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DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING

By Stephen Waddams
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One of the late Professor Peter Birks's many achievements was to re-animate longstanding debates about the usefulness of institutional overviews of the law.[1] He subscribed to the view that although the common law is the product of accumulated legal experience, its doctrines and remedies could nonetheless be classified on the basis of rational criteria. Shirking intellectual challenges never being one of his failings, he developed his own taxonomy of the common law of obligations. To this task he brought formidable credentials. Although better known for his work on the English law of unjust enrichment,[2] he was a distinguished Roman law scholar. He was also familiar with previous attempts by Blackstone and Austin to create legal taxonomies (including the reasons for the failure of these attempts), and had an informed interest in the work of the great Scottish institutional writers such as Stair.[3] The scheme he elaborated is predicated on a series of causative 'events', namely consent, wrongs, unjust enrichment and miscellaneous others. Proof of a legally recognised 'event' attracts a variety of 'responses', either personal or proprietary (eschewing, for this purpose, the word 'remedy' which Birks considered to be too ambiguous to be utilised for taxonomic purposes).

Birks's taxonomy is not just a scheme for arranging the subject-matter of private law. It also announces a program for reorganising that subject matter according to criteria which are rational (given the foundational distinction between 'events' and 'responses'), as opposed to being explicable in terms of the history of the common law. An important aim of the project is to integrate legal and equitable obligations.

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1 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1998) 26 *University of Western Australia Law Review* 1; Peter Birks, 'Definition and Division: A Meditation on *Institutes* 3.13', in Peter Birks (ed), *The Classification of Obligations* (1997) ch 1.

2 Peter Birks, *An Introduction to the Law of Restitution* (1985); Peter Birks, *Unjust Enrichment* (2003).

3 P Birks and G McLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion in the Century before Blackstone' (1986) 6 *Oxford Journal of Legal Studies* 46.

Equitable doctrines are dispersed among the four causative events. So, for example, breaches of fiduciary obligations are classified as wrongs, in effect becoming 'tort law in equity', while undue influence, innocent misrepresentation, and unconscionable dealings (at any rate, where relief is not awarded under the *Australian Trade Practices Act)* are identified as grounds of unjust enrichment.

The reception to this intellectual refashioning of the common law has ranged from enthusiastic adoption to outright hostility. Some features of Birks' model, in particular the integration of legal and equitable doctrine, can be found in *English Private Law*,[4] a scholarly magnum opus on English private law edited by Peter Birks. Robert Chambers' lucid *An Introduction to Property Law in Australia*[5] also makes use of the model. And while Sarah Worthington has drawn her own map of the doctrinal terrain in her recent book, *Equity*[6], the map cannot unfairly be described as a product of the taxonomic tradition revived by Birks. Birks' model also provides a framework within which unresolved analytical questions in the law of obligations can be debated. For example, is liability for receiving property in breach of fiduciary duty an example of unjust enrichment or a species of equitable wrong?[7] A legal taxonomy cannot answer the question. But it can assist in clarifying the terms of the debate. And since the question raises important issues of liability (fault versus strict liability) the role of taxonomy here is not insignificant.

On the other side of the argument, critics of Birks' model have taken issue with both the principle of the taxonomy and its application in practice. Some have examined specific areas of private law, such as pre-contractual liability, with a view to demonstrating that the model is of limited explanatory value when applied to these areas[8]. Others have argued that comparisons drawn by Birks between legal classification and the classification of species in the natural sciences ignores important differences between the empirical and the conceptual worlds. This is the thrust of Geoffrey Samuel's 'Can Gaius Really be Compared to Darwin?',[9] which directly challenges the methodological assumptions on which Birks's scheme rests. The argument that the scheme is false to the methods of the common law has also been made by Gummow J in a well-known dictum:

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4 Peter Birks (ed), *English Private Law* (2000).

5 Robert Chambers, *An Introduction to Property Law in Australia* (2001).

6 Sarah Worthington, *Equity* (2003).

7 Lord Nicholls, 'Knowing Receipt: the Need for a New Landmark', in W R Cornish et al (eds), *Restitution Past, Present and Future* (1998) 231; L D Smith, Unjust Enrichment, Property and the Structure of Trusts, (2000) 116 *Law Quarterly Review* 412; Peter Birks, 'Receipt', in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (2002) 213.

8 Joachim Dietrich, 'The "Other" Category in the Classification of Obligations', in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (2004) ch 7.

9 (2000) 49 *International and Comparative Law Quarterly* 297.

> To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the sources of the theory may be the writing of jurists and not the decisions of judges. However, that is not the way in which a system based on case law develops: over time, general principle is derived from judicial decisions upon particular instances, not the other way around.[10]

In *Dimensions of Private Law*, Stephen Waddams sets out his own objections to the taxonomies proposed by Birks and other writers. His perspective is not that of the comparative scholar (though he is aware of, and agrees with, the objections advanced by comparativists, such as Samuel, to the Birksian scheme), but that of the legal historian. His central objection to legal mapping of the kind undertaken by Birks is that it imposes a false order on the past of the common law, and by extension therefore on its present. Legal taxonomies include examples of legal doctrines that conform to their preferred scheme; non-conforming examples will either be ignored, marginalised or condemned for being unprincipled.

The book identifies the analytical distortions of the law caused by over-zealous classification. The first is a tendency to ignore, or at any rate minimise, the role played by the contingencies of litigation in the formulation of legal principle. Drawing on his well-known researches into the background of the 'Covent Garden' cases, *Lumley v Wagner*[11] and *Lumley v Gye*[12] he shows how findings of fact, such as Lumley's failure to make an advance payment to Johanna Wagner, shaped the development of the law. The relevance of this fact to the formulation of legal principle was to confirm that courts would not be disposed to hold a defendant liable for inducing breach of contract on the basis of an honest though incorrect belief that the contract was no longer binding. The failure of the plaintiff's claim in *Lumley v Gye* was to inhibit the development of this head of liability for many years.

The level of particularity at which facts are held to be legally relevant, like the level of particularity at which rules are formulated, constitutes a serious obstacle to any attempt to constrain a legal principle within a pre-ordained legal category. Legal rules emerge from, and are shaped by, the process of fact-finding, and that process is incompatible with any notion of 'timeless' legal categories.

This distortion is closely linked to another, namely the tendency of the system builders to insist that legal concepts are distinct when in fact they interact with each other. In contrast to Birks, who identified discrete spheres of application for his causal events, Waddams emphasises the connectedness of these concepts, and their cumulative impact upon decision-making. The protection of reliance interests, for

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10 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544.

11 (1852) 1 De GM & G 604.

12 (1853) 2 El & Bl 216. See Stephen Waddams, 'Johanna Wagner and the Rival Opera Houses' (2001) 117 *Law Quarterly Review* 431.

instance, cannot be explained in terms of a single legal concept. In a chapter that takes in promissory and proprietary estoppel, secret trusts, negligent mis-statement, agency, fiduciary obligations and liability for breach of confidence as examples of reliance-based liability, the point is made that the cases on these topics cannot be rationalised exclusively in terms of consent, wrongs or unjust enrichment. Nevertheless, the cumulation of these concepts does play a part in the imposition of liability. Moreover, the concepts themselves must be fluid and not over-determined. Throughout the book references to unjust enrichment are usually qualified by the addition of the words 'in the general sense of that phrase'. The qualification captures the idea of preventing unjust enrichment, as well as the more familiar notion of reversing unjust enrichment.[13]

Dimensions of Private Law is a beautifully written and very erudite book. Stephen Waddams writes authoritatively on all areas of private law, and is conversant with recent developments in all common law jurisdictions. It is hard to think of another writer who could have taken the entirety of private law as a theme and written so impressively about all its constituent parts. The achievement is all the greater when one bears in mind the fact that the author works with a broad definition of private law. Indeed, one of the arguments of the book is that the appropriation by common lawyers of the civilian term 'the law of obligations' has resulted in important areas of private law, such as domestic obligations and maritime law, being overlooked. On one view, the book can be said to reclaim private law from the taxonomic pre-occupations of obligations lawyers.

Does the book substantiate its claims that taxonomic maps have played little part in the development of private law, and that the exercise of mapping can distort our understanding of the methods of the common law? Most readers of this book will already have taken up a position on one side or the other of the taxonomy debate. This reviewer has long been convinced of the correctness of the major premises of Birks's scheme, as well as the closely-structured model of unjust enrichment championed by Birks and others of the restitution school. It is possible to accept the historical evidence adduced by Waddams that intellectual maps have played little or no part in the development of the law, and yet to believe that we understand the law better for their existence. Imperfect and incomplete though they are undoubtedly are, taxonomies can serve to clarify thinking about the aims and divisions of private law, as the books discussed above illustrate.

Dimensions of Private Law has little to say about the reasons for creating taxonomies. The advantages of mapping are sometimes alluded to, but never spelt out. For example, near the end of the book the reader is informed that '[t]he idea of mapping cannot be entirely discarded, and it owes its attraction partly to the fact that

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13 A similar idea informs the inclusion of ch 17, 'Wrongful Death', in Keith Mason and J W Carter, *Restitution Law in Australia* (1995).

it is understood in many different ways, some of which are essential to the organisation of thought'.[14] Some account of these heuristic reasons for classifying private law would have been welcome. If mapping really is essential to the organisation of legal thought, an analysis of the kinds of classification that are least likely to distort our understanding of the past or present would have been valuable.

There have been times in the history of the common law when lawyers have had to reorientate their view of private law. The procedural reforms of the nineteenth century which resulted in the elaboration of the modern law of contract and tort was one such time. Peter Birks's taxonomy is arguably a response to another turning point in the history of the common law, though one that is not highlighted by legislation. More than a century after the enactment of the Judicature legislation of 1873, it is no longer intellectually satisfactory to define equitable doctrine solely in terms of the body of doctrine, principles and remedies applied by the Court of Chancery before the enactment of that legislation. The past is not by itself an adequate explanation of the present. Judges and writers naturally look to other explanations for the continuing separation of common law and equitable doctrine. It is for this reason that rationalisations of equitable doctrine in terms of some meta-principle, such as the prevention of unconscionable conduct, have recently been so influential. And it is for this reason, also, that Birks' taxonomy, which integrates common law and equitable doctrine on the basis of causative events, has an intellectual appeal for some (though, of course, not for all). In Sarah Worthington's graphic aphorism, we have reached the 'endgame' of equity, so that the separate existence of equitable doctrine now calls for a contemporary justification[15]. In the absence of such justification, integration of the two main sources of private law is unavoidable.

Nevertheless, Stephen Waddams is right to draw attention to the distortions that inevitably occur when private law is reorganised in order to achieve preconceived functional objectives. The dangers of classification — including the twin dangers of oversimplifying complex legal phenomena and underestimating the role of public policy — are clearly documented in his book. Recurrent attempts to systematise private law may be unavoidable, as being 'essential to the organisation of thought', but *Dimensions of Private Law* is a salutary reminder that our attempts to create legal taxonomies will never be wholly successful.

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14 Stephen Waddams, *Dimensions of Private Law* (2003) 226.

15 Sarah Worthington, above n 6, ch 10. Worthington's argument is that comprehensive, rational integration of common law and equitable doctrine is needed, though the basis of integration differs in important respects from the scheme proposed by Birks.