COHERENCE IN THE AGE OF STATUTES

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The High Court of Australia, in pursuing coherence between common law and statute law, has limited itself to ensuring that the rules of common law and statute law should be free of contradiction. The Court does not appear to have embraced the idea, which lies at the core of some major theories of private law, that a set of rules is coherent only if the set can be explained as the outworking of a single principle. Applying that idea to the relationship between common law and statute law is confronted by some serious challenges. In the past, coherence as non-contradiction (combined with the idea of parliamentary supremacy) has worked well as a means of reconciling common law with statute law, but the proliferation of legislation in recent years and the character of much modern legislation has drawn attention to the limitations of such an approach to the question. A more exacting approach to coherence of common law and statute law, on the other hand, would require the revision of some widely-held assumptions about the nature of law, such as the core assumption of legal positivism that the ultimate criterion of the authority of the law is its pronouncement by an authoritative institution.

I INTRODUCTION

This paper explores the idea of coherence in the law, both as that concept is used by the High Court of Australia and more generally. It also considers whether the conceptual nature and normative values that underpin legislation and the common law,[1] and in particular the private law, are such that they can be melded into a coherent and seamless whole. When the High Court speaks of 'coherence', its focus is almost entirely on consistency in the operation of rules: that the law should not have rules that mandate opposite courses of action.[2] Several major

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1 The term 'common law' is used in a variety of senses: A W Brian Simpson, 'Common Law' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008) 164, 164–5. For present purposes, we will use 'common law' in its two most common senses. First, in terms of its source, we use it to describe that body of law that arose through the process of adjudication, as opposed to having been promulgated by Parliament. Second, in terms of its content, we use it to describe that body of law that historically and still predominately is concerned with relations between individuals qua individuals, and which is also described as *private* law. These two senses are not precisely co-extensive, but there is a substantial overlap between them.

2 Both Stephen McLeish and Elise Bant seem to take this view, although neither explore the broader meaning of the idea of coherence: Stephen McLeish, 'Challenges to the Survival of the Common Law' (2014) 38 *Melbourne University Law Review* 818, 827; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 *University of New South Wales Law Journal* 367, 368.

theories of private law, by contrast, envisage a concept of coherence which is more exacting in its demands. Complete coherence of a set of rules is achieved only if the set can be explained as the outworking of a single principle.

Conventionally, inconsistencies between legislative rules and common law have been resolved by a rule of parliamentary supremacy.[3] Accordingly, in cases such as *Miller v Miller*, the High Court has concluded that common law rights could not be asserted to the extent that their assertion would be inconsistent with the intention of a statute.[4] Conceptually, this rule has functioned as a meta-principle that assumed the silo-like separation of legislation and common law and resolved inconsistencies by prioritising legislative rules over those of common law rules. As long as legislation was targeted and was limited in volume, as had been the case until fairly recently in the history of the Anglo-Australian legal system, legislative intrusions into the otherwise seamless perfection of the common law could be treated as mere exceptions.[5] This approach largely preserved the coherence (in the second, more exacting sense) of the basic fabric of the law, which was provided by common law. However, the second half of the 20th century saw a massive proliferation of legislation. During 1901 (the first year of federation), legislation enacted by the Commonwealth Parliament amounted to just 488 pages. In 1997, that figure had increased to 7521 pages[6] — a 15-fold increase — and the pace of addition to the body of legislation has increased since then.[7] Today, whole areas of law that as recently as 30 years ago were largely if not entirely left to the common law are now matters of legislation.[8] Moreover, the style and reach of legislation has changed. Legislation is no longer limited to making specific changes to common law doctrine or restating settled areas of the common law.[9] Instead, it seeks to establish comprehensive legal regimes that replace the common law for

3 McLeish, above n 2, 834.

4 *Miller v Miller* (2011) 242 CLR 446, 473 [73]–[74], 481–2 [101] ('*Miller*'). Other cases in which the High Court has discussed the idea are *Sullivan v Moody* (2001) 207 CLR 562, 581 [55]; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, 186 [35]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 407–9 [41]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 514 [25]; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 525 [119]; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 625 [156].

5 Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232, 234. Burrows noted that, historically, most legislation necessarily assumed the existence and preservation of the common law as the basic fabric against which the legislative changes had to be seen and understood. The advent of statutory codes that cover the entire field mean this assumption is no longer necessary.

6 Justice K M Hayne, 'Australian Law in the Twentieth Century' (2000) 74 *Australian Law Journal* 373, 376. See also McLeish, above n 2, 821.

7 Chris Berg, 'Policy without Parliament: The Growth of Regulation in Australia' (2007) 19(3) *IPA Backgrounder* 1, 4. Berg's analysis shows a sudden leap in legislative production in the late 1980s. Berg also shows that the output of state legislatures has increased at similar rates.

8 For example, company law, the law of personal property securities, labour law, and consumer law are all now substantially, if not entirely, comprised of statutory rules: see, eg, *Personal Property Securities Act 2009* (Cth); *Fair Work Act 2009* (Cth); *Competition and Consumer Act 2010* (Cth).

9 The great 19th century statutes dealing with partnership, bills of exchange and sale of goods were restatements of a settled body of common law. On the other hand, the *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100 was a miscellany of specific changes: Jack Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291, 299. See also Alan Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *Law Quarterly Review* 570.

large areas of legal regulation but, falling short of complete codification of the private law, exist side-by-side with remnants of the common law. Areas such as company law,[10] personal property securities law,[11] and consumer law are now largely statutory.[12] The law of torts in Australia has also undergone significant statutory reform and modification.[13] When the volume of legislation was small and legislation, for the most part, sought to make relatively modest and specific changes to the common law, the interaction of common law and legislation could successfully be managed by principles of statutory interpretation that narrowly confined the import of legislative intent.[14] In the 'age of statutes'[15] in which we now live, the issue of the relationship between legislation and common law and whether these two bodies of law can be rendered into a coherent whole is one of the utmost importance and one which cannot be ignored or resolved by the simple expedients of the past.

II THE CONCEPT OF COHERENCE

Inspired by the writings of John Rawls[16] and Ronald Dworkin,[17] as well as the demands of contemporary legal practice,[18] the idea of coherence in the law

10 The *Corporations Act 2001* (Cth), whether or not initially intended as a code, has effectively covered the field: see Ross Grantham, 'The Proceduralisation of Australian Corporate Law' (2015) 43 *Federal Law Review* 233.

11 The *Personal Property Securities Act 2009* (Cth) effected a wholesale and virtually complete replacement of the common law, with a system that employs an approach (based on substance over form) and terminology that is alien to the common law tradition.

12 *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*'). See also Bant, 'Statute and Common Law', above n 2, 372.

13 See generally Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Sydney Law Review* 443.

14 Roscoe Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383, 385. See generally Arthur Corbin, 'The Dead Hand of the Common Law' (1918) 27 *Yale Law Journal* 668. For a recent example, see *Weiss v The Queen* (2005) 224 CLR 300, 305 [9].

15 Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982); Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14 *Sydney Law Review* 474.

16 See generally John Rawls, *A Theory of Justice* (Harvard University Press, 1971). His concept of reflective equilibrium is widely interpreted as being about coherence.

17 See generally Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986). His argument from integrity is commonly understood to be a principle of coherence, where coherence is both central to intelligibility of the legal system and an independent virtue. Cf Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994) 261–303.

18 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 593 (McHugh J); *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 297–8 (Gummow J); *Sullivan v Moody* (2001) 207 CLR 562, 581 [55]; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, 242 [227]; *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, 204 [51]. See also, Justice J D Heydon, 'Limits to the Powers of Ultimate Appellate Courts' (2006) 122 *Law Quarterly Review* 399, 400, quoting Sir Carleton Kemp Allen, *Law in the Making* (Oxford University Press, 7th ed, 1964) 298; Chief Justice Murray Gleeson, 'Australia's Contribution to the Common Law' (2008) 82 *Australian Law Journal* 247, 253; Stefano Bertea, 'The Arguments from Coherence: Analysis and Evaluation' (2005) 25 *Oxford Journal of Legal Studies* 369, 369.

has been a topic of sustained and deep thought.[19] In addition to the intuitive appeal of the idea that the law is something more than a random assemblage of unrelated and inconsistent rules, coherence in the law is held up as an essential precondition of a legitimate legal system.[20] While views differ as to whether it is an independent virtue,[21] coherence is nevertheless central to the idea of the law as being intelligible.[22] Only that which is coherent is intelligible and intelligibility is in turn a necessary precondition of any system that purports to establish reasons for action. As a fundamentally normative system, it is, therefore, an essential precondition that the legal system makes sense as a whole and be free from internal contradiction.[23] Coherence also connects with another necessary condition of a legitimate legal system, the rule of law: 'In setting down the conditions for the proper exercise of powers, the rule of law stipulates, among other things, constancy in the law. No such constancy can be assured in a normative system that fails to present a sufficient degree of coherence'.[24]

In its most basic sense, coherence denotes simply that a set of rules is coherent if it is free from contradiction.[25] Rules which belong to the same legal system must not prescribe different outcomes in relation to the same set of facts. This requirement underpins, for example, the legal conclusion that, if statute law prohibits the making of a contract of a particular kind, then the law of contract must regard such contracts as unenforceable.[26] The rule that 'parties to contracts shall perform those contracts' and the rule that 'no person shall make a contract which has the attribute *X*', taken individually, prescribe different outcomes when applied to situations involving *X*. These two rules make up a coherent set only if contracts with the attribute *X* are excluded from the scope of the first rule. Contracts with the attribute of *X*, being a class of consensual undertakings which people are not allowed to make, cannot be taken to belong to the class of consensual undertakings which people are required to perform (ie contracts). A requirement to perform such an undertaking would contradict the law's commitment to the notion that

19 The body of literature is enormous, but important contributions have been made by Neil MacCormick, 'Coherence in Legal Justification' in Aleksander Peczenik, Lars Lindahl and Bert van Roermund (eds), *Theory of Legal Science* (D Reidel Publishing, 1984) 235; Raz, above n 17, 261; Kress, 'Coherence and Formalism', above n 16; Ken Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 521; Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart Publishing, 2015).

20 Kress, 'Coherence and Formalism', above n 19, 536.

21 Hanoch Dagan, 'Codification, Coherence, and Proprietary Competitions' in Kurt Siehr and Reinhard Zimmermann (eds), *The Draft Civil Code for Israel in Comparative Perspective* (Mohr Siebeck, 2008) 149, 153.

22 This lies at the heart of Dworkin's argument from integrity: see generally Dworkin, above n 17.

23 See generally Barbara Baum Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355.

24 Bertea, above n 18, 386. See also D Neil MacCormick and Robert S Summers, 'Interpretation and Justification' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth Publishing, 1991) 511, 535.

25 See generally Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' (1990) 3 *Ratio Juris* 130.

26 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413; *Miller* (2011) 242 CLR 446, 457, citing *Cope v Rowlands* (1836) 2 M & W 149, 157; 150 ER 707, 710.

no such contract shall ever be made. That is perhaps one of the more obvious consequences of pursuing coherence as consistency or lack of contradiction.

It is in this most basic sense, as mere consistency in the operation of rules, that the High Court should be understood as having referred to coherence. In *Nelson v Nelson*,[27] a woman had arranged for the title to a house which she had previously purchased to be transferred to her son in order to qualify for a low interest defence housing loan. The High Court concluded that Mrs Nelson was able to assert that the son held the title to the house on resulting trust for her.[28] Since this was a case in which the presumption of advancement arose — the transfer of the title being from parent to child — Mrs Nelson had to refer to her purpose of fraudulently obtaining the loan in order to argue that a resulting trust arose on the facts of the case. Nevertheless, the arrangement whereby Mrs Nelson transferred the legal title to the house to her son while expecting to retain beneficial ownership was not illegal. What was prohibited by the relevant statute was her false representation to the relevant government authority that she did not have a beneficial interest in the house. Therefore, Mrs Nelson was able to assert her rights in equity subject to repaying to the relevant government authority the value of the benefit that she received by making the false representation. McHugh J said:

> As the examination of the Act has disclosed, it contains internal mechanisms for dealing with false declarations and applications by persons who are not entitled to subsidised advances. The Act recognises that ineligible persons may apply for subsidised advances and provides for recovery of the subsidy paid in relation to such persons. These provisions lend weight to the submission of the appellant that the policy of the Act will not be defeated if the Court enforces her equitable rights. They also suggest that the policy of the Act is not frustrated so long as there is recovery of the benefit given.[29]

In short, it was consistent with the purpose of the relevant statutory provisions to allow Mrs Nelson to assert an equitable interest in the house.

Similarly, in *Equuscorp Pty Ltd v Haxton*,[30] the central issue was whether allowing the plaintiff to assert its claim would undermine the purpose of a statute. More specifically, the controversy between the parties concerned whether the amount

27 (1995) 184 CLR 538 ('*Nelson*'). The High Court's decision in *Nelson* represented a sharp difference of opinion with the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 ('*Tinsley*'). The High Court in *Nelson* (1995) 184 CLR 538 was unanimous that neither of the views expressed in *Tinsley* were appropriate. The minority approach in *Tinsley* was felt to be both unfair, in that it denied recovery irrespective of the relative blameworthiness of the parties, and inconsistent with equity's general tendency to eschew harsh decisions. Dawson and McHugh JJ also thought that the minority in *Tinsley* were mistaken in applying the clean hands principle: at 579–80; 608. The High Court also thought that the majority approach in *Tinsley* was equally inappropriate: at 559 (Deane and Gummow JJ); 580 (Dawson J); 593 (Toohey J); 609 (McHugh J). This approach, which Toohey J described as the 'triumph of procedure over substance', failed to take account of the seriousness of the illegality and produced results that turned on such arbitrary factors as the state of the pleadings and whether the presumption of resulting trust or advancement applied: at 592–3. In *Jetivia SA v Bilta (UK) Ltd (in liq)* [2015] 2 WLR 1168, the UK Supreme Court appears to have kept faith with *Tinsley*, though there remained sharp disagreements amongst their Lordships: at 1175 [14].

28 *Nelson* (1995) 184 CLR 538, 571–2.

29 Ibid 616.

30 (2012) 246 CLR 498 ('*Equuscorp*').

payable under certain loan agreements that were illegal by statute could be recovered by way of an action for money had and received.[31] The problem with the loan agreements was that they were an integral part of investment schemes which had been marketed to investors in a way which did not comply with s 170 of the *Companies (Victoria) Code*.[32] While s 170 did not, of itself, prohibit the making of the loan agreements, enforcing the loan agreements against the investors would have undermined the legislative purpose of protecting the investors.[33] Fidelity to the purpose of the statute, which required that the loan agreements not be enforced, also required denial of recovery by way of an action for money had and received:

> Recovery from the investors would have been recovery from persons whose protection was the object of the statutory scheme … The failure of consideration invoked by Equuscorp was the product of [the lender's] own conduct in offering the loan agreements in furtherance of an illegal purpose. This is a clear case in which the coherence of the law, and the avoidance of stultification of the statutory purpose by the common law, lead to the conclusion that [the lender] did not have a right to claim recovery of money advanced under the loan agreements as money had and received.[34]

As in *Nelson*, the Court's emphasis was upon coherence as lack of contradiction between the common law's recognition of a cause of action and the legislative purpose.

The High Court's concern for coherence, so understood, has extended beyond cases concerning illegal trusts and contracts. In *Miller*,[35] the High Court had to determine whether the fact that a person who was injured in a motor vehicle accident and had been a party to the theft and unlawful use of that vehicle precluded a finding that the injured person was owed a duty of care by her co-participant in the theft. The specific question was whether a provision of the Western Australian *Criminal Code* that made the theft and use of the vehicle unlawful pre-empted or suspended the normal operation of the tort of negligence.[36] The High Court identified the central question as being:

> would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct? Other questions, such as whether denial of liability will deter wrongdoers or advantage some at the expense of others, are neither helpful nor relevant. And likewise, resort to notions of moral outrage or judicial indignation serves only to mask the proper identification of what is said to produce the response and why the response could be warranted.[37]

31 Ibid 514.

32 *Companies (Application of Laws) Act 1981* (Vic) sch 4, as repealed by *Legislation Reform (Repeals No 5) Act 2010* (Vic) sch 1.

33 *Equuscorp* (2012) 246 CLR 498, 514 [25] (French CJ, Crennan and Kiefel JJ), 537 [96] (Gummow and Bell JJ).

34 Ibid 522–3 [45] (French CJ, Crennan and Kiefel JJ). See also 543–4 [111] (Gummow and Bell JJ).

35 (2011) 242 CLR 446.

36 *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 371A.

37 *Miller* (2011) 242 CLR 446, 455 [16] (citations omitted).

The question of whether the driver owed a duty of care (and was consequently liable to be sued in the tort of negligence) was not to be resolved by asking what effect a particular ruling on the question would have on the conduct of would-be parties to the unlawful use of motor vehicles. The appropriate question was whether it was 'incongruous' for the plaintiff to be, under the criminal law, a party to the offence of unlawful use of a motor vehicle and to be able, under tort law, to sue the driver for damages in respect of an injury which arose from the very circumstances which constituted the offence.[38]

Although a superficial reading of the Court's comments in *Miller* might suggest otherwise, in characterising the purpose or policy of particular legislation the Court was concerned only with the purpose or policy that was manifested in the *language* of that provision, rather than with what might be supposed to be the economic, social or political motive for the enactment of the legislation stated at a high level of generality. Statements, for example, that the statutes which implement the Torrens system of title by registration have a purpose of promoting transparency as to ownership of land and interests therein,[39] and that statutes which create road traffic rules have a purpose of promoting road safety[40] are not particularly helpful in relation to the enquiry which has to be made and may be positively harmful. The form which a statute takes may be the result of a series of compromises among several competing goals. For this reason, it is the precise intention which can be found in the language of the legislation, rather than the supposed purpose of making land ownership transparent or roads safer, which ought to be the focus of the enquiry.[41] This point was emphasised by Heydon J in his dissenting judgment in *Equuscorp*: 'The scope and purpose of the statute depend solely on the meaning of its language.'[42] His Honour remarked that 'an anomalous result is relevant to statutory construction' but concluded that there was 'no sufficient anomaly between preventing enforcement of the loan contracts and permitting recovery of unpaid advances as money had and received'.[43] Although Heydon J was perhaps more conscious than the other members of the High Court of the slippery slope faced when attempting to resolve an apparent inconsistency between a common law rule and a statutory one by resorting to the purpose or policy of the statute, it is nevertheless clear that the High Court's coherence principle has not been concerned with developing the common law to further the supposed public policy goals of certain legislative regimes. Elise Bant is thus correct in saying that 'the High Court's approach … has been to

38 Ibid 455 [16], 479–80 [93].

39 See Bant, 'Statute and Common Law', above n 2, 374–5, citing Douglas J Whalan, *The Torrens System in Australia* (Law Book, 1982) 14–17.

40 *Miller v Miller* (2011) 242 CLR 446, 478 [89].

41 Raz, above n 17, 277, explaining the shortcomings of the 'intention thesis': that legislation reflects (or should reflect) the actual intentions of the law makers who promulgated the law.

42 *Equuscorp* (2012) 246 CLR 498, 549 [124].

43 Ibid 551–2 [133].

"silo" evolution of judge-made and statutory principle unless their interaction is squarely in issue'.[44]

The concept of coherence undoubtedly involves, as a minimum requirement, the absence of internal contradiction. However, as previously noted, coherence can be understood as being about much more than absence of internal contradiction. Robert Alexy and Aleksander Peczenik have said that a set of propositions may be said to be coherent to the extent that they share the same 'supportive structure'.[45] The coherence of a set of normative propositions, according to this definition, involves something more than lack of contradiction either as propositions or in their application to concrete situations. On this definition, a set of rules and their applications may be free from contradiction and yet still lack coherence. The set is coherent only to the extent that all of the rules in the set can be explained as the outworking of a single principle. This concept of coherence lies at the heart of the legal formalism of Ernest Weinrib. For Weinrib, 'a juridically intelligible relationship cannot consist in an aggregate of conceptually disjunct or inconsistent elements that, like a pile of pebbles, happen to be juxtaposed'.[46] A body of rules, to be truly coherent, must have a unity which is founded upon a single normative idea:

> inclusiveness is achieved not by adding another item to an aggregation, but by subsuming the item under a higher level of abstraction. Form is a unity, all the component characteristics of which comprise an ensemble whose intelligibility is greater than that of the sum of its parts. The components of a legal form thus collectively express a single idea. A form is accordingly not a manifold that can incorporate new elements without their being integrated into its organizing unity. If a form is to encompass the widest possible variety of juridical relationships, these relationships cannot be pluralistically tacked on to one another, but must exemplify the unifying idea of the form to which they belong. This requires abstracting to clarify the common structure that various relationships instantiate through their participation in a single form.[47]

On this view, to continue with the example above, a set of legal outcomes in which performance of promises or undertakings was required is coherent to the extent that there is a common idea, such as the idea of a contract, which justifies the requirement in every case. The idea of contract can, in turn, be seen to be justified insofar as it is an instantiation of a higher principle which pervades a larger part of the system. In Weinrib's view, the idea, articulated most famously by Kant that every individual is entitled to that degree of freedom of choice which is compatible with the same freedom of every other individual, is pervasive in

44 Elise Bant, 'Thieving Lawyers: Trust and Fidelity in the High Court*: Legal Services Board v Gillespie-Jones*' on Melbourne Law School, *Opinions on High* (16 August 2013) <http://blogs.unimelb.edu.au/opinionsonhigh/2013/08/16/bant-gillespie-jones>.

45 Alexy and Peczenik, above n 25, 131.

46 Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949, 968.

47 Ibid 976. See also Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) 41–3.

private law.[48] Every private law obligation is an instantiation of that more general idea, so rights to contractual performance can arise only where two parties have made reciprocal undertakings. One party cannot curtail the freedom of the other party (by insisting on the other party's performance of its undertaking) while insisting that it is free not to perform its undertaking. Treating the parties equally demands that each party can control the choice of the other as to whether it will perform the undertaking.[49] Other types of private law relationship, such as those which give rise to tort, unjust enrichment, and fiduciary liability, express the same idea.[50]

There are legal scholars who adopt the concept of coherence as involving a common supportive structure, but who accept that there may be a plurality of ultimate meta-principles from which lower order rules derive. Neil MacCormick accepts that 'coherence of a set of norms is a function of its justifiability under higher order principles or values',[51] but, unlike Weinrib, he believes that the set of norms may be related in the relevant way 'instrumentally or intrinsically'.[52] This formulation appears to allow for a greater range of candidates for the higher principle or principles which are pervasive in the system than does Weinrib's strictly monist, Kantian theory. Joseph Raz has spoken in favour of 'local coherence'.[53] Local coherence 'is a mere by-product of the consistent application of a sound moral doctrine'.[54] The pursuit of sound moral doctrines 'generates pockets of coherence which exist, or should exist, where the law should reflect one overriding moral or evaluative concern'.[55] In contrast to local coherence, 'global coherence' accounts of the law 'impose coherence on the whole of the law'.[56] Raz has objected to such accounts on the basis that they 'underestimate … the degree to which morality itself is not a system but a plurality of irreducibly independent principles' and they attempt 'to idealize the law out of the concreteness of

48 In *The Idea of Private Law*, Weinrib cited the following passage from Kant: 'Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom': Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 95, quoting Immanuel Kant, 'The Metaphysics of Morals' in Mary J Gregor (ed), *Immanual Kant: Practical Philosophy* (Cambridge University Press, 1996) 353, 387.

49 Kant, above n 48, 421–2.

50 Ernest J Weinrib, 'The Juridical Classification of Obligations' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 37, 44–5. Weinrib argued that 'the underlying assumption of torts is that the only limitation on the independent pursuit of one's separate interests is the obligation to avoid wrongfully infringing another's rights', while the law of unjust enrichment assumes that 'because the parties are independently pursuing their separate interests, enrichments are not effective unless they are the products of an intent to enrich'. In Weinrib's view, the much greater restriction of freedom of choice involved in fiduciary obligations is justified because 'the beneficiary's interests are so completely at the mercy of the fiduciary that the law disables the fiduciary from acting except in the beneficiary's interests'.

51 MacCormick, above n 19, 238.

52 Ibid.

53 Raz, above n 17, 298.

54 Ibid 299.

55 Ibid.

56 Ibid 298.

politics'.[57] Politics, understood as an activity whereby competing values are weighed and compromises or trade-offs between them are negotiated, is untidy and renders unlikely a scenario whereby the law will be completely coherent, but Raz does not object to this untidiness. For Raz, '[i]t is sanctioned by the morality of authoritative institutions'.[58]

It is remarkable that Raz does not appear to distinguish between different ways in which institutions are authoritative. In his view, since both legislative institutions and adjudicative institutions are involved in making law, both sets of institutions are necessarily involved in politics. The outcomes of political processes are inherently incoherent. What is implicit in Raz's stance has been boldly asserted by Steve Hedley. Hedley has insisted that courts are 'public authorities' and private law is 'a technique or instrument used by those authorities'.[59] According to Hedley, private law has 'reached the state it is in because of the efforts of a great many people — judges, lawyers, reformers, politicians, academics — over a considerable period of time' and 'compromises had to be made between competing goals'.[60] For Hedley, both legislatures and courts are involved in an exercise of determining what rules will best promote the purposes that the system has to serve.

For a scholar such as Weinrib, who insists that private law, at least, must be coherent in the exacting sense conveyed by the Alexy and Peczenik definition, the distinction between what a legislature does and what courts do is crucial. Judges cannot engineer compromises between competing goals of the law because judges are 'neither positioned to canvass the range of possible collective goals nor accountable to the community for the particular goal chosen'.[61] This contrast between judges and legislators is echoed by Stephen McLeish's comment that a legislature 'is deciding the law for the polity, rather than deciding an outcome for parties to a specific controversy' and 'is accountable to the electors of the polity for the manner in which it performs its task'.[62] The legislature, being the democratically accountable institution, is the forum in which compromises between competing goals can be negotiated and, as the product of that plurality of considerations, legislation necessarily cannot represent a coherent body of rules. Courts, by contrast, are accountable to principles which are intrinsic in the prior adjudicative practice. Therefore, while a certain degree of untidiness is to be tolerated and expected in the legislative process, coherence, in the exacting sense of the Alexy and Peczenik definition, must be an aspiration of the adjudicative process and the body of law that is generated by that process. The very legitimacy of the common law as a normative order that claims obedience is fundamentally

57 Ibid. See also Morton J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423, 1425–6.

58 Raz, above n 17, 298–9.

59 Steve Hedley, 'Courts as Public Authorities, Private Law as Instrument of Government' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 89, 90.

60 Ibid 92.

61 Weinrib, *The Idea of Private Law*, above n 48, 221.

62 McLeish, above n 2, 831.

dependent upon the extent to which its rules cohere with one another and with the higher order principles that supply the moral justification of those rules.

III LEGISLATION AND COMMON LAW: 'OIL AND WATER'[63]

If coherence is understood as being nothing more than an absence of inconsistency or contradiction at the level of the rules of a system, then, as the High Court has shown in cases such as *Nelson*, *Equuscorp* and *Miller*, there is unlikely to be very much real difficulty in achieving 'coherence' as between legislative and common law rules. Ascertaining when and to what extent a statutory rule and a common law rule speak to the same issue may require careful and sensitive interpretation, but there is no reason to suppose that the exercise is anything more than one of interpretation. However, the idea of treating legislation and common law as a coherent, single whole in the deeper sense defined by Alexy and Peczenik poses vastly greater challenges. Although there is an inevitable blurring of lines at the margins, in their classical or paradigm forms,[64] differences in the form, content, and normative or moral bases of legislation and common law mean that they represent independent and incommensurable systems of rules.

A *Form*

Lon L Fuller spoke of two distinct forms of social ordering, namely 'organization by common aims' and 'organization by reciprocity'.[65] The former 'requires that the participants want the same thing or things'.[66] A necessary prerequisite is thus the knowledge of the existence of shared wants or objectives. The satisfaction of that prerequisite enables the design of rules and other institutions which facilitate the satisfaction of the shared wants or objectives. The mechanism of

63 This is the metaphor used by Beatson to describe the historical approach to the interrelationship of legislation and common law: Beatson, above n 9, 300. Beatson did not identify the correspondents but, presumably, as common law was regarded as the fabric of the law, and legislation rode on top of common law, legislation is properly characterised as the oil.

64 For present purposes, it is assumed that in terms of the content of the law as opposed to its source, 'common law' and 'private law' in their classical or paradigm forms are co-extensive. Although the interpretation of statutes is now a major part of the work of the courts, historically, and at its core, the common law was predominately concerned with what is now called private law, being the laws of contract, torts, property, and wills and trusts. See, eg, William Blackstone's description of the common law: Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) vol 1, 68. Courts develop the common law by resolving disputes between individuals about whether one individual can demand something of or from the other individual. What is the correct way to resolve one dispute is also the correct way to resolve any materially identical dispute, but ultimately the question is one as to whether an individual is entitled to make a demand of another individual in the circumstances in which the demand is made.

65 Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 357 (emphasis altered). See also Darryn Jensen, 'Keeping Public Law in Its Place' (2014) 33 *University of Queensland Law Journal* 285, 288; Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012) 168–74.

66 Fuller, 'The Forms and Limits of Adjudication', above n 65, 358.

'organization by common aims' is legislation.[67] It is through the political and democratic process by which legislation is created that the common aims of society are identified, articulated, and pursued.[68] On the other hand, the 'proper province' of reciprocity 'lies in that area where divergent human objectives exist'.[69] The common law, for the vast majority of its history and still at its core, is about social ordering through reciprocity. The law of contract is an obvious example of ordering by reciprocity. One party wishes to acquire goods or receive services and another party wishes to provide them. The terms under which one party acquires and the other provides are worked out by agreement. The parties are participating in a form of ordering that is common to them and consists of the terms that they have negotiated, but each is pursuing an objective which is her or his own.[70] Accordingly, a contract cannot be understood in terms of a collective goal of either of the two parties directly involved or of the wider community. Rather, it has to be understood as a particular form of interaction — namely, one in which parties give or take or exchange things on terms which they have agreed and where those terms are an expression of the autonomy of each party. Whether the law is justified in recognising an obligation to perform upon a person is a question about whether that person's interaction with another is an instantiation of the form which the law calls a 'contract'.[71]

The distinction between social ordering by common aims and social ordering by reciprocity, then, is a distinction between the use of (collective) power and authority to pursue shared objectives and the common observance (by pairs or groups of individuals) of certain modes of conduct that have tended to facilitate the pursuit by the individuals of their individual objectives. Whereas the former is predicated upon communal objectives and seeks to advance those objectives, the latter is predicated upon a shared view about the right forms of interpersonal conduct and 'has no purpose except in the banal sense that it provides a body of expectations which individuals may rely upon in their pursuit of their disparate purposes'.[72]

67 Ibid. For an interesting discussion of this issue, see *Teva Pharmaceuticals USA Inc v Sandoz Inc*, 135 S Ct 831 (2015) where the majority of the US Supreme Court rejected a suggestion that a patent claim should be interpreted in the same way as a statute. Breyer J said: 'Statutes, in general, address themselves to the general public … patents typically … rest upon consideration by a few private parties …': at 840.

68 Even the great 19th century restatements of the law of sale of goods, partnership, and bills of exchange had an element of collective goals. In restating the law, these statutes sought to enhance society by making the law clear, certain and accessible. Modern regulatory theory has no hesitation in using the private law as a means of achieving collective, regulatory goals. This is a vast topic, but by way of general themes and overview, see Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119.

69 Fuller, 'The Forms and Limits of Adjudication', above n 65, 359.

70 See Weinrib, 'The Juridical Classification of Obligations', above n 50, 45, who says that contracts and gifts involve 'the common pursuit of independent interests' and that a transfer 'requires a common undertaking … through which both parties consensually accomplish their purposes'. See also Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 103, 139, discussing the promissory and autonomy promoting bases of contract law.

71 See above n 48 and accompanying text.

72 Jensen, 'Keeping Public Law in Its Place', above n 65, 294.

B *Content*

Nigel Simmonds has argued that the fundamental concern of the common law has been 'individual project pursuit'.[73] This is because, 'it protects the ability of individuals to pursue goals which are their own, and lead their lives as they please, within the constraints established by the general scheme of legal rules and rights'.[74] In doing so, it creates a conceptual and practical space where individuals have the 'freedom to formulate and pursue their own projects without warrant from other citizens or the state, and the value we place upon our collective power, primarily through law and politics, to change and maintain the social and related structures in which we live'.[75] As such, the common law stands in opposition to legislation which classically is concerned with 'collective project pursuit'.[76] Legislation 'confers and regulates powers that are to be exercised, not for the benefit of the individual power-holder, but for and on behalf of the collectivity'.[77] In other words, legislation is a tool through which effect can be given to the inherently contestable and political decisions as to how the interests of the collective ought to be pursued. It enables the subordination of the individual's private projects to the interests of the collective as understood by the legislature. The focus of the common law, on the other hand, is the individual person and the adjudication of disputes between individual persons. The establishment of rules that permit each individual to pursue her or his autonomy to the greatest extent that is consistent with an identical autonomy for each other person is a by-product of the adjudication of disputes.

This is not to say that legislation does not, on occasion, facilitate 'individual project pursuit'[78] by establishing or restating rules of individual conduct. Additionally, legislation may, for reasons associated with the administration of justice, restrict the ways in which individual projects may be pursued. For example, the *Statute of Frauds* provisions are predicated on the idea that individuals have projects which

73 N E Simmonds, 'The Possibility of Private Law' in John Tasioulas (ed), *Laws, Values and Social Practices* (Dartmouth, 1997) 129, 144. A similar analysis of what differentiates public and private law is advanced by Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003) 247, 274 and by William Lucy, 'What's Private about Private Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 47, 58. There are, of course, those who take a different view of the common law: see, eg, Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003). Such views, however, tend to deny any possibility of any systematic analysis of the common law and are thus self-defeating: see, eg, Allan Beever and Charles Rickett, 'Interpretative Legal Theory and the Academic Lawyer' (2005) 68 *Modern Law Review* 320.

74 Simmonds, 'The Possibility of Private Law', above n 73, 145.

75 Lucy, above n 73, 58, citing Simmonds, 'The Possibility of Private Law', above n 73, 144.

76 Simmonds, 'The Possibility of Private Law', above n 73, 144. See also Lucy, above n 73, 59; Cane, 'Accountability and the Public/Private Distinction', above n 73, 274.

77 Simmonds, 'The Possibility of Private Law', above n 73, 145.

78 One might give as an example here modern consumer legislation, such as the *Australian Consumer Law*. Insofar as this seeks to redress the asymmetry of information as between retailer and consumer, it may be said to support individual project pursuit. See, eg, Commonwealth Consumer Affairs Advisory Council, 'Consumer Rights: Statutory Implied Conditions and Warranties' (Issues Paper, Commonwealth of Australia, July 2009).

they wish to pursue but provide that the person who chooses to create or dispose of an interest in land must adopt particular formalities.[79] Such provisions override individual autonomy in cases in which the required formalities or evidential requirements are not satisfied but they are, nonetheless, integrated with the common law rules which facilitate individual autonomy in creating or disposing of interests in land. The effect of those provisions is, in turn, tempered by an accretion of equitable doctrine around them. Equity ensures that the requirements of form cannot be used to block the enforcement of rights where the evidence of an intention to create or transfer an interest in land is overwhelming.[80] There is a symbiosis of common law, statute law and equity which facilitates the individual projects of the parties to the extent that there is a reasonable level of assurance that the alleged transaction does, in fact, represent a meeting of two individual projects.

Equally, the common law can and does serve the public interest. There are likely to be many instances in which this is the case. However, we should not confuse the effects of rules with the rationale or justification for those rules. Thus, for example, the fact that the law of tort imposes liability for injuries may have the effect of improving public safety. Judges may have regularly referred to historical or anticipated effects in their reasons for judgment. That does not mean that improving public safety is the rationale of or justification for these rules.[81] The rules of the law of tort are historically and, arguably, intrinsically about the pursuit of private projects. Tort law restricts the means that individuals may adopt to pursue their personal projects, so that each person's freedom to pursue personal projects is consistent with an identical freedom of every other person. The fact that following a particular rule has improved public safety — assuming that the aggregate effect on public safety can be measured — is a reasonable motive for not abolishing the rule once it has become the rule, but it does not retrospectively justify restricting particular defendants as to the means that they may adopt in the pursuit of their personal projects. The imposition of individual duties to refrain from certain types of means is characteristic of tort law and reflects tort law's concern with each person's use of the means at her or his disposal in a way which is consistent with every other person's enjoyment of a similar freedom. It may be said, at the risk of repeating the point, that the fact that tort law has had the effect of improving public safety is a reason for persisting with tort law but it does not explain why tort law takes the particular form that it takes.

79 See, eg, *Property Law Act 1958* (Vic) ss 53(1)(a)–(c).

80 The doctrines of part performance and 'common intention' constructive trusts are examples of this accretion of equitable doctrine.

81 The fact that, on occasion, courts considering common law rules may have introduced public interest considerations as justifications for their decisions may explain why some areas of the law seem so resistant to coherent explanation. The law of negligence appears to suffer from this malaise. See especially Allan Beever, 'Formalism in Music and Law' (2011) 61 *University of Toronto Law Journal* 213, 234; Allan Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, 2013) 266 (the anecdote about the boy smashing his brother's toy). See also Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87 — concerning deterrence as effect (but not rationale).

If, as MacCormick said, 'the coherence of a set of [legal rules] is a function of its justifiability under higher order principles or values',[82] then the interpretation of legal rules is a question of whether the application of a particular rule to a particular factual situation is justifiable in terms of the higher order principles or values which are thought to give coherence to the set of legal rules. Interpretations which maintain the coherence of the set in terms of the relevant principles or values are to be preferred to those which undermine it. Simmonds observed that, where interpretation of rules proceeds by asking whether applying the rule to a particular fact pattern furthers a collective goal, 'our sphere of private immunity' is insecure.[83] He suggested that '[l]egal rules will exhibit the highest degree of determinacy of meaning, and will be most resistant to the possibilities of degeneration into bureaucratic "purposive" interpretation, when the rules reflect understandings and expectations that already characterize the community regulated by the legal rules'.[84] Where rules are understood as expressing expectations about proper modes of interpersonal conduct, those rules define a sphere within which individuals may pursue their individual projects. Where rules are understood in terms of the pursuit of collective goals, there cannot be any protected sphere for the pursuit of individual projects. Every claim to a domain of free action would be defeated wherever pursuit of a collective goal demands it. Only a system of legal rules which finds its coherence in the forms of the established constraints and the principles or values which provide the best possible justification for those constraints can be a system of *private* law in the sense intended by Simmonds.[85]

C *Normative Values*

It may be that the ultimate normative and moral values which legislation and common instantiate are incommensurate and incompatible. Weinrib has offered a view of the law as the manifestation of one of two broad conceptions of justice: corrective justice or distributive justice.[86] The common law, or at least the private law, is to be understood in terms of a highly sophisticated combination of Aristotelian corrective justice and Kantian right. Thus, the private law is to be understood as manifesting two principal features. First, corrective justice is concerned to restore, repair, or correct an injustice that has occurred as between

82 MacCormick, above n 19, 238.

83 Simmonds, 'The Possibility of Private Law', above n 73, 146.

84 Ibid 147 (citations omitted).

85 Simmonds' position is, in this respect, similar to that of F A Hayek:

> the only method yet discovered of defining a range of expectations which will be … protected, and thereby reducing the mutual interference of people's actions with each other's intentions, is to demarcate for every individual a range of permitted actions by designating (or rather making recognizable by the application of rules to the concrete facts) ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded.

F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge & Kegan Paul, first published 1973–79, 1982 ed) vol 1, 107.

86 Weinrib, *The Idea of Private Law*, above n 48, 61.

the parties to a transaction or relationship. Thus, fundamentally, corrective justice is concerned with the reasons for recognising a duty to restore, repair or correct and the circumstances in which that duty arises. Secondly, and possibly more importantly, corrective justice manifests a bipolar or correlative structure that links plaintiff and defendant, right and wrong, and losses and gains together as part of a single conception and not as separate, coincidental considerations. The correlative, bipolar structure, manifested in law in the right-duty relationship, allows for no considerations other than those arising out of the transactional relation of the parties. Thus for example, in seeking to correct the injustice arising from an injury to X caused by Y, the law cannot admit considerations such as whether the imposition of liability would be efficient or would promote societal aims. Distributive justice, on the other hand, is about the just distribution of the goods of a society.[87] It is, therefore, not concerned with the justice of the position as between a plaintiff and a defendant, but is concerned with justice at a societal level. Thus, for example, that particular form of distributive justice called utilitarianism seeks to maximise the overall utility of society, but is largely unconcerned with the effects on particular individuals. As such, it may subordinate the interests of the individual to the needs of the group.[88] Legislation, insofar as it is concerned with the collective interest and common aims, thus seems to instantiate concerns associated with distributive justice.

In Weinrib's view, corrective justice and distributive justice are fundamentally distinct conceptions that exist in binary opposition.[89] They are, therefore, fundamentally incompatible and incommensurable. On this basis, the legal rules that instantiate these two forms of justice must also be incompatible and any attempt to render them coherent would be misguided, impossible and inappropriate. In holding this view, Weinrib appears to accept that the incompatibility of the two forms of justice is a matter of a priori logic. There are, however, other accounts of private law which do not accept this premise and attempt to combine corrective justice and distributive justice. Prominent among them is the account given by Hanoch Dagan,[90] in which the role of distributive justice was to set a baseline distribution of benefits and burdens for the parties' relationship and the role of corrective justice was to restore the parties to the baseline distribution wherever it has been disturbed.[91] Dagan argued that the initial entitlements of the parties are

87 The literature on the question of distributive justice is immense, but for present purposes see Lon L Fuller, 'Some Reflections on Legal and Economic Freedoms — A Review of Robert L Hale's "Freedom Through Law"' (1954) 54 *Columbia Law Review* 70, 81; Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 *Oxford Journal of Legal Studies* 213.

88 The fact that '[u]tilitarianism does not take seriously the distinction between persons' is one major source of criticism: Rawls, above n 16, 27.

89 Weinrib, *The Idea of Private Law*, above n 48, 61–3.

90 Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 *Michigan Law Review* 138.

91 Ibid 150.

defined by reference to 'the social vision respecting the parties' relationship'.[92] A limitation of such accounts, from Weinrib's perspective, is that the justification of the baseline distribution cannot proceed from within an adjudication with respect to a particular bipolar transaction:

> Corrective justice involves no decision as to the selection of a collective purpose. When construing a transaction in accordance with corrective justice, the adjudicator does not choose one scheme of correction over another but rather specifies the meaning of corrective justice with respect to the transaction in question. The contrast with distributive justice is stark. The varieties of distribution are the various ways of mediating relationships through different distributive purposes, but for the relationship of doer and sufferer, a single conception of corrective justice gets worked out in accordance with the transaction's particular facts and history.[93]

A distributive consideration or a particular compromise between two or more such considerations can justify the liability of one party to a transaction to the other through the decision of a body which has the authority to select among the possible distributions and engineer compromises between different distributional criteria — namely, a legislature. Dagan does, however, acknowledge that 'open normative discussion'[94] was needed in order to choose among the various possible distributions for a particular class of relationships, but maintained that it was inevitable that the initial entitlements of parties would be determined by such distributive choices.[95] Accordingly, Dagan accepts as inevitable a level of incoherence (relative to the more exacting definition of coherence) which Weinrib does not.

John Gardner also sees distributive justice considerations at work in the private law, at least in the law of torts. While he accepts that corrective justice is a necessary part of any explanation of the law of torts,[96] Gardner sees tort litigation as involving localised distributive justice in the sense that the apparatus for adjudicating disputes necessarily involves the distribution of access to court-based adjudication and enforcement of claims.[97] However, Gardner's thesis conflates two conceptually distinct questions. On the one hand, there is the question of

92 Ibid 153. Accounts of particular areas of private law which are similar to Dagan's account are Peter Cane, 'Distributive Justice and Tort Law' [2001] *New Zealand Law Review* 401; Matthew Harding, 'Constructive Trusts and Distributive Justice' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 19. Another leading corrective justice theorist, Jules Coleman, does not dismiss the possibility that corrective justice and distributive justice can be combined: Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001) 53.

93 Weinrib, *The Idea of Private Law,* above n 48, 211–12.

94 Dagan, 'The Distributive Foundation of Corrective Justice', above n 90, 152–3.

95 Ibid 153. Similarly, Cane was of the view that tort cases inevitably gave rise to distributive questions and suggested that there were only two ways of dealing with the problem — '[e]ither courts must be barred … from dealing with cases that raise distributive issues that are … more appropriately dealt with by another branch of government, or steps must be taken to make good the "democratic deficit" under which courts labour': Cane, 'Distributive Justice and Tort Law' above n 92, 420.

96 John Gardner, 'What is Tort Law for? Part 1: The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1.

97 John Gardner, 'What is Tort Law for? Part 2: The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 335.

the intelligibility of claims by one party to an interaction against another, which arise independently of the existence of a system of adjudication and for the actualisation of which the system of adjudication is brought into existence. On the other hand, there is the matter of the institutionalisation of the enforcement of intelligible claims through a system of adjudication. Weinrib was concerned with the former question. In focusing upon the system of adjudication,[98] Gardner mistakes the necessarily contingent mechanisms for enforcement for an essential feature of the claim of the individual plaintiff against a particular defendant.[99]

Returning to the question of integrating common law and legislation, it might be observed that an important difference between distributive justice and corrective justice accounts is the pluralism of the former, in their openness to a multiplicity of competing distributional criteria, and the monism of the latter. As a monist account, an exclusively corrective justice account is ipso facto a more coherent account of legal practice. Moreover, since distributive justice is necessarily pluralist, the distributional criteria embodied in a statute may conflict with whatever values (distributive or otherwise) that are embedded in the common law or, for that matter, the distributional criteria which inform other statutes. The whole point of a statute may be to override the distributive *effects* of common law rules in relation to particular relationships or transactions.[100] Accordingly, such legislation does not combine with the common law in a single coherent system. It overrides the common law in respect of the relationships or transactions which fall within its ambit. Such coherence as is possible is, therefore, the coherence of non-contradiction rather than the more exacting idea of coherence as the outworking of a single principle.

IV CAN OIL AND WATER MIX?

The age of statutes has not only changed the character of the law, but it also presents the issue of the coherence of the law as an infinitely more acute problem. In the face of the sheer volume of legislation now pouring from parliament, and the extent of its coverage, the silo-approach to the relationship between legislation and common law is no longer viable, as there is now at least as much legislative oil as there is common law water. For present purposes, the modern reality has two important consequences. First, if the volume and extent of legislation in our law is now such that we cannot plausibly treat legislation as a

98 Ibid 340–4.

99 As merely one means of vindicating a claim, court-based mechanisms cannot be a necessary feature of the claim. Moreover, court-based mechanisms have undergone a huge decline in use in the last 20 years owing to the proliferation of alternative dispute resolution mechanisms: see Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010).

100 For example, the *Family Law Act 1975* (Cth), in requiring the Family Court to consider, in matrimonial property cases, contributions 'made in the capacity of homemaker or parent': at s 79(4)(c), and 'the physical and mental capacity of each of [the parties] for appropriate gainful employment': at ss 75(2)(b), 79(4)(e), would appear to be concerned with ensuring more favourable outcomes for non-breadwinner parties to marriages than would be possible under the common law and equitable principles, which focus upon financial contributions.

mere exception that operates only at the level of bare rules and does not disturb the underlying normative coherence of the common law, then the coherence of the law is moving further from our grasp. To the extent that we regard coherence as a fundamental quality and condition of law (as distinct from other forms of social organisation), the presence of two incompatible bodies of law threatens the very legitimacy and moral authority of our legal system as a *legal* system. Secondly, from the perspective of the issue of the coherence of the law, the rule of parliamentary supremacy as the means of resolving inconsistencies (at least at the level of principle or policy) may no longer be an adequate or appropriate meta-principle.[101] While the rule of parliamentary supremacy may be able to continue to resolve particular inconsistencies between particular rules, each time this occurs, and the prevailing rule is at odds with the deeper principles and normative values of the common law, more of the normative coherence of the common law is compromised. As mentioned, when statutes were narrower in their scope and targeted at specific defects in the pre-existing law, as was the case historically, the coherence of the law was compromised only infrequently or only in a small number of defined areas. Thus, the level of incoherence introduced did not threaten the overall coherence of the law. However, the explosion in legislation means that the likelihood of common law rules conflicting with statutory rules is now much greater, so the level of incoherence being introduced into the common law is also much greater. We are, therefore, presented with the question of how we should understand the relationship between legislation and the common law and, in particular, how we might integrate the oil and water of our legal system.

One solution to the incoherence generated by the incompatible normative bases of legislation and common law is simply to live with the normative incoherence and, as the High Court seems content to do, address those inconsistencies as and when they manifest themselves as incompatible rules. This solution would pay homage to the practical tradition that has always marked out the common law from its Civilian neighbours and would represent an acceptance that, while the law might not work in theory, it still works in the vast majority of cases as a reason for action for its subjects and as a dispute resolution mechanism.[102] This solution would also reflect a frank recognition that, if the trend of increasing legislative coverage of areas formerly the province of the common law continues, the issue will eventually cease to be of importance as 'pure common law'[103] is increasingly relegated to a few obscure backwaters of the law. Whether this is a good thing or not is beyond the scope of this paper, but it is impossible to deny the 'incremental

101 In any event the idea of the supremacy of legislation may be a relatively recent development. Both Stone and Pound suggest that it only became firmly entrenched after the Glorious Revolution of 1688: Justice Harlan F Stone, 'The Common Law in the United States' (1936) 50 *Harvard Law Review* 4; Pound, above n 14, 392, citing Brinton Coxe, *An Essay on Judicial Power and Unconstitutional Legislation: Being a Commentary on Parts of the Constitution of the United States* (Kay and Brother, 1893) 179.

102 The phrase, '[w]ell, it may be all right in practice, but it will never work in theory' is attributed to Warren Buffett: see Letter from Warren Buffett to Shareholders of Berkshire Hathaway Inc, 25 February 1985 <http://www.berkshirehathaway.com/letters/1984.html>.

103 As opposed to 'statute-based common law', which develops as a more civil law style gloss on the statute: see Burrows, above n 5, 240.

codification' or the 'civilising' trend apparent in many areas of Australian law.[104] As both federal and state legislatures churn out ever more legislation, the issue of coherence will be less concerned with the relationship between common law and statute than with the relationship between federal and state statutes.[105]

The idea of coherence as non-contradiction sits well with what has probably been the dominant account of the concept of law in the Anglo-Australian tradition, namely legal positivism. In this tradition, Hobbes, Bentham, Austin, Kelsen and, most recently, H L A Hart, have contributed to a view of law as 'posited' as opposed to given. Although there are sharp differences within legal positivism, all would agree that, at its core, positivism is about the idea that 'whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits'.[106] Positivism thus identifies what counts as law by the criterion of its source: it is 'law' if its source (whether that be a text or the actions of particular institution or official) is one that the legal system recognises as authoritative. In Hart's work, the source/authority criterion was labelled the 'rule of recognition'.[107] If a purported rule satisfies the rule of recognition (for example, it was enacted by the 'Queen in Parliament'), then it qualifies as 'law', irrespective of whether the rule so enacted fails to cohere with the rest of the law. Hart's rule of recognition idea is not logically confined to an idea that legal validity depends upon the endorsement of a sovereign legislature of unlimited power but Hart contemplated that the existence of a rule of recognition for a legal system, whatever its precise content, 'is a matter of fact'.[108] For Hart, a rule of recognition was concerned with *whose* pronouncements counted as a source of valid rules rather than with content-based criteria.[109] Therefore, in relation to the interaction of common law and legislation, as long as legal propositions which satisfy the applicable source/authority criterion do not prescribe contradictory outcomes in particular cases, the law can adequately do its work of supplying 'standards of correct judicial decision'.[110] The meta-principle of Parliamentary

104 See, eg, Lord Jonathan Mance, 'Is Europe Aiming to Civilise the Common Law' (2007) 18 *European Business Law Review* 77. One suspects the term 'civilise' was intended to be provocative.

105 See, eg, McDonald, above n 13, 454, in the context of the fractured and inconsistent pattern of federal and state tort law legislation. Such is the intrusion of legislation into the common law and the inconsistencies between federal and state legislation that, even though there is a single final court of appeal, it is difficult to take seriously the idea that there can be an Australian common law. See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 62 (Gleeson CJ, Gaudron and Gummow JJ); cf Chief Justice Robert French, 'Trusts and Statutes' (2015) 39 *Melbourne University Law Review* 629, 631.

106 John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, 199.

107 H L A Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 94.

108 Ibid 110.

109 Note that in the postscript to the second and third editions of *The Concept of Law*, Hart denied that his theory was a 'plain-fact theory of positivism', but also rejected the idea (which he attributed to Dworkin) that 'the purpose of law is to justify the use of coercion': ibid 248; H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 248.

110 This phrase is taken from Hart. Hart (in talking about the possibility of judicial development of the law) said:

> At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision.

Hart, *The Concept of Law*, above n 107, 145.

supremacy provides, in effect, that the common law cannot contradict statute law, so as to provide the necessary determinacy.

This solution would not satisfy the more exacting idea of coherence that has been discussed in this paper. When applied to law, that idea of coherence casts a negative judgement upon propositions of law which fail to express a higher order principle which animates the system as a whole, notwithstanding that such propositions may satisfy the source/authority criterion. Just as the reasons given by a judge in deciding a case may be subjected to criticism on the basis that they do not represent the best possible fit with the prior adjudicative practice, legislation that meets the source/authority criterion specified by the rule of recognition could be regarded as 'law only in the merely *pre-interpretive* sense'.[111] Its meaning *as law* would have to be determined in the light of an assumption that, whatever the legislature intended, it did not intend to undermine the coherence of the law. In other words, the interpretation of legislation would proceed on an assumption that it forms part of the same system as the pre-existing law, the existence of *system* (as opposed to an ad hoc accumulation of propositions which fortuitously do not contradict) being a fundamental characteristic of law.[112] As Simmonds has said, 'the judicial task is one of fidelity, not to a rule of recognition, but to the idea of law itself'.[113] It is not being proposed that legislation that fails the coherence test should be seen as invalid. The solution that is being proposed represents a movement away from the 'bivalence of legal validity and invalidity' of particular rules and towards an enquiry as to what extent the practice of a particular community counts as a legal system, which is 'a matter of degree'.[114] Such a solution would still require a rule of recognition to identify what practices have to be surveyed and interpreted in order to find the law.

At least two objections to this idea might be anticipated. First, the idea that the meaning of a statutory text might be influenced by the needs of coherence faces the objection that it is inconsistent with the constitutional supremacy of Parliament and of legislation.[115] On the other hand, such an approach is entirely consistent with the idea that courts are established to interpret the law and are, accordingly, the final arbiters of meaning for both common law and legislative rules. As the comments of the High Court discussed above illustrate, it is an entirely proper part of the judicial function to seek coherence in the law through the process of interpretation. The work of judges and scholars is and has always

111 T R S Allan, 'Interpretation, Injustice, and Integrity' (2016) 36 *Oxford Journal of Legal Studies* 58, 67.

112 A similar idea is found in Beatson, above n 9, 313: 'It is the task of commentators and judges to realise "the idea of a unified system of judge made and statute law woven into a seamless web by the processes of adjudication"', citing Stone, above n 101, 12. See also Lon L Fuller, *Anatomy of the Law* (Frederick A Praeger, 1968) 94 (emphasis in original):

> Those responsible for creating and administering a body of legal rules will always be confronted by a *problem of system*. The rules applied to the decision of the individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure.

113 N E Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007) 157.

114 Ibid.

115 McLeish, above n 2, 834.

been to seek to provide the best, most consistent and coherent explanation of what would otherwise be a jumble of ad hoc judicial decisions limited to the particular facts. We are accustomed to this process in relation to the common law. Indeed, the body of rules and principles that we call the common law is the product of a process of incremental interpretation and reinterpretation of the mass of legal materials slowly approaching, but never reaching, complete coherence. The same is true of legislation. As Justice Gageler has recently noted:

> Over time, the meaning of a statutory text is reinformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases. The meaning of a statutory text is also informed, and reinformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists.[116]

Of course, the ability or appropriateness of the court's efforts to integrate legislation into the totality of the law is necessarily limited by the principle of 'judicial economy'.[117] The function of the courts is, first and foremost, to resolve the particular disputes between the parties that come before them and the extent to which even a final appellate court should adopt a prescriptive or 'top down' view of the law continues to be a matter for debate. Nevertheless, it is the case that, whatever may be the content of the principle of parliamentary supremacy, it is for the courts to determine the meaning of a statutory text. A legislature which is unhappy with a judicial interpretation of a statutory text has no remedy apart from amending the statutory text so as to provide a text which better conveys the legislature's original intention.

The second conceivable objection is that while we may all agree that coherence is a worthy aspiration, it can never be more than an aspiration. In Raz's hands, this objection rests on the apparently empirical observation that the processes that create law, both legislative and adjudicative, are fundamentally political processes that reflect compromises and pragmatism. Thus, while we may find pockets of coherence in the law, the law as a whole is necessarily the untidy 'debris of past political struggles'.[118] As discussed above, while legislation is necessarily a political process, this is not obviously true of the common law, and in particular the private law. In any event, even if it is true that legislation is inherently incoherent, this may be seen as an argument in favour of a coherence criterion. If we accept, as even Raz does, that coherence is a good thing, it surely follows that we ought to try to work the legislation 'pure'.[119] A court must interpret that text as part of the totality of the law and, like the builders of Neurath's ship, the courts must constantly strive to remake the law out of the best materials available.[120] The fact that the pursuit of coherence is difficult is not a reason for not trying, as Peter Birks reminded us:

116 Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash University Law Review* 1, 1–2.

117 Ibid 3.

118 Raz, above n 17, 280.

119 See Corbin, above n 14, 672 n 15.

120 Otto Neurath, 'Protocol Sentences' (George Schick trans) in A J Ayer (ed), *Logical Positivism* (Free Press, 1959) 199, 201.

> there hangs in the balance the question whether the pursuit of rationality in law, which is certainly exceedingly arduous, will be laid aside before it has been properly tried. … As the difficulty of saintliness is no argument in favour of unrestrained evil, so the impossibility of perfectly attaining these goals is no argument for preferring unrestrained intellectual disorder. Disorderly law is no more than an alibi for illegitimate power.[121]

V CONCLUSION

In a number of cases over the last decade, the High Court of Australia has identified coherence in the law as an important objective. Moreover, the High Court seems to have suggested that the objective is and ought to be coherence of the totality of the common law and legislation as a seamless whole. On closer examination, however, the High Court seems to have meant only that the rules of the common law and legislation should be free of internal inconsistency and contradiction. Understood in this way, the pursuit of coherence is a manageable task. Insofar as the common law and legislation reflect fundamentally different organising principles and normative values, the pursuit of a thorough normative coherence between common law and legislation would constitute a radical departure from certain prevalent assumptions about the relationship between these two bodies of law, whatever may be the attractions of a thoroughly coherent law. In the face of the enormous proliferation of legislation in recent years, and the greater inroads legislation is making into areas that were hitherto the sole domain of the common law, we are left with the pressing question of how we deal with the inconsistencies between common law rules and statutory rules.

121 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *Western Australian Law Review* 1, 99. See also French, above n 105, 631.