Durham University

Durham Law School

The 2024 Meeting of the Private Law Consortium

30-31 May 2024

Durham Law School

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Introduction

The theme of the Meeting of the Private Law Consortium in 2024 is *Private Law and Public Interest*. The meeting will focus on the ways in which private law doctrines, theory and discourse engage with public objectives and matters of the public interest.

The 2024 Meeting of the Consortium is hosted by Durham Law of School, Durham University, one of the world's leading universities, with excellence in teaching and world-leading research. Durham Law School is a world leader in legal education and research. Its award-winning academic staff produce ground-breaking research with impact. Durham Law School is in the QS World Rankings top 50 law schools.

The conference organisers would like to express their gratitude to Durham Law School for the financial and administrative support of the Meeting of the Consortium.

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Abstracts: Panel 1

A New Perspective for Private Law: Toward a Transdisciplinary Methodology

Arianna Alpini, University of Macerata

The evolution of legal hermeneutics has placed the role of argumentation in the foreground. Argumentative reasoning is the soul of the motivation of every decision and identifies the most appropriate solution that prevails over any other. When technological development renders the traditional techniques of normative production obsolete and, at the same time, the plurality and diverse origin of the sources of law makes the legal system increasingly complex, argumentation is the only tool capable of performing an anchoring function to the foundations of the legal system. To this end, the extension of the so-called 'meta-legal' foundation of law is pivotal. If we consider that concepts can be expressed in different languages, the comparison of different experiences on the same concepts expands the area of connections with further concepts and thus enriches knowledge of reality and argumentative capacity of the jurist.

The contemporary conception of law is far removed from dogmatic abstractions and the 'pure' Kelsenian approach. The norm is the result of processes determined not only by institutions but also by private actors. Law arises from society as an economic, social, cultural, political and religious fact; it is the result of human life, sensitive to certain values and contaminated by them. There is no 'pure legal act': law as such includes 'connections' with other disciplines. However, these connections do not cause confusion because law performs a function of controlling order through the hierarchy of principles. At the same time, the law guarantees the promotion of an ever more adequate implementation of inviolable rights, which is all the more effective the more the jurist is able to include - in the world of legal concepts - the connections with man's real needs.

Hence the need for the legal method to acquire knowledge of the 'contaminations' relevant to the development of an argumentative technique closer to human needs. *The centrality acquired by the theory of sources and interpretation, and the blurred boundary between private and public law, have contributed to expanding the object of reflection of private law*. Compliance with Constitutional and European legality is no longer an interpretative option but the interpreter’s point of reference. Consequently, private law is increasingly balanced between the horizontal plane of equality and the vertical plane of differentiation.

Scholars distinguish sources of law and interpretation, but the latter is an essential component of the former. Law and life can manifest themselves because they influence each other through the impulse initiated by the activity of interpretation that links law

to life. Science does not support itself, it needs a conception of the human being and the world, a philosophy. Science acquires true value only by representing the importance that its results can have on the human being. Consequently, the jurist is called to find the philosophy in law.

The Interaction of Private Law and Financial Regulation

Hans Tjio, National University of Singapore

This paper will take as a starting point the recent warning by Lord Leggatt in *Philipp v Barclays Bank* [2023] UKSC 25 that private law should not overreach into areas of regulation. He thought that it is not the role of private law or that of the courts to provide a 'fair balance' (at [67]) but one for legislators and regulators. But statutes still have to be interpreted in the courtroom particularly because financial legislation often uses private law concepts. Even more than that, however, is that there are always attempts to "contract out" of regulation. Two things are identified here with respect to financial regulation. First, courts intervene to determine if an instrument created or recognised by regulation is indeed what it is. The starting point in financial centres is the sanctity of contract. This, however, may come up against regulatory policy. What that policy is, however, may not always be clear. It may depend on how much third parties are affected by a particular transaction. Externalities can call for the recharacterization of a transaction which may in turn depend on the burden of proof. Much also depends on whether one sees a statute as largely providing relaxed default provisions, or at the other extreme strict mandatory ones. In other words, many statutes may not be exhaustive of a particular position, and so good lawyers still have room to paint private law onto a blank canvas. The former will be discussed in the context of company charges, and the latter with digital assets.

Abstracts: Panel 2

Minority Protection of Shareholders and Public Policy

Tan Cheng Han, National University of Singapore

Corporate law is highly influenced by contractarianism. One area where this manifests itself is in rules that serve to constrain oppression of minority shareholders. Yet in recent years, the courts in the UK and Singapore have expressed reservations over the "oppression action" where the basis for the claim relates to wrongs perpetrated against companies even though it seems logical that the implicit bargain between shareholders would proscribe such acts. It is clear that notions of policy lie behind the reservations but it will be suggested that the courts have not always articulated the right policy.

The Right to Abandon Property: Balancing Private Ownership and Public Interest

Tommaso De Mari Casareto dal Verme, University of Trento

Whatever the legal system of reference, in the western private law tradition the concept of ‘ownership’ is generally linked to a broad range of rights and powers pertaining to the owner over his or her assets. These typically include the freedom to enjoy and use one’s property, i.e., the ability to lease it to others, to take advantage of it for personal profit, to transfer it to someone else, and even to destroy it. Nevertheless, it has long been debated whether these entitlements encompass the right to abandon property, intended as the unilateral and clear intent to relinquish all the interests relating to it. The reasons for the discussion are usually traced back to the negative externalities that abandonment is capable of producing on the collective interests of the society as a whole. Indeed, the owner who abandons the property also frees themselves, for instance, of all maintenance and tax obligations that in most cases fall on the state and therefore on the community.

Traditionally, the answer to the question on the admissibility of the right to abandon property has varied depending on whether it was asked in a civil law or common law legal system. In both cases the legal treatment appears to be very different for movable (chattels) and immovable (real estate) property. In principle, the abandonment of chattels appears to be generally admissible, while significant divergence of views exists with regard to the possibility of relinquishing ownership over real estate. While common law usually prohibits the abandonment of real estate presumably for historical and political reasons, in civil law traditions the picture is not so clear and the opinions by no means univocal.

The paper will analyze the right to abandon property and the main differences in its treatment between common law and civil law systems by reading the phenomenon through the lens of the relationship between the protection of owners' rights, on the one hand, and the public interest, on the other. To do so, the analysis will be divided into two main stages: i) identifying and describing the cases in which the right of abandonment is admissible in different legal traditions; ii) when it is admissible, identifying and describing the legal limitations to this right. The purpose of the paper will be to assess whether existing legal solutions are suitable for implementing a proper balance between private law rights and public interests.

Healthcare Between Public Interest and Individual Right from the Italian-European Perspective: The Role of AI-powered Medical Devices in the Safety of Care

Francesca Ferretti, University of Macerata

The protection of health – as an inviolable principle and an immanent value of the human person – is contained in Article 32 of the Italian Constitution, which qualifies it as both an 'individual right' and an 'interest of the community'. The two syntagmas demonstrate the dual value of health. On one side, it is the object of interest of the public authorities in the provision and management of care to citizens through the national health system. On the other, it is configured as a primary and absolute right, fully operative even in horizontal relations, between private individuals. The relevance of the issue is also felt at a European and supranational level, as demonstrated both by the reference to the purpose of 'protection and improvement of human health' made by Article 6(a) TFEU, and by the broad interpretation of Article 8 of the ECHR, from which the Court has based the obligation of States to guarantee the right to effective respect for the physical and psychological integrity of individuals.

The dynamism of the concept of health, understood not simply as the 'absence of disease', but as a 'state of complete psycho-physical well-being', has been translated into variable subjective legal situations (from the right to health services, to the power to refuse health treatment, to the right 'to suicide'). Following the same expansive trend, the right to health has been enriched by a new component, represented by 'safety of care', to be understood also as safety of medical devices and prevention of risks from technological accidents: the medical device must be "built-in-safety", for the entire life cycle, as recently confirmed by Reg. 2017/745.

The focus on safety in healthcare has experienced a recent development, following the spread of increasingly advanced and complex medical devices, also equipped with artificial intelligence. The regulations contained in the AI Act, which classifies them as 'high-risk' systems, given their use in the medical field and the consequent impact on the right to health, will also be applied to these intelligent medical devices.

The entry of new technologies in this field, despite the advantages in treatment results, complicates the aetiological reconstruction of the damage, possibly caused, to the patient. The identification of adequate criteria for imputation of liability represents a challenge for private law, read from a remedial perspective. In a complementary perspective, the presence of a rich regulatory framework that aims to proceduralise the production of medical devices and to impose on all manufacturers the respect of obligations of conduct, ensures a preventive action, to avoid the damage. This leads to the imposition of administrative sanctions, in the presence of devices that are not harmful to patients, but nevertheless fail to comply with standards.

The synergic coexistence of safety and liability issues confirms the dual relevance, both public and private, even more so in the presence of care delivered with the use of AI devices.

Abstracts: Panel 3

Binding the Future: Far-looking Altruism Boosts Long-term Sustainability

Eliran Halali and Oren Perez, Bar-Ilan University

Intergenerational cooperation, essential for addressing some of the most pressing challenges facing humanity today, is particularly challenging to achieve. The risk of asteroid impact, biodiversity, and AI safety are archetypal examples of such intergenerational social dilemmas, but the most formidable and pressing one is climate change. A unique challenge of intergenerational social dilemmas is that key mechanisms that facilitate cooperation in single-period social dilemmas (reciprocity and third-party punishment) or compensate for its absence (formal compliance mechanisms) are lacking in the intergenerational context. An effective solution for fostering multigenerational collaboration could involve the implementation of a commitment mechanism imposed by the current generation on future generations, compelling them to continue and collaborate with subsequent generations. In the current work, we experimentally examine the behavioral aspects of implementing a commitment mechanism to enhance intergenerational collaboration. We find a widespread endorsement for using commitment mechanisms, despite their associated costs. This seems to reflect '*far-looking altruism'*: the inclination of some individuals to forego personal gain to improve not just the welfare of the next generation but also that of a more distant one (the third). We also find that commitment mechanisms yield long-term benefits, by increasing the sustainability rate (that is, the proportion of chains that managed to sustain the common pool across all generations). Finally, our results imply that once set in motion, commitment mechanisms are highly persistent, as subsequent generations tend to continue utilizing them. These results have important implications for policymakers who explore ways to make climate policies more credible.

Keywords: intergenerational cooperation; climate policies; commitment mechanism; public goods; sustainability

Signaling by Harming: Experimental Analysis

John Shahar Dillbary, George Mason University

Stephan Kroll, Bucerius Law School

and Kip Viscusi, Vanderbilt University

This Article is the first to empirically test whether *tort law* facilitates collusions by providing a coordination mechanism to injurers (e.g., polluting factories). It focuses on cases where actors will not engage in a collusive and harmful (e.g., pollutive) activity unless a minimum number of actors pre-commit to do the same. In high transaction cost settings, such as when cooperation is impossible or illegal, these actors must overcome a number of hurdles. First, they must be able to identify those who are interested in joining the tortious activity. Second, they must be able to credibly pre-commit to do so. We theorize and, using an innovative experimental design, empirically test the claim that tort law allows actors to credibly signal their interest and pre-commit to engage in collusive activities.

Abstracts: Panel 4

Carbon Taxes and Certified Carbon Offsets from the Voluntary Carbon Market: An Impossible (and Yet Increasingly Common) Marriage

Vittoria Battocletti, Universita' Bocconi

Alberto Quintavalla, Erasmus University Rotterdam

and Alessandro Romano, China University of Political Science and Law

There exists a pervasive tension between corporate behaviour and the tax landscape on the one hand, and environmental protection on the other. In some jurisdictions, corporations are allowed to buy carbon offsets certified by standard setters operating on the voluntary carbon market (VCM) to lower their carbon tax liability. We use the phrase 'carbon tax with VCM offsets' to refer to such regimes. Under a carbon tax with VCM offsets, standard setters can *de facto* sell a tax discount with their certifications. Although an ever-increasing number of countries have started adopting the carbon tax with VCM offsets, we argue that this may create a perverse dynamic.

All the main standard setters operating on the VCM seem to adopt – what has been named in corporate law as – the "issuer pays model". That is, they are paid by the project developer who implements the project generating the offsets they certify. Moreover, the fees of standard setters increase when they certify more offsets. Consequently, they have a natural incentive to overstate the amount of emissions reduced by a given project, and hence to inflate the number of offsets. At the same time, emitters can lower their carbon tax liability by buying cheap phantom offsets.

What helps preventing extreme offset inflation on the VCM are the reputational sanctions standard setters may face if they constantly certify offsets that do not correspond to a true reduction in emissions ('phantom offsets'). Normally, that is, absent tax incentives, demand for offsets on the VCM is driven by corporations that purchase offsets to obtain reputational benefits. Clearly, a certification by a standard setter that is widely perceived to be unreliable is less likely to produce such benefits, and hence corporations have less incentives to pay for it.

As a result, a carbon tax with VCM offsets: *i)* generates a substantial loss on state budget without producing commensurate environmental benefits; *ii)* increases the level of greenwashing in the VCM by incentivising the certification of phantom offsets. Therefore, countries should not adopt carbon taxes with VCM offsets. It is in this context that it is necessary to reconsider how the voluntary carbon market is design and impact public interests.

Circular Construction and Property Law: Friends or Foes?

Koen Swinnen, Erasmus University Rotterdam

Traditionally, buildings are designed without paying much attention to what will happen to the building materials at the end of a building's lifecycle. Mostly the ruble of a demolished building ends up in a landfill or an incinerator. In light of current issues such as climate change and the exhaustion of natural resources, the idea of transforming the traditional, linear way of designing buildings into a circular way of designing them is catching on and is high on the agenda of policymakers. In order to make the transition happen, policymakers also call upon private actors to start thinking differently about designing buildings and building materials and, as far as building owners are concerned, about their expectations in terms of design, use and legal entitlements.

The core of so-called 'circular construction' is that buildings (and building materials) are designed and constructed in such a way that all building materials can be used and re-used endlessly without loss of quality and utility. More specifically, the goal of circular construction is that when a building has reached the end of its lifecycle, its façade, roof, floors, interior walls etc. can easily be removed and used in the construction of another building.

Manufacturers of building materials (e.g. modular facades, roofs, solar panels, interior walls, modular kitchens) are destined to play a pivotal role in this process as both the responsibility to produce circular building materials and the responsibility to re-use them endlessly would lie with the manufacturers. Moreover, they would also at all times remain responsible for the maintenance and updating of the building materials they have produced given that they are the one with the most expertise and knowhow. In light of these specific responsibilities, it is often stated that ideally, or even inevitably, ownership of circular building materials remains with the manufacturer at all times.

Still in academic literature, however, it is often noted that in civil law jurisdictions (e.g. Dutch law) property law constitutes a major obstacle to the realization of circular building. In particular the principle of accession is often considered to be problematic. As a result of accession, ownership of an object that is attached to another object such as to form a part of it by law falls to the owner of the latter. Applied to the construction of buildings, this entails that many building materials will be owned by the owner of the building, which is at odds with the basic principles of circular building according to which ownership of building materials remains with the manufacturer.

The goal of this presentation is to shed light on the extent to which accession really constitutes an obstacle to the realization of circular building. Would circularly designed building materials (e.g. clip- on facades) also fall within the scope of accession? Which tools are at the disposal of manufacturers and building owners to realize that ownership of building materials remains with the manufacturer? And if accession really proves to be problematic, what are possible ways forward to facilitate circular building?

Abstracts: Panel 5

Understanding Crowding Out: How Lawmakers Can Avoid Unintended Incentive Effects

Yijia Lu, George Mason University

Monetary rewards and fines are important tools in lawmakers' arsenal to encourage desirable and discourage undesirable behaviors. However, monetary rewards and fines can crowd out moral motivation and lead to opposite effects. For example, encouraging people to donate blood by paying them has been found to lead to less, not more, blood donors.

Laboratory experiments and policy studies in the last three decades have identified (though not consistently) the crowding-out phenomenon in different contexts. What these studies have in common, however, is that they analyze scenarios of purely pro-social motivation. The work on blood donation is a paradigmatic example: donating blood benefits recipients but does not directly benefit donors. However, in many situations of policy relevance, people may act out of both selfish and pro-social motivations. An example that has gained prominence during the Covid-19 pandemic is vaccination against a contagious disease. One may choose to receive vaccination to protect oneself, or to stop spreading the disease to others, or both. If policymakers provide incentives to vaccinate, as they did in Covid, would we expect positive incentive effects to be offset by crowding out?

To help policymakers make better decisions, it is important to have a better understanding of the mechanisms that drive the crowding out effect. Our paper focuses on two competing theories. Social signaling theory (SST) suggests that individuals derive utility from being perceived as prosocial actors by others. Once monetary incentives are introduced, it becomes difficult for them to signal to others that their action is based purely on prosocial motivations; the monetary incentive thus crowds out the utility of being perceived as prosocial actors (Arieli et al. 2009). Self-determination theory (SDT), on the other hand, claims that monetary incentives crowd out desirable activities because individuals value autonomy, and recoil when monetary incentives are used to interfere with their autonomous choices (Deci et al 2010).

In our first experiment, participants are asked to respond to monetary incentives for mixed-motivation activities that have both a self-interest component and a prosocial component (e.g., vaccination typically benefits both the vaccinated person and people around her) and purely prosocial activities with a predominantly prosocial component (e.g., blood donation, which primarily benefits others). We find a much weaker crowding-out effect in mixed-motivation activities. This finding provides preliminary

evidence that SST better explains the crowding-out phenomenon than SDT: monetary incentives interfere with one's personal autonomy for both mixed-motivation and purely prosocial activities whereas signaling of intrinsic motivation is more difficult for mixed-motivation activities.

We then conduct a second experiment that specifically tests the two theories by switching on and off the possibility to signal one's prosocial motivation in different treatments while controlling for the same mixed-motivation activity. Each participant is told that a harmful contagious disease is spreading. While many would want to get vaccinated to protect themselves and others, the participant is told that she belongs to a minority group that, if infected, will not suffer from any significant symptoms. In other words, if the participant chooses to get vaccinated, it is for the pure prosocial goal of protecting others. In treatment 1, participants receive vaccination together with everyone else – because they are not distinguishable from everyone else, they are unable to signal their prosocial motivation. In treatment 2, we assign the participants to receive vaccination separately so it is clear that they are getting vaccinated to protect others.

If signaling theory is right, we would expect to see no crowding-out effect in treatment 1 after incentives are introduced (compared to the baseline of no monetary incentives) because participants in treatment 1 are unable to signal prosocial motivations (no crowding out). By contrast, for treatment 2, we expect the introduction of monetary payments to decrease vaccination rate (crowding out). By contrast, if self-determination theory is correct, we would expect to see crowding out in both treatments. Our experimental finding here again supports signaling theory.

Concealed Third-Party Litigation Funding

Omer Pelled, Bar-Ilan University

The common perception of third-party litigation funding envisions a direct for-profit investment in litigation. However, third parties can assist litigants in other ways and for different reasons. This paper examines how different funding arrangements affect the incentives to engage in litigation. Alternative funding schemes can take the form of equity, debt, or donations, which may be fixed-sum or create marginal cost reduction. Each alternative has divergent effects on litigants' expected value calculations and marginal costs/benefits when deciding whether to file suit, invest in their case, or settle. The analysis shows third-party funding can address underinvestment due to budget constraints, but can also lead to overinvestment and distorted settlement incentives depending on the funding structure. From an organizational perspective, third-party funding often misaligns investor and litigant interests, leading to principal-agent problems. However, incentives can paper concludes that some forms of litigation funding can expand access to courts and properly align incentives. Still, regulators should consider incentive distortions created by concealed forms of funding more

accessible to corporate litigants. Overall, this economic analysis enriches our understanding of how third-party funding arrangements affect organizational behavior in the legal process.

Abstracts: Panel 6

Does It Go Too Far? Punitive Damages in Chinese Public Interest Litigation

Carrie Chunyan Ding, City University of Hong Kong

Punitive damages are an exceptional type of private remedy. A civil wrongdoer may be required to pay punitive damages on top of compensatory damages to punish his outrageous conduct or deter others from engaging in similar conduct. Chinese civil procedure law grants private actors and procuratorates the standing to file public interest litigation to safeguard public interests, such as environmental protection, consumer protection, minor protection, etc. In practice, they often claim punitive damages in addition to compensatory damages in public interest litigation according to the rules of punitive damages provided by the *Civil Code* and the *Consumer Rights and Interests Protection Law*. This article examines whether punitive damages should be awarded in public interest litigation and, if yes, how the law should appropriately restrict its application so that the tortfeasors will not be punished unfairly or disproportionately.

Unveiling the Mysterious Role of Contractual Disgorgement: A Comparative and Functional Approach

Yang Chen, City University of Hong Kong

and Xingguang Zou, Tsinghua University

Under the contract laws of both common law and civil law jurisdictions, the prevailing doctrine states that the non-breaching party is typically entitled to expectation damages as compensation for a contractual breach. This primarily aims to restore the position the non-breaching party would have had if there had been no breach. While the doctrine fully compensates the non-breaching party for any actual damage accrued, it fails to prevent the breaching party from retaining extra profits arising from the breach when the profits exceed the non-breaching party's actual damages (expectation interests). This results in a morally counterintuitive outcome where the breaching party profits from their wrongdoing. To mitigate this problem, common law offers the disgorgement of profits as a morally coherent alternative in certain circumstances, a remedy less familiar within civil-law contexts.

Though the doctrine of disgorgement receives intense discussion in current literature, there is still a lack of comprehensive analysis on disgorgement's unique functions and its ideal relationship with expectation damages. Additionally, it remains uncertain and inconsistent regarding the circumstances under which courts would apply disgorgement in practice. Addressing these issues demands an in-depth exploration of the economic

justifications for the doctrine of disgorgement and a comparative analysis of its application across jurisdictions.

This article aims to address these research gaps. It delves into the functions of disgorgement and normatively suggests its ideal relationship with expectation damages through critical analysis of three options available from a law and economics perspective. The most radical option advocates for the complete replacement of expectation damages with disgorgement. However, this presumes that disgorgement, as a remedy, can achieve better economic efficiency than expectation damages. Yet the so-called "compensation paradox" identified by law and economics literature considers such a comparison between the two as indeterminate, challenging this presumption. Nonetheless, this article argues that expectation damages, if chosen as the only available monetary remedy, are more efficient, primarily due to the prohibitive costs inherent in quantifying profits when applying disgorgement. The second proposal considers disgorgement as an alternative remedy to expectation damages. However, existing empirical evidence cannot persuasively support the superiority of this arrangement over the conventional rule of using expectation damages as the primary remedy. In this sense, this article contends that the third option is the most convincing one, which allows the plaintiff to claim disgorgement only in specific circumstances where the award of disgorgement can be well justified in terms of economic efficiency. Following this line of reasoning, the article identifies these specific scenarios explicitly or implicitly acknowledged in relevant case laws and legislative provisions across both common-law (US, UK) and civil-law (Germany, China) jurisdictions. The article then systematically classifies these instances into four distinct categories, each underpinned by unique economic justifications. This novel classification not only enhances theoretical robustness beyond previous literature but also provides legal practitioners with significantly clearer interpretive guidance.

Abstracts: Panel 7

Data, Privacy and AI: Striking the Right Regulatory Balance

Angelia Jia Wang, Durham University

The notion of information is central to data protection law and algorithms/machine learning. This centrality gives the impression that algorithms are just another data processing operation to be regulated. We argue that the current data protection law has disproportionately hindered AI models from achieving optimal efficiency that would otherwise better meet societal needs. In particular, we note a serious but under-researched phenomenon: allowing the withdrawal of personal data can lead to bias, as specific groups of people are more prone to withdraw their data. We aim to explore how to balance data minimisation with statistical accuracy. The objectives of the essay are: (1) to clarify the meaning of data and information through the lens of information theory with a focus on the categorisation of data between personal and non-personal data, and (2) to test the influence of removing certain regulated attributes from the dataset on the performance of relevant algorithms. We adopt the doctrine of balance of interests by weighing privacy, human rights, and various public interests to ensure the proposed regulatory approach is well-balanced. Methodologically, we identify the regulatory patterns with a comparative study of the right-based and the risk/harm-based approaches in the US, the EU, and China, the top three AI developers in the world. We run experiments to test whether removing data creates a bias in a given dataset. Based on the findings, we propose a cost-benefit approach to replace the approaches based on the rights/risks dichotomy. This approach will lead to a shift towards evaluating decisions based on a cost-benefit analysis (e.g., privacy vs. national security) rather than solely on rights. To underpin the proposed approach, we suggest a proportionality test of rights by recognising different interpretations and applications of proportionality in rights. The first section of the essay reviews the problem of defining data, information, and algorithmic regulation. The second section compares the regulatory approaches of the US, the EU, and China and the third section runs experiments testing the impact of removing attributes from data on the input data. The last section provides recommendations.

Company Shares as Intangible Property

Greg Allan, Durham University

and Peter Jaffey, University of Leicester

A share might be taken to be simply a contract right, a right to have the company run in accordance with the articles. A shareholder has no property right in the company's

property, which belongs to the company. But a share is generally regarded as a form of property. This is mainly because it is transferrable. Also there can be an ineffective or invalid transfer, such that the shareholder has a right to recover the share, and this claim is not a contractual claim. It would appear to be a claim to protect the shareholder's ownership of the share. In what sense is a share property? The same issue arises with respect to other receivables or rights of payment such as a bank draft or even a bank account. The conventional understanding, reflected in the common law of trespass, is that a property right is a right against interference to protect possession. This is apt with respect to land and tangible goods, but not shares and other intangibles. The paper will suggest that the "right against interference" or "right of exclusion" theory gives only a partial account of property and discuss how company shares and other intangibles can be understood as property.

Safeguarding of Backing Assets: The Continuing Policy Drive for Use of the Trust

Johanna Jacques, Durham University

Trusts are property arrangements that are created or arise on the basis of property relations. While there are some statutory trust provisions that prescribe the use of a trust in defined circumstances, the trust here mirrors the underlying property relations. Not so with recent policy proposals put forward by the FCA and the Bank of England in relation to the safeguarding of backing assets relating to electronic money and stablecoins. The proposals envisage backing assets to be held on a statutory trust even though these assets neither belong nor ought to belong to the intended beneficiaries. If adopted in their current form, the proposals would not only change private property relations established between parties freely contracting for financial services, they would also change the legal nature of the financial instruments in question and may introduce to English law a new form of conditional trust. This paper will explore the legal and policy arguments around the use of the trust in relation to e-money and stablecoin backing assets in a bid to stem the continuing policy drive for use of the trust.

Abstracts: Panel 8

After Kantiana: A Contractualist Alternative to Interpersonal Justice in Private Law Theory

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My claim is that the predominant conception of the 'interpersonal', especially as set out by the field-defining work of Kantian and corrective justice theorists (such as Weinrib, Ripstein and Beever), is in various ways deficient or at least incomplete. As I argue, such theorists go too far in narrowing the scope of interpersonal justice. The 'Kantian right' notion of equal and reciprocal non-interference, which informs and often exhausts these theorists' understanding of the 'relational', unnecessarily and unhelpfully excludes a range of interpersonal justice considerations grounded inter alia on interests, conduct, and relationships, that enter our deliberation as bases for determining acceptable and justifiable principles for the general regulation of interpersonal interactions; considerations that are genuinely non-instrumentalist and yet more fine-grained and informative in determining what we owe each other in private law. I situate my contractualist critique (drawn from the works of Rawls and Scanlon) of Kantian right and corrective justice across four dimensions: empowerment and the institution of private rights of action; the identification of entitlements; the construction of remedies; and the division of labour between public and private law. On all these counts, I argue that contractualism provides a superior alternative to Kantiana, and furthers helps us to overcome certain ossified dichotomies in private law theory - the corrective and distributive; forwards versus backwards approaches; and monism and pluralism.

Contracts and Gratuitous Voluntary Obligations: Two Systems, One Approach

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In common law systems, contracts are claimed to be exchanges. Yet, this claim has triggered much debate in contact theory. As a matter of explanation, some question whether the claim is descriptively true of the common law of contract, but assuming it is largely true, the current status quo is thought to be problematic as a matter of justification. It may feel unusual—and unpalatable—that only promises that are 'paid for' are contractually enforced, and one argument that has invariably been invoked is comparative. Compared to civil law, the common law of contract is said to be peculiar in not enforcing gratuitous obligations due to its consideration requirement, which requirement is perceived as restricting—unduly and uniquely— persons' freedom to impose on themselves such obligations.

It is the comparative argument against the doctrine of consideration that the paper challenges. It exposes some limitations of existing theoretical accounts of contracts in common law and in civil law. While contracts are normally contrasted with gifts, which are regarded as ‘contracts’ in civil law, but not in common law, little attention is paid to the technicalities of other gratuitous obligations that are part of the civil law of ‘contract’, but not of the common law of contract; relatedly, it is not often considered how such obligations are dealt with—by private law—in common law jurisdictions. Through a detailed analysis of different types of voluntary obligation, the paper demonstrates that common law is not unique in reserving what we understand, in common law, by contractual enforcement for exchanges, while suggesting why consideration is unique—and indispensable—common law tool for distinguishing exchanges, as contractually enforceable undertakings, from other private law undertakings, gratuitous or not, that persons in common law jurisdictions are no more inhibited from assuming than persons in civil law jurisdictions.