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# *What is in an Index? A View from a European Orientated Lawyer*

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*Abstract: Anyone familiar with French legal education will know that what a common lawyer would call the contents page to be found at the beginning (often in summary form) or at the end (often in detail) of a French textbook or monograph on law is more than a mere guide for browsers and readers. It forms le plan, that is to say the epistemological framework the intellectual importance of which is equal to the substance of the work. It is what endows the book with its scientific credibility and any thesis or textbook lacking a coherent cartesian plan will by definition lack intellectual credibility. But what of the other guide provided in many academic books, namely the index? Is this guide nothing but a guide, never to be allowed to aspire to an epistemological status like that accorded to le plan? Or is an index, with its strictly alphabetical ordering, capable of having an epistemological role?*

ANYONE FAMILIAR WITH French legal education will know that what a common lawyer would call the contents page to be found at the beginning (often in summary form) or at the end (often in detail) of a French textbook or monograph on law is more than a mere guide for browsers and readers. It forms *le plan*, that is to say the epistemological framework, the intellectual importance of which is equal to the substance of the work. It is what endows the book with its scientific credibility and any thesis or textbook lacking a coherent cartesian *plan* will by definition lack intellectual credibility.

As one might expect, there is an explanation for endowing the *plan* with such a status. The great model which inspired so much of European doctrine—including of course some doctrinal works in the common law tradition—was the *institutiones* of Justinian, itself inspired by the Institutes

* The author would like to thank Catherine Barnard and John Bell for their very helpful comments and suggestions on an early draft of this chapter. The author would also like to thank Nicholas Kasirer for his support and encouragement with respect to this article.

https://doi.org/10.5235/152888712801752988 Published online by Cambridge University Press

of Gaius.[1] The importance of this Roman introductory legal textbook lay not so much in the details contained in its paragraphs (although of course this detail hardly lacked importance) but in the plan according to which the details to be found in the paragraphs were organised. All law was framed around the three institutional focal points of person, thing and action; and this framework provided the scientific foundation to legal knowledge (*scientia iuris*) itself in as much as it gave structural coherence to the body of legal rules or norms (*regulae iuris*).[2] In turn this coherence gave (seemingly) epistemological validation for a discipline which, like mathematics and theology, could not justify itself by reference to some external object. *Le plan* is, perhaps, the epistemological alternative to Karl Popper's falsification test.[3]

But what of the other guide provided in many academic books, namely the index? Is this guide nothing *but* a guide, never to be allowed to aspire to an epistemological status like that accorded to *le plan*? Or is an index, with its strictly alphabetical ordering, capable of having an epistemological role? Might the apparent randomness of word juxtapositions—an abstract concept suddenly finding itself next to a strictly descriptive word itself, in turn, situated beside some empirical but generic idea—be a force for provoking knowledge not perceivable through the use of traditional taxonomical coherence? Might a descriptive word or a generic empirical term provide a perspective or even a *grille de lecture* which reveals some dimension to *le savoir juridique* condemned to remain hidden if the recourse is had only to *le plan*? Put another way, does an index have the capability of making a difference to our understanding of law or our way of reading legal texts? It would no doubt be unrealistic to claim that the index is capable of radically making a difference to our understanding of law in the way that Gaius' plan finally transformed legal thinking from the descriptive to the systematic.[4] Yet it will be argued that a thoughtfully compiled index has a capability of contributing to legal knowledge by revealing certain elements that are

[1] A Watson, 'The Importance of "Nutshells"' (1994) 42 *American Journal of Comparative Law* 1.

[2] See, eg P Birks, 'Definition and Division: A Meditation on *Institutes*' 3.13 in P Birks (ed), *The Classification of Obligations* (Oxford, Oxford University Press, 1997) 1. See also P Birks, 'Roman Law in Twentieth-century Britain' in J Beatson and R Zimmermann (eds), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (Oxford, Oxford University Press, 2004) 249, 260–63.

[3] Karl Popper developed his falsification test as a means of determining whether or not an assertion was a scientific statement (as opposed to a non-scientific statement such as 'God loves man'). A scientific statement is one that was capable of being falsified by experience: K Popper, *The Logic of Scientific Discovery* (London, Hutchinson & Co, 1959) (reprint London, Routledge, 2002) 18. Thus the statement 'all swans are white' (Popper's own example) is a scientific one because it can be falsified by the appearance of a black swan.

[4] See Birks, 'Definition and Division', above n 2.

https://doi.org/10.5235/152888712801752988 Published online by Cambridge University Press

hidden within legal texts and materials and which might not always be revealed even by the most coherent of taxonomical schemes.[5]

## A IS FOR … ACKNOWLEDGEMENT, ALPHABET …

Now it might be tempting to think that this index question is, if not a rather bizarre question, at least a novel and original one. However, this is not really the case. For a start, the use of descriptive notions as a means of legal classification is as well established in legal education as the institutional system itself; alongside the traditional categories of property, obligations and public law are courses on banking law, housing, products, children and so on. In turn these empirical categories—which are to be found now in civil as well as common law countries—can exert what might be termed an epistemological influence on the structure of legal knowledge. That is to say they can create new areas of legal knowledge. Thus certain areas—one thinks of labour law for example—can gradually be removed from say, contract, tort (delict) or property to become *sui generis* units of knowledge in themselves, these units in turn influencing legislators if not judges.[6] Ships, motor vehicles and water, to mention just some terms that might have their place in an *index verborum*, are now focal points for legal courses and educational texts.

Another reason why the index question is not exactly novel is that the whole issue of classification through the alphabet has been examined in a seminal paper by Professor Nicholas Kasirer.[7] 'Is it wrong', asks the Canadian author, 'to proceed letter by letter through the vocabulary of the law rather than allowing the categories and organizing devices inherent to Obligations to do the work?'[8] One might add that common lawyers, or some of them at least, have been happy enough with the alphabet as a means of structuring law: for such a scheme works well enough when one is determining liability by the application of a list of forms of action or, now, categories of torts or types of remedies and reasoning is by analogy.[9] Indeed

[5] Nothing in this contribution should be taken as suggesting that taxonomy in law is not of importance; consequently the present author has no difficulty in endorsing the late Professor Birks' views in 'Roman Law in Twentieth-century Britain', above n 2. What is being suggested is that different epistemological schemes can reveal different types of knowledge (or at least different perspectives on knowledge).

[6] Another example might be government contracts which now seems to be a subject capable of being separated from general contract courses: see, eg P Vincent-Jones, *The New Public Contracting* (Oxford, Oxford University Press, 2006); A Davies, *The Public Law of Government Contracts* (Oxford, Oxford University Press, 2008).

[7] N Kasirer, 'Pothier from A to Z' in *Mélanges Jean Pineau* (Montreal, Thémis, 2003) 387.

[8] Ibid, 388.

[9] See eg B Rudden, 'Torticles' (1991–92) 6/7 *Tulane Civil Law Forum* 105. For a good example of this approach to liability see Denning LJ in *Esso Petroleum Ltd v Southport Corporation* [1954] 2 QB 182 (CA).

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one might note Professor Kasirer's opening comment in another paper on law and the alphabet. 'If, as has sometimes been said, law is chaos with an index, then', he notes, 'that index can itself be thought of as a legal idea, and maybe even as law itself.'[10]

## B IS FOR ... BIRKS (PETER)

Civil lawyers are quite different in this respect. As Professor Kasirer observes, the civilians 'feel an apparent "need" to structure the law of Obligations as an intellectual exercise, and a dictionary does fail to speak directly to this dimension of the law.'[11] The alphabet and the institutional system are at opposite ends of the intellectual spectrum when viewed from the perspective of coherence and logic. Indeed Professor Peter Birks asserted that the common lawyer's 'lack of awareness of the importance of taxonomy is alarming'.[12] Later he asks: 'If then the law is destined in day-to-day reality to be context-based, and if the alphabet is ideally suited to the ordering of contextual subjects, can it be said that legal taxonomy matters at all?'[13] Professor Birks' answer is to assert that legal 'topics have to use compatible software' in order that 'they are able to talk to each other'. If one relies just on the alphabet 'one topic will cease to be able to speak to another, each one having developed its own technical language and its own view of the world'.[14]

What Birks seems to be implying is that communication depends upon the reduction of a knowledge discipline to a single system so that one has not only a map which locates the user's position at any one time but a hierarchical model that leads one back to a single unifying concept.[15] Maps of course are important but they are not the only form of knowledge. Thus if one wants to gain knowledge of an unknown country a good map is essential and will act as a means from which a vast amount of information can be inferred. But a series of photographs of important geographical and institutional features—some typical town centres and back streets, some industrial zones, some natural phenomena such as lakes, forests, mountains and so on—will provide an alternative three-dimensional form of knowledge whose image and detail cannot be captured on any two-dimensional plan however

[10] N Kasirer, '"K" as a Structure of Anglo-American Legal Knowledge' (1997) 22 *Canadian Law Libraries* 159.
[11] Kasirer, above n 7, 388.
[12] Birks, 'Definition and Division', above n 2, 1.
[13] Ibid, 34.
[14] Ibid.
[15] In other words Birks is advocating scientific reductionism. This term has been described as an epistemological strategy consisting of the application of concepts and methods designed to reunify an area of knowledge that previously had had to be broken up and diversified in order to understand its objects: J-M Besnier, *Les théories de la connaissance* (Paris, Presses Universitaires de France, 1996) 102.

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rational.[16] By way of analogy one might say the same about the code and the case. The code, or at least the taxonomical system, acts as the basis of one kind of reasoning while the case with its concrete and detailed set of facts acts as another. Once one appreciates these two different kinds of knowledge and reasoning methods there is no reason why the index with its alphabet cannot be seen as a 'language' of communication.[17] Indeed philosophers have long appreciated these two different kinds of reasoning processes.[18]

## C IS FOR ... CHAOS (WITH AN INDEX), CONTRACT

The late Professor Birks was certainly not content, then, to see the common law as nothing more than—to use Professor Kasirer's insightful expression—'chaos with an index'.[19] But from the historical viewpoint one of the main ways of thinking about English law was through a series of forms of action which never really allowed themselves to be arranged according to a genus and species hierarchy. Debt, Detinue, Nuisance, Replevin, Trespass, Trover and the like shared few common denominators—save that they were personal actions at common law—and it was only during the eighteenth and nineteenth centuries, when a general theory of contract was gradually developed out of trespass and debt, that lawyers had to think about where to class all the other claims.[20] Thus was born the category of tort which even today remains little more than a collection of diverse claims not really amenable to any convincing general theory. As Tony Weir has put it: 'Tort is what is in the tort books, and the only thing holding it together is the binding.'[21] And also, perhaps, the index.

Accordingly the abolition of the forms of action in 1852 and the fashioning of a general theory of contract are probably connected. However, despite the enormous success of contract in the history of Western law it does remain a rather puzzling legal device when viewed from the position of empirical research.[22] As John Wightman points out, the 'textbook's

[16] G Samuel, 'Can the Common Law be Mapped?' (2005) *55 University of Toronto Law Journal* 271.

[17] In fairness Professor Birks does not dismiss the importance of contextual categories; they serve as a 'factual focus on a particular aspect of life identified as any layman would identify it': Birks, 'Definition and Division', above n 2, 34.

[18] A Jonsen and S Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley, University of California Press, 1988).

[19] Kasirer, above n 10, 159.

[20] On which see Bramwell LJ in *Bryant v Herbert* (1877) 3 CPD 389.

[21] T Weir, *An Introduction to Tort Law* 2nd edn (Oxford, Oxford University Press, 2006) ix.

[22] On the history of contract in Europe see, eg J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, Oxford University Press, 1991); J Gordley, 'Contract in Pre-Commercial Societies and in Western History' in *International Encyclopedia of Comparative Law*, Vol VII, Ch 2 (JCB Mohr, 1997).

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confident generalisation of legal principle and how it applies to the facts can result in the impression that those principles are applied in the sort of situations in which they are applied in the books'. And he continues, the 'tacit understanding (which the text does not discourage) is that a breach of contract will be followed by reparation in the form indicated by the rules, backed by legal threat or actual legal action if necessary'. He then asserts, quite bluntly, that 'this picture is simply wrong'.[23] Why it is wrong—or at least one reason why it is wrong—may be found in the old forms of action themselves. Given that these actions did not spring, ready-made so to speak, from some rediscovered old book, they are likely to have reflected the social reality of the time and perhaps there remains a certain reality in today's contract and tort remedies.

## D IS FOR … DAMAGES, DEBT

No doubt thinking about law in terms of remedies—the form of the action—rather than as a coherent structure of rights might well dismay the legal scientist, but the importance of remedies can easily be eclipsed by the institutional system as modified by the rights theorists of the later civil law. And so if one looks at the European codes on contract what is striking is the number of articles devoted to the remedy of damages. Contract appears as a legal device to enforce agreements or promises between individuals and the failure to perform an obligation or a promise seems to lead naturally to liability (*responsabilité contractuelle*) and to the payment of compensation. Indeed even an English Law Lord once asserted that of 'all the various remedies available at common law, damages are the remedy of most general application at the present day, and they remain the prime remedy in actions for breach of contract and tort'.[24]

Now what a good index might reveal—if it lists, as it should, 'debt'—is that this statement is simply wrong. By far the most important remedy in England for non-performance of a contract is that of debt, a form of claim that remains completely distinct from an action for damages.[25] Historically the distinction is located in the dichotomy between the writs of trespass and debt,[26] but what seems so revealing about this early writ of debt is that failure to pay for goods or services supplied was as much a social problem in the thirteenth century as it is today.[27] Did not the recent banking crisis partly, if not completely, result from bad debts? Do not banks fail when

[23] J Wightman, *Contract: A Critical Commentary* (London, Pluto Press, 1996) 37.
[24] Lord Hailsham LC in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1070.
[25] R Zakrzewski, *Remedies Reclassified* (Oxford, Oxford University Press, 2005) 108.
[26] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 1999) 87.
[27] Ibid, 31.

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they cannot call in their debts and in turn cannot pay their own? The point to stress here is that contract as a legal device is empirically important because it is the theory that lies behind the enforcement of most debts. Yet a debt is more than just a contractual remedy. It is a form of property and thus what the index might help reveal is the social irrelevancy not only of much of the law of contract but also of the axiomatic distinction in legal science between personal and real rights. The common law might well have been 'chaos with an index' but at least debt was a legal notion seemingly rooted in economic reality. Business people might well be reluctant to go to court to claim damages for some breach of contract,[28] yet they probably do worry about whether or not they will be paid. Empirical research, as Wightman points out, appears to suggest that business people might not be over-ready to seek damages for breaches of contract, but one might ask what their attitude is towards those who do not pay.[29]

Moreover once one puts the emphasis on such non-payers the index—via the word 'debt' or 'debtor'—may go on to make another rather different connection. What methods are acceptable on the part of a creditor to bring pressure on a debtor to pay? Indeed what methods are acceptable on the part of a debtor to encourage the creditor to reduce the debt? The index may trace a link to the tort of harassment,[30] to the effects of duress and to the roles of consideration and estoppel in contract.[31] Debt, one might say, is a most interesting word for the indexer.

## E IS FOR … EFFICIENT (BREACH OF CONTRACT)

Thinking in terms of remedies is important for another reason. The relative independence of remedies from contractual rights permits the courts either to mitigate the effects of a strict enforcement of a contractual right or to go some way in providing relief to a victim of a non-performance of a contract in situations where there may be no actual substantive contractual right. Take the shipowner who refused to accept repossession of its ship from a charterer until the latter fulfilled its contractual obligation to redeliver it in good repair.[32] Now the problem for the charterer was that to render it in good repair would cost twice the value of the ship. Nevertheless the owner simply went on racking up the hire fee and then tried to claim this enormous sum in a debt claim. As Lord Denning noted, what the owners were trying to do was to enforce specific performance of the contract; however

[28] J Gava, 'Judges, Commerce and Contract Law' (2010) 84 *Amicus Curiae* 4.

[29] Even if a company does not itself enforce the debt through legal proceedings it might well sell a package of debts to a third party who might well be prepared to sue.

[30] *Ferguson v British Gas Trading Ltd* [2010] 1 WLR 785.

[31] *D & C Builders Ltd v Rees* [1966] 2 QB 617.

[32] *Attica Sea Carriers Corporation v Ferrostaal* [1976] 1 Ll Rep 250.

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he went on to assert they 'should not be allowed to do so when damages would be an adequate remedy'. What he said were the charters to do? 'Either the charterers must pay the charter hire for years to come, whilst the vessel lies idle and useless for want of repair'; or, he said, they 'must do the repairs which would cost twice as much as the ship would be worth when repaired—after which the shipowners might sell it as scrap, making the repairs a useless waste of money.'[33] The owners were prevented from suing in debt in situations 'when damages would be an adequate remedy.'[34]

What is interesting about this case is the recognition that a claim in debt is a form of specific performance and thus the good index ought to reveal that such a remedy is not confined to equity.[35] Moreover, as we have seen, it is not, in this common law version, an exceptional remedy either. Yet was Lord Denning being a maverick in this shipping case? Probably not if one compares it with a more recent case where the House of Lords refused to grant specific performance in equity to enforce a clear contract provision that a supermarket was to remain trading in a shopping centre even when it could only do so at a loss.[36] The owner of the shopping centre was told that it had to rely on its common law remedy of damages since the equitable remedy would simply result in economic wastage and inefficiency. The law of remedies permitted the court to mitigate the effect of the defendant's breach. Whether the French courts would do the same is another question. In one case where a contractor failed to construct a house which completely conformed to the contract—it was few centimetres out—the *Cour de cassation* ordered the builder specifically to perform the contract.[37] In other words the builder was in effect told to destroy the house and rebuild it in such a way that it conformed to the contract. One wonders how long the builder was able to stay in business.

## F IS FOR ... FAMILY

Yet Equity can obviously aid a contractor in a positive way. In one leading case a husband had agreed to transfer his coal merchants business to his nephew in return for a promise to pay him a weekly sum of money until his death and then, thereafter, a weekly sum to his surviving widow. When the husband died the nephew paid one instalment to the widow and then no

[33] Ibid, 255.
[34] Ibid.
[35] The index should, then, list 'Specific performance' with two sub-entries of 'in equity' and 'in common law'.
[36] *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1.
[37] Cass.3e ch.civ 11.6.2005; D.2005.IR.1504. A translation of this can be found in T Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (Basingstoke, Palgrave Macmillan, 2009) 236–37.

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more, forcing the widow to sue him in debt both in her personal capacity and as administratrix of her late husband's estate (the estate being treated as an independent legal subject).[38] The House of Lords held in this case of *Beswick v Beswick* that the widow could not sue in her personal capacity because she was not a party to the contract and thus was caught by the privity of contract rule.[39] With respect to her action as representative of her husband's estate she was caught by the common law rule that in order to receive substantial damages the claimant must have actually suffered damage; in this case it was the widow in her personal capacity that had suffered the damage and not the estate. At common law, then, she was entitled only to nominal damages. However the House of Lords turned to Equity and declared that, because the common law rule concerning damages was clearly inadequate, Equity could intervene with its remedy of specific performance. In other words the court could order the nephew to pay the estate—that is to say in reality the widow—the weekly sum.

An index will of course pick up this remedy under S for specific performance, R for remedies or whatever. But more interestingly the index might identify this case under F for family because this will link it with some other rather exceptional, if not controversial, obligation cases. The first is *White v Jones*.[40] In this case a majority of the House of Lords permitted a person who had failed to benefit under her father's will, as a result of the family solicitor's negligence, to recover damages in the tort of negligence. This result was controversial because the claimant's damage was the loss of a mere financial expectation and normally no duty of care is owed in respect of this type of harm. Sometimes a duty can be established under the *Hedley Byrne* principle if the cause of the loss is a misstatement and it can be can established that there was both an undertaking by the defendant and reliance by the claimant on the statement.[41] However the facts of *Jones* do not seem to meet these criteria. The majority of the Law Lords justified their decision by reference to 'practical justice' (under J no doubt).[42]

The second case is *Jackson v Horizon Holidays* in which the Court of Appeal awarded damages to a husband and his wife and children in respect of their mental distress which resulted from a holiday that did not conform to the contractual promises.[43] What made the case difficult was that the wife and children were not parties to the contract and thus formally had

[38] Law Reform (Miscellaneous Provisions) Act 1934 s 1. Besides being classified under E, should the concept of an 'estate' be classed under Persons or Things (or both)?

[39] *Beswick v Beswick* [1968] AC 58.

[40] *White v Jones* [1995] 2 AC 207.

[41] *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465. Should 'misstatement' and 'misrepresentation' be listed separately in the index? Certainly 'reliance' should be listed.

[42] The index is thus able to connect particular cases with particular reasoning concepts and devices.

[43] *Jackson v Horizon Holidays* [1975] 1 WLR 1468.

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no rights under it. Nevertheless in awarding to the husband damages that covered everyone's mental distress the court had effectively protected the interests of the wife and the children. No doubt this case—like *Jones*—could be justified under the heading 'practical justice', the same equally being true of *Beswick*. But what the index might pick up is the common denominator of the family. The effect of the three cases is that they indicate that in certain circumstances a contractor, although formally contracting with an individual, is on the level of interests contracting with a family (see also under I for interest). Viewed in this light it is not at all unreasonable to assert that some contractors, like the family solicitor and tour operator, owe a 'contractual' duty of care to the whole (or at least immediate) family since their very business is often orientated towards this institution. Even the employer is expected to look beyond the immediate employee and encompass his or her family on occasions.[44]

Grouping a range of contract and tort cases around the word family ought, then, to encourage one to appreciate that this is more than just a word or even an inert common denominator. The word 'family' can have the effect of turning seemingly controversial cases into perfectly rational decisions and it can even do this without any need to have recourse to other words like 'practical justice' (or 'Justice, -practical'). Moreover it can act as a comparable in comparative law. If an employer is to be strictly liable for the torts committed by his employees could the same ever be true of parents? One can of course focus on the relationships involved and as a result arrive at the conclusion that the parent and child connection is enough to act as a conduit from child to parental liability. But the index may equally stimulate an analogical connection between terms that would be likely to find themselves in it. In thinking about the family one may make the link with other groups such as partnerships and corporate employers with the result that one might be stimulated in posing the following question. Are there systems where a parent might be automatically liable for delictual or quasi-delictual wrongs committed by a child?

## G IS FOR ... GENUS (AND SPECIES), GOOD FAITH

The word 'family' is useful in another way: it can stimulate one into thinking about the relationship between a whole and its parts. As has just been mentioned, if the commercial enterprise is to be liable for the acts of its employees why should not the family unit be liable for the acts of one of its members? In posing this question one is not actually presupposing the answer, for it is not necessarily true that the two units are analogous or indeed, even if they are, that one family member should necessarily

[44] See eg *Pickett v British Rail Engineering Ltd* [1980] AC 126.

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be liable for the act of another. The complications and implications are serious. Nevertheless, such reflection ought to provoke thoughts about the relationships between a generic category (company, family) and the individual species that make it up (individual employees, partner and children). Ought parents to be automatically liable for the acts of their children? An index—C is for child—might at least provoke this question; indeed it might even encourage the reader to look over the Channel in order to see what other systems might do (F is for France?).[45]

The genus and species reflection does not stop with the legal subject or *persona*. Similar questions can arise with respect to a *res*. Why is it that if one contracts to supply generic goods the rules that apply to such a contractual object are different from the rules that might apply if one is dealing with a specific item of property? *Genera non pereunt* is the legal response of course; the seller can, it is assumed, go out to the market to fulfil the contractual obligation to supply whereas each specific good in deemed unique.[46] Yet it can lead to some odd results. The person who contracts to purchase a new car and but refuses subsequently to take delivery will be liable in principle to pay substantial damages even if the seller is able to sell the vehicle to someone else. But if the car is a second-hand one and the seller is able to sell it to another buyer the contractor might not have to pay damages. Indeed one might add that the case that established this point was also, at least to an extent, a family case. Shifting the risk of a commercial loss of profit onto a family was perhaps too much for Lord Denning.[47]

A similar situation arises with regard to impossibility of performance in contract. Take, for example, the European commercial van hire company. A person who contracts to hire a standard van from such a company may find himself in a different position from the person who contracts to hire a unique van from the same company. If, after the contract but before the taking of possession of the vehicles by the hirers, some of the company's vans, including the unique one, are destroyed in a fire that has not been caused by the company's fault, the hirer of the unique van will not be able to claim damages for non-delivery. The contract to hire the unique van will have disappeared thanks either to the defence of impossibility (civil law) or to frustration (English law).[48] However, the hirer of the standard van, if he is told there is no van for him, may well be able to claim damages on the basis that the company is guilty of causing by its own act the non-performance (civil law) or self-induced frustration, for it could have

[45] See *Code civil* Art 1384.

[46] F Zenati and T Revet, *Les biens* 2nd edn (Paris, Presses Universitaires de France, 1997) 103.

[47] See *Lazenby Garages Ltd v Wright* [1976] 1 WLR 459.

[48] See, eg DCFR III-3:103; *Taylor v Caldwell* (1863) 122 ER 309.

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given him one of the surviving vans but chose to give these vans to other contractors.[49] (V is for vans, F is for fire?).

In the civil law there is a possibility that the principle of good faith might help the hire company if the product was something other than vans. For example, in one old German case the seller of sugar beet seed was unable to supply the full contractual quantity to the claimant because of an exceptionally bad harvest that left him in short supply. As the seller had made contracts to sell sugar beet seed to other buyers he allocated the seed amongst these buyers on a pro-rata basis. The claimant's action was dismissed on the basis, first, that the seller had was not at fault in the face of this exceptionally bad harvest—exceptional circumstances—and, secondly, that the requirements of good faith laid down in paragraph 242 of the German Civil Code justified the way he had acted in distributing the seed on a pro rata basis.[50] English law does not, of course, have any general principle of good faith and, even if it did, it is difficult to see how vans could be equitably distributed on a pro rata basis. Seed and vans are therefore worth their own entries in the index because, at a European level, they are 'sources' of different rules.

## H IS FOR ... HARDSHIP

If these frustration rules seem odd then it has to be remembered that the whole doctrine of frustration of contracts in English law can be a bit odd. For a start, English law seems to take a position that is diametrically opposed to that of the civil law. If a contractor fails to perform in France the position is that he will be liable to the other party unless he can prove that the non-performance was due to a *force majeure*.[51] In English law, if a contractor fails to supply a ship because the ship has been destroyed in some accident the onus is not on the ship owner to prove the absence of fault; it is on the other party to prove that the accident was caused by the owner's fault. If he cannot do this then the doctrine of frustration will relieve the owner from any liability.[52]

But what if the ship is not destroyed in an accident? What if the owner just finds it very difficult, say because of very bad weather or because of some serious economic reason, to supply the ship by the contract date? Here English law does, at least at first sight, seem much closer to French

[49] See, eg DCFR III-3:103 ('beyond the debtor's control'); *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

[50] RG 3 February 1914 RGZ 84.125; an English translation of this case can be found in H Beale, B Fauvarque-Cosson, J Rutgers et al (eds), *Cases, Materials and Text on Contract Law* 2nd edn (Oxford, Hart Publishing, 2010) 1105.

[51] *Code civil* Arts 1147–48.

[52] *Constantine (Joseph) SS Ltd v Imperial Smelting Corporation* [1942] AC 154.

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law in as much as both systems will not relieve a contractor who just finds it more difficult, through a hardship or change of circumstances, to perform (D is for *difficultas*).[53] To escape liability one must prove the change of circumstances amounts to a frustration event or a *force majeure* (Under F or indeed under I for *impossibilitas*).[54] The event must destroy the commercial basis of the contract. What is interesting about this rather strict rule is that it seems of recent origin; in the past the doctrine of *clausula rebus sic stantibus* (classed of course under C) might well have come to the aid of a contractor and this approach is now making something of a comeback.[55] In both the *Principles of European Contract Law* and the UNIDROIT code there are change of circumstances, or hardship, provisions dictating that the contract should be renegotiated (C is for codes?).[56]

## I IS FOR … IMPRÉVISION, INTEREST, INTERPRETATION

However, even without any hardship provisions, both English and French law turn out to be more complex than it might at first seem. In French law the *imprévision* rule (classed under I of course) does not apply to public bodies if the hardship that threatens performance equally threatens the public interest (see P is for public).[57] Consequently the administrative courts may well apply a different rule than the ordinary courts.[58] What is fascinating about this difference is the role of a legal concept that has been described (by Professor Ost, under O in the index) as a 'passport' or 'pass key' to the whole of the law. This concept is the notion of an 'interest'.[59]

Here the index comes into its own because the moment one identifies the word 'interest' in the text of a law book it soon becomes evident that it will require a large number of sub-words in the list. In the French hardship case it was the 'public' interest that came into play; yet this is just one of many interests recognised by lawyers as having a role in legal analysis. In English law 'commercial' interests, the interests of 'children', 'reputation' interest, 'economic' interest, 'restitutionary' interest, 'reliance' interest, 'expectation' interest, 'best' interest (of a patient) to name but a

[53] P Pichonnaz, *Impossibilité et exorbitance* (Fribourg, Éditions Universitaires Fribourg Suisse, 1997) 172–73; Cas.civ.18.5.2009 no 07-21.260; D.2009 AJ 950; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696.

[54] Pichonnaz, ibid, 71–72; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696. But see Fages, RTDciv. 2010, 782–83.

[55] Pichonnaz, above n 53, 29–34, 174–75.

[56] PECL Art 6.111; UNIDROIT Arts 6.2.1–6.2.3. See now Draft Common Frame of Reference art III-1:110.

[57] CE 30.3.1916, D 1916.3.25 (the famous *Gaz de Bordeaux* case).

[58] But *cf* Fages, above n 54.

[59] F Ost, *Droit et intérêt: volume 2: Entre droit et non-droit: l'intérêt* (Bruxelles, Facultés universitaires Saint-Louis, 1990).

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few have been developed into reasoning devices.[60] In the civil law there are several well-known uses of this notion. For example, a claimant injured as a result of the fault of another, in addition to establishing damage, fault and causation, must show that one of several named interests have been invaded.[61] French law does not permit a person to sue or be sued unless they have a 'legitimate interest' in the action.[62] And of course the public and private division itself (P is for…) has been based, since Roman law, on the distinction between the interest of the state and the interests of private individuals.[63] Interests have effectively been given what might be called 'ontological' (O is for…) status.

There is, it must be said, hardly room here to develop this notion any further.[64] Therefore suffice it to say, first, that the notion of 'interest' has formed the basis of a whole theory of law that has its roots in the writings of Rudolf Von Ihering and, later, in Rosco Pound.[65] Indeed the contemporary law and economics movement might be said to be built on this (economic) interest foundation.[66] The notion of an interest is attractive because it appears to act as an external empirical object for the 'science' of law and thus seemingly permits one to apply a causal approach to legal analysis.[67] Such-and-such a rule or case law decision can be tested, in the Popper sense, against such an external object.[68]

The second thing to say is that even if one rejects the thesis that the ontological basis of rights and duties—or perhaps one should say of law itself—are social and economic interests, the index will help identify how this notion of an interest is still embedded in legal reasoning and analysis. It is the index that will identify its existence in every nook and cranny (so to speak) of public and private law. This is not to suggest that one should necessarily reconstruct the whole of law on the basis of protected interests, but it is to make the point that it is an important legal reasoning tool. It is a means of linking the world of fact with the world of law and what the index can do is indentify within the whole mass of a legal treatise where these linkages are to be found.

[60] See G Samuel, 'The Notion of an Interest as a Formal Concept in English and in Comparative Law' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law Before the Courts* (London, British Institute of International and Comparative Law, 2004) 263.

[61] German Civil Code § 823.

[62] French New Code of Civil Procedure Art 31.

[63] Ulpian used the word *utilitas*: see D.1.1.1.2.

[64] See Ost, above n 59.

[65] D Lloyd and M Freeman, *Lloyd's Introduction to Jurisprudence* 8th edn (London, Sweet & Maxwell, 2008) 850–51; O Ionescu, *La notion de droit subjectif dans le droit privé* (Brussels, Bruylant, 1978) 120–24, 143, 148–49.

[66] A Leroux and A Marciano, *La philosophie économique* (Paris, Presses Universitaires de France, 1998) 15–18.

[67] Ibid, 17.

[68] So the argument goes, but such a thesis might not stand up to scrutiny: see very generally Lloyd and Freemen, above n 65, 620–27.

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If one returns to the hardship provisions which led into this brief discussion on interests one might ask this question. Are these provisions to be found in the two international contract codes a response to a 'commercial interest' need? If one approaches the topic from the position of an interest what emerges, at least in English law, is a picture that is more complex than the one painted by the law of frustration. If, say, severe inflation erodes profits in a long-term contractual relationship this may well not amount to a frustrating event. However, this does not mean that the victim of the inflation does not have alternative possibilities. It may be that the court will imply into the contract a term that such contract can be terminated by either party on the giving a reasonable notice.[69] This evidently is not frustration (although it has to be said that frustration was once based on an implied term theory) nor is it the application of some kind of hardship doctrine. However the 'commercial interest' result is much the same in that the victim of the inflation can escape from the contract (E is for escape?). Even if the victim cannot escape but simply refuses to go on with the contract and finds himself in court facing a breach of contract action, the chances are that, as we have seen (under E is for…), the court will not grant an action of specific performance. The claimant will get only damages and these may be limited thanks to the remoteness or the mitigation rules. The 'commercial interests', in other words, might be taken into account at the level of remedies (R is for…).[70]

## J IS FOR … JUSTICE

This notion of an implied term is worth pursuing a little further. It is of course one of the characteristic elements of English contract law, but it was abandoned in respect of the doctrine of frustration on the ground that it created an inherent contradiction within contract theory. How can parties foresee the unforeseeable asked Lord Radcliffe?[71] The answer of course is very easily indeed: for there is nothing so foreseeable as the unforeseeable. If a friend promises another friend that he will attend her party but does not turn up, the party-giver will understandably be annoyed—but only until she learns that he was injured by a bus on the way to the event. The friend does not have to spell a list of exceptions when making the social promise to attend; it is implied that the promise is subject to a qualification with respect to illness or accident. The error made by the Law Lord was to fail to distinguish between genus and species (G is for…). One can

[69] *Staffs Area Health Authority v South Staffs Waterworks Co* [1978] 1 WLR 1387.
[70] *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1.
[71] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 728.

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certainly foresee that an accident or an illness might intervene; what one cannot foresee is the actual type of accident or illness.

Yet does it matter that the implied term theory has been abandoned? Lord Radcliffe does not at first sight seem to be developing any radical new tests or methods; the contractual parties themselves, he said, have become so much 'disembodied spirits that their actual persons should be allowed to rest in peace'. And in their place there should rise 'the figure of the fair and reasonable man … who represents after all no more than the anthropomorphic conception of justice'.[72] What is interesting, on reflection, about this comment is the association of the constructed figure of the 'reasonable man' with the idea of 'justice' because, at least with respect to contract, it arguably hides more than it reveals. No doubt it is unjust to expect parties to execute their obligations when such execution has become impossible as a result of a *force majeure*. But once the reasonable man, rather than the 'disembodied spirits' of the actual contractors, is introduced into the scene it re-orientates contractual justice away from the subjective to the objective. Is contractual justice to be measured by reference to the parties themselves or to some objective figure such as the reasonable man? In the nineteenth century the answer to this question seemed clear enough, although this is not to say that the reasonable man never made an appearance in contract cases; and even in 1963 a judge felt able to assert that he would 'be sorry to find a new concept of law introduced that a man may unreasonably exercise his right of termination, which was clearly given to him by the contract'.[73] Surely, it might be said, that if one is going to construct an actor as a means of reasoning in law it might have been better for Lord Radcliffe to have talked in terms of the 'reasonable contractor' rather than the reasonable man (R is for reasonableness?).

The difference could be important. In civilian thinking, as we have seen, when a contractor fails to perform he will be liable under the contract unless he can prove that the non-performance was due to *force majeure* for which he was not in any way responsible. This seems most just in that it is surely incumbent on the non-performer rather than the victim to provide an explanation. However, what will be the situation if the intervening event which prevents performance is unexplainable? Is the burden to be on the non-performer to prove that he was not at fault or is it on the other party, the victim of the non-performance, to prove fault? Viewed from the position of the 'reasonable contractor' it would seem, as has been suggested, that contractual justice demands that the burden of disproving fault should be on the non-performer. He is the one with a case to answer, so to speak. However, from the position of the 'reasonable man', the position

[72] Ibid.
[73] Upjohn LJ in *Financings Ltd v Baldock* [1963] 2 QB 104 at 115.

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appears quite different. He who alleges fault should prove it.[74] This kind of mix-up—that is between fault in contract (reasonable contractor) and fault in tort (reasonable person)—cannot easily be made in French law since the code locates these different species of fault, or different species of person, in different parts of the code.[75] Taxonomy, it might be said, plays a positive role here.

## K IS FOR … KNOWLEDGE

One could say, then, that there is a difference between objective knowledge to be attributed to the 'reasonable man' and subjective knowledge to be attributed to the 'reasonable contractor'. The difference can be important in certain situations. Take the person who has spent much of his or her life becoming an expert on, say, a particular artist or antiques. Such an expert might often visit charity shops and boot fairs in search of good bargains. What if, one day, the expert goes to a boot fair and discovers an antique on sale for a few pounds that he or she knows to be extremely valuable? The 'reasonable contractor' has traditionally been under no legal obligation to disclose to the seller the actual value of the item he is selling; as the Roman jurists put it by natural law one contractor can take advantage of another.[76] In France this position may be changing; it may be that a contractor is obliged to look after not just his own interests but also those of the other party. The buyer is under a good faith duty to act positively and to impart his subjective information to the other party.[77] Subjective knowledge might, in other words, be said to be becoming more objective and thus is to be shared at a social level. Knowledge is to be judged in terms of the reasonable man, at least in France.[78]

Yet there are situations where the reverse might be true. What if an employer carelessly exposes his employees to asbestos with the result that one of them develops pleural plaques? These plaques, it would seem, are not in themselves a form of cancer but they do have the possibility of developing into cancer at some future date with the result that a person who has them is subject, if not to physical damage itself, at least to mental anguish? Is this knowledge damage capable of triggering a compensation claim in negligence? It would seem not.[79] Here, then, is a form of subjective knowledge which is being denied any objective status as far as the law

[74] *Constantine (Joseph) SS Ltd v Imperial Smelting Corporation* [1942] AC 154.
[75] *Cf*, *Code civil* Art 1147 with Arts 1382 and 1383.
[76] D.4.4.16.4; D.19.2.22.3.
[77] D Deroussin, *Histoire du droit des obligations* (Paris, Economica, 2007) 438–40.
[78] H Ramparany-Ravololomiarana, *Le raisonnable en droit des contrats* (Paris, LJDG, 2009) 387–94.
[79] *Rothwell v Chemical & Insulating Co* [2008] 1 AC 281.

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of tort is concerned. It has been suggested, however, that such employees might be able to sue their employers in contract.[80] Such subjective mental distress (under M for mental or D for distress?) might be an interest that the reasonable contractor should think about protecting.

## L IS FOR … LOSS

The idea of 'loss' and 'damage' is not, therefore, something that is completely independent and empirical in its orientation. Its existence or non-existence can depend upon the legal context in which it is considered and thus, to an extent, loss and damage are created or denied through reference to a structural scheme of intelligibility. It is the scheme as much as reality that creates the 'damage'. The distress caused by pleural plaques is not damage within the structure of a duty of care relationship but might be damage if the relationship is redefined as a contractual one. P is for 'pleural plaques' can lead to M is for 'mental distress' which in turn can cross reference with I is for 'interest' and D is for 'damage'.

Another way of 'creating' a loss is to link it, structurally, to risk (R is for…). A taxi negligently fails to arrive on time to collect one of the finalists in a dancing competition with the result that the finalist is unable to compete. If he had a one in six chance of winning the competition had he arrived on time could it be said that he has suffered a 'loss', namely the loss of a chance (C is for…) to win the competition? English law certainly thinks so in relation to these facts,[81] but it has also become a little wary of extending this notion in the area of personal injury and causation.[82] Accordingly it might be quite difficult for a person who is suffering pleural plaques to plead that he has suffered a 'loss' rather than physical damage. In other words it would probably not be possible for him to plead that his chances of not getting cancer have been reduced and thus he has lost a chance of remaining healthy. There are limits to the structural scheme and one way of imposing a limit is to turn to a causal approach. The defendant has not caused a loss because the causal object—the pleural plaques—are not recognised forms of damage.[83] Yet viewed from the index, with its cross-referencing, one might ask why such claimants should be classified under *damnum sine injuria*. Perhaps, however, the index can again help. Might it be that the courts simply think that that there are some losses for which a defendant ought not to be liable because it is not within the risk of this activity or this type of contract? Some judges in the House of Lords have

[80] See Lord Hope and Lord Scott in *Rothwell v Chemical & Insulating Co* [2008] 1 AC 281, paras 59 and 74.
[81] *Chaplin v Hicks* [1911] 2 KB 786.
[82] *Barker v Corus UK Ltd* [2006] 2 AC 572.
[83] *Rothwell v Chemical & Insulating Co* [2008] 1 AC 281.

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more recently suggested that this notion of risk (see under R) might prove more practical than struggling with the remoteness rule, and the meaning of 'contemplation'.[84]

## M IS FOR … MEANS (AND ENDS), MEASUREMENTS, MENTAL DISTRESS, MISTAKE

This idea of risk finds expression in French contract in the distinction between an obligation of means (*obligation de moyens*) and an obligation of result (*obligation de résultat*).[85] This distinction has been adopted by the UNIDROIT code as well.[86] As UNIDROIT says, an obligation of means is one where a contractual party is under an obligation only to use his or her 'best efforts in the performance of an activity' and this 'best efforts' is in turn measured by the 'reasonable person'.[87] An obligation of result is one where there is 'a duty to achieve a specific result' and the party is 'bound to achieve that result'.[88] Such a distinction does not at first sight appear to form part of the common law since all contractual promises are said to be strict, that is to say it is no defence in principle for a non-performer to argue that he had done his best.[89] Thus one would not expect to find these different kinds of obligations mentioned in an index to a common law textbook on contract. Yet this does not mean that a distinction between fault and no fault contractual liability does not exist in English law; in truth the idea that all contractual promises are strict is at best misleading. The art (so to speak) is where to find the distinction in the index.

Goods and services (under G and S of course) would be one obvious starting point since the implied level of duty is different in such supply contracts. Goods normally have to be both reasonably fit and of satisfactory quality, an objective requirement (*résultat*),[90] whereas the supplier of a service need exhibit only skill and care (*moyen*).[91] However index entries such as 'mistake', 'measurement' and 'mental distress' hide some, perhaps exceptional, situations. A bank hires a firm of surveyors to value a building that one of the bank's clients wishes to use as security for a loan from the bank: the surveyors mistakenly value the wrong building which turns out, when the client defaults on the loan, to be much less valuable than the

[84] See *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61.
[85] For a discussion in English see Beale, Fauvarque-Cosson, Rutgers et al, above n 50, 721–25.
[86] *Unidroit Principles for International Commercial Contracts* Art 5.1.4.
[87] Ibid Art 5.1.4(2).
[88] Ibid, Art 5.1.4(1).
[89] *Raineri v Miles* [1981] AC 1050, 1086.
[90] See, eg Sale of Goods Act 1979 s 14; *Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608.
[91] Supply of Goods and Services Act 1982 s 13.

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right building. Can the bank recover its loss from the surveyors without having to prove fault? A majority in the English Court of Appeal think, exceptionally, it can and their argument is intriguing.[92] If a photographer photographs the wrong wedding or an artist hired to paint a portrait paints the wrong person, then neither can recover the price owed even if they were not actually careless. It would follow, says the majority, that there is liability without fault. Goods and services are not, therefore, sufficient as reliable indicators. Other index entries like 'artist', 'photographer' and 'surveyors'—not to mention 'debt'—will reveal the more complex nature of English law of contractual liability.

Even 'mental distress' can add to this complexity. Of course mental distress has to appear as an index item in a work on the law of obligations because it provokes an interesting question as to whether or not it is a well-protected interest.[93] As far as the common law of tort is concerned it is tempting to conclude that it is not a protected interest because the precedents indicate that a victim of negligence must prove that they have suffered severe psychological harm before they can even think about bringing a claim for damages.[94] Yet mental distress has been recognised as a protected interest in some types of contract.[95] Indeed in one famous (or perhaps one should say notorious) case it has been used to avoid having to award to a claimant a huge sum by way of damages in respect of a swimming pool (under P or S?) that did not conform, in its measurement, to the contract. The damage, said the House of Lords, was not to be found in the *res*, for it was a perfectly reasonable swimming pool, despite not conforming to the promised measurement. The damage was to be found in the disappointment, that is to say mental distress, suffered by the *persona*.[96] This shift from a thing to a person must surely open up some index possibilities. The idea that contract protects an expectation interest might well be a fine statement in the text of a textbook, but the index with its 'swimming pool' might expose a rather different contractual knowledge. Moreover the idea that the constructor had produced a 'reasonable' swimming pool begins to look a bit like another way of saying that it had done its best and therefore should not be made to achieve an actual result (a pool conforming to the contractual measurements). Nevertheless we have already seen under E for efficient that the judges will use the law of remedies to mitigate the effect of a breach of contract if it would otherwise result in economic wastage.

[92] *Platform Funding Ltd v Bank of Scotland* [2009] QB 426.
[93] P Giliker, 'A "New" Head of Damages: Damages for Mental Distress in the English Law of Torts' (2000) 20 *Legal Studies* 19.
[94] See generally *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.
[95] *Farley v Skinner* [2002] 2 AC 732.
[96] *Ruxley Electronics Ltd v Forsyth* [1996] 1 AC 344.

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## N IS FOR … NOMINALISM

Much may depend on how judges 'see' facts. If one returns to the case of the second-hand car (G is for … Genus) the result was determined not by any rule application but by how the judges 'saw' a second-hand car.[97] Was it a unique item or was it a generic item? Are there for example, such things as 'forests' or 'society' or are these just names? In saying with Margaret Thatcher (T is for …) that there are only individuals—although she qualified this by adding families (see under F)[98]—one is not just setting up an opposition within the index (I is for individual versus U is for *ubi societas ibi ius*) but equally bringing together theory (E is for epistemology, J is for jurisprudence), case law method (R is for reasoning) and positive law. A college of judges is established to consider some matter or other, but over time some judges leave and are replaced by others. Is it still the same 'college'?[99]

## O IS FOR … OBLIGATION

This dichotomy between names and things emerges equally with regard to the notion of a law of obligations. In civilian thinking the idea of an 'obligation' existing over and above its constituent source categories—that is to say contract (under C), delict (under D) and unjust enrichment (under E or U)—as a metaphorical (V is for *vinculum iuris*), if not actual, reality is reflected in the textbooks by the existence of chapters entitled 'General Theory of Obligations'. English law has now adopted this civilian generic category,[100] but it is extremely difficult to imagine what one might put into an English textbook chapter on general theory because the notion of an abstract *vinculum iuris* detached from contract, tort and restitution is absent from the history of these specific categories. Indeed for much of its history the common law did not even think in terms of contract and tort. Certainly one might use another expression such as 'duty' (under D), 'right' (under R) or 'liability' (under L), but these other expressions are conceptually different from the notion of a 'legal chain' to be found in Justinian's *Institutes*.[101] Thus in addition to *lien juridique* French law has *devoir*, *droit subjectif* and *responsabilité*. What an index in an English law book should reveal, then, is that the expression obligation will come with no sub-reference to 'definition of'.

[97] *Lazenby Garages Ltd v Wright* [1976] 1 WLR 459.
[98] See *Women's Own*, 31 October 1987.
[99] D.5.1.76.
[100] See, eg Birks, *Classification of Obligations*, above n 2.
[101] J.3.13pr.

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## P IS FOR ... PATRIMONY, PERSONS, PRIVACY, PROPERTY

Moreover the problem with an English obligations category does not end with this question of an abstract bond. In civil law thinking the obligations category is defined in part by its dialectical relationships with the categories of persons and property. The law of persons is a category containing non-patrimonial rights while the law of things (which contains the law of obligations and property) consists of patrimonial rights.[102] In turn the law of obligations is a category consisting of personal (not personality) rights (rights *in personam*) while property deals with real rights (*in rem*). Thus the idea of a law of obligations really only makes sense within a structural system (S is for structuralism, system) of carefully constructed legal relations and types of right.

Such a system is largely absent from the common law. While there does seem to be a distinction between status (again under S) and contract,[103] there is certainly no coherent law of persons defined in terms of non-patrimonial rights nor is there a rigid dichotomy between personal and property rights. Indeed much of the law of personal property—see under C for conversion and under T for trespass—is to be found in contract and tort, that is to say the law of obligations.[104] As for restitution, based it would seem on unjust enrichment,[105] this often contains a mixture of *in rem* and *in personam* rights and remedies.[106] The result is that certain rights that in France would be seen as personality (law of persons) non-patrimonial rights are, in England, seen as tort or property issues. One does not think of privacy and harassment as belonging to some category of rights attaching to the person as a human; they are just as much a 'patrimonial' right as a claim for negligently caused property damage.

What an accurate and comprehensive index should reveal, then, is that much of the recent literature by common lawyers on legal classification—particularly that literature which tries to import into the common law the Roman institutional scheme—ought to be treated with much scepticism.[107] Common lawyers, or at least those who do not spend their time in ivory towers pretending that reform of the law is just a matter of reform of the law books (see under M for Maine, Sir Henry),[108] are simply not that interested

[102] B Beignier, 'Droits (Classification)' in D Alland and S Rials (eds), *Dictionnaire de la culture juridique* (Paris, Presses Universitaires de France, 2003) 533.

[103] R Graveson, *Status in the Common Law* (London, Athlone, 1953); but *cf Stevenson v Beverley Bentinck Ltd* [1976] 1 WLR 483.

[104] See, eg Torts (Interference with Goods) Act 1977.

[105] Ibbetson, above n 26, 289.

[106] Ibid, 264–93.

[107] Although this is not to argue that the institutional scheme should be absent from any first year UK law syllabus: see Birks, 'Law in Twentieth-century Britain', above n 2, 260–63.

[108] H Maine, *Early Law and Custom* (London, John Murray, 1890 edition) 363.

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in thinking about whether or not human rights are to be categorised under 'persons' or 'things'. Indeed the notion of 'patrimony', if it exists at all in English law, will probably only be discovered by a trawl through an index to a law book written by someone who knows something about the civil law.[109] Such an index trawl might have the fortuitous effect of also taking the reader from 'patrimony' to 'procedure' where, perhaps, some of the functional equivalents (F is for functionalism) in English law to French law patrimonial problems might be found.[110] As for the category of a 'law of persons', this is a notion that can make sense within the chaos of English law only within an index with a civilian as well as a common law bias.[111]

## Q IS FOR … QUID SI?

If this lack of system and structure seems odd, it must be remembered that English law bears an analogical (not genealogical) similarity with classical Roman law.[112] Of course Roman law had system and structure, but the *Institutiones*, where this system and structure found its expression, were books written for students. In other words system and structure was for legal education. As far as the jurist-practitioners were concerned legal solutions were not to be discovered through logical deductions from *regulae iuris*.[113] They were often discovered through pushing outwards from one factual situation to another. Discussing necessitous intervention, for example, Ulpian asks: what if (*quid si*) he [the actor] thought he was acting in the other's interest but the head of the house did not really benefit?[114] Or again, what if (*quid ergo si*) two slaves run away each concealing the other?[115] Is this theft by each? Ulpian had started out from the factual situation of two slaves mutually encouraging each other to run away; each slave would not commit theft in respect of the other. But what if …? Many other examples could be given of this kind of method.

## R IS FOR … REASONING

Legal reasoning in the common law is very similar. The emphasis on case law and precedent has encouraged both professors and practitioners to

[109] See, eg F Lawson and B Rudden, *The Law of Property* 3rd edn (Oxford, Oxford University Press, 2002) 46.
[110] See, eg County Courts Act 1984 s 89.
[111] H Goldschmidt, *English Law from the Foreign Standpoint* (London, Pitman and Sons, 1937) 154–75.
[112] K Zweigert and H Kötz, *An Introduction to Comparative Law* 3rd edn, T Weir (trans) (Oxford, Oxford University Press, 1998) 70.
[113] See, eg D.50.17.1.
[114] D.3.45.10.1.
[115] D.47.2.36.3.

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approach legal problems through this same pushing outwards from one factual situation to another. 'During the hearing', said Bingham LJ in a 1990 case, 'the questions were raised: what if, in a situation such as the present, the council had opened and thereupon accepted the first tender received, even though the deadline had not expired and other invitees had not yet responded?'[116] And he continued: 'Or if the council had considered and accepted a tender admittedly received well after the deadline?'[117] When counsel for the defendant replied in saying that by so acting the council might breach its own standing orders, and might fairly be accused of discreditable conduct, such conduct would not be in breach of any legal obligation because at that stage there would be none to breach. Bingham LJ had no hesitation in concluding that this was a conclusion he could not accept.[118]

## S IS FOR … SCIENTIA IURIS

What the index should reveal, either directly or indirectly, is that the common law does not consider law to be a science.[119] The word will thus probably not even appear in most books on the English legal system[120] and in Professor Cownie's book on legal academics few claim this status for their discipline.[121] In a French work on legal academics, or at least on their writings, the position is very different. Accordingly some forms of perfectly respectable academic writing on law—for example a sociological analysis or even a work on legal history—will not qualify for doctrinal status.[122] Of course one can raise a question about what exactly is meant by 'science' in this context; and so in Roman times the expression *scientia iuris* meant knowledge rather than science in the modern sense of the term. If it simply means a doctrinal or 'black-letter' approach to legal analysis and reasoning it is certainly arguable that such 'scientists' were, and are, to be found just as much within the common law tradition.[123]

Yet two French authors writing on the doctrinal tradition in France indicate that there are two characteristics that underpin its meaning in France (and probably in the civil law world in general). The first is the divorce between 'legal science' and the human sciences and the second is the

[116] *Blackpool & Fylde Aero Club Ltd* v *Blackpool BC* [1990] 1 WLR 1195, at 1201.
[117] Ibid.
[118] Ibid.
[119] See further P Legrand and G Samuel, 'Brèves épistémologiques sur le droit anglais tel qu'en lui-même' (2005) 54 *Revue Interdisciplinaire d'Études Juridiques* 1.
[120] But *cf* Goldschmidt, above n 111, 65–80.
[121] F Cownie, *Legal Academics* (Oxford, Hart Publishing, 2004).
[122] P Jestaz and C Jamin, *La doctrine* (Paris, Dalloz, 2004) 171–74.
[123] See eg, the discussion on this question in K Gray and S Gray, 'The Rhetoric of Reality', in J Getzler (ed), *Rationalizing Property, Equity and Trusts* (London, Butterworths, 2003) 204.

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notion of *la dogmatique* (D is for…). This idea of *la dogmatique* has been described by the two authors as a 'learned, reasoned and structured study of the positive law from the angle of an ought position, that is to say from the angle of the desirable and applicable solution'.[124] It is a normative ('ought') science rather than a science that studies what exists ('is'). This internal (dogmatic) view is governed by a rigid logic that in turn is attached to the study of texts and only the texts with the result that there is 'a lack of curiosity for the human sciences which are considered as the sciences of fact'.[125] This absence of an external ('is') object would seemingly condemn assertions in law from being scientific ones in the Karl Popper sense since there is no means by which the assertion can be falsified. Yet one way around this problem is to associate law with the science of mathematics which, equally, has no external object and, in consequence, has to use coherence as its means of epistemological validation.[126] A third characteristic, therefore, that might be said to underpin the civil law 'scientific' tradition is the search for a *cohérence absolue*.[127]

## T IS FOR … TAXONOMY

However this is not to suggest that there are not common law jurists who would like to see more order introduced into common law reasoning. The late Peter Birks, as we have seen, tried very hard to convince common lawyers to take taxonomy seriously and so, whatever else he may or may not achieved, the word should at least figure in the indices of a range of textbooks and monographs on the common law. Whether common lawyers should take classification and structure seriously is, however, another matter. Ordering law is not like ordering the natural world because law is, in the end, the object of its own legal science.[128] Yet there is no doubt that Birks has influenced a new generation of younger academics who seem in some ways to be advocating a French-like doctrinal approach to law under the guise of interpretation theory.[129] These jurists would no doubt be much dismayed by any attempt to suggest that the alphabet is as good a way of

[124] Jestaz and Jamin, above n 122, 172.

[125] Ibid, 173.

[126] For an interesting comparison between mathematics and theology see J Puddefoot, 'Mathématiques' in J-Y Lacoste (ed), *Dictionnaire critique de théologie* 2nd edn (Paris, Presses Universitaires de France, 2007) 860.

[127] Ibid, 11. See further G Samuel, 'Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?' (2009) 36 *Journal of Law and Society* 431.

[128] See further G Samuel, 'Can Gaius Really be Compared to Darwin?' (2000) 49 *International & Comparative Law Quarterly* 297; G Samuel, 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24 *Oxford Journal of Legal Studies* 335.

[129] See, eg E Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford, Oxford University Press, 2009).

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arranging the common law as any institutional system. But the way the common law goes from the very abstract—for example it thinks uniquely in terms of a general theory of contract and some of its property notions may equally be seen as very conceptual[130]—to the very detailed suggests in the end that one needs a good index to capture accurately legal thought.[131]

## U IS FOR … UNREASONABLE

Several examples can be given, but perhaps the most compelling is the notion of 'unreasonableness' which is to be found in many different places within the common law. There is the unreasonable behaviour of the defendant who is in breach of his duty of care, the unreasonable actor whose act breaks the chain of causation, the unreasonable user of land, the unreasonable interferer with Her Majesty's Subjects, the unreasonable contractual party, the unreasonable goods and so on and so forth. The temptation here might be for the legal scientist to attempt some overarching definition of reasonableness and unreasonableness. Alternatively, if such an overarching definition proves elusive, one might equate the role of reasonableness in English law with, say, that of good faith in the civil law.[132]

However, such attempts at definition or comparison are misleading because even if such a definition or comparison could be abstracted out of all the legal texts where it has been used, it would probably be epistemologically meaningless. What matters is the particular factual situation of each case where it has been a determining factor and within such factual contexts reasonableness has very different meanings. One does not talk about 'good faith' goods or 'good faith' links in a causal chain. No doubt a better principle with which reasonableness (or unreasonableness) might be compared is abuse of a right, but even here there are difficulties because the common law reasonableness is not a notion that attaches just to behaviour.[133] In truth reasonableness is utterly nominalistic in its operation; that is to say it is not dependent any generic category but attaches always to a specific person, thing or other object within a particular factual context. The way to understand reasonableness is not, then, through reference to some abstract principle contained within a rationalised *plan*; it is to compile a dictionary

[130] See, eg F Lawson, *The Rational Strength of English Law* (London, Stevens & Sons, 1951).

[131] Rudden, 'Torticles', above n 9.

[132] Ramparany-Ravololomiarana, above n 78, 6.

[133] Even if the role of reasonableness can be compared functionally with the role of principles like good faith and abuse of rights in the civil law, this does not really affect the argument that the essence of reasonableness is better expressed in an index rather than in *un plan*. The argument is not that the index should present an epistemological challenge to *le plan*; the argument is that the index will reveal things that *le plan* will not reveal.

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of specific cases attached to specific factual things and people.[134] Here is a notion, perhaps more than any other, that sums up the attitude of English law, yet it cannot be used as the basis of any rational plan. It inhabits only the world of the index.

## V IS FOR ... VIRTUAL

None of this is to suggest that reasonableness and unreasonableness are dictated strictly by the facts.[135] The point that needs to be stressed is that it is a reasoning device that works within the facts through the construction of the *personae* and the *res*. Was Mr Forsythe really being 'unreasonable' when he refused to pay for a swimming pool that did not conform to the contract specifications?[136] The courts were effectively able to say that he was by holding that the pool itself was 'reasonable' and that his damage was, therefore, not one that attached to the *res* (pool) but to the *persona* (Mr Forsythe). In saying this, the courts might or might not have been reflecting the actual facts. Is it actually reasonable for a construction company to force a client to accept something for which they have not contracted? Much will depend upon where one wishes to locate the notion of 'reasonable' and this suggests that, from an epistemological point of view, lawyers, like natural scientists, work with models of virtual rather than actual facts.

This distinction between actual and virtual facts is made by the French mathematician and epistemologist Gaston-Gilles Granger in respect of scientific laws.[137] Such laws often do not function in the way they should in the actual world because they have been formulated using purified, or virtual, facts. Thus, for example, if a cannon ball and a feather are dropped at the same moment from the leaning tower of Pisa it is more than likely that the ball will hit the ground before the feather, especially if it is a windy day. Lawyers might be said to use virtual facts when they formulate their laws, although the amount of detail incorporated or omitted often varies considerably. Take, for example, the lawyer who is handling a case concerning the sale of defective underpants which cause injury.[138] If he acts for the injured victim he will certainly and vigorously dispute any claim by the manufacturer that a pair of underpants is completely different from a

[134] S Boarini, 'Collection, comparaison, concerntation: Le traitement du cas, de la casuistique moderne aux conférences de consensus' in J-C Passeron and J Revel (eds), *Penser par cas* (Paris, Éditions de l'école des hautes études en sciences sociales, 2005) 129, 133–36.

[135] See in general Ramparany-Ravololomiarana, above n 78.

[136] *Ruxley Electronics Ltd v Forsyth* [1996] 1 AC 344.

[137] G-G Granger, *La science et les sciences* 2nd edn (Paris, Presses Universitaires de France, 1995) 49.

[138] *Grant v Australian Knitting Mills Ltd* [1936] AC 85.

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bottle of ginger-beer. They are both 'products'. However, if by some chance he is defending the seller of the underpants against a prosecution under the *Food Safety Act* he will make the obvious point that underpants are completely different from bottles of ginger-beer. In the index, then, one should certainly have 'product' under P, but it would be helpful, equally, to have 'underpants' under U and 'ginger-beer' under G, if only to remind the common lawyer that these two items are both similar and different at one and the same time.

## W IS FOR … WATER

As for a swimming pool, one might well want to list it under P for pool given the specific problems such things raise if constructed defectively. But another listing might be made under W for water. And not just because the escape of such a 'thing' from one's land can trigger liability in tort but also because what counts as a 'thing' under the rule in *Rylands v Fletcher* depends on a string of analogies leading back to the reservoir water in this precedent.[139] As Lord Simon once explained, precedent is not simply a matter of applying an abstract rule induced out of one set of facts (the precedent) and applied to a new set of facts (the case before the judge).[140] The material facts in both situations must disclose an analogical relationship and this is one reason why case law reasoning in the common law is very different from the syllogistic reasoning associated with codification. Is electricity analogous to water? If not, then the rule of *Rylands v Fletcher* will not apply to the escape of electricity. Given this situation the index needs surely to contain not just, under C or R, a reference to casuistic reasoning but individual references to any object that might have analogical relevance in respect of this kind of reasoning.

## X IS FOR … X RAY

Perhaps one might begin to move towards some conclusions by arguing that the index, if comprehensive enough, can act like an X ray which allows the reader to see through the whole book while at the same time highlighting details that might or might not trigger insights. Hopefully the good index will trigger connections that cannot be gleaned either from the contents page—or *le plan* if a French treatise—or from a reading of the whole text. Listing the objects and the persons that act as focal points in cases and in statutes can reveal some strange regimes. Is it not odd that the owner of a

[139] *Rylands v Fletcher* (1866) LR 1 Ex 265 (Ex); (1868) LR 3 HL 330 (HL).
[140] *Lupton v FA & AB Ltd* [1972] AC 634, 658–59.

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horse that causes a traffic accident might well be strictly liable for the road casualties while the owner of another vehicle which causes an accident will not?[141] The index might well stimulate one into reflecting why it is that English law should have in the twenty-first century a special regime for horses but not for motor vehicles. In turn, such reflection might cause the reader to go back to the precedent that seemingly acts as an obstacle to the development of strict liability in the area of accidents on the road. In holding that the owner of a defective motor vehicle could not be liable for breach of statutory duty, Bankes LJ makes the surely not unimportant observation that the case was not one involving personal injury.[142] Might it not be time to revisit this area given the important role that breach of statutory duty has in accidents at work (classed under W)? Perhaps it is unrealistic to expect judges to be radical in respect of road accidents, especially if the reader has chanced upon 'compensation culture' in the index. But, were judges to be radical, life would be considerably improved for the victims. Cars, lorries and coaches would, in turn, be able to claim the same status in the index as horses, elephants, products and defective factory machinery. They would all be part of a strict liability for things (see under L and T).

## Y IS FOR ... YING, YANG

In addition to the X ray vision a well constructed index can free the reader's mind from the constraints of legal categories allowing the reader to reflect, as we have suggested, on individualised objects, situations and people. In particular in juxtaposing the concrete with the conceptual there is within this reader's guide a continual dialectical tension that is mirrored often in the arts. As an interesting, but now sadly late, film critic and writer observed: 'Screen visuals usually make their point by one or two contrasts rather than by an intricate organization.'[143] For the 'camera needs visual metaphors' and one such metaphor is the contrast between the bodily motifs of people and, say, the architectural shapes and forms against which the motifs are placed.[144] Raymond Durgnat equally observed how architecture 'may constitute an X-ray photograph of the heroes' minds'.[145] Of course the film maker's dialectical images can be said to be deliberately constructed whereas the contrasts to be found in an index are the result of alphabetical accident. However, as Durgnat points out, many images in the cinema can often result as much from accident as design.[146]

[141] See *Mirvahedy v Henley* [2003] 2 AC 491.
[142] *Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832, 840.
[143] R Durgnat, *Films and Feelings* (London, Faber & Faber, 1967) 51.
[144] Ibid, 102 ff.
[145] Ibid, 102.
[146] Ibid, 41.

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The index, then, is the meeting place for a tension between words and things. It is where reality, or at least near reality, shares the same space with unreality. It is where real objects like parasites, parrots and pork are juxtaposed with more dubious ones like personality, privacy and possession. In turn these tensions are mediated to some extent by linking terms like power, presumption and principle; and so for example there are few presumptions about how consumers should cook their products save when it is pork.[147] Yet this exception is vital and the index is there to remind the law student that pork really is different from partridge and pants when it comes to the application of the Sale of Goods Act.

## Z IS FOR … ZWEIGERT AND KÖTZ

Perhaps one should end, however, with a reference to methodology, an area of legal knowledge that remains in some respects largely ignored or underdeveloped by jurists. In what must be one of the most well known of introductory works on comparative law the authors, Zweigert and Kötz, assert that for the comparatist the basic method is one referred to as the functionalism.[148] This is an approach that puts the emphasis not on the rules and concepts of a legal system but on what they do. Of course the functional method has been employed by legal theorists well beyond comparative law; it lies at the heart of American realism[149] and is often used by jurists working in the field of socio-legal studies.[150] Now Zweigert and Kötz are not wrong in putting the emphasis on the functional method since it is often the most practical means of understanding another legal system. But if one turns to their index one soon discovers that the two authors do not offer any alternatives. Under 'methodology' there are no references to, say, hermeneutics, a method asserted by other comparatists.[151] Would not a more thoughtful index compiler have been stimulated into researching into the whole question of method in the social sciences? Perhaps the two authors did not do the index to their book and perhaps this is one of the reasons why the methodology chapter is incomplete. It possibly never occurred to them that one explanation of why different judges arrive at different conclusions with respect to the same case is that different judges can

[147] *Heil v Hedges* [1951] 1 TLR 512.
[148] Zweigert and Kötz, above n 112, at 34.
[149] See F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.
[150] See generally Lloyd and Freeman, above n 65, 835–80.
[151] See, eg P Legrand, *Le droit comparé* 3rd edn (Paris, Presses Universitaires de France, 2009).

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apply different methods.[152] Functional approaches are often employed in judicial reasoning but so are structural and dialectical approaches.

The point to be stressed here, particularly for the comparatist, is that different methods reveal different kinds of knowledge. Functionalism will give the comparative lawyer one insight while hermeneutics will give her another. And of course structuralism will reveal a further form of knowledge. Accordingly, the problem with Zweigert and Kötz stressing just one method, namely functionalism, is that they end up stressing just one form of knowledge. This is arguably unacceptable since the aim of comparative law is to elicit new knowledge through the use of comparative methodologies and so what the comparatist needs is a range of schemes of intelligibility. As one social science theorist has noted, knowledge is possible only through a *découpage* of reality and thus is dependent upon the schemes, methods and levels of operation the observer chooses to employ.[153] The historian who chooses to work on the long-term view is not arguing that there are no individual heroes or great figures; equally the historian who focuses on the individual will not be claiming that social classes do not exist.[154] By way of analogy, the comparatist who employs a hermeneutical approach ought not to be denying that another scheme of intelligibility or paradigm orientation—say structuralism—will reveal a different form of comparative knowledge.[155]

As for the index, this finds itself closely indentified with schemes and methods. Thus those civilian jurists mentioned by Nicholas Kasirer who see the index as having no inherent epistemological value are applying to law a structural scheme; law is a coherent system of rules, categories and concepts that can be captured, epistemologically, only by *le plan*. But substitute for that scheme a dialectical approach—that is one that sees knowledge emerging from contradiction—then the index begins to look more attractive. As this chapter has tried to show (and drawing its inspiration from the work Professor Kasirer), the index is the place where the tension between words and things are exposed for all to see and appreciate.

[152] See further G Samuel, 'Can Legal Reasoning Be Demystified?' (2009) 29 *Legal Studies* 181.

[153] D Desjeux, *Les sciences sociales* (Paris, Presses Universitaires de France, 2004) 91–92.

[154] Ibid, 95.

[155] On schemes of intelligibility and paradigm orientations in comparative law see G Samuel, 'Taking Methods Seriously (Part One)' (2007) 2 *Journal of Comparative Law* 94; 'Taking Methods Seriously (Part Two)' (2007) 2 *Journal of Comparative Law* 210.

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