KEEPING PUBLIC LAW IN ITS PLACE

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I INTRODUCTION

Suri Ratnapala has lately been known as the Professor of Public Law at the University of Queensland. Yet, to think of Professor Ratnapala as a *public* law scholar fails to capture fully his contribution to legal education and scholarship. The focus of this article is upon the boundary between public law and private law. It defends the notion that there is an idea of private law which is fairly stable and conceptually distinct from public law. The existence of a fairly stable conceptual distinction does not rule out all disputes about how particular areas of human activity ought to be regulated. Moreover, the argument herein is not an argument that the common law of contract, tort, property and so on should be immune from legislative reform. The argument is merely that it makes sense to speak of a realm of private law which represents a distinct form of social ordering as compared to public law and that the distinction has important implications for legal interpretation and reasoning. The argument draws upon some of the major themes of Professor Ratnapala's jurisprudential writing, particularly his engagement with the thought of Friedrich Hayek.

II WHAT IS PRIVATE LAW?

Kit Barker has defined 'private law' as 'that body of positive law which governs relationships between private individuals (natural or otherwise), as opposed to the relationship between individuals and the state acting in its capacity as mediator of the public good'.[1] On this definition, contract law, tort law and the law of property are private law because they are concerned with the rights that one individual may assert against another. The state need not be directly involved in private law relationships, although it may be involved in private law as a legislator – in so far as those rights are, from time to time, clarified or modified by legislation – or as an adjudicator – in so far as there is a dispute about whether one individual has infringed the rights of another. In neither of these cases is the state a participant in a private law relationship. It stands outside of the relationship as a guarantor or, sometimes, a conferrer of rights. Of course, states or organs of states may enter into private law relationships with other private actors. A government department which makes a contract to acquire a supply of paper clips is a private actor whose relationship with the supplier of paper clips is a private law relationship – specifically, a contractual relationship. Of course, there may be matters of public interest which are seen to require government bodies to follow certain procedures when entering into contracts. These are matters of the government's obligations to the community as a whole, so should be classified as public law. The relationship with the supplier, by contrast, is fundamentally private in character.

What distinguishes public law from private law, according to Barker's definition, is that public law is concerned with the state's role as 'mediator of the public good'.[2]

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1 Kit Barker, 'Private Law: Key Encounters with Public Law' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 3-4.

2 Ibid.

William Lucy and Alexander Williams have observed that the distinction between private interest and public interest had a 'vivid life' in republican Rome, where the *res publica* referred to 'matters of concern to the community of Roman citizens in general, including their interest in various public spaces (the Forum and so on)'.[3] In the contemporary Anglo-Australian context, constitutional law and administrative law are clearly public law because they are concerned with the boundaries of the state's power to make and enforce laws and otherwise to carry out activities in the public interest. Criminal law is, somewhat more tentatively, public law in so far as the state is seen to have a monopoly upon the power to punish wrongdoers for the sake of maintaining the peace and good order of the community as a whole. In other words, the definition assumes that there is a distinction between private interests and individual good, on the one hand, and public interests and public good, on the other.

Several cautionary notes should be sounded at this point. First, a distinction can be drawn between the *rationale* of a rule and its *effects*. More specifically, it is possible to draw a distinction between rules of law which are justified and rationalised in terms of the public interest and rules of law which happen to serve public interests without necessarily having been designed to have those effects. For example, rules about personal liability for injuries may have an effect of improving public safety and the law of contract may ultimately provide a more efficient means of allocation of resources than allocation by a central authority. Yet, even if one can attribute a beneficial effect to the general observance of a particular rule or set of rules, one cannot necessarily impute a rationale of public safety or economic efficiency to the originators of the rule or set of rules. General obedience to a rule may be attributable to the fact that it happens to serve the interests of numerous individuals – but that is altogether different from saying that a rule has a public interest rationale. The beneficial effects are 'positive externalities'[4] rather than something internal to the rule.

Secondly, as Lucy and Williams have noted, a weakness of a distinction drawn in terms of interests is that the public interest is always contrasted with 'those matters of concern only to individuals as individuals rather than individuals qua members of subgroups within the community'.[5] Lucy and Williams have noted that there are areas of Anglo-Australian law in which the law recognises a public interest where the group of people who share that interest falls short of the community as a whole. For example, a purpose of a trust may be characterised as being for the public benefit, so as to be the object of a charitable trust enforceable under the fiat of the Attorney-General, 'even if it benefits only a small number of people in a particular locality'.[6] The matter of public benefit in the charity context is not a matter of whether all or most or a significant portion of the community benefit from the carrying out of the purpose. It is a question of whether the class of potential beneficiaries is *not private* in character. It has been said that the question of what classes are private or public is 'a question of degree'.[7] Of

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3 William Lucy and Alexander Williams, 'Public and Private: Neither Deep nor Meaningful?' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law*, above n 1, 47.

4 Allan Beever, 'Formalism in Music and the Law' (2011) 61 *University of Toronto Law Journal* 213, 234.

5 Lucy and Williams, above n 3, 47-48.

6 Ibid 49.

7 *Dingle v Turner* [1972] AC 601, 624 (Lord Cross of Chelsea). Earlier in his reasons, Lord Cross stated that the '[t]he blind can naturally be described as a section of the public ... [because] what they have in common – their blindness – does not join them together in such a way that they could be called a private class'. His Lordship contrasted that class with a class consisting of 'the descendants of Mr Gladstone'. See also *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, in which Lord Simonds (at 306) spoke of 'a trust established by a father for the

course, even though the line between public benefit and private benefit may be difficult to draw in practice, the necessity of drawing such a line is directly related to a distinction on the basis of interests. Characterising a benefit as a *public* benefit provides the justification for the Attorney-General (i.e. a *public* official) lending the name of her or his office to legal proceedings for the enforcement of a privately-established trust. The establishment of the trust may have been a private act but the enactment of the settlor's purpose is capable of having beneficial effects for more than a finite class of individuals.

Thirdly, it needs to be acknowledged that, in a democratic political environment, private law as it has been received through case law may be found to conflict with or undermine the public interest as it comes to be defined through democratic deliberation. As Barker has remarked, '[a]s law increasingly claims its legitimacy from democracy, so democracy sets law to work in the delivery of its political ends'.[8] Legislative modification of the received law may be public, in the sense that it is motivated and justified in terms of the interests of the community as a whole, but private, in the sense that its method of serving the public interest is to regulate relationships between individuals. For example, anti-discrimination laws regulate private relationships, such as employment relationships and relationships concerned with the supply of goods and services, but are motivated and publicly justified, at least in part, by a belief that eliminating or reducing disadvantages suffered by members of particular groups within the community produces benefits for the community as a whole.[9] Therefore, the distinction between public law and private law does not correspond precisely with the distinction between legislation and law which emerges from adjudication. At the very least, one can distinguish between legislation which is public in the classical sense of regulating the operation of government as mediator of the public interest and legislation which regulates relationships between individuals.

Finally, mention should be made of another version of the public-private distinction contemplated by Lucy and Williams. That version of the distinction relates to 'the various doctrinal and procedural differences between private and public *law*'.[10] Lucy and Williams remarked that the set of differences which exist in English law are not 'the only possible set' and 'might simply be a historical accident rather than a well-founded and valuable means of distinguishing private and public law'.[11] The distinction between public law and private law may be of practical significance for the presentation of cases within a particular legal jurisdiction, but it 'seems rarely in and of itself dispositive'.[12] A purely doctrinal-procedural version of the distinction leaves open the possibility that the distinction 'might be drawn in a morally or politically mistaken way'.[13]

The story might be summarised as follows. Fundamentally, the distinction between private law and public law is a distinction between rules which govern relationships between individuals and rules which govern the relationship between the

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education of his son' as being 'at the bottom of the scale' (i.e. private), while 'the establishment of a college or university' was 'at the other end of the scale' (i.e. public).

8 Barker, above n 1, 5.

9 See, for example, Law Reform Commission New South Wales, Report 92 (1999) – Review of the *Anti-Discrimination Act 1977* (NSW) par 1.8, which refers to increases of productivity and the 'net welfare of society' when 'the self esteem of discriminated [sic] groups is elevated and people reach their full potential', and Clause 6 of the Preamble to the *Anti-Discrimination Act 1991* (Qld), which refers to the improvement of 'democratic life' which comes from a community which is 'appreciative and respectful of the dignity and worth of everyone'.

10 Lucy and Williams, above n 3, 64 (italics added).

11 Ibid.

12 Ibid 65.

13 Ibid 66.

state and its citizens. This distinction is closely related to another distinction, namely the distinction between private interests, which are protected by the complex of rights and duties which governs the relationships between individuals, and interests which are held collectively by the community as a whole. Public law can be limited to the protection of the latter group of interests, thereby excluding the state's activity as a private actor. The stability of this distinction is undermined by the possibility of a democratic state using its legislative power to modify the rights and duties which govern relationships between individuals in order to further the public interest – or, at least, a democratically-determined view of where the public interest lies. There are good reasons for doubting that 'private law' and 'public law' signify two hermitically-sealed departments of legal principle,[14] but rejection of the thesis that the two bodies of law never interact need not entail complete scepticism about the value of the distinction. Even though the line between private law and public law is not always clear, it is possible to speak of law which is classically private and law which is classically public. Sophisticated legal systems will consist of both types of law and the distinction has important implications for legal reasoning within those systems. The lynchpin of the argument that follows is that the word 'law' signifies something different when we speak of 'private law' compared to what it signifies when we speak of 'public law'.

III TWO MEANINGS OF 'LAW'

In a posthumously published paper, Lon L Fuller spoke of two forms of social ordering. He called these 'organization by common aims' and 'organization by reciprocity'.[15] The former 'requires that the participants want the same thing or things'.[16] In other words, a necessary prerequisite is 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 'proper province' of reciprocity, on the other hand, 'lies in that area where divergent human objectives exist'.[17] Private law is, at its core, a matter of reciprocity. In relation to a contract of sale, a buyer wants the goods offered for sale by the seller and the seller wants the buyer's money. An exchange takes place at the price at which the seller would prefer to have the money to the goods and the buyer would prefer to have the goods to the money.[18] In this way, the notion that there is a contract which the parties must perform is a matter of the individual interests of the parties to that contract.

As noted in the previous section, the existence of the institution of contract may serve a public interest in so far as the community as a whole is interested in the individual members of the community being enriched in the ways that contractual exchanges enable, yet all of the individuals who are enriched by contractual exchanges are enriched in particular ways in which they, as individuals, are interested. Fuller spoke of a 'general tendency ... to obscure the role of reciprocity as an organizing principle and to convert everything into "social policy", which is another way of saying that all organization is by common aims'.[19] The rationale of the rule that

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14 Morton J Horwitz, 'A History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423, 1425-1426; see also Barker, above n 1, 5-6.

15 Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 357.

16 Ibid 358.

17 Ibid 359.

18 Ibid.

19 Ibid 386.

contractual undertakings ought to be performed is that it is right to perform such undertakings. The notion such undertakings ought to be performed arises from a 'generally shared conception of right and wrong that could gradually be crystallized into legal doctrine'.[20] In this way, law has 'been built on community'.[21] The opposite view, i.e. that the law should provide for the enforcement of contractual undertakings *because* the performance of those undertakings is beneficial to the community – so that community is built on law – might confuse rationale with effect. Lionel Smith has made the same point by saying that legal liability for assault may deter people from punching others, but to acknowledge this is to make an observation about the *effect* of a legal institution – in this case, the 'right to bodily integrity'.[22] Of course, it is socially beneficial that most people refrain from punching other people most of the time but, as Smith has remarked, it would be 'slightly ridiculous to suggest that my right to bodily integrity arises *in order to* deter' people from punching one another.[23] Once it is recognised that it is wrong for one person to punch another, recognition of a person's legal right not to be punched requires no further justification.

The distinction between social ordering by common aims and social ordering by reciprocity, then, is a distinction between the use of power and authority to pursue shared objectives while the latter involves the common observance (by pairs or groups of individuals) of certain modes of conduct which have tended to facilitate the pursuit by the individuals of their individual objectives. The former is predicated upon communal objectives while the latter is predicated upon a shared view about the right forms of interpersonal conduct. As Fuller noted, reciprocity may be manifest in highly formalised relationships, such as contracts or treaties, or consist merely of 'a tacit perception of the advantages of an association, scarcely rising to consciousness'.[24]

Fuller's main object, in the paper being discussed, was to discern the limits of adjudication – that is, whether there are certain types of social tasks which 'by their intrinsic nature fall beyond the proper limits of adjudication'.[25] Adjudication involves the resolution of a dispute between two or more persons.[26] Its distinguishing feature is that 'it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor'.[27] Adjudication demands a form of rationality which is not demanded of political deliberation or voting. Fuller explained the matter in the following way:

> This problem can be approached somewhat obliquely ... by asking what is implied by "a right" or by "a claim of right." If I say to someone, "Give me that!" I do not necessarily assert a right. I may be begging for an act of charity, or I may be threatening to take by force something to which I admittedly have no right. On the other hand, if I say, "Give that to me, I have a right to it," I necessarily assert the existence of some principle or standard by which my "right" can be tested.[28]

Fuller emphasised that his point was not so much that adjudicators decide only questions of existing right, but that '*whatever* they decide, or *whatever* is submitted to

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20 Ibid 374.
21 Ibid.
22 Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87, 89.
23 Ibid (italics added); see also Beever, above n 4, 234. Beever spoke of the beneficial effects of private law rules as 'positive externalities'.
24 Fuller, above n 15, 358.
25 Ibid 355.
26 Ibid 357. Fuller stated that '[the] normal occasion for a resort to adjudication is when parties are at odds with one another'.
27 Fuller, above n 15, 364.
28 Ibid 368.

them for decision, tends to be converted into a claim of right or an accusation of fault or guilt'.[29] Fuller thought that adjudication was a form of social ordering which was distinct from both ordering by reciprocity and ordering by common aims. Adjudication is predicated upon the existence of a plausible claim that one party to the dispute has a right as to how the other party or parties should behave or should have behaved. It is concerned with relationships between individuals, although it is conceivable that the claim of right might be based either upon rules or undertakings which are the product of reciprocity or upon organisation according to common aims. Adjudication is not an appropriate means of resolving highly 'polycentric' problems.[30] Such problems have to be resolved either by contractual negotiation, i.e. reciprocity, or managerial direction, i.e. organisation according to common aims.[31]

A highly developed variation upon the reciprocity/common aims distinction is to be found in the work of Friedrich Hayek. Hayek distinguished between *cosmos* and *taxis*. The former could also be described as a 'spontaneous order' and the latter as an 'arrangement' or simply an 'organisation'.[32] For Hayek, an important difference – perhaps the most important difference – between the two types of order was that 'not having been deliberately made by men, a *cosmos* has no purpose'.[33] An order which has no purpose, in the sense that it was created *for* a purpose, is still capable of having beneficial effects. Hayek thought that the existence of social order of this type was 'indispensible for the pursuit of any aim'.[34] For Hayek, as for Fuller, the critical distinction was between an order which was defined in terms of shared objectives and an order which accommodated the diverse objectives of individual members of a community:

> While a *cosmos* or spontaneous order has thus no purpose, every *taxis* (arrangement, organisation) presupposes a particular end, and men forming such an organisation must serve the same purposes. A *cosmos* will result from regularities of the behaviour of the elements which it comprises. It is in this sense endogenous, intrinsic or, as the cyberneticians say, a 'self-regulating' or 'self-organising' system. A *taxis*, on the other hand, is determined by an agency which stands outside the order and is in the same sense exogenous or imposed.[35]

Hayek observed the 'the first important corollary' of the distinction is that 'in a *cosmos* knowledge of the facts and purposes which will guide individual action will be those of the acting individuals, while in a *taxis* the knowledge and purposes of the organiser will determine the resulting order'.[36] In Hayek's opinion, the disadvantage of *taxis* compared to *cosmos* was that '[t]he knowledge that can be utilised in such an organisation will therefore always be more limited than in a spontaneous order where all the knowledge possessed by the elements can be taken into account in forming the order without this knowledge first being transmitted to a central organiser'.[37]

Hayek, as an economist, was concerned with a problem that confronts the formation of both legal and economic order, namely 'the impossibility for anyone of knowing all the particular facts on which the overall order of the activities in a Great

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29 Ibid 369.
30 Ibid 398.
31 Ibid.
32 FA Hayek, 'The Confusion of Language in Political Thought' in *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge Kegan and Paul, 1978).
33 Ibid 73-74.
34 Ibid 74.
35 Ibid.
36 Ibid 75.
37 Ibid.

Society is based'.[38] For an economist, a market price aggregates and conveys information about the willingness of buyers to buy and of sellers to sell. Rules of conduct can, in the same way, be understood by a legal scholar as a means of coping with uncertainty:

> Man has developed rules of conduct not because he knows but because he does not know what the consequences of a particular action will be. And the most characteristic feature of morals and law as we know them is therefore that they consist of rules to be obeyed irrespective of the known effects of the particular action.[39]

A spontaneous order consisting of rules emerges and persists in so far as the general observance of those rules has beneficial effects for the community which observes those rules but, for Hayek, this had nothing to do with those beneficial effects being foreseen and intended. Rules are useful to the extent that 'they have become adapted to the solution of recurring problem situations and thereby help to make the members of the society in which they prevail more effective in the pursuit of their aims'.[40] It is notable that Hayek's emphasis was upon the achievement by individuals of their diverse aims rather than the furtherance of objectives shared by the community as a whole. The order envisaged by Hayek was not one which had been planned by a dominant mind so as to produce particular outcomes which were desired by the community as a whole. The order was and continues to be generated spontaneously and gradually through the actions of many individuals.[41]

Two characteristics of Hayek's spontaneous order should be emphasised at this point. First, Hayek contemplated an order of *actions*, not a collection of *verbal rules*. For order to exist among people who do not share a common purpose, '[i]t is enough that they *know how* to act in accordance with the rules without *knowing that* the rules are such and such in articulated terms'.[42] Occasionally, there may be disagreements between individuals as to how they should act towards each other. The possibility of disagreement generates the need for a public authority to adjudicate upon disputes, which may involve having to translate understandings about right action into verbal formulae.[43] This insight points to a basis for distinguishing between private law and public law. We shall return to that question shortly. Secondly, the order is concerned with *conduct* and not *purposes*. The order must prescribe right forms of conduct because only such an order is compatible with allowing the pursuit of a variety of purposes by individuals:

> [T]he 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 others' 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. ... [R]ules are required which

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38 FA Hayek, *Law, Legislation and Liberty* (Volume II: *The Mirage of Social Justice*) (Routledge Kegan and Paul, 1982) 8.

39 Ibid 20-21.

40 Ibid 21.

41 Hayek's descriptions of the process, apart from 'spontaneous order', included 'social evolution' (Hayek, above n 38, 22) and 'evolutionary selection' (FA Hayek, *The Fatal Conceit: The Errors of Socialism* (The University of Chicago Press, 1989) 6).

42 FA Hayek, *Law, Legislation and Liberty* (Volume I: *Rules and Order*) (Routledge Kegan and Paul, London, 1982) 99.

43 Ibid 97.

> make it possible at each moment to ascertain the boundary of the protected domain of each and thus to distinguish between the *meum* and the *tuum*.[44]

To be clear, individuals can be confident about planning and executing their own purposes only where they can be reasonably certain about what demands they can make of others and others can expect to make of them. Accordingly, individuals are generally prohibited from interfering with the physical body and possessions of others. Generally speaking, Person A cannot demand that Person B devote her or his time or resources to the pursuit of Person A's purposes unless Person B has made a contractual undertaking to do so in the particular ways which Person A demands. Where a contract is made, one party's undertakings are part of the resources which the other party can command in the pursuit of her or his purposes.[45] Individuals may pursue whatever *purposes* they may choose, so long as their *conduct* remains within the bounds of permitted action.

Hayek regarded the common law of his adopted country, England, as an exemplar of a spontaneous order. Hayek said that 'as a necessary consequence of case law procedure, law based on precedent must consist exclusively of end-independent abstract rules of conduct of universal intent which the judges and jurists attempt to distil from earlier decisions'.[46] A common law judge is 'not concerned with what any authority wants done in a particular instance, but with what private persons have legitimate reasons to expect'.[47] Judges will often have to be creative. The rules which have previously been articulated by judges might not directly address the facts of today's dispute. In such a case, the judge will have to 'fill a definite gap in the body of already recognized rules *in a manner that will serve to maintain and improve that order of actions the already existing rules make possible*'.[48] This point has been emphasised by Professor Ratnapala:

> [Hayek's] explanation of the role of the judge stands as the finest theoretical exposition of common law adjudication. The common law's custom based rules adjust gradually to the changes in the factual order of society through the process of adjudication by impartial judges. Judges, when they act as they should, maintain the ongoing order. Their job is maintenance, not construction.[49]

Francis Fukuyama has observed that Hayek's spontaneous order theory of law contained 'both an empirical and a normative assertion' – that is, not only that, as matter of fact, 'law developed in an unplanned, evolutionary manner' but also that 'spontaneously generated law *ought* to be superior to consciously legislated rules'.[50] For Hayek, this superiority had two aspects – that use of the rules of individual conduct which make up the spontaneous order 'considerably extends the range and complexity of actions which can be integrated into a single order' and it 'reduces the power anyone can exercise over it without destroying the order'.[51]

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44 Ibid 107.

45 Kant said that 'what I acquire directly by a contract is not an external thing but rather [the promisor's] deed, by which that thing is brought under my control so that I make it mine': Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, Mary Gregor trans, 1996) [6:274] (Part I, Chapter II, Section II, 'On Contract Right').

46 Hayek, above n 32, 79.

47 Hayek, above n 42, 98.

48 Ibid 100 (italics added).

49 Suri Ratnapala, 'The Jurisprudence of Friedrich A Hayek' in Oliver Marc Hartwich, *The Multi-Layered Hayek* (Centre for Independent Studies, Sydney, 2010) 53-54.

50 Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Profile Books, London, 2011) 253.

51 Hayek, above n 32, 75.

It does not follow from Hayek's normative assertion that a sophisticated legal order can or ought to consist entirely of spontaneously generated rules. First, as Hayek acknowledged, there is a need for 'the occasional intervention of a legislature to extricate [the law] from the dead ends into which the gradual evolution may lead it, or to deal with altogether new problems'.[52] Secondly – but more importantly – there is a need for the establishment of an apparatus for the regular and efficient enforcement of the norms of conduct. Fukuyama has observed that the establishment of English common law as the *common* law of the realm of England required an act of centralised political power in the form of establishment of the Royal courts of justice.[53] The common law, as we know it, has not been entirely the product of spontaneous forces. Yet there is a distinction to be made between the creation of a body of law and the establishment of that law as something which is commonly enforced. H Patrick Glenn[54] has commented upon how the role of central government in the establishment of the common law was procedural rather than substantive:

> The common law grew slowly in the plenitude of laws and legal institutions of medieval England. It did so by the accretion of learning around the royal commands, given by the chancellor, for the resolution of individual disputes. Each writ gave rise to a particular procedure to be followed, appropriate for the type of dispute ... outside the writs, there was no common law, no way to state a case or get before a judge ...[55]

Through the writ system, the common law 'came to be composed of a series of procedural routes ... to get before a jury and state one's case'.[56] The procedure 'implied a substantive law' but 'no one other than the jury knew what [the law] was'.[57] Glenn described the juries as 'law-finders, playing a fundamental, mediating role between local, unwritten law and central, royal courts', while the writs 'determined when you could get to the jury' and, in doing so, 'became the best available indications of a secreted, substantive, common law'.[58] The nineteenth century saw the disappearance of the writs and, somewhat more gradually, the disappearance of juries from civil cases. It was from this point in the history of the common law that judges had to 'decide cases on the merits ... and by application of substantive law'.[59]

These observations, far from undermining Hayek's thesis, draw our attention to a way of understanding the distinction between private law and public law. It is possible to see private law as a body of norms of interpersonal conduct, which are intelligible independently of their enforcement by a central authority, although not necessarily articulated in canonical language, and public law as the apparatus established to ensure the consistent interpretation and enforcement of those norms of conduct. This way of understanding the distinction approximates Hayek's own thoughts about the distinction. Public law tells us 'which rules of conduct an organisation will in practice enforce' and 'organises the apparatus required for the better functioning of that more comprehensive spontaneous order'.[60] In other words, the organisation of government – that is, public law – comes into being in order 'to protect a pre-existing spontaneous order and to enforce the rules on which it rests'.[61] The *public* purpose of public law, so

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52 Hayek, above n 42, 100; See also Ratnapala, above n 49, 55.
53 Fukuyama, above n 50, 258.
54 H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 3rd ed, 2007).
55 Ibid 229.
56 Ibid 230.
57 Ibid 231.
58 Ibid.
59 Ibid 243.
60 Hayek, above n 32, 78.
61 Ibid.

understood, is the maintenance of the pre-existing spontaneous order. Private law might be said to be logically prior to, and presupposed by, public law.[62]

A criticism which could obviously be made of this version of the private-public distinction is that, in contemporary welfare state societies, the public interest is conceived much more broadly than simply in terms of establishing and maintaining the apparatus for the interpretation and enforcement of private law. It was remarked earlier that democratic politics places pressures upon private law in so far as it uses law governing private relationships as an instrument for the pursuit of public purposes.[63] Even if this process creates a grey area which is neither purely private nor purely public, it is still possible to speak of law which is classically private and classically public. At the very least, recognising such a distinction raises a question about every legislative attempt to organise the activities of a community in the 'public interest', namely, whether the measure is really justified by an interest held in common by everyone – such as the common interest in the proper functioning of government and due enforcement of the law – or merely by the interests of government officials or a conglomeration of politically powerful private interests. More importantly for legal interpretation, the demarcation of a domain of classically private law exposes as fiction the notion that all law is to be understood and interpreted as something designed to achieve collective aims. As Professor Ratnapala has said, 'Hayek's complaint is against the intellectual attitude of regarding *all* social structures as the results of deliberate action'.[64]

IV INTERPRETATION OF PRIVATE LAW

It has been argued herein that private law, in its classical sense, has two distinguishing features. First, it consists of norms of conduct. Secondly, it is not the product of deliberate design, so it 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. In other words, private law is not concerned with the community's collective purposes. Suppositions about the purposes of a rule or norm of conduct cannot play any role in the interpretation of private law. Instead, the interpretation of private law – in particular, questions about whether a known rule should be extended to capture a situation which does not fall within the letter of the rule – is a matter of drawing analogies between particular events by reference to an abstract idea of just conduct. It cannot refer to social goals or purposes. The process of reasoning is formalistic rather than instrumental. Hayek explained the matter in the following terms:

> Like a knife or a hammer they [i.e. rules] have been shaped not with a particular purpose in view but because in this form rather than in some other form they have proved serviceable in a great variety of situations. They have not been constructed to meet foreseen particular needs but have been selected in a process of evolution. The knowledge which has given them their shape is not knowledge of particular future

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62 For another example of a theory that private law is logically prior to public law in this way, see Ernest J Weinrib, 'Public Law and Private Right' (2011) 61 *University of Toronto Law Journal* 191, 195, where Weinrib speaks of the content of *private right* as being 'normatively intelligible even apart from the public institutions that made them effective' while *public right* 'refers to a condition in which public institutions actualize and guarantee these rights'. Weinrib's approach to the matter is Kantian in its inspiration.

63 See above nn 8-9 and accompanying text.

64 Suri Ratnapala, 'The Trident Case and the Evolutionary Theory of FA Hayek' (1993) 13 *Oxford Journal of Legal Studies* 201, 216 (italics added).

> effects but knowledge of the recurrence of certain problem situations or tasks, of intermediate results regularly to be achieved in the service of a great variety of ultimate aims.[65]

Perhaps language provides an even stronger analogy than tools such as knives or hammers. As Professor Ratnapala has noted, language 'is a grown order that has no author'.[66] Every speaker of a language regularly engages in a creative exercise whereby certain well-established grammatical forms are applied in novel, but analogous, situations. It might be said that 'He climbed over the fence' but 'I walked through the gate'. Both of those sentences conform to conventions as to syntax, so as to indicate who was acting and what was being acted upon, and inflection of the verb, so as to indicate that the actions occurred in the past. Those conventions are adaptable to an infinite number of particular situations. The use of these conventions depends upon the existence of a commonly-held set of abstract categories – that everyone 'puts certain kinds of sensory stimuli into certain kinds of classes'.[67] In other words, we negotiate the world around us by putting concrete things or events into abstract categories – and, in the case of language and law, having views shared by other members of our community about the categories to which particular events belong – and then reacting to events in accordance with prescriptions which are attached to the relevant categories. This point about abstraction reinforces the notion that the application of the received law to novel situations is a matter of upholding the legitimate expectations of individual members of the community rather than furthering the purposes of a sovereign legislator.[68]

Abstraction involves taking a view about what features are essential to a category. Accordingly, lawyers have views about what features are essential to a contract or a property right or the wrong of negligence. Adjudicators have, in the course of deciding cases, articulated definitions of these categories which point to their essential features and many of these definitions have proved to be durable in guiding human conduct, in settling disputes and in adjudicating upon those disputes that cannot be settled by the parties. Professor Ratnapala has pointed out that such abstract definitions are, nonetheless, provisional:

> When we realise by experience that [abstractions] misrepresent the world (in the sense that our actions fail), we modify them. However, we replace the failed abstraction with a modified or new abstraction. We do not, and cannot, abandon abstraction and start dealing in singularities. If we do so, we will literally lose our minds.[69]

The fact that a dispute requires adjudication points to a possibility of different understandings of the relevant category of just conduct. This difference is not to be resolved by referring to a social purpose which transcends the parties. The resolution is to be found by making such adjustments to the received understanding of the relevant category as are consistent with the preservation of the larger system of categories which has proved to be durable and upon which the expectations of individuals are based. Accordingly, judicial development of the law received through the cases is a matter of testing the fit of any proposed interpretation within the larger system. It is in

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65 Hayek, above n 38, 21.

66 Ratnapala, above n 49, 51; Professor Ratnapala referred, in this connection, to the work of David Hume. Note, in particular, David Hume, *A Treatise of Human Nature* (Clarendon Press, 1896) 489-490 [Book III, Part II, Section II – 'Of the origin of justice and property'].

67 Ratnapala, above n 49, 49.

68 See above n 47 and accompanying text.

69 Ratnapala, above n 49, 50.

its concern with fit of their decisions within a larger system that the task of adjudicators is maintenance rather than construction.[70]

Finally, an understanding of private law as primarily an order of actions, and only secondarily as an order of rules, has important implications for interpretation of the law in novel cases. This point was emphasised by Professor Ratnapala in a 1993 article which analysed the decision of the High Court of Australia in *Trident General Insurance Co Limited v McNiece Brothers Pty Ltd*.[71] The question for the High Court was whether a contractor on a construction site could be indemnified, under a contract of insurance maintained by the owner of the site, in respect of its liability to an injured employee. Professor Ratnapala, in the course of his analysis, contrasted the reasoning of two of the minority judges – that is, those who concluded that the contractor could not proceed against the owner's insurer. Dawson J was concerned that a conclusion that the contractor could claim from the owner's insurer undermined the well-established doctrine of privity of contract. An exception to the doctrine which captured the case 'could not be restricted upon any conceptual basis to contracts of insurance'.[72] His Honour said that the appeal invited the court 'not so much to engage in judicial creativity ... [but] to engage in the destruction of accepted principle'.[73] Professor Ratnapala suggested that Dawson J was concerned primarily with logical consistency between legal rules.[74]

Brennan J, on the other hand, was prepared to countenance the possibility that there were cases in which existing legal doctrines would allow a third party to obtain the benefit of the promisee's contractual undertaking. While these situations were 'sometimes described as exceptions to the doctrine of privity', they were 'in truth applications of other legal principles to the contractual relationship of promisor and promisee'.[75] For example, where a third party is able to assert that the promisee holds the benefit of the contractual promise on trust for the third party, the third party would be able to sue the promisee in its capacity as trustee.[76] Reliance on such a doctrine sidesteps, rather than undermines or negates, the privity doctrine. It does not contemplate that the third party would be able to proceed against the promisor directly, as if it had been a party to the contract, and does not raise the spectre that the promisor could be sued twice by different plaintiffs. Professor Ratnapala observed that the reasoning of Brennan J 'eschews the purely logical approach' and 'is directed more to an examination of the potential conflict of norms as they operate in the factual order'.[77] It was the reasoning of Brennan J, in its focus upon whether the factual order of action was maintained, which was more consonant with Hayek's theory of adjudication.

Professor Ratnapala's emphasis upon the order of actions, rather than upon logical consistency of the verbal rules, reinforced the notion that the verbal formulae which courts have used to justify their decisions are always open to revision. Disputes arise when parties' preferred *actions* are in conflict – or, as Fuller said, 'when parties are at odds with one another'.[78] It may be necessary to reconsider or supplement rules articulated in previous cases in order to adjudicate upon the dispute in a way which maintains the factual order of actions. If, on the other hand, the conflict between the parties' actions can be resolved within the limits of existing doctrine, it is of no great

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70 See above n 49 and accompanying text.
71 (1988) 165 CLR 107. For the citation of the article, see above n 64.
72 Ibid 162.
73 Ibid 161.
74 Ratnapala, above n 64, 223.
75 *Trident General Insurance Co Limited v McNiece Brothers Pty Ltd* (1988) 165 CLR 107, 134-135.
76 Ibid 135.
77 Ratnapala, above n 64, 223.
78 See above n 26.

moment that the articulation of the law is inelegant or incomplete. As Brennan J said, '[j]udicial preference for a more elegant or logically satisfying jurisprudence is insufficient to warrant a change in settled doctrine which works satisfactorily in conjunction with other legal principles'.[79]

V CONCLUSION

Keeping public law in its place is, first and foremost, a matter of understanding what private law is and how public law complements private law. Scholars such as Fuller and Hayek have shown how 'law' encompasses two distinct forms of social ordering. On the one hand, there are norms of conduct which have proven themselves to be useful in coordinating the actions of individuals in the pursuit of their various projects, so general observance of those norms persists. On the other hand, there are rules which have been imposed on the community by the state on the basis of a calculation that their observance will have desirable consequences for the community as a whole. Private law consists of law of the former type. Private law, so understood, has desirable effects but it has no purposes. Therefore, speaking of a purpose or goal of, for example, the institution of contract or compensation for wrongful acts is of no assistance in the interpretation of the received law. Interpretation of private law is a matter of deciding what this or that particular person may demand of another person in a particular situation and, conversely, whether that other person may rightly resist compliance with a demand. As Professor Ratnapala has pointed out, the task of interpretation is one of looking at previous practice as the systematic expression of an order of *actions*. A right action is neither one which furthers the supposed purposes of the order nor one which obeys a rule which is logically consistent with all of the other known rules. Right action is action which does not conflict with the range of actions which have previously been found to be permissible. Private law interpretation, then, is a never ending story of examining previous adjudicative practice, fashioning and revising abstract definitions of what that practice reveals to be right conduct and using those definitions to see whether and where today's case fits within the order of permissible actions. Private law is not and cannot be the whole of law – but it is a mistake to assume that all law has been deliberately fashioned for public purposes.

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79 *Trident General Insurance Co Limited v McNiece Brothers Pty Ltd*. (1988) 165 CLR 107, 131.