Limits of Law: Reflections from Private and Public Law

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1 Introduction

There are a number of enduring themes relating to substantive judicial review, including its intensity, the legal form through which this should be expressed, the extent to which the courts should show deference, respect or appropriate weight to the views of the initial decision-maker, and the capacity of courts to undertake the kind of assessment required of them, given that they may be required to balance considerations that are to some degree incommensurable. These issues are distinct, albeit related. Lurking beneath the surface there are more general inquiries concerning the limits of law,[1] connoting in this respect views about what kinds of issues are suited to adjudication and the extent to which adjudication on rights-based claims is qualitatively different from other types of adjudication. These are important questions, and they should not be ducked.

It is however noteworthy that much of the soul-searching undertaken in this regard by public lawyers is framed pretty exclusively within a public law frame. We the public law fraternity pose the preceding questions focusing on the standard fare of constitutional and administrative law. This may be because we have made a considered judgment that the issues that arise in public law are so distinctive as to render any comparison with private law otiose.

[1] See, e.g., Lord Sumption, 'The Limits of Law', 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, available at http://supremecourt.uk/news/speeches.html .

It may be for more prosaic and contingent reasons, viz that increased specialization within academia has meant that scholars simply do not know enough about private law to test their assumptions about the limits of law as determined from a public law perspective. My guess is that in empirical terms the latter rationale is more significant than the former.

Whatsoever the answer to the empirical inquiry, it is surely axiomatic that the conclusion we reach on the preceding issues as judged from a public law perspective must be consistent with any judgment that we might make about private law. To be clear, this does not preclude the conclusion that public and private law are distinct with respect to the salient issues. It does preclude the reaching of a conclusion about such issues as they arise within a public law perspective, without testing it from a private law standpoint. The reason is obvious. If the principal rationales for disquiet concerning public law adjudication relate to matters such as balancing of incommensurables, or the making of complex normative assessments that are felt to be beyond the judicial role, then we must surely test whether such problems are also to be found in the private law context. If they are this prompts a series of second order inquiries. We might condemn private law adjudication to the extent that such considerations prevail therein. We might revise our previous view about public law. We might distinguish the two in accord with some convincing normative criterion.

2 Private Law: Normative Judgment and Balancing

We could conduct this inquiry with reference to numerous areas of private law, and there is no a priori reason why the answer would be the same. Exigencies of space require that choices be made. The focus here will be on the law of torts. There will be analysis of negligence, given its centrality as the principal innominate fault-based tort, and economic torts, which exemplify the judicial approach to an area where the criterion of liability is intent-based and where the jurisprudence is still predicated on a series of nominate torts. It is

important to emphasize that the following inquiry concerns both the making of complex normative assessments, and the balancing of values that are felt to be incommensurable to some degree.

There is very considerable normative contestation as to the background object or purpose that is to be served by tort law. It plays out most dramatically in the debates between those who conceive of tort as being concerned with economic efficiency, and those who adopt a corrective justice perspective. This is just the tip of the iceberg, because there is considerable contestation as to what corrective justice means,[2] which can in turn lead to very different concrete implications for particular doctrines within tort law. There is moreover contestation as to whether negligence should be regarded as entailing moral responsibility, so as to trigger ideas of corrective justice at all.[3] The nature of the interests that should be protected through the law of torts; whether the standard of liability should be conceived in terms of fault, intent or strict liability; and the more particular meaning accorded to these standards, are all fiercely debated in the academic literature. The normative complexity and contestability raised by these issues matches anything that is found in public law, and what is salient for present purposes is that the courts make the relevant determinations through development of tort doctrine and we accept with equanimity that this is a legitimate part of the judicial role.

[2] See, e.g, E Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012); J Gardner, 'The Purity and Priority of Private Law' (1996) 46 University of Toronto Law Journal 459; J Gardner, 'What is Tort Law for? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1; R Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007); J Oberdiek, *Philosophical Foundations of Law of Torts* (Oxford: Oxford University Press, 2014).

[3] See, e.g., H Hurd, 'The Innocence of Negligence', http://ssrn.com/abstract=2612084.

The prevalence of complex normative judgment and balancing of incommensurables is further apparent when we move from theory to concrete case law. They are present throughout tort law. The test for negligence as judicially interpreted requires courts to balance a range of incommensurable considerations in deciding whether a duty of care exists.[4] Historically there were doubts raised as to the necessity of duty as a separate juridical concept, with Winfield characterizing it as the result of an historical accident,[5] and Buckland describing it as the fifth wheel on the coach.[6] These doubts were predicated on the assumption that the criterion for duty was cast simply in terms of reasonable foresight, the argument being that this led to duplication of inquiry, given that the same issue would be considered in more detail in order to determine whether there had been a breach of the duty on the facts of the case. We do not require proof an antecedent duty in other torts. We simply state that failure to comply with the legal rules that pertain to nuisance, assault, economic torts and the like is an actionable wrong. The role of duty within negligence has, however, been defended more recently by scholars exploring the philosophical foundations of tort law.[7]

It is nonetheless the case that duty is the medium through which policy considerations are taken cognizance of by the courts in order to decide whether liability should be imposed, even assuming that the defendant has been careless and caused the loss. Current orthodoxy is

[4] J Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 Canadian Bar Review 471; F Lawson, 'Duty of Care: A Comparative Study' (1947) 22 Tulane Law Review 111; Markesinis and Deakin's, *Tort Law* (Oxford: Oxford University Press, 7th ed., 2013), p. 102; B Markesinis and S Deakin, 'The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) 55 MLR 619.

[5] P Winfield, 'Duty in Tortious Negligence' (1932) 32 Columbia Law Review 41, 66.

[6] W Buckland, 'The Duty to take Care' (1935) 51 LQR 637.

[7] See, e.g., J Goldberg and B Zipursky, 'Tort Law and Responsibility', Ch. 1, and S Perry, 'Torts, Rights and Risk', Ch. 2 in Oberdiek (n 2).

for a three stage test to decide whether a duty of care exists: reasonable foresight, a relationship of proximity between plaintiff and defendant and whether it would be fair, just and reasonable to impose a duty of care.[8] Duty of care thus conceived has been used as the vehicle through which the courts have denied liability in relation to types of loss, types of defendant and types of act.[9] The considerations that inform the determination whether it is fair, just and reasonable to impose a duty of care will often vary and require balancing inter se.[10] This determination may also turn on complex normative judgments as to what justifies the imposition of liability, as exemplified by the distinctions drawn between acts and omissions, personal/property damage and pure economic loss, and bodily harm as compared to psychiatric harm.

It is also readily apparent that balancing is required in order to decide whether there has been a breach of the duty of care. This was given voice most famously by Learned Hand and become known eponymously as the Learned Hand formula.[11]

> The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest that he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is thought most likely to accord with commonly accepted standards, real or fancied.

[8] *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson and Co Ltd* [1985] AC 210, 241, 245; *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] QB 1034; *Murphy v Brentwood District Council* [1991] 1 AC 398.

[9] Markesinis and Deakin's, *Tort Law*, pp. 102-4.

[10] See, e.g., *X (Minors) v Bedfordshire CC* [1995] 2 AC 633; *MacFarlane v Tayside Health Board* [2000] AC 59.

[11] *Conway v O'Brien* 111 F. 2d 611, 612 (1940).

For advocates of law and economics this was a quintessential example of the common law fashioning a rule to enhance economic efficiency, since an accident is deemed to be legally negligent only if the cost of avoiding it is less than the losses incurred by the injured party, discounted by the chance that the injury will actually occur.[12] It is important however not to forget the language used by Learned Hand J., since this is a corrective to any idea that it is a simple economic calculus, reducible to precise monetary amounts. It is more debatable how far English courts take cognizance of the costs of precautions when adjudicating on breach,[13] but it is in any event generally accepted that there can be considerable practical and normative difficulty in ascertaining what constitutes an unreasonable risk for the purposes of negligence liability.[14]

The discussion thus far has highlighted two instances of balancing within the law of negligence, at the level of duty and breach respectively. This area of the law also exhibits contestable normative judgments, over and beyond any issues of balance per se. Limits of space preclude extensive treatment, so the point can be exemplified by focusing on two examples, both of which are central to negligence liability.

The premise of negligence liability is that to justify the shifting of loss from plaintiff to defendant the former must show fault caused by the latter. This has significant distributive consequences, since it means that the risk of non-fault accidents lies with the plaintiff rather than the defendant, even where the defendant caused the loss. The normative premise is that the defendant was not at fault and thus should not be required to pay the defendant. The obvious rejoinder is that nor was the defendant, yet he or she is required to shoulder the loss

[12] R Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29.

[13] See, e.g., *Bolton v Stone* [1951] AC 850; *Latimer v AEC Ltd* [1953] AC 634; *Wagon Mound (No 2)* [1967] 1 AC 617; *Smith v Littlewoods Ltd* [1987] AC 241; *Tomlinson v Congleton* [2004] 1 AC 46.

[14] Markesinis and Deakin's, *Tort Law*, pp. 209-14.

even where it is unequivocally clear that this was caused by the defendant. This does not however in general suffice to establish liability, given that negligence is the dominant tortious cause of action. The legal status quo has been defended on the ground that it comports with corrective justice,[15] but this argument is controversial in various respects.[16] The argument is not that negligence liability is therefore 'wrong', but rather that it embodies contestable normative assumptions, and it was the courts that chose to adopt this standard of liability. Matters were not always so. There were prominent areas where liability was indeed based on cause,[17] such that a plausible interpretation of *Rylands* v. *Fletcher*[18] was that it was drawing together particular instances of strict liability, analogizing/expanding from them and enunciating a general principle of liability,[19] thus presaging the reasoning of Lord Atkin in negligence over half a century later.[20]

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[15] Weinrib, *The Idea of Private Law*, Ch. 6.

[16] Compare Hurd (n 3).

[17] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), Ch. 4. David Ibbetson provides a balanced assessment of the cause of action for trespass to the plaintiff's person, goods, or land, concluding that this was prima facie strict, albeit not absolute, given that the defendant could plead that the behaviour was justified on grounds of, for example, self-defence. He cautions against too great a contrast between strict and fault liability, noting that issues concerning the ascription of responsibility could arise in either method of analysis. He however also cautions against the elision of the medieval idea of fault and modern conceptions of negligence. The modern idea that there is no negligence where the Learned Hand calculus indicates that the costs of taking precautions outweigh the seriousness of harm discounted by the risk that it might occur, would have been foreign to medieval thought.

[18] (1865) 3 H & C 774; (1866) LR 1 Ex 265; (1868) LR 3 HL 330; A Simpson, 'Legal Liability for Bursting Reservoirs: the Historical Context of *Rylands v Fletcher*' (1984) 13 Journal of Law and Society 209.

[19] F. Newark, 'Non-Natural User and *Rylands v Fletcher*' (1961) 24 MLR 557.

[20] *Donoghue v Stevenson* [1932] AC 562

The judicial choice to foster negligence as the general principle of liability was manifest directly and indirectly. It was apparent directly in the judicial willingness to regard new categories of relationship as subject to the negligence standard, and in the courts' rejection of reasons to deny such liability, as exemplified most famously by *Donoghue* itself, where the House of Lords denied that the existence of a contract precluded negligence liability for cases of physical injury. The indirect preference for negligence liability was less obvious, but very real nonetheless.

It was evident in the judicial limitation or emasculation of the *Rylands* principle.[21] It was not simply that the courts imposed increasingly difficult conditions for the existence of such liability, nor that they expanded the range of available defences. It was the very reasoning that drove these judicial decisions. It was clear from the seminal rulings that strict liability was regarded as something alien and unnatural to be confined to the narrowest possible circumstances. This was the message from the House of Lords in *Rickards*, where non-natural user was defined as 'some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community'.[22] The message was clear, strict liability was reserved for socially unusual or abnormal activities, not ordinary uses of land that might be beneficial. While the utility of the idea of 'general benefit to the community' has been doubted,[23] no judgment did more than *Rickards* to block the development of *Rylands* as a modern principle of strict liability that could be applicable precisely where the activity was normal, and yet entailed an inevitable number of accidents where it was difficult to prove fault, such as the running of

[21] R Bagshaw, '*Rylands* Confined' (2004) 120 LQR 388.

[22] *Rickards v Lothian* [1913] AC 263, 280.

[23] *Transco v Stockport MBC* [2004] 2 AC 1.

utilities.[24] The idea that the burden of such losses should be spread among those who take the benefit of the activity, rather than being left to lie on the person fortuitously injured is an attractive one, but was precluded by the courts' jurisprudence.

The possibility of using *Rylands* in such instances was further limited by questionable decisions concerning the impact of statutory authority on such liability.[25] The same message was evident in the House of Lords' decision in *Read*.[26] The simple ratio of the case is that liability pursuant to *Rylands* is only applicable where there is some escape from a place where the defendant has occupation or control. The reason for this conclusion is apparent from the judgments: an unwillingness to recognize any distinct rule for dangerous activities, and a desire to prevent the tort encroaching on what was felt to be the natural domain of negligence liability.[27] None of the foregoing was pre-ordained, nor was it value free. It was the result of contestable normative judgments as revealed forcefully by Markesinis and Deakin.[28]

> Not for the first time, an English seed was borrowed by America, combined with indigenous elements and brought to full bloom under the doctrine of liability for extra hazardous activities. On the other hand, in its country of origin the idea had a mixed reception almost from the very beginning .... after a moderately welcoming start, give to it by some Victorian judges, the rule was progressively emasculated of all its potential as it struck at the heart of another Victorian favourite: fault. For the Victorian era became (progressively) moralistic and thus any legal rule that encouraged tort to depart from this favoured shibboleth was suspicious, to say the least. In fact it was both suspicious and dangerous in so far as it also challenged the hypocrisy of the age. This is because the fault rule … served this hypocrisy as well, since it protected nascent industries at a time of weak, if not non-existent, insurance practices. For by this time the fault rule had acquired a double aspect: not only did it mean that if you were at fault you must pay; it was also (less convincingly) understood to require that if you are not at fault, you need not pay.

[24] See, e.g., *Transco v Stockport MBC* [2004] 2 AC 1; *British Celanese v A. H. Hunt* [1969] 1 WLR 959.

[25] See, e.g., *Smeaton v Ilford Corporation* [1954] Ch. 450; P Craig, *Administrative Law* (London: Sweet & Maxwell, 7th ed., 2012), pp. 939-41.

[26] *Read v J. Lyons and Co. Ltd.* [1947] AC 156.

[27] J Fleming, *The Law of Torts* (Sydney: Law Book Co., 9th ed., 1998), p. 383.

[28] Markesinis and Deakin's, *Tort Law*, p. 518.

The second example of the kind of contestable normative issue that arises within negligence concerns the test for remoteness. The House of Lords settled the matter in the *Wagon Mound (No 1)*, stating authoritatively that the test was to be cast in terms of foreseeability, castigating the alternative causal criterion as illogical and unjust.[29] This was in accord with some academic opinion, which regarded foreseeability as more consistent, simpler and fairer than its causal rival. Thus Weinrib[30] contends that corrective justice demands the linkage between culpability and compensation forged in the *Wagon Mound (No 1)*, but the reasoning is contestable.

Herbert Hart and Tony Honore revealed the questionable assumptions underlying this conclusion.[31] They questioned the need for consistency, noting that there is no a priori reason why the same criterion should be used to determine liability, and the extent to which a person should be held liable for the consequences of his action.The fact that a person who has committed an intentional harm may be liable for consequences over and beyond those he intended attests to this. They questioned the argument based on simplicity, which assumes that simplicity is achieved by making culpability and compensation subject to the same test, viz that of foreseeability. The flaw in the argument is the assumption that foreseeability means the same thing in the two instances, which it does not. When used in relation to the determination of culpability it is captured by the elements that constitute the Learned Hand formula, which Hart and Honore term practical foresight. When used in relation to remoteness and compensation it bears a different meaning, otherwise it would only be possible to recover for harm if the risk of that specific harm occurring was the reason for

[29] *Overseas Tankship (U.K.) Ltd. v Morts Dock & Engineering Co. Ltd. Respondents. (the Wagon Mound)* [1961] AC 388 at 424.

[30] Weinrib, *The Idea of Private Law*, Ch. 6.

[31] HLA Hart and T Honore, *Causation in the Law* (Oxford: Clarendon Press, 2nd ed., 1985), pp. 259-75.

calling the defendant's act negligent. The argument concerning fairness, to the effect that it is unfair to burden the defendant with large losses beyond what could have been contemplated, is not at all self-evident. Thus as Hart and Honore pithily noted 'if the liability is out of all proportion to the defendant's fault it can be no less out of proportion to the plaintiff's innocence'.[32] Moreover the apparent unfairness takes on a different light when it is revealed that the defendant may engage in, for example, negligent driving on many occasions, such that the 'justice of holding me liable, should the harm on that one occasion turn out to be extraordinarily grave, must be judged in the light of the hundred occasions on which, without deserving such luck, I have incurred no liability'.[33]

The *Wagon Mound (No 1)* nonetheless settled the matter in favour of foreseeability, and the rest as they say is history. This does not however alter the fact that courts routinely make choices in private law based on considerations of justice and fairness, which are contestable on normative grounds, notwithstanding the fact that the new status quo is embodied in a rule that has been strengthened by the effluxion of time. Indeed the very fact that the choice is embodied in a rule that is not readily revisited is of more general interest as will be seen below.

The discussion thus far has focused on negligence liability, but it would be wrong to conclude that issues of incommensurability, let alone difficult normative choice, are confined to this tort. To the contrary they are present throughout this body of the law. There are numerous instances of incommensurability that are embedded on the face of the 'legal rule'. Consider in this respect the fair/honest comment rule in defamation cases, whereby the common law courts have decided that free speech is sufficiently important that there can be a defence for defamation even where the critic is extreme or unbalanced, provided only that he

[32] Hart and Honore, *Causation in the Law*, pp. 267-8.

[33] Hart and Honore, *Causation in the Law*, p. 268.

is not malicious.[34] The rule is based on a balance between the value of free speech manifest in the very great freedom accorded to the critic, and the interest of the individual whose life may be destroyed by the captious and excessive critique. Consider the rule in nuisance, such that a person who 'comes to' a nuisance will not be able to complain of smell, noise or the like, but can still claim if there is some physical incursion into the property that constitutes an unreasonable user of land by the neighbour. The rule encapsulates a balance between the interests of the property owner and those of the public interest, the rationale being that industrialization should not be impeded by private complaint of noise, smoke and the like within the relevant area.[35]

Let us now turn to the other principal area adumbrated above. Liability for economic torts is intent-based and a range of competing values have shaped the entire architecture, not merely a particular rule therein. The courts determine the extent to which tort law should impose limits on free competition. It is axiomatic that such competition can impose economic loss on other parties, and this may indeed be the intent or inevitable outcome of a person's action, as exemplified by classic price competition. The legitimacy of such competition is a foundational value in this area.[36] It is, however, qualified by values that serve to define what the judiciary believes to be the limits to that competition. The precise contours of these competing values, their scope and underlying justification are contestable, more especially given that the judicial criteria have often been enumerated in trade disputes between employer and employee. This is readily apparent from the three areas commonly regarded as

[34] *Merivale v Carson* (1888) 20 QBD 275, 281; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 170; *Reynolds v Times Newspapers* [2001] 2 AC 127 at 193; Markesinis and Deakin's, *Tort Law,* pp. 664-9.

[35] *Sturges v Bridgman* (1879) 11 Ch D 852, 865; Markesinis and Deakin's, *Tort Law,* pp. 428-9.

[36] *Mogul Steamship Co. Ltd. v McGregor, Gow & Co. Ltd.* (1889) LR 23 QBD 598, [1892] AC 25; *Allen v Flood* [1898] AC 1.

constituting the economic torts, inducement to breach of contract, interference with trade by unlawful means and conspiracy. There are tensions as to the foundational assumptions as between these areas, and within each of them.

The tension between these areas is whether the courts will decide what should be the limits of free competition, and make judgments as to the legitimacy thereof. The general assumption in the case law concerning interference with trade by unlawful means is that this is not the correct province for the judiciary, with the consequence that the boundary of legitimate competition is defined by proof of independent illegality. This obviates the courts from making free-standing judgments in this respect, but at the cost of making liability turn on parasitic concepts of illegality, the presence or absence of which may be fortuitous and therefore of questionable relevance for this purpose.[37] This approach is moreover in tension with that concerning inducement to breach of contract, where liability is not based on the existence of some independent illegality, such as breach of statutory duty, commitment of a crime, or of another independent tort. The fundamental assumption underlying inducement to breach of contract is that the value of free competition is bounded by the value of the claimant's contractual right to the services of the person induced to break their contract by the defendant.[38] There is no a priori reason why this should be so. The court might have decided that the plaintiff should be left to pursue any contractual claim against the person breaking their contract, without any independent recourse in tort against the person who offered the inducement. This might well be regarded as the optimal solution in terms of efficient breach viewed from a law and economics perspective. The choice to regard the contract as generating rights actionable against third parties in tort was not therefore preordained, but was simply reflective of what the judiciary regarded as a legitimate limit on

[37] J.D. Heydon, *Economic Torts* (London: Sweet & Maxwell, 2nd ed., 1978).

[38] *Lumley v Gye* (1853) 2 E & B 216.

free competition. In true compromise style, the two limbs of the law relating to conspiracy reflect respectively the two preceding approaches, the one predicated on the existence of unlawful means, the other not.

There are moreover tensions within each of the three areas. The subsequent case law on inducement to breach of contract revealed contestation within the judiciary as to how far they were willing to press this competing value that embodied a limit on free competition. There was classic incremental case law development whereby the courts expanded the cause of action to include indirect interference with the contract[39] and hindering of the contract,[40] followed by judicial retrenchment disapproving these developments.[41] Analogous tensions are apparent in the case law on interference with trade by unlawful means. It was suggested with good reason, in the light of the expanded case law on inducement to breach of contract, combined with the reasoning in the case law on intimidation,[42] that UK law should develop from a series of nominate economic torts to an innominate tort cast in terms of interference with trade by means of action that the defendant was not at liberty to commit.[43] The time seemed ripe for an Atkin-type judgment in this area. It never happened and the courts once again pulled back in this area, through a more constrained definition of what constitutes unlawful means and increased focus on intent to inflict economic damage.[44] While it is therefore unsurprising that the value of free competition should be bounded by the need to

[39] *DC Thomson Ltd. v Deakin* [1994] EMLR 44.

[40] *Torquay Hotel Co. Ltd. v Cousins* [1969] Ch 106; *Merkur Island Shipping Corp. v Laughton* [1983] 2 AC 570.

[41] *OBG Ltd. v Allan* [2008] AC 1.

[42] *Rookes v Barnard* [1964] AC 1129 at 1168-9.

[43] T Weir, 'Chaos or Cosmos: *Rookes, Stratford* and the Economic Torts' [1964] CLJ 225.

[44] *OBG Ltd. v Allan* [2008] AC 1.

pursue competitive aims lawfully, the case law throws into sharp relief the real choices that have to be made as to what constitutes unlawful means for these purposes, both in terms of the nature of the illegality that should qualify in this regard and its causal connection to the harm suffered.

3 Public Law: Normative Judgment and Balancing

Normative judgment and balancing are prevalent within public law. They are present in relation to controls framed in terms of purpose/relevancy and reasonableness/proportionality.

Controls over the way in which discretion is exercised commonly operate at two levels.[45] The initial inquiry is as to whether the public body used the discretion for a proper purpose and based on relevant considerations, followed by analysis cast in terms of reasonableness/proportionality.[46] Controls framed in terms of purpose and relevancy are central to the very idea of judicial review. If a legal system has any legal controls over the exercise of public power then these must include constraints designed to ensure that it is used for the purpose for which it was intended. It would logically be possible to stop there and make this the only species of control over discretionary power. The fact that almost every legal system uses a further method of control is readily explicable. Legal constraints framed in terms of purpose/relevancy are relatively blunt tools, and the courts substitute judgment on these matters, treating them as a matter of statutory interpretation, interpreting the legislation

[45] Lord Woolf, J. Jowell and A. Le Sueur, *De Smith's Judicial Review* (London: Sweet & Maxwell 6th ed 2007), Chs. 5, 11; Craig, *Administrative Law*, Chs. 19, 21; J. Auburn, J. Moffett and A. Sharland, *Judicial Review, Principles and Procedures* (Oxford: Oxford University Press 2013), Chs. 14, 17.

[46] *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228-231, 233-234; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410; *R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860 at [32]-[33].

and deciding whether the purpose can be lawfully pursued, or a consideration can be lawfully taken into account. Legal constraints framed in terms of reasonableness/proportionality allow the court to review in circumstances where it is not self-evident that the purpose was wholly improper or the consideration was wholly irrelevant, enabling the court to weigh such matters and to do so in accord with a less exacting standard than substitution of judgment.

Judicial statements[47] that relevancy and reasonableness in its substantive sense can shade into each other commonly capture the situation where courts are unsure whether to treat a consideration as wholly irrelevant, and hence take it into account and weigh it when undertaking reasonableness review. This may in part be for interpretive reasons, viz that it is unclear from the statutory remit whether the consideration should be deemed wholly irrelevant. It may also be for more conceptual reasons, in the sense that courts will have to decide on the level of abstraction or specificity with which they pose the inquiry. The broader or more abstract the inquiry at the level of purpose/relevancy, the more likely that the challenged action will satisfy those precepts, the corollary being that the case will be decided through reasonableness/proportionality. By way of contrast, the narrower the initial inquiry at the level of purpose/relevancy, the more likely that the case will be resolved at that level, the corollary being that less remains to be done through reasonableness review. Thus in the *Wednesbury* case[48] the hypothetical of the teacher being dismissed for the colour of her hair was tested for conformity with reasonableness review, the assumption being that dismissal on such grounds satisfied the tests of purpose/relevancy. This could only be so if the issue was posed in relatively broad terms, viz that 'physical characteristics could be relevant in hiring or dismissing a teacher'. If however the issue was framed in more specific terms, viz that 'the

[47] *Wednesbury Corporation* [1948] 1 KB 223, 228-231.

[48] *Wednesbury Corporation* [1948] 1 KB 223.

natural colour of a person's hair could never be a relevant consideration in hiring or firing a teacher' then the case would have been resolved without recourse to reasonableness review.

It is moreover clear that value judgments and balance pervade both levels of inquiry. The pure theory underlying review for purpose/relevancy is that the courts are simply demarcating the four corners of the relevant statutory power. This may be so in some straightforward cases, but in many it will not. The decision as to allowable purpose, and the determination of relevant considerations, will frequently require judicial assessment of values, and application of background principles, as is readily apparent from consideration of any of the leading decisions.[49]

The fact that value judgments and balance are prominent in reasonableness/proportionality is acknowledged, but it is nonetheless worth dwelling for a moment on the variability of such review in cases of rights even prior to the HRA, since it raises more general issues concerning the bounds of judicial legitimacy. The existence of rights increased the intensity of reasonableness review;[50] legislation was interpreted with a strong presumption that it was not intended to interfere with rights;[51] and the courts held that Convention rights were embedded in the common law.[52] These developments were regarded

[49] See, e.g., *Roberts v Hopwood* [1925] AC 579; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1; *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768; *R. (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756.

[50] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; *R v Ministry of Defence, ex p Smith* [1996] QB 517.

[51] *R v Secretary of State for the Home Department, ex p Simms & O' Brien* [2000] 2 AC 115; *R v Lord Chancellor, ex p Witham* [1998] QB 575.

[52] *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

as controversial by some political constitutionalists.[53] They were court-sceptic and opposed to expansion of judicial review—some were also rights-sceptics—and they regarded balancing in such cases as problematic. The judicial decision to recognize rights in the preceding ways was not value free, but the reality is that there is no neutrality to be had. Thus the political constitutionalists' objections grounded in either court-scepticism and/or rights-scepticism are every bit as value-laden as the opposing views.

If the courts apply reasonableness review to control discretionary power, there is good reason for varying its intensity depending on the affected interest. It makes no sense in normative terms to assume that a relatively trivial interest is of the same import as an interest that is objectively more significant, indeed the very statement is a contradiction in terms. It was therefore perfectly defensible for the courts to vary the intensity of such review. This requires evaluation of the importance of the interest, and whether it should be recognized as a right, in the manner explicated by, for example, MacCormick and Raz.[54] The proposition that statute will be read so as not to interfere with rights unless Parliament made clear its intent to do so, is a defensible one. It is normatively sound both because of the importance of the interest that has been denominated as a right, and for the reasons powerfully expressed by Lord Hoffmann in *Simms*, viz that Parliament should be mindful of such incursions and accept the political cost of doing so by making its intent explicit.[55] The development

[53] Tomkins, *Our Republican Constitution*, pp. 18-25; JAG Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159.

[54] DN MacCormick, 'Rights in Legislation', in P Hacker and J Raz (eds), *Law, Morality and Society, Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977), Ch. 11; J Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

[55] *Simms* [2000] 2 AC 115.

signalled in *Derbyshire*[56] that Convention rights were to be regarded as embedded in the common law, was potentially the most far-reaching. While much development in administrative law was remedy-driven, the courts nonetheless had explicit regard for some rights, such as the right to vote, and most notably property rights. Rights-talk was not therefore absent from our legal heritage, but became obscured by the Diceyan formulation of negative residual liberties. There was, however, always a tension in this characterization. It carried a descriptive connotation, that the scope of, for example, your freedom of speech was the result of the aggregate limits placed thereon by statute or common law. It nonetheless also embodied the normative recognition that the relevant interests were indeed liberties. The real importance of the change to talking openly of rights was that it signified both that duties could flow from the rights and that any limitations of the rights would not simply be acknowledged, but be rigorously scrutinized.

4 Normative Judgment and Balancing: Reflections

(a) Polycentricity, Private Law and Social Policy

An oft-voiced element in the discourse concerning the limits of what the courts should and should not do is the stricture concerning the courts to be wary about adjudicating on social policy, more particularly given the fact that judicial decisions given in one context may well resonate more broadly where the problem is polycentric in nature. Such concerns have been raised by Lord Sumption.[57] The extent to which polycentricity should be regarded as problematic in this regard has properly been questioned by Jeff King, who revealed its pervasiveness and the judicial techniques that could be used to deal with it short of judicial

[56] *Derbyshire County Council* [1993] AC 534.

[57] Lord Sumption, 'The Limits of Law', pp. 15-16.

abstention.[58] It is interesting that those who express concern about polycentricity normally do so from within the frame of public law. It is public law broadly conceived that is felt to be problematic in this respect.

This does not however withstand examination. Reflect for a moment on the foregoing analysis of private law. It has profound social implications in two senses: it embodies social policy choice and has far-reaching consequences for such choices made by the legislature. It would be reductionist to claim that all instances of private law adjudication embody social policy choice, but it would be equally blinkered to deny the linkage. Tort law sets the boundaries for private responsibility in relations between individuals that are primarily non-consensual. It expresses a social policy choice that is not in any sense preordained as to when a person should bear the costs of loss caused to another, and the social dimension to that choice is not resolved by being cast in terms of corrective justice, given the contestation that surrounds its meaning and application. The courts make the value judgments, they modify them and amend them over time. The choice thus made then has far-reaching implications for social policy in the second sense. It will determine the respective areas in which losses are borne by a private party and those where they are borne by the state in terms of social welfare payments and the like, as is evident from the seminal literature on accidents, compensation and the law.[59] If there are concerns as to the limits of law flowing from polycentricity in a public law context, then they are more than matched by the realization that defining the boundaries of private responsibility has far-reaching implications for the general social-

[58] J King, The Pervasiveness of Polycentricity' [2008] PL 1; J King, 'The Justiciability of Resource Allocation' (2007) 70 MLR 19

[59] P Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld & Nicolson, 1970); P Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 8th ed., 2013).

welfare budget. Indeed the systemic nature of this impact casts many polycentric problems posed in public law into the shadow.

(b) Normative Choice, Balancing, Private and Public Law

There is a temptation to think that issues of normative choice and balancing are more common and complex in public as opposed to private law, thus fuelling conclusions that we should conceive of the limits of adjudication differentially in this regard. There is a kindred temptation to think that the ways of dealing with such issues are somehow more tractable in the realm of private as opposed to public law, thereby lending further support to the same conclusion. Both temptations should be resisted.

There is no sound foundation for claims that issues of normative choice and balancing are more common and complex in public as opposed to private law. There is an interesting inquiry as to the relationship between normative choice and balance, more especially balance of incommensurables. Space precludes detailed analysis.[60] Suffice it to say for the present that the former does not necessarily entail the latter, but may often do so. It is thus perfectly possible for the normative choice to be between two or more different foundational precepts that will shape a rule or body of legal doctrine. It is equally possible for the normative choice to express the result, explicitly or implicitly, of a range of incommensurable values. There is moreover no a priori reason why a normative choice that does not involve the balancing of incommensurables will be less contestable than one that does. It is in any event the case that issues of normative choice pervade just about every rule in private as well as public law, most

[60] See more generally, C Sunstein, 'Incommensurability and Valuation in Law' (1993-94) 92 Michigan Law Review 779; Symposium on Law and Incommensurability (1998) 146 University of Pennsylvania Law Review 1169.

certainly every rule of any significance. This is precisely what we unpack when we think about the soundness of common law doctrine in any area. Nor is there any reason to conclude a priori that the issues are necessarily more complex, as judged by any dimension that the word might bear, in public law as opposed to private law. We can all think of morally foundational issues that arise in the context of judicial review, which can affect the life or liberty of particular individuals, as well as many cases that do not raise concerns of this nature. We can however readily consider issues of analogous importance that arise in areas such as crime and tort, while recognizing that they also regulate matters of less significance.

The idea that such issues can be resolved in a more tractable manner in private as opposed to public law should also be resisted. There are doubtless different ways in which courts can address the balancing of incommensurable values, but these differences do not pan out neatly on a private-public law divide, nor is one such technique unequivocally 'better' than another. The choice of techniques includes: the ad hoc balancing of the relevant factors in each case, as exemplified by the duty concept in negligence and by the determination of the particular hearing rights that should be accorded to the claimant; a modified version of this approach whereby the balancing is undertaken with different intensity for different kinds of case, as epitomized by proportionality review; formulation of a doctrinal rule that embodies the chosen result of the balancing, as in the context of the rules for nuisance, defamation or restitutionary relief for mistake of law; or the division of the specified area so that its component parts reflect the different balances struck, as illustrated by the sub-divisions within economic torts.

These are different juridical techniques that cut across the public-private divide, and they each have different merits and demerits. It might be felt that it is better in terms of legal certainty for the result of the balancing to become part of the rule, which can then be applied evenly thereafter. This is however dependent on the issue, whatsoever it might be, being

amenable to embodiment in a rule-like format, which will not be the case if the number of variables is too broad or too fact-specific. Even where this is not so, there can be other less obvious disadvantages to rule-type formulations. Thus, where the balancing is not readily apparent on the face of the rule it is common for the rule to take on a canonical nature and for the balancing that underpins it to be forgotten, such that it is not reassessed. This is in effect what happened in relation to the rule concerning restitutionary relief for mistake of law prior to recent judicial reforms, and is also what occurred in relation to the remoteness rules in tort since the 1960s.

(c) Statute, Private and Public Law

It might be felt that while private law is reflective of normative choice and while it might entail balancing of incommensurables that it is nonetheless distinctive from public law in three respects.

The first is that private law is largely confined to the terrain of adjudication between private parties, while public law is primarily applicable in the context of power exercised pursuant to a statute. Thus on this view the exercise of normative choice/balancing of incommensurables is less problematic when it does not impinge directly on legislative choice. This contains a wealth of contestable assumptions, but let it be accepted for the present that most public law entails statutory interpretation, since most public power dealt with by judicial review has a statutory origin. The normative choices and balancing exercises at common law nonetheless impact on legislative choice in two senses. There are many statutes dealing solely and directly with private law relationships, and the general principles of contract, tort, restitution and the like will be read into the statute, unless there is some clear indication therein to the contrary. The results of the common law choices will in addition inform statutes that deal with public law issues. This is readily apparent from the case law on

negligence and public bodies, where the precepts of negligence have been used to shape the confines of such liability, whether through the definition of duty[61] or at the level of breach.[62] It is readily apparent yet again in the way that foundational common law assumptions, such as opposition to strict liability, have been used to limit radically the extent to which such statutes will be read as leading to the imposition of such liability.[63]

The second sense in which it might be argued that private and public law are distinct is that the result of the normative choice or balancing is likely to be more controversial in public law. This argument conceals more than it reveals. It is predicated on the contestable empirical assumption that people are likely to be more engaged by such choices made in the public as opposed to the private law context. This claim is a good deal easier to make than to verify. Thus while the legislature and the general public might have strong views about an issue such as voting rights for prisoners, this was also the case for high profile issues in private law, such as the Thalidomide, Bhopal and asbestos litigation, more especially given the victims' difficulties in securing adequate redress based on existing tort doctrine. The reality in any event is that relatively few Strasbourg rulings have raised the domestic legislative ire.

A third ground of distinction might be said to be that the result of normative choice and balancing is easier for the legislature to overturn in private law. This argument is however doubly problematic.

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[61] See, e.g., *X (Minors) v Bedfordshire CC* [1995] 2 AC 633; *Stovin v Wise* [1996] AC 923; *Curran v Northern Ireland Co-Ownership Housing Association Ltd* [1987] AC 718.

[62] See, e.g., *Barrett v Enfield LBC* [2001] 2 AC 550; *Phelps v Hillingdon LBC* [2001] 2 AC 619.

[63] See, e.g., *O' Rourke v Camden LBC* [1998] AC 188; *Hammersmith Ry Co v Brand* (1869) LR 4 HL 171; *Manchester Corporation v Farnworth* [1930] AC 171; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001; *Dunne v North Western Gas Board* [1964] 2 QB 806; *Smeaton v Ilford Corporation* [1954] Ch 450.

The Human Rights Act 1998 was a choice consciously made by the sovereign legislature, which entailed judicial oversight pursuant to Convention rights made actionable in UK law. If the sovereign legislature wishes expressly to amend or repeal that choice it can do so. While the legislation remains in force it continues to reflect the legislative choice initially made in 1998. Some might feel that the legislature should never have made this choice, since in reality it gives the last word to a judicial organ outside the UK, but this is no reason to deny the democratic legitimacy of that choice. Lord Sumption would say that not everything done by a democratically elected Parliament enhances democracy. He is right as a matter of abstract principle. This argument is however fraught with danger. It can be wielded too easily by supporters of democratic choice who wish nonetheless to deprecate a particular exercise of that choice of which they disapprove. The bottom line is that there may be all manner of reasons why a Parliament might be willing to accept constraints, even if the temptations to be avoided are not directly analogous to Ulysses and the Sirens. There will be certain decisions that a particular signatory state does not like, but that is the inevitable consequence of collective action in any context, which entails surrender of some freedom of action for the benefits of membership. The reality is, as noted above, that relatively few Strasbourg rulings have raised the domestic legislative ire, and many rulings have been in the government's favour.

The argument is also problematic because the HRA embodies a softer form of constitutional review, such that the legislature still has the last word in relation to primary statute. This was the deal struck when the HRA was enacted so as to respect the tradition of parliamentary sovereignty. It is true, as attested to by the academic literature, that Parliament commonly follows the judicial ruling. This does not alter the preceding point concerning the latitude afforded to the legislature. It may accept the judicial ruling because it had not seen the infirmity and is happy to correct it, which is by definition not problematic in terms of

legislative choice since Parliament is in accord with the judicial result. Parliament might alternatively find it difficult to resist the ruling by a UK court made pursuant to a margin of discretion afforded by Convention jurisprudence, even where Convention demands could be met in some other way. To which the answer is that Parliament should be more robust in this regard. There is something decidedly odd about bemoaning the circumscription of legislative choice where the legislature is not willing to avail itself of the power at its disposal. Parliament might yet again feel compelled to accept the judicial outcome, because it is dictated by Strasbourg case law. This is clearly the most constraining in terms of legislative power, but this takes us full circle back to the point made in the previous paragraph, viz that this is the result of the legislative choice embodied in the HRA.

(d) Statute, Courts and Respect

The centrality of normative choice and balancing of incommensurables to both private and public law does not mean that courts should ride roughshod over legislative choice, nor does it mean that they should fail to accord respect to it. My own views in this respect are considered elsewhere,[64] but two more general points should be borne in mind.

We have always taken cognizance of democratic status within the fabric of judicial review. It is built on assumptions concerning the relationship between the legal and political branch of government, as exemplified by the generally accepted proscription on judicial substitution of judgment for that of the administration in relation to the merits of discretionary power. The extent to which primary decision-makers have democratic credentials varies very considerably. The strongest case for such respect is in relation to

[64] P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge: Cambridge University Press, 2015), Ch. 2.

primary legislation, which embodies the result of legislative choice expressly made after due consideration, although there may, by way of contrast, be rights-based issues that the legislature was unaware of, more especially in long, complex legislation. The initial determination may be made by bodies such as local authorities, agencies, prison governors, school governors, health boards and bodies to whom power has been contracted out. The extent of their democratic credentials varies considerably. There is clearly a distinction between the existence of democratic legitimacy that inheres by virtue of the vote, and the authority given by a democratically elected body to an agency or institution that is not itself democratically elected.

The second consideration should be regarded as a counterpoise to the first. The Human Rights Act 1998 is not the source of the problem in the manner that some conceive it to be. It is not just that its amendment or repeal might trigger judicial recourse to the common law jurisprudence that pre-dated it. It is more fundamentally because the very recognition of such rights at common law, justified for the reasons set out above, necessarily requires inquiry as to the scope of the right and possible justifications for limitations thereof, thereby raising the same issues that currently require resolution. The only way to avoid such a conclusion is either through some form of rights-scepticism whereby the very denomination of certain interests as rights is felt to be misconceived, or through some fairly extreme form of court-scepticism, which would connote not merely the need for respect calibrated according, inter alia, to the nature of the primary decision-maker, but something more akin to judicial abstention. Nor should it be thought that the difficulties of such review at common law or pursuant to the HRA will be obviated or overcome if reasonableness/proportionality control were to be radically limited or even cast aside. Courts would engage in analogous value judgments in the context of purpose/relevancy, and for those concerned about the limits

of legitimate judicial intervention the position would be worse insofar as courts substitute judgment on these heads of review.

5 Conclusion

It is right and proper for there to be informed debate as to the limits of law, it is indeed vital that such issues should not be ducked or treated dismissively. It is by similar token equally important that we test our conclusions as to what those limits should be in a particular legal area, against explicit or implicit assumptions that frame our thinking about the legitimate limits of law in other areas. This chapter has sought to contribute to this discourse. Insofar as we are concerned about the limits of law then this must apply equally to contestable normative judgments that courts routinely make, as well as to the balancing of incommensurables. Insofar as we are concerned about the limits of law viewed from both dimensions, then our considered conclusions from a public law perspective must cohere with those that inform our thoughts about private law. The assumption that there is some stark dichotomy in this respect as between public and private law does not withstand close analysis.