The Goals of Private Law BY ANDREW ROBERTSON AND TANG HANG WU, eds. [Oxford: Hart Publishing, 2009. x + 516 pp. (including index). Hardcover: US$176.00]

The origins of this book lie in the Fourth Biennial Conference on the Law of Obligations, hosted for the first time by the National University of Singapore in July 2008. Out of the sixty-eight papers presented at the conference, nineteen were ultimately assembled and presented in this collection of essays about *The Goals of Private Law*.

It is a testament to the power of his account of corrective justice that nearly 15 years after it was first published, Ernest Weinrib's *The Idea of Private Law* (Cambridge, Massachusetts: Harvard University Press, 1995) remains the starting point for any discussion of the nature and purpose of private law. His contention that "the sole purpose of private law is to be private law" (at p. 8)—internally coherent, with no aim except to correct those normative inequalities that arise between the claimant and defendant whenever a wrong is done by the latter to the former—attracts both strident criticism and spirited defence in this book. It is, however, never ignored. Thus, Steven Hedley in his contribution entitled "Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century" (at p. 193) attacks what he sees as the senseless radical internalism of the Weinrib school of thought. To him, Weinrib's account provides an impoverished account of the law of obligations; to William Lucy, on the other hand, the only goal of private law is to facilitate the private pursuit of individual goals. In "What's Private About Private Law?" (at p. 47), Lucy classes any attempt to examine or understand these individual goals as falling outside the domain of private lawyers and jurists. To the extent that private law may be said to have goals, Lucy believes that these goals are primarily the domain of social scientists

interested in the side-effects or consequences of private law. These are external (in Weinrib's terminology) to private law.

The title of this book is itself an implied critique of Weinrib's insistence that private law is solely concerned with only one idea: that of corrective justice. *The Goals of Private Law* not only posits that private law is more instrumentalist than what Weinrib's idea of corrective justice would allow, it also (in speaking of goals rather than a single goal) makes an implicit concession on the possibility that private law may be at once shaped and informed by a multiplicity of different goals. In effect, it implies that "we are all pluralists now". Stephen A. Smith, in "The Rights of Private Law" (at p. 113), tackles this issue of pluralism head on. He argues that certain parts of private law (such as the rules that deal with limitations or costs) cannot be explained on the basis of corrective justice alone, and even those parts which can be explained using corrective justice invoke a range of qualitatively different values or interests. For that reason, he concludes, any plausible account of private law as corrective justice must be one that is pluralist both in an external and internal sense. The one area of private law—restitution or unjust enrichment—that appears at first sight to best embody the strict bilateral logic of Weinrib's idea of corrective justice also comes under a value pluralist attack by Hanoch Dagan in "Just and Unjust Enrichments" (at p. 423). Dagan acknowledges the importance of correlativity between the defendant's liability and the plaintiff's enrichment to any credible theory of restitution law; however, he argues that private law adjudication and enforcement necessarily places a burden on the plaintiff to justify why people in his or her predicament should be able to claim the remedy he or she demands of people in the defendant's category. Those reasons must necessarily operate against the background of social values that explain the law's *a priori* approval of certain kinds of enrichments over others. Values such as autonomy, utility and community inform society's understanding of when enrichments might be unjust and it is only when one of these values is undermined that a court will step in to recognise the enrichment as unjust and reverse it.

Value pluralism in law is often rejected out of the fear that it might invite unbridled judicial law-making. This concern is addressed by Andrew Robertson in "Constraints on Policy-Based Reasoning in Private Law" (at p. 261), where he argues that—alongside institutional constraints such as the prospect of peer scrutiny, the common law method, convention, the desirability of consistency and coherence in the law—the inherently bipolar nature of and the need to do justice to both parties in private law adjudication ensures that judges take a pluralism of values into account in a constrained judicial capacity and not as legislators.

The implicit commitment of this book to a pluralistic account of private law, however, raises another more interesting question: if private law is informed and guided by a pluralism of values and goals, is there any way in which we can continue to talk meaningfully about 'private law' in its singular and monolithic form? The advantage of Weinrib's account of private law is that by claiming that private law is entirely concerned with corrective justice (and implying that public or other forms of law are concerned with other forms of justice), it gives private law a coherence and intelligibility that renders it, at once, unique and exclusive. In the terminology employed by Charlie Webb in "Treating Like Cases Alike: Principle and Classification in Private Law" (at p. 215), Weinrib's idea of corrective justice transformed the classificatory term 'private law' from an expository category of classification to a dispositive one;

laws as disparate as contract, tort, property and trusts could be grouped together, with the implication that they all fell to be analysed, understood and treated in the same way. The moment that the enterprise of identifying a single idea to unify all of private law is abandoned in favour of value pluralism, however, private law loses its power as a dispositive category and reverts to being a mere shorthand descriptive term for what it claims not to be; and as Webb acknowledges, the divisions between categories in an expository classification scheme are neither hard nor fast.

Mayo Moran in "The Mutually Constitutive Nature of Public and Private Law" (at p. 17) picks up on this idea that the dividing line between public and private law in a value-pluralistic world is inevitably porous. She argues that the relationship between public and private law is not hierarchical but mutually constitutive. While this porosity of the borders of private law does not appear to worry Moran, others such as Emily Sherwin are uneasy with the idea of allowing judges to consult a plurality of values when making decisions about the validity of rules and their application to the particular case. The temptation, she implies, would be for judges to have recourse to the values behind the rules in order to justify departures from the rules themselves. Such departures from the rule would, to some extent, undermine the future reliability of the rule and do it irreparable systemic harm. In "The Rules of Obligations" (at p. 445), she argues that while in theory, judges should refer to established rules when those rules are justified in order to define what a just or unjust enrichment is, and only overrule those rules which run contrary to the values of autonomy, utility and community identified by Dagan, the implementation of such an approach would be very difficult in practice.

A more potent illustration of the danger that pluralistic values pose to the coherence of private law, however, is to be found in Donal Nolan's "Causation and the Goals of Tort Law" (at p. 165). Nolan's analysis demonstrates that the relaxation of the orthodox rules of causation in the causal indeterminacy cases of *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 (H.L.), *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32 (H.L.), and *Barker v. Corus (U.K.) Ltd.* [2006] 2 A.C. 572 (H.L.) [*Barker*] cannot be explained by reference to notions of corrective justice; the causal link between negligence and damage justifies why a particular defendant should be liable to a particular claimant, weakening it undermines the strict bilateral nature of that relationship between the parties. He argues that adapting causation—a mechanism of corrective justice—to achieve broader social goals (such as that of compensation and deterrence) results in incoherence in the law. The apportionment approach adopted by Lord Hoffmann in *Barker* is premised on holding that the damage which the defendant should be regarded as having caused was not the disease itself, but the creation of a risk of the disease coming about. This reasoning, however, is almost indistinguishable from the 'loss of a chance' argument that was considered by the House of Lords in *Hotson v. East Berkshire Area Health Authority* [1987] 1 A.C. 750 (H.L.) [*Hotson*] and *Gregg v. Scott* [2005] 2 A.C. 176 (H.L.) [*Gregg*]. The latter was ultimately rejected on the basis that to accept the argument would radically change the nature of tort law, but as Nolan points out, the logic of broader, instrumentalist goals such as compensation and deterrence have no natural limits. It is hard to say why analysing causation in terms of risk instead of damage should be allowed in cases of causal indeterminacy but not in *Hotson* or *Gregg*. The logic of utilising tort law as a means of deterring wrongful behaviour would also transform

tort law into something akin to criminal law, while the logic of compensation would render it akin to social security. Thus, value pluralism does not merely threaten the coherence of particular doctrines in private law—it threatens the very identity of private law as 'private' to begin with.

The Goals of Private Law is a book that contains much fodder for thought. It contains views as diverse and pluralistic as its title implies and is a collection of articles that will be appreciated by anyone seeking to understand the nature of law and what the law as an institution can, and should, seek to achieve.

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