be worth serious consideration as an alternative constitutional possibility in the wake of these developments.

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Form and Substance in the Law of Obligations BY ANDREW **ROBERTSON** AND JAMES **GOUDKAMP**, eds [Oxford: Hart Publishing, 2019. ix + 457 pp. Hardcover: £85.50]

In *Parkin v Thorold* (1852) 16 Beav 59, Lord Romilly MR held that "Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance" (at pp 66-67). The distinction between form and substance is long-standing and is familiar to both Chancery and Common Law judges. In contract law, Bingham LJ (as he then was) had warned in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA) that a court must be alive in identifying a "disguised penalty clause" which would be unenforceable at common law (at 439). With the apparent obsession of 'substance over form', does 'form' still have a role to play in private law? The collection of essays in this volume explores the interactions and influences of both camps within the law of obligations. Broadly speaking, the essays can be sorted into three clusters.

In the first cluster (Chapters 2-6, 8), scholars scrutinise the various dimensions of 'form' and 'substance' in private law. The knee-jerk reflex to 'form' invokes notions of rules and rigidity whereas 'substance' emanates notions of reasons and nuances. Despite the sharp distinction between 'form' and 'substance', each term is susceptible to multiple interpretations. Perhaps the ironic question to ask is whether there is real substance in embracing such a formal dichotomy? Andrew Burrows (Chapter 2) interprets the dichotomy as one between false appearance and inner reality. He contends that judges do adopt legal fictions to obscure their true substantive reasoning. One such fiction is that the courts do not make the common law but rather discover it. Another example he identifies is Lord Hoffmann's "assumption of responsibility" doctrine in *The Achilleas* [2009] AC 61 (HL) in relation to remoteness in contract. Burrows argues that legal fictions are employed to mask the fact that judges do exercise their power to make law. However, it is the real reasoning of the courts that lawyers need to be scrutinising, and judges should not shy away from making overt normative and policy evaluations. Viewed through this lens, there is no merit in maintaining the 'form'/'substance' dichotomy.

Pey-Woan Lee (Chapter 4) observes that a court may "recharacterise" a transaction when its substance is substantially different from the label assigned to it by the parties. "Recharacterisation" can be achieved either by resorting to the sham doctrine or through the process of construction of the relevant document. She surveys across the areas of tenancy, employment, trusts and securities law, and argues that English

courts generally adopt doctrinal formalism for both techniques, and only incorporate policy concerns obliquely in their reasoning. Lee concludes that the courts should be more explicit in articulating their policy considerations (more substance) rather than disguising them under the guise of doctrinal analysis (less form). On the contrary, William Swadling (Chapter 5) advances a case in defence of formalism. Examining landmark decisions in trusts and unjust enrichment, he argues that it is illegitimate for the courts to replace a substantive law with another rule of substantive law merely on grounds that the former law is "formalistic", "technical" or has ignored the "substance" of the matter. His essay criticises such a judicial reasoning technique, and argues that formalism is necessary for the articulation of reasons and the application of rules to be determinate.

Although Burrows and Lee lean more towards 'substance', while Swadling favours more 'form', their arguments are similar: value judgments cannot exist as shadows behind the curtains of formal reasoning and rules. Where policy considerations are engaged, they should be evaluated transparently. The debates in these chapters arguably reveal that it is not entirely helpful to polarise between 'form' and 'substance'. For private law to flourish, there must be a balance between the two. Just as there can be no justice without rules, Birke Häcker (Chapter 3) warns that courts must also guard against "substantivist" tendencies to treat values like "fairness" as building blocks to be factored directly into those rules. Any legal system would, therefore, have to establish an equilibrium between 'form' and 'substance'. In this regard, the approach of the Singapore courts could be instructive. For instance, in assessing whether a duty of care is owed by an individual, the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR (R) 100 (CA) developed a framework where policy considerations have to be explicitly articulated and evaluated at the second stage instead of implicitly considering them under the label of "fair, just and reasonable". The use of analytical frameworks is one method of balancing form and substance. Principles thereby emerge as a compromise between rigid rules on the one hand, and mere desiderata on the other.

In the second cluster (Chapters 7, 9-14), scholars scrutinise the 'form'/'substance' dichotomy within the various pillars of the law of obligations. In the realm of equity, Man Yip (Chapter 10) argues that English law has increasingly retreated from formal rules and reasoning, and embraced more fact-sensitive inquiries. In order to cope with the diversity of facts, judges have pragmatically developed a more discretion-based model in judicial reasoning. Furthermore, trusts and fiduciary concepts are increasingly relied upon in the commercial sphere, and traditional Chancery rules may not provide a "one size fits all" formula for modern equity. James Lee (Chapter 12) argues that English tort law has been inching towards "substantive" reasoning, and that too much of such a reasoning method is detrimental to the development of tort law jurisprudence. He examines recent Supreme Court authorities across duty of care, actionable damage in negligence, and vicarious liability, and criticises the various tests formulated by the courts for openly embracing indeterminacy. Whilst tort law develops in an incremental fashion, Lee argues that it is alarming for the law to collapse into a caricatured general principle where each case will turn on its facts. Through Yip's and Lee's analyses, one could observe that equity and torts are both trending towards 'substance' over 'form'. However, it is interesting that Yip concludes with optimism that such an open-textured approach could be a natural

process of renewal for equity, where equity is remoulding itself to meet modern exigencies, and that these discretionary-based tests could become firmer over time. On the contrary, Lee expresses a more pressing need for better structures within tort law, lamenting that the current law possesses "bad form" and "addictive substance".

James Goudkamp and Eleni Katsampouka (Chapter 14) investigate the development of punitive damages. While primarily examining English law, the duo also perform a comparative analysis engaging Australian, American, and Canadian law. They argue that while English law started off with substantive reasoning, it slipped into a formalistic and rigid analysis in *Rookes v Barnard* [1964] AC 1129 (HL). Even though there were some signs that the courts were loosening its grip over formalism, the duo concludes that English law on punitive damages remains the most formal whereas the Canadian position represents the most substantive approach. The "categories" test formulated by Lord Devlin ought to be abolished as a step towards a more substantive engagement of the law; a law that relies more on principles than precedents. The essays in this cluster provide superb scrutiny of the 'form'/'substance' dichotomy within each silo of the law of obligations. Given that private law consists of both the common law and equity, it would also be edifying if more attention could be devoted to engaging the fault lines between equity and the various disciplines of the common law. After all, the common law/equity distinction is itself a formal one, and one questions whether there remains much substance in maintaining this distinction. There is evidence that the two fields are commingling. Just to name a few, common law doctrines of causation and remoteness have been steadily encroaching into equity in recent years; the proprietary remedy of subrogation is now intertwined with unjust enrichment, and the doctrine of good faith has influenced developments in contract law. Perhaps it is a fruitful endeavour to explore the legitimacy of substantive cross-fertilisation between this formal divide.

The third cluster of essays (Chapters 15-17) undertakes the challenge of applying the 'form'/'substance' dichotomy to statutory law. Mark Leeming (Chapter 15) emphasises that statutes should not be interpreted the same way as case law and vice versa. He argues that statutes are more formal and textual in nature, and should be interpreted more "to the letter". Statutes, therefore, have an anchoring effect against incremental change. On the contrary, case law should not be read like a statute. Judgments convey principles and are meant to be illustrative rather than definitive. Case law is thus more substantive in nature, and one should avoid the textualisation of precedents. However, the 'form'/'substance' dichotomy can be blurred when statutes co-exist with case law. Leeming argues that the proscription of "unconscionable" conduct in Australia is one such example, where multiple statutes codified the principle, with the statutory regimes prescribing their own understanding of the principle.

Ben Chen and Jeff Gordon (Chapter 16) argue that 30 years after Atiyah and Summers' seminal work titled *Form and Substance in Anglo-American Law* (1987), judicial attitudes of the Australian and American courts toward statutory interpretation has largely swapped places. American law, influenced by the late Justice Antonin Scalia, has embraced a high degree of "interpretive formality", where a written law is interpreted literally rather than by reference to its underlying rationale. Australian law, on the other hand, has adopted a more contextual and purposive approach. The duo argues that after appeals to the Privy Council were abolished in 1986, Australian courts were freed from the shackles of interpretive formalism which was then the

prevailing attitude in England. It is interesting to observe that while too much of either 'form' or 'substance' is detrimental to the development of the common law, fidelity to either 'form' or 'substance' can each produce an equally robust regime for statutory interpretation instead.

Re-examining the law of obligations through the lens of 'form' and 'substance' is not only useful in taking stock of the rich developments of private law over the years; it also magnifies the potential pitfalls in its future development. In his valedictory speech, Lord Sumption jokingly referred to judicial reliance on tell-tale phrases such as "common sense approach" or "pragmatic approach" as a euphemism for "we can do what we like". Jokes aside, the law should not adopt a cold turkey withdrawal from formalism only to result in substance abuse. As society progresses, issues that confront the courts will inevitably become more complex. It is therefore increasingly challenging for courts to lay down formal rules and guiding precedents. Perhaps it is understandable why judges intuitively rely on vague notions such as 'unconscionability', 'fair and just', and 'legitimate interests' to resolve hard cases without clearly articulating what each notion entails. In this way, courts remain faithful to the doctrine of *stare decisis* in form, but the substance of each precedent diminishes in value since decided cases would be opaquely reasoned and heavily fact sensitive. In the same speech, Lord Sumption also reflected on the perennial tension between the instinct to soften the law's hard edges and the search for a coherent body of rules that may accommodate qualifications but can never be rendered wholly discretionary. The essays in this volume may not resolve this tension completely, but they are a useful map for navigating the choppy waters of private law in a brave, new world. In form and in substance, this volume is a treat to members of academia, the judiciary, and the Bar.

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