Legal Studies (2024), 1–5
doi:10.1017/lst.2024.38

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The Society of Legal Scholars

CURRENT DEVELOPMENTS: BOOK REVIEW

Justice in Private Law

by Peter Jaffey. Hart Publishing, 2023, 178 pp (price and format) ISBN 978 0 192 88502 9.

Sagi Peari

University of Western Australia, Perth, Australia
Email: sagi.peari@uwa.edu.au

(Received 9 July 2024; revised 10 October 2024; accepted 14 October 2024)

Private law represents the 'bread and butter' of legal scholarship and studies. It encompasses such core subjects as contract, torts, property law, trusts and restitution. A unifying theory of private law would aim to provide a single conceptual framework for grasping the nature of each one of those subjects. What are the underlying ideas standing behind the development of traditional contract law? What is the nature of what appears to be the core of contemporary tort law – the law of negligence? What explains the rapid development of the restitution/unjust enrichment law in recent decades? And, would it be possible to draw a unifying parallel between the various subjects (or categories) of private law, through illustrating their internal unity, common threads and interconnectedness?

From this perspective, Professor Peter Jaffey's *Justice in Private Law* deserves attention. Written by a well-known private law theorist, this book accomplishes a difficult task: making an argument about the interconnectedness of the categories of private law under a single set of ideas. This position enables the author to make a further argument about the past, present and future of private law and the plausible direction of legal reform.

The paradigmatic tension between the so-called 'corrective' and 'distributive' approaches to private law's justice lies at the heart of *Justice in Private Law*. As Jaffey explains, corrective justice perceives private law as fundamentally focusing on the litigants: the specific claimant and defendant. To make a civil claim actionable, the defendant must commit a certain wrong against the claimant, such as breaching a contractual promise (in the context of contract law) or interfere with the defendant's bodily integrity or property (in the context of torts). This focus on the bilateral interaction between the parties excludes policy analysis and public considerations as a legitimate dimension of private law's adjudication process. Private law must be kept 'private'.[1] It also explains the remedial aspect of corrective justice: the claimant should receive from the defendant the exact benefit/financial compensation which had been taken from them by the defendant. In other words, the claimant's remedy must mimic the wrong caused by the defendant to the claimant; no less and no more.[2]

Jaffey makes it clear that the distributive justice approach to private law represents a diametrically opposite school of thought. It abstracts itself from specific litigants by focusing on the needs of a given society/community/state and the way the risks and benefits should be allocated within it. In this way distributive justice aims to take seriously the task of facilitating societal purposes through private law, viewing private law as normatively 'public' enterprise.[3] Thus, one of the vivid approaches of distributive justice – the economic analysis of private law – supports the contract law doctrines which contribute to commercial activity. Contracts should be upheld, not because of the intentions of the

[1]See P Jaffey *Justice in Private Law* (Oxford: Hart Publishing, 2023) pp 13–17, 62–65.
[2]Ibid, pp 19–29, 74–79, 121–124.
[3]Ibid, pp 2, 40–61.

contractual parties, but as means of promoting the economic activity of the state.[4] Similarly, economic analysis places much emphasis on the cost associated with negligence acts, favouring those rules which impose liability that would maximise the aggregated welfare of a society and reduce losses across it. This focus on cost-benefit analysis tends to favour strict liability rules which are immaterial to the questions of fault or unreasonable conduct of a particular defendant.[5] Stated in these terms, the point of departure of distributive justice's angle is completely different to that of corrective justice: instead of considering the normativity between two private individuals, it considers the application of certain distributive criteria (such as economic efficiency) on a society as a whole and the promotion of the public good.[6]

One of the major achievements of *Justice in Private Law* is that it elegantly situates corrective and distributive justices' approaches within a single normative sequence. Jaffey takes the distributive justice approach as standing at the basis of the private law categories: contract, torts, property, trusts and restitution. These are public considerations of society which normatively undergird these categories. Thus, for example, the societal considerations of commercial activity explain the nature of the contract law category[7] and the distribution of benefits across society underpins the property law category.[8] Subsequently, the reason for a defendant's liability in private law should not be explained through the prism of the bilateral claimant-defendant relationships, but rather through publicly informed questions concerning such issues as the proper allocation of risks across a society for certain losses caused by a defendant.[9]

As Jaffey frankly admits, the historical development of English private law tends to follow the dualistic structure of corrective justice. Common law judges appear to adjudicate cases on an individual basis rather than concerning themselves with the societal impacts of the litigation process.[10] True, as Jaffey shows, the presence of distributive considerations is evident through a careful examination of several traditional private law doctrines, rules, concepts and principles.[11] Thus, for example, these are 'public' considerations which shed light on the general reluctance of the common law courts to grant the remedy of specific performance (which requires a defendant to perform the promised contractual act instead of compensating the defendant)[12] and the *White & Carter* principle[13] (which in some circumstances exempts a claimant from a duty to mitigate their losses) in the context of contract law. Jaffey also shows that these 'public' considerations underpin the favourable treatment of the legal doctrine of socially desirable activities in the context of negligence law[14] and explain the sustained presence of the 'public policy' doctrine across the various categories of private law.[15] However, as Jaffey notes, the presence of distributive justice is quite sporadic and limited.[16] Generally, private law doctrine operates in a manner which is more consistent with corrective justice's claimant-defendant bilateral approach.[17] This traditional predominancy of corrective justice within the traditional adjudication process is quite puzzling and requires an explanation.

Justice in Private Law provides an explanation of the above puzzle and offers an attractive argument about the way to reconcile the historical contingency of corrective justice and the normative adequacy of the distributive foundation of private law.[18] Jaffey tells us that these are considerations of public law

[4]Ibid, pp 40, 52, 117.
[5]Ibid, pp 5, 12–13, 40, 46, 96–100, 149–153.
[6]Ibid, p 46.
[7]Ibid, pp 19–22.
[8]Ibid, pp 129–135.
[9]Ibid, pp 29–33, 57, 67–69.
[10]Ibid, pp 61, 92.
[11]Ibid, pp 19–22, 34–36, 102–106, 111–113.
[12]Ibid, pp 20–22, 27–29, 76–78, 122–124.
[13]Ibid, p 34.
[14]Ibid, pp 70–71.
[15]Ibid, pp 48, 56, 115.
[16]Ibid, pp 48, 56.
[17]Ibid, pp 29, 52–57, 116, 153–155.
[18]Ibid, pp 14–16, 18.

which justify the traditional self-restraint of the common law judges to reform private law towards its distributive/public foundations. The consideration of rule of law[19] and democratic legitimacy[20] are the ones that limit the mandate and authority of the judges. The adjudicative role must be subject to what Jaffey calls public 'common knowledge'[21] or 'ordinarily common knowledge'[22] of the public. Regardless of how plausible a revision of private law is, it must meet the stringent requirement of the public 'common knowledge' applicable to judiciary. This notion explains the above-mentioned traditionally limited presence of distributive considerations within private law doctrine, such as a limited version of the public policy doctrine. Bringing private law fully to its distributive foundations must, according to Jaffey, be left to the legislative authority. The difference between 'adjudicative' (ie of judges) and 'legislative' mindsets[23] are quite paradigmatic. It is the legislative authority which has the legitimate power to align private law with its distributive foundations. Indeed, this position explains why, according to Jaffey, the legislative reforms of private law are governed by distributive justice's considerations.[24]

Justice in Private Law is well-organised. The first three chapters of the book provide a helpful introduction to its structure and main ideas. Chapters 4 and 5 present a succinct yet clear exposition of corrective and distributive justices' approaches to private law. Chapter 6 outlines the central idea of the book: distributive justice's foundation of private law, which must be mitigated through the conception of 'common knowledge', which indeed explains (and justifies) the continuous presence of corrective justice within common law reasoning. Chapters 7–10 go deeper and focus on particular private law categories: negligence (Chapter 7), contract (Chapter 8), property, trusts, restitution (Chapters 9 and 10). While these chapters show the distributive foundations of the categories, Jaffey insists that the public conception of 'common knowledge' must leave plausible reforms in the hands of legislators. Finally, Chapters 11 and 12 comment on the future of common law and its development in light of the suggested argument.

There is much to admire about *Justice in Private Law*. First, the very reconciliation of corrective and distributive justices standing at the very core of the argument is rare in the landscape of private law theory. While private law scholars tend to focus on only one form of justice, ordinarily they simply neglect the other.[25] Secondly, the internal balance between the discussed categories and covered literature are truly impressive. Throughout the work Jaffey demonstrates a comprehensive knowledge of contract law, torts, property, trusts and restitution law doctrines. Masterfully, the author makes his argument with reference to all major scholarly works of private law theory in recent decades, situating the argument within the existing literature and smoothly navigating the reader across a massive spectrum of private law fields. Finally, the author puts forward a multilayered argument about the distributive/public foundation of private law, the dominance of corrective justice in the courts and the critical role of legislation in the future development of private law. In this way, *Justice in Private Law* laudably links between the traditional work of common law judges and the recent growing legislative tendency to intervene in subjects which were traditionally reserved to the autonomy of private law. Making an argument in this context provides an invaluable opportunity for a better understanding of the future of private law, whether in the hands of legislators or adjudicators.

Of course, there are several issues of concern and possible improvement. While the relative shortness of *Justice in Private Law* is an advantage,[26] I would argue that several points in the book could

[19]Ibid, p 89.
[20]Ibid, p 93.
[21]Ibid, pp 86, 90, 114–115, 125–126, 156–157, 161.
[22]Ibid, p 91.
[23]Ibid, p 90.
[24]Ibid, pp 6, 40–42, 55–56, 80–81, 86, 88, 103, 113, 121, 127–130, 163, 174–175.
[25]For some exceptions see P Benson 'The basis of corrective justice and its relation to distributive justice' (1992) 77 Iowa Law Review 515.
[26]For other excellent works in private law theory which are relatively brief see C Fried *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981).

have been further explored and detailed, especially in the context of the trajectory of the argument that Jaffey makes. First, there is a question of the traditional dominant role of the corrective justice approach within common law reasoning. While Jaffey shows some vivid exceptions to this role, he does not deny the strong position of this approach. While Jaffey says that the hardly deniable predominance of corrective justice could be attributed to the judicial focus on individual cases, it could be helpful to know, in light of the author's position, whether common law jurisdictions should follow their continental European counterparts towards a full-blown move to private law codification. Recall, the debate about the desirability of private law codification used to be one of the most heated debates within continental legal thought.[27] There is no reason for common law jurisprudence not to learn, with the necessary qualifications, from the lessons and wisdom of this comparative continental context.

Secondly, the argument about the current role of legislation could be further explored and evidenced. There is no doubt that the notion of private law legislation plays a central role in Jaffrey's argument. However, it could be helpful to elaborate on the alleged tendency of the legislature to focus on distributive considerations. One could argue, for example, that the legislation frequently follows corrective justice's structure of private law. This point could be extended even to consumer and employment protection legislation,[28] which could be perceived as concerning the equality between litigating parties and therefore framed within the conceptual stances of the corrective justice approach. The fact that consumer protection law rebalances the traditional doctrines of private law in favour of the weaker party – the consumers – could be perceived as an exercise in reframing the traditional corrective justice approach to the modern reality defined by an inherent inequality of powers and super-large businesses. Consumer law could be perceived as tackling the multiplicity of bilateral transactions between a given consumer and business. Without losing sight of the bilateral claimant-defendant relationship, this vision of consumer law would solely ground it within the value of equality which underpins the approach of corrective justice.[29] Put simply, the justification of consumer law does not necessarily need to be distributive; it may remain private.

Thirdly, and relatedly, the central argument about public policy doctrine could be substantiated and further detailed. One would need to illustrate that the operation of this doctrine as an exception to the traditionally bilateral structure of private law categories actually epitomises public distributive considerations. Or, as I have argued elsewhere,[30] public policy doctrine could be viewed as crystallising 'private' considerations, despite its linguistic title of 'public policy'. The fact that judges use the term 'public policy' does not mean that a careful review of the judicial reasoning would not reveal frequent references to such 'private' considerations as 'fairness' and 'justice'.[31] In its present form, *Justice in Private Law*'s argument about the limited place of public policy in private law hinges on its 'public' understanding, which could have been further elaborated on and substantiated.

Finally, I would be interested to learn about the conceptual underpinnings of the suggested vision of private law. The corrective justice approach, for example, is deeply rooted in pre-institutional theory, autonomy and natural rights philosophy.[32] Albeit the author provides some hints to the reader about the legal positivistic roots of *Justice in Private Law*,[33] it could be beneficial to hear more on this point. Some answers to this question would be helpful for marking the precise identity of the

[27]For an excellent discussion of the continental context of private law legislation, see FC von Savigny *Of the Vocation of Our Age for Legislation and Jurisprudence* (A Hayward trans, London: Littlewood & Co, 1831) pp 132–139.

[28]Jaffey, above n 1, p 94.

[29]For the centrality of the value of equality within the stances of the corrective justice approach see eg E Weinrib 'Aristotle's forms of justice' (1989) 2 Ratio Juris 211.

[30]See eg S Peari *The Choice Equality Foundation of Choice of Law: Choice & Equality* (Oxford: Oxford University Press, 2018) ch 4.

[31]Ibid.

[32]E Weinrib *Reciprocal Freedom* (Oxford: Oxford University Press, 2023).

[33]Jaffey, above n 1, p 57, fn 49.

specific 'society'/'community'/'state'[34] towards which the distributive criteria of *Justice in Private Law* applies.

Despite these reservations, I think that *Justice in Private Law* is a remarkable achievement. It is a well-written, balanced and thoughtful book which puts forwards an argument applicable to each one of the private law categories. Everyone who is interested in private law should take the time to learn from *Justice in Private Law* and consider Jaffey's argument regarding a unifying theory which governs almost every legal aspect of our daily interactions.

[34]Ibid, pp 44, 46, 59, 61.