvind and Jenny Steele (eds.), *Tort Law and the Legislature* (Oxford: Hart Publishing, 2012); Neil Foster, 'The Merits of the Civil Action for Breach of Statutory Duty' (2011) 33 *Sydney Law Review* 67. Looking more broadly across the law of obligations, see James Lee, *Legislation and Reform in the Law of Obligations* (Oxford: Hart Publishing, 2014, forthcoming).

⁸ Hugh Collins, *The Law of Contract* (London: Weidenfeld and Nicolson, 1986); Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999).

⁹ This type of suspicion has strong historical roots and was probably at its keenest in the nineteenth century, when judges saw legislation in precisely this manner and did their best to limit its impact. See further Morton J. Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

¹⁰ For a possible contemporary example in Australia of legislation born in part on the back of short-term pressures experienced by the insurance industry (and rushed through in quick time), see the various Civil Liability Acts in place in all States and Territories. For the background and process, see Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 649.

¹¹ On the history of codification attempts, problems and recent developments in relation to the Draft Common Frame of Reference in respect of European Private Law (not in itself a

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clearly add to existing pressures to *create* more and more private law publicly. Moreover, when the interpretation of legislative provisions is open to doubt, courts are nowadays entitled to have regard to an increased range of 'political' material (parliamentary debates in particular¹²), from which to draw guidance in deciding how to apply law. It is therefore not simply that more private law is now sourced publicly through the democratic process, but that instruments of legal interpretation have themselves become more permeable to arguments in the political arena.

A third pressure towards the public, identified by Steve Hedley, Anita Krug and Alastair Hudson later in this volume, is the rapid rise of the corporation since the latter part of the nineteenth century.¹³ The fact that so many parties to private litigation are now publicly constituted (by which I mean that their recognition as persons is publicly regulated) and the fact that such unnatural persons represent the collective financial interests of sizeable investor communities both present challenges to the traditional paradigm of private law as a set of norms existing 'between individuals'. Analogous challenges to the same individualistic conception of the law have flowed from the abolition of Crown immunities (making the state itself the object of more and more private law actions), by the rise and rise of compulsory liability insurance (which clearly real-locates and spreads individual liabilities) and by extensions to the doctrine of vicarious liability, which in practice relocate significant remedial responsibilities to an individual wrongdoer's employer (normally corporate, sometimes the state), even (now) when the activity constituting the wrong furthers no interest of the employer itself.¹⁴ It is therefore not just the case that many of the persons we identify as private legal actors tend these days to be corporate, but corporations are almost always in the

code, but potentially a draft of one), see Steve Hedley, 'Is Private Law Meaningless?' (2011) 64 *Current Legal Problems* 89, 106–10. In Australia, the most recent fixation is with contract codification: Commonwealth of Australia, *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (Canberra: Australian Government Attorney-General's Department, 2012). See further Andrew Stuart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74.

¹² In the UK, see *Pepper v. Hart* [1993] AC 593.

¹³ Corporations were known to law (in particular Roman law) much earlier than this, but the emergence of the public corporation from the law of partnership is predominantly a late nineteenth-century and twentieth-century phenomenon. For an English history, see Laurence Gower, *Gower's Principles of Modern Company Law*, 4th edition (London: Stevens, 1979), Chapters 2 and 3.

¹⁴ *Bazley v. Curry* [1999] 2 SCR 534 (SCC); *Lister v. Hesley Hall Ltd* [2002] 1 AC 215 (HL); *New South Wales v. Lepore* (2003) 212 CLR 511 (HCA).

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background in one way or another in private litigation, even where the particular legal interaction forming the focus of the litigation is between natural persons. Corporate entities either step directly into the shoes of natural parties via the subrogation process, or they provide a secondary mechanism for the socialisation of the latter's liabilities via market-pricing and insurance processes.

State interests in corporate entities (such as the interests taken by the state in failing banks in the wake of the recent global financial crisis) further widen (and democratise) these insurance effects. The way in which insurance systems as a whole interact with private law principles is itself a complex topic, of course, and it is no longer clear that insurance is an entirely passive party in the relationship.¹⁵ Does insurance really only redistribute risks that the law has previously fixed, as traditional views would have us believe, or does the institution of insurance affect the way in which private law chooses to fix them in the first place?¹⁶

Finally, corporations (in particular financial institutions such as banks) are central to a shift in our understanding of 'private' and public in another way. Some international corporations are so powerful and so influential upon key aspects of our public economy these days that there may be good reasons for subjecting them (on some occasions and for some purposes) to similar levels of scrutiny and accountability as the state itself. As Alastair Hudson's work in Chapter 8 suggests, these 'public' aspects of private corporations may well invite into their private law responsibilities a range of stricter 'public' (regulatory) standards.

A fourth, very significant pressure is the rise of a 'public' jurisprudence of human rights, whether constitutionally embedded or not. The impacts of this jurisprudence upon private law rights (direct and/or indirect, depending on the jurisdiction in question) are well documented in recent

¹⁵ For recent challenges to the passive characterisation of insurance's role, see Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75 *Modern Law Review* 301; Jenny Steele and Rob Merkin, *Insurance and the Law of Obligations* (Oxford University Press, 2013). Contrast Ernest J. Weinrib, 'The Insurance Justification and Private Law' (1985) 14 *Journal of Legal Studies* 681; Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 *Modern Law Review* 820.

¹⁶ The uncertainty on this issue is neatly exemplified in Australia by a contrast between the approaches of McHugh J in *Perre v. Apand Pty Ltd* (1999) 198 CLR 180 at [130] (insurance 'generally' irrelevant to the duty of care issue in negligence law) and Gillard J in *Johnson Tiles Pty Ltd v. Esso Australia Pty Ltd* [2003] VSC 27 at [1093]–[1110] (fact that first-party insurance widely available and in fact held by plaintiff relevant to exclusion of any duty of care on part of the defendant in respect of pure economic harm). See also Tracey L. Carver, 'Insurance and the Law of Negligence: An Influential or Irrelevant Persuader?' (2011) 22 *Insurance Law Journal* 51.

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works.¹⁷ Michelle Flaherty alludes to some of them in Chapter 7. In the United Kingdom, the interactions between public law actions against the state under the Human Rights Act (HRA) 1998 and private law actions are particularly interesting and complex, not least because courts – as public authorities – are obliged by the terms of the Act to apply the norms of the European Convention in developing traditional private law doctrines.¹⁸ In some instances, such as in the domain of privacy law, English private law has effectively imported the substance of these ‘public’ norms wholesale into individual civil law actions.¹⁹ At the same time, many of the rights protected by the Act, although technically exigible by individuals only against state agencies, bear close resemblance in their substantive terms to the rights (property, physical liberty, rights to life) traditionally protected by private law doctrines of ancient pedigree. ‘Human’ rights, as they exist in the modern day, have a ‘public’ dimension in the sense that they circumscribe liberties and goods that democratically accountable public authorities have positive obligations to protect. At the same time, however, some of these are matters in respect of which private law has developed its own robust reasoning structures, remedies, checks and balances.

There is obvious potential for collision. In the recent *Rabone* case,²⁰ for example, an action under the HRA seems to have undermined the regime of bereavement damages laid down by a domestic private law statute, by according distressed parents compensation for the state’s failure to protect their child’s right to life. Although English parents have no action of their own in negligence against other private parties for bereavement flowing from the death of an adult child, they may now sue the state for precisely this emotional harm, where the latter fails in its positive obligations under the HRA to protect the child’s life. Such developments seem likely to (further) increase the incentive for litigants to allocate blame wherever possible to public (state) parties. They also demonstrate the complexity of the public–private rights relations in issue in interactions of this sort. In *Rabone*, private law disclosed no individual (private) interest of the parent giving rise to a right to compensation. By contrast, the (public law)

¹⁷ E.g. Daniel Friedmann and Daphne Barak-Erez (eds.), *Human Rights in Private Law* (Oxford University Press, 2001); David Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011).

¹⁸ Human Rights Act (HRA) 1998 (UK), s. 6(3).

¹⁹ *Campbell v. Mirror Group Newspapers Ltd* [2004] 2 AC 457; *McKennitt v. Ash* [2008] QB 73 at [11].

²⁰ *Rabone v. Pennine Care NHS Trust* [2012] 2 AC 72 (*‘Rabone’*).

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action under the HRA seems to have given rise to damages for harm to *precisely that private interest*, on the hypothesis that it resulted from the infringement of a *public law* right belonging to a *distinct*, private party (the child).²¹ Unpicking this Gordian knot of public and private rights is not easy, but it remains an important aim if we are to determine the respective functions and purposes of public and private law in respect of these important human interests in the twenty-first century. Such interests are now protected by both legal domains and the respective systems of public and private rights are only loosely coordinated and therefore capable of chafing uncomfortably against one another.²²

A fifth ‘public’ pressure upon private law stems from the phenomenon of legal globalisation, which Zamboni defines as ‘the circulation of legal models (i.e. legal categories and concepts) in a way that ... render[s] ... many different aspects of ... different legal systems homogenous’.²³ It has sometimes been said that globalisation renders private law *more private* (because it extends the operation of the law beyond the reach of nation-states and places it more in the hands of the market),²⁴ but there is also a sense in which globalisation makes the source of relevant private law norms more ‘public’, in so far as it sources them in a wider range of trans-jurisdictional legal materials. European human rights law provides a classic example of (geographically limited) globalisation as Zamboni defines it: the jurisprudence of the European Convention supplying the relevant norms for domestic courts to apply and the European Court of Human Rights (ECtHR) itself comprising judges drawn from a wide variety of different constitutional backgrounds. United Kingdom domestic private law still retains a degree of ‘norm-sourcing’ autonomy as a consequence of principles of state derogation from (some Articles of) the Convention and via generous margins of appreciation, but it is nonetheless obliged to

²¹ This was made possible by construing the parents as ‘victims’ of the right-violation. An alternative analysis, perhaps more compatible with the conventional view that the HRA creates no private rights per se, is that this is the ‘private damage’ suffered by the parents as a result of the state’s violation of their *own public* right that the state properly implement the pattern of rights contained in the Convention. On this view, the HRA effectively creates a statutory ‘public’ tort specific to public authorities: Robert Stevens, *Torts and Rights* (Oxford University Press, 2007), p. 239. For trenchant criticism of *Rabone* for trivialising the human rights exercise and for blurring the line between human rights actions and tort law, see Andrew Tettenborn, ‘Wrongful Death, Human Rights and the Fatal Accidents Act’ (2012) 128 *Law Quarterly Review* 327.

²² Some might say, of course, that this is the whole point of human rights – to act as constant correctives to domestic law, both public and private.

²³ Zamboni, *The Policy of Law*, p. 200.

²⁴ Michaels and Jansen, ‘Private Law Beyond the State?’, 873.