HART STUDIES IN PRIVATE LAW

JUSTICE IN PRIVATE LAW

Peter Jaffey

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This book discusses the dominant corrective justice and distributive justice approaches to private law and identifies their strengths and weaknesses. It goes on to propose a general approach to private law, including contract, tort and private property, and explains how this approach can provide solutions to some longstanding problems.

Two general ideas inform this approach: the 'standpoint limitation' and 'remedial consistency'. The standpoint limitation explains the distinctive character of private law, that is to say why it is focused mainly, though not exclusively, on particular individual interests rather than the common welfare. Remedial consistency explains the way in which remedies depend on and give effect to primary rights.

The book also discusses the nature of common law legal reasoning and its relationship to the suggested understanding of private law.

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ABBREVIATIONS

EAL	economic analysis of law
MTL	moral theory of law
STL	socio-legal theory of law

1

Introduction

Private Law

Private law is the law applicable as between individuals, by which one person enforces a legal right against another through civil proceedings. The main areas are contract, tort and private property: in contract, rights arising from agreements for the exchange of goods or services for payment; in tort, rights with respect to harm to or interference with person or property, including inadvertent harm in negligence; and, in private property, rights with respect to things, including land, personal property, and, it is widely thought, intangible property, including intellectual property and money. By virtue of these bilateral legal rights, an 'interaction' between individuals, such as a contract or the failure to perform a contract, or an accident, or a transfer of property, can have the legal effect of creating a new bilateral right, including a remedial right or claim, usually a claim for compensation. Thus one can also say that private law is the law of interactions between individuals.

There are two rival schools of thought in the literature on private law, which I shall refer to as the corrective justice and distributive justice approaches. On the corrective justice approach, the bilateral legal relations of private law are based exclusively on the bilateral or interpersonal moral rights of the parties to an interaction: the claimant (C) and the defendant (D). On the distributive justice approach, the justification of private law is in the contribution it makes to justice with respect to benefits and harms of people across society. The standard though not the only version of the distributive justice approach is the 'economic analysis of law' (EAL), which holds that private law should serve to maximise the aggregate welfare or net benefit associated with interactions. In this book, I assess the strengths and weaknesses of the corrective justice and distributive justice approaches, and then I suggest a new approach.

The Characteristic Features of Traditional Private Law

It is helpful to begin with the distinctive features of what one might describe as 'traditional private law'. It may be open to question whether these features continue to characterise private law and whether they ought to, but describing them is a good way to outline the subject matter and the issues that divide the opposing

theoretical approaches. The corrective justice approach appears to provide a better account of these characteristic features than the distributive justice approach, though as considered further in chapter two this is not necessarily the crucial issue in evaluating them.

Bilateral Relations

Private law establishes bilateral legal relations between two parties, C and D. As conventionally understood, these bilateral relations consist of a right of C against D and a correlative duty owed by D to C. The relation is correlative in the sense that C's right and D's duty are the same thing expressed from opposite viewpoints: one can describe the law equivalently in terms of C's right and D's duty. In contract, C's right to performance of the contract by D is correlated with a duty on D's part to provide the performance, and in negligence C has a right to a certain standard of care by D, and D has a correlative duty to meet the standard for C's benefit. In property law, the owner C has a right against interference with C's use and possession of the property and D has a correlative duty not to commit such interference.

On the traditional understanding associated with the corrective justice approach, the bilateral rights of private law are apt because they represent 'justice as between the parties' or interpersonal justice. The bilateral relations are a natural feature of private law in the sense that they reflect and give effect to underlying interpersonal moral rights of the parties to the dispute. For some commentators at least, on the corrective justice approach private law is a manifestation or extension of the ordinary personal morality that governs personal and social interactions between individuals.[1] For example, the rationale of the law of negligence is to give effect to the moral right of C against D not to be harmed by D's negligent conduct.

By contrast, on the distributive justice approach, private law is concerned with justice with respect to benefits and harms across society as a whole. The rationale of the law of negligence is to reduce the damage or injury caused by accidents in society, or to spread losses across society to reduce the burden imposed on particular individuals (or some such public or societal purpose). The bilateral legal rights of the parties do not represent justice as between the parties or interpersonal moral rights. Rather than being a necessary and intrinsic feature of private law, they are a device for promoting a societal purpose to which the parties' own interests may be incidental. It would seem that bilateral legal rights have come to be recognised only because the law developed through civil proceedings between the parties to an interaction. This approach is at odds with the traditional understanding of private law and may favour departures from traditional private law. Indeed the implication is that the objectives of private law might often be better achieved through a different sort of legal regime that does not take the form of bilateral relations enforced through civil proceedings, for example a regime that provides

[1] See J Gardner, *From Personal Life to Private Law* (Oxford University Press, 2018).

for compensation for accidents through a compensation fund or even government allocation of goods and services rather than private exchange by contract.

Conventionally the bilateral relation is understood to consist of C's right correlated with a duty on the part of D, and accordingly C's claim arises from a breach of duty or wrong by D (I equate 'wrong' and 'breach of duty'). However, the law does not always seem to reflect the idea that C's claim arises from a wrong by D. For example, sometimes D's supposed primary duty requires D to do something that it is impossible for D to do, or in committing the wrong D's action is something that he is entitled to do. That C's claim can arise without a breach by D of a duty to C, if this is the case, is taken to support the distributive justice approach, since it is taken to imply that the justification for the claim is not a matter of interpersonal justice between C and D.

Primary and Remedial Relations

C's claim is a right to a remedy. The remedy is what the court requires from D for the benefit of C at the conclusion of the proceedings (if C is successful), typically an order for compensation, but sometimes an order to perform or not to perform an action, ie an injunction or order of specific performance.

It is convenient to distinguish between the primary relation and the remedial relation. The primary relation subsists before the claim arises, and it determines the circumstances in which a claim will arise. In negligence, the primary relation is the duty of care and the correlative right, and in contract it is the duty of performance and the correlative right. The remedial relation is the claim – the right to a remedy – correlated with a remedial duty or liability, which arises when D commits a breach of duty.

The relationship between primary and remedial relations is unclear: do the right to a remedy, and the type of remedy to which C is entitled, follow directly and logically from the primary right, so that they are in effect already implicit in the primary right, or are they independent of the primary right and dependent on a new set of considerations, which form the basis for a distinct body of remedial rules? These are the rival positions sometimes described as remedial monism and dualism. One can find support for both approaches in the case law and literature. The claim for compensation is generally understood to follow automatically in the event of a breach of duty, but the availability of specific performance or an injunction is often taken to depend on a new set of considerations, and is sometimes understood to be a matter for judicial discretion.

This issue is related to another contentious issue: why does a right to compensation arise at all? It is often said that the justification is the principle of moral responsibility that a wrongdoer should correct the wrong, but this seems unsatisfactory because it is implausible to think that D is generally morally responsible for the harm for which D is legally liable in private law. Indeed, as mentioned already, it is open to question whether a claim generally arises from a wrong by D at all.

The uncertainty over how remedies, and in particular the right to compensation, arise from primary rights, and about whether, or in what sense, claims arise from wrongs, raises doubts about the traditional understanding of private law and difficulties for the corrective justice approach.

Remedies not Sanctions (or Other Non-remedial Responses)

Any measure ordered by the court at the conclusion of proceedings may be described as a remedy, but it is helpful to distinguish between remedies in the strict sense, and non-remedial responses, including sanctions. A remedy in the strict sense is a measure that serves to protect C's primary right by mitigating or reversing so far as possible the effects of the infringement of C's right, typically by compensating C for the harm C has suffered. By contrast, a sanction serves the public interest by protecting not C's primary right but the rights of others in the same position as C in the future, through the effect of the sanction on D in deterring other people in a comparable position to D from committing a similar wrong, and possibly also by incentivising people in a comparable position to C to take proceedings to secure a sanction.

The traditional position is that private law provides remedies in this strict sense rather than sanctions. In particular, compensation is understood as a remedy in this sense. It seems natural to understand civil proceedings as designed in this way to enable C to protect C's own primary right by securing a remedy. This reflects the corrective justice idea that the legal relations of private law reflect underlying interpersonal moral rights, since a remedy simply serves to protect C's right against D. On the corrective justice approach, there is thus a close connection between the bilateral character and the remedial character of private law. This is why the expression 'corrective justice' is apt for what it might seem preferable to refer to as the 'interpersonal justice' approach. This is not to say that remedies do not actually operate to influence people's behaviour in the future, but on this view that is not their rationale. This understanding is consistent with the fact that punitive damages as a response to a wrong are not normally available. Punitive damages are clearly not a remedy: what C receives through a punitive measure is merely incidental so far as its rationale is concerned, and it is a windfall to C.

On the distributive justice approach, under which private law is justified in terms of its effect on society at large and not in terms of bilateral moral rights, it would seem that the measures dispensed by courts should be understood in terms of their effect as sanctions in influencing the behaviour of people generally, rather than as remedies in the strict sense. On this understanding, even compensation may be understood as a sanction rather than a remedy.[2]

[2] A measure can be non-remedial without being a sanction, eg a measure intended to provide compensation through loss spreading, as considered in ch 4.

Objectivity

Traditional private law is 'objective' or impersonal in its characterisation of individuals. It judges each person under a 'reasonable person' standard with respect to what that person is expected to do or know or how that person will be affected by harms or benefits, regardless of individual strengths and weaknesses. The law of negligence turns on whether D reached a 'reasonable person' standard, which does not depend on what D is personally capable of or knows or intends. Similarly, in contract, the test of agreement is whether the parties would be understood by a reasonable observer to have reached agreement and the contract terms are generally understood as a reasonable observer would have understood them, irrespective of the parties' true intentions or actual knowledge or understanding.

This may be thought justified because it treats people, at least in a sense, as equals – this is the position taken on the corrective justice approach – but, at the same time, for private law not to differentiate between people according to their actual intentions or knowledge or their actual strengths or weaknesses may seem to involve a crude approximation, or even a fiction.

Focus on the Particular Parties

On the traditional understanding, which reflects the corrective justice approach, the rules of private law appear to be generally concerned only with the particular interaction and the particular parties' relationship and their interests. They do not generally depend on the wider ramifications of the interaction or on the effects of that type of interaction across society. The standard of care in negligence is traditionally understood to reflect a balance between C's interest against suffering harm and D's interest in freely conducting the activity that gave rise to the harm, rather than on what would be best to reduce accidents and accident costs across society more widely. In contract, it is the interests of the contracting parties in making and performing the contract that are relevant, not the public interest in the practice of contracting. This feature of the law is expressed in various ways. It is sometimes said, particularly in connection with the law of negligence, that the law is concerned with matters of interpersonal justice or rights rather than with matters of community welfare or social goals or the common good or the public interest. Sometimes it is said, apparently to the same effect, that the law is concerned with principle and not policy or with legal policy and not public policy. The implication is that the law does not draw on 'policy analysis', as it is sometimes described, meaning the analysis of the effects of possible rules across society as a whole, drawing on social and economic theory and knowledge, based on empirical evidence.

This restriction again reflects the corrective justice approach that private law simply gives effect to interpersonal moral rights based on personal morality rather than being concerned with harms and benefits across society more widely. Commentators who favour a version of the distributive justice approach are liable

to suggest that there is no such restriction in private law, or that if there is it ought to be abandoned. In fact, although there does seem to be a limitation in the law along these lines, it does not seem to be as strict as the corrective justice approach would require, and the law does not seem to reflect either the corrective justice approach or the distributive justice approach.

Private Law as Common Law

Private law in its traditional form developed through the common law, by virtue of the authority of the decisions made by judges in adjudication. It appears to have arisen through common law legal reasoning by precedent and analogy and to be distinctive of the common law. It seems that analogical reasoning, where the court decides a case in the same way as a previous case that is considered equivalent, is supportive of the corrective justice approach because it involves a focus on the interaction and the parties' relationship, and excludes policy analysis. Proponents of EAL and the distributive justice approach are liable to think that traditional common law reasoning is misguided insofar as it hinders the development of the law to give effect to distributive justice.[3] When the legislature legislates to reform private law, it draws on distributive justice. It does not, of course, use common law reasoning to decide on the content of the legislation, and it can certainly use policy analysis. Law created by legislation may not show the characteristic features of traditional private law. In particular, it may not even take the form of bilateral relations – for example, negligence law might be replaced by a form of public compensation fund for accident victims. Even where the legislature retains bilateral relations, it may abandon other features of traditional private law, for example where it introduces a mandatory regime in contract for the benefit of a sector of the population, on the basis of policy analysis.

It is said that on the corrective justice approach private law is autonomous, in the sense that the interpersonal morality concerning interactions that it draws on is distinct from the political morality of legislation, which is a matter of distributive justice. Thus when judges decide how to develop the law they are not engaging in the same sort of exercise as the legislature when it decides how to reform private law. On the distributive justice approach, there is no such distinction in principle between judicial development and legislative reform. It seems to be generally accepted, even by proponents of the corrective justice approach who think that judges should preserve private law in its traditional form in the common law, that it is legitimate and even desirable for the legislature to reform the law to promote distributive justice in this way, but it is not clear that this is a consistent position.

[3] See eg L Kaplow and S Shavell, *Fairness versus Welfare* (Harvard University Press, 2006) ch II.

The Corrective Justice and Distributive Justice Approaches

The main source of theoretical disagreement over private law is between the distributive justice and corrective justice approaches. The corrective justice approach tends to support traditional private law and purports to account, on the whole, for the characteristic features identified above, in particular bilateral relations. It treats the justice of private law as a matter of interpersonal justice or interpersonal moral rights as against each other of the individuals involved in an interaction, and it holds that in consequence a claim arises from a breach of duty or wrong that gives rise to a remedy in the strict sense to protect C's right. It appears to explain the focus on the parties' relationship and the exclusion of other considerations, and it appears to accord with traditional common law legal reasoning. The distributive justice approach by contrast rejects the idea that the bilateral relations of private law are based on interpersonal moral rights and tends to regard the other features of traditional private law as artificial. It accepts the possibility that justice might be better achieved in some other way that does not conform to traditional private law and may not even involve bilateral relations.

The two rival approaches have quite different visions of private law. Although they do not necessarily lead to different outcomes in particular cases, in some cases the differences emerge explicitly. Over time the two approaches would tend to take private law in quite different directions.

In modern times, the theoretical controversy over private law seems to have begun with the emergence of EAL, which prompted the development of modern corrective justice theory by way of response, broadly with the aim of vindicating the traditional understanding of private law. Corrective justice theory was developed principally with respect to tort law and negligence in particular,[4] and the equivalent reaction to EAL in contract was 'contract as promise',[5] which I treat as a version of the corrective justice approach.

Both the corrective justice and the distributive justice approaches are thought by their opponents to have serious if not overwhelming problems. Proponents of the corrective justice approach tend to reject the distributive justice approach on the ground that it fails to account for private law, that is to say it makes prescriptions about what the law should be but these conflict with what we actually find in private law and legal reasoning in private law. Proponents of the distributive justice approach, in particular EAL, seem to be attracted by its arguments about what the law should be, irrespective of whether it provides a good account of traditional private law, or instead implies that reform of private law is required. They may take the view that the characteristic features of traditional private law are indefensible

[4] In particular, EJ Weinrib, *The Idea of Private Law* (Oxford University Press, rev edn 2012).
[5] In particular, C Fried, *Contract as Promise* (Oxford University Press, 2nd edn 2015).