

Chapter 7

Taking Common Law Concepts Seriously: Extending the Principle of Legality in Private Law

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Introduction

In the last 50 years private law has undergone a revolution created by a massive increase in statutes in an area which previously was relatively statute free. This shift into an ‘age of statutes’¹ is of great consequence. What was previously a system predominantly of judges analysing cases and changing the law by the process of increment and analogy has exploded into a plethora of ‘new’ statutory ideas which come from Parliament and may have a political end in view. Instead of thinking only about judges’ analysis of cases, we now have to add parliamentary intention to the matrix to decide what the law is and what it means. The influx of statute has created a crisis in our consideration of private law because we have continued to try to analyse the structure, function and coherence of private law as if statutes were not there, and we have treated statutory interpretation as a clumsy add-on to the process. Statutory interpretation is often not well-connected to the rest of the analysis – that is, it may be treated as one distinct area and the case law as another distinct area. In this chapter I argue that we need to develop a structural analysis of the common law which can accommodate both judge-made law and statutes, and that this structural analysis should inform the process of both statutory interpretation and case analysis so as to develop a coherent sense of system across the subject matter of private law.² The aim is to develop a version of the principle of legality which might be useful in private law. I try to do this on the basis of a structural analysis of the common law (including equity)³ which can accommodate both judge-made law and statutes, and this structural analysis should inform the process of both statutory interpretation and case analysis so as to develop a coherent sense of system across the subject matter of private law.

What is meant by a coherent sense of system across the subject matter of private law is that we need to see our separate sources of law as part of the same system. We need to recognise that there are structures in private law common law which are recognisable and systematic and that can inform statutory interpretation as they inform case

1 G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

2 Private law is defined for my purposes in Chapter 1 of this volume.

3 In this chapter when I refer to common law I am generally referring to the judge-made law that includes both common law and equity.

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