The Decline of Private Law

A Philosophical History of Liberal Legalism

Gonçalo de Almeida Ribeiro

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OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Ribeiro, Gonçalo de Almeida, author.

Title: The decline of private law : a philosophical history of liberal legalism / Gonçalo de Almeida Ribeiro.

Description: Oxford, UK ; Chicago, Illinois : Hart Publishing, 2019. | Series: Law and practical reason | Based on author's thesis (S.J.D. : Harvard Law School, 2012). | Includes bibliographical references and index.

Identifiers: LCCN 2018057166 (print) | LCCN 2018057921 (ebook) | ISBN 9781509907915 (Epub) | ISBN 9781509907908 (hardback)

Subjects: LCSH: Civil law—Philosophy. | Liberalism—Philosophy. | BISAC: LAW / Contracts.

Classification: LCC K600 (ebook) | LCC K600 .R53 2019 (print) | DDC 340.5/601—dc23

LC record available at https://lccn.loc.gov/2018057166

ISBN: HB: 978-1-50990-790-8
ePDF: 978-1-50990-792-2
ePub: 978-1-50990-791-5

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

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PREFACE

This book is based on the dissertation I successfully defended at Harvard Law School in September 2012, in partial fulfilment of the requirements to be awarded a doctoral degree. As often happens when the author of an academic thesis is slow to move towards publication, I nearly let go of it. It was my good fortune that when I did make a move, in late 2015, I found in Hart Publishing, and particularly in its then Commissioning Editor Bill Asquith, enthusiastic support for the project.

My appointment to the Constitutional Court in July 2016 delayed the process of publication even further, and indeed it threatened to stall it indefinitely. Fortunately, in the summer of 2018 I was able to carry to the end the task of editing and polishing the manuscript. I am grateful to the current Commissioning Editor of Hart Publishing, Kate Whetter, and to Production Editor Linda Staniford, for their support in the latter stages of this stormy journey.

Notwithstanding my belief that the manuscript withstood fairly well the test of time, this book is undoubtedly different from the dissertation on which it is based. I rewrote the Prologue and the Epilogue; divided the last chapter of the thesis into two, rewriting a good deal of what is now chapter five; excised the original text of material that struck me as digressive, pedantic, or downright silly; and revised the whole manuscript as thoroughly as limited time, energy and ability allowed. To be sure, the main thrust, the bulk of the writing and the background research are the same. But what I now offer to the reader is the leaner, neater and crisper work of a more mature scholar and writer.

Over the years, a large number of generous scholars read parts of the manuscript in some form or shared with me their thoughts about themes and arguments in this book. On that score, I am indebted to Adilson Moreira, Ana Taveira da Fonseca, André Salgado de Matos, António Araújo, António Cortês, António Hespanha, Armando Rocha, Axel Gosseries, Catarina Santos Botelho, Daniel Vargas, Dennis Patterson, Elsa Vaz de Sequeira, Fernando Sá, Filipa Calvão, Frank Michelman, Giovanni Marini, Hans-W Micklitz, Henrique Antunes, Holger Spamann, Hugh Collins, Ingo Sarlet, Jan Dalhuisen, João Gama, Joaquim Pedro Cardoso da Costa, Jorge Azevedo Correia, Jorge González-Jácome, Jorge Mattamouros, Jorge Pereira da Silva, José de Sousa e Brito, JHH Weiler, José Lamego, José Teles Pereira, Júlio Gomes, Karl Klare, Ken Winston, Lewis Sargentich, Louis Kaplow, Luís Pereira Coutinho, Luís Roberto Barroso, Marcos Keel Pereira, Maria-Rosaria Marella, Matej Accetto, Miguel Galvão Teles, Miguel Nogueira de Brito, Miguel Morgado, Mikhail Xifaras, Mitch Lasser, Neil Walker, Nimer Sultany, Nuno Garoupa, Patrícia Fragoso Martins, Paulo Mota Pinto, Pedro Fortes, Pedro Garcia Marques, Pedro Lomba, Pedro Machete, Pedro Múrias, Pedro Velez, Ravi Afonso Pereira,

Richard Fallon, Rita Lynce de Faria, Roni Mann, Rui Pinto Duarte, Rui Ramos, Talha Syed, Tiago Macieirinha, Tito Rendas, Vishaal Kishore and Wim Decock. Joe Singer and Mattias Kumm, who read the whole manuscript in its dissertation form and gave me extensive feedback, belong in a distinguished category of their own.

I owe a special debt of gratitude to Jorge Braga de Macedo, Luís Barreto Xavier, Maria da Glória Garcia, Maria Lúcia Amaral, Miguel Poiares Maduro and Rui Medeiros, for having played, in one way or another, a decisive role in my academic career.

I dedicate this book to Duncan Kennedy, my former teacher and supervisor. In spite of our occasional differences of thought and style, this book is, as careful readers will not fail to notice, a progeny of Duncan's towering legacy in the fields of legal theory, legal history and comparative law. The dedication is my modest but heartfelt tribute to that intellectual pedigree, and to several years of captivating and enlightening mentorship.

Gonçalo de Almeida Ribeiro
Lisbon

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Prologue

The Drama of Liberal Legalism

Imagine that you are a political official. You claim authority over other people, and your authority is enforceable. Now, if you are a reflective person, you will ask yourself the following question: What right do I have to coerce others to abide by my say-so? Put at its briefest, that is the problem of political justification.

There were times in which the solution to that problem was straightforward. To the slave-owner, or the *pater familias*, the question of political justification did not even occur; his mastery over the slave, or over the members of the household, is not a matter of right but of violence – settled *de facto* as opposed to *de jure*.[1] To the medieval *seigneur* or manorial lord, on the other hand, the question of political justification elicited one or another of two quite different types of answer. One such answer – call it naturalist – was that the right to rule inhered in his person; it was the defining feature of his lordship, as evinced in custom and tradition.[2] A different type of argument – call it functionalist – was that the right to rule was inscribed in the vital role he plays within the community, as suggested by the medieval mythology of the three orders of *oratores*, *bellatores* and *laboratores*.[3] Finally, if we fast-forward a few hundred years, more precisely to the eighteenth century, we shall find a very different type of rule, personified by Frederick the Great – the enlightened despot. Political right derives mostly from the sharp contrast between the enlightenment of the despot and the superstition and ignorance of ordinary folk.[4] The historical mission of the enlightened ruler is to prepare his people for political emancipation, to force it out of the current state of self-complacent idiocy.[5]

I should clear at once a potential misunderstanding. It is possible, indeed very likely, that in the course of history a considerable number of slave-owners, manorial lords and enlightened despots experienced anxiety or even lost faith in their authority. But we should be careful not to trade on confusion between the individual and the role, the actor and the mask. It is a key part of the social plot of slavery, lordship and enlightened absolutism that the characters of slave-owner,

[1] See Hannah Arendt, *The Human Condition*, 22–37.
[2] See Otto Brunner, *Land and Lordship*, 114–24.
[3] Georges Duby, *Les Trois Ordres ou L'Imaginaire du Féodalisme*; Charles Taylor, *A Secular Age*, 165.
[4] See Alexis de Tocqueville, *The Old Regime and the Revolution*, 32–41, 226–31.
[5] These are crude ideal-types. See Max Weber, *The Theory of Social and Economic Organization*, 89–90.

manorial lord and enlightened despot take their political authority for granted. That says nothing, of course, about the experience and moods of particular performers; comedians – so goes a show business *cliché* – are often depressed.

To the contemporary official, however, the question of political justification appears under a very different light. (I must insist that by 'the official' I mean the *character* and what concerns me is the reasoning process that is to be expected from him. What goes on backstage – in the minds of the individual holders of office – is none of my business.) What distinguishes him from other well-known political characters in history is that he cannot vindicate a putative right to rule in his status. He must regard those subject to his authority as equals both among themselves and with himself. Under these conditions, which furnish the normative environment of our political culture, it is much harder to figure out what justifies political authority. For political authority appears to imply by its very nature precisely the inequality of status that our egalitarian political culture deplores.

What avenues are open for the political official hoping to justify his authority in egalitarian terms? The obvious answer is democratic legitimacy. The official represents the majority formed over the course of free and open elections; ultimately, the basis of political authority is plain and simple 'one person, one vote'. But this may not be a sufficient basis for justified rule, as the slogans 'tyranny of the majority' and 'populist rule' so readily convey.[6] As a contemporary political philosopher put it, 'Individuals have rights, and there are things no person or group can do to them (without violating their rights)'.[7]

Are we then to think of rights – at least of fundamental rights – as matters outside and above the purview of ordinary politics? That is surely the prevailing view in constitutional democracies, particularly those that embrace a robust conception of the legal force of bills of rights and the role of the judiciary in their enforcement. But that road leads to insurmountable difficulties of its own. For as to what rights individuals have, which of such rights are fundamental, or how to apply a list of abstract rights, namely how to resolve (whether in general theory or in case-by-case practice) the many conflicts among them that arise in everyday life, there is no agreement in society.[8] To the protest that majoritarian government puts individual rights in jeopardy, then, one is bound to reply that the egalitarian credentials of having non-elected and non-accountable officials in charge of deciding about them are at least dubious. Accordingly, there is indignant and persistent talk of 'moral elitism' and 'aristocracy in robes' in connection with the practice of judicial review of legislation.

Indeed, any claim of political authority in an egalitarian political culture is problematic. The predicament of the political official is suffused with anxiety, for there is a permanent tension between the unwaivable responsibility to decide that

[6] Alexis de Tocqueville, *Democracy in America*, Book I, ch 15. See also, *The Federalist Papers*, 'Federalist 51' (Madison) and 'Federalist 58' (Madison).

[7] Robert Nozick, *Anarchy, State and Utopia*, ix.

[8] See, eg, Jeremy Waldron, *Law and Disagreement*, 1–19, 282–313.

is underwritten in his role and the duty to justify all decisions in ways consistent with the status of the addresses as equally worthy and respectable agents. No wonder that so much ink has been spilled over Alexander Bickel's 'countermajoritarian difficulty',[9] and that legal academics – who sit right at the intersection of power and reflection – have developed an intense obsession with the theme.[10] Alasdair MacIntyre wrote famously that 'every moral philosophy presupposes a sociology'.[11] Much the same holds for political philosophy, particularly of the variety that fascinates legal academics. The constitutional theory that is hosted in seminar rooms and debated in law reviews is really but a continuation of the political anxiety inherent to liberal democratic regimes by other – high-minded and hyper-conscious – means.

To treat the other as a political equal is to treat him, as Ronald Dworkin would have it, with equal concern and respect.[12] 'Equal concern' implies that everyone's good is worthy of the same consideration, that each individual is entitled to an equal share of the benefits and is obliged to partake an equal share of the burdens of communal life. 'Equal respect' means that each individual capable of self-government is entitled to have his judgement regarded with the consideration accorded to the judgement of any other individual equally capable of self-government. Equality of concern and respect leads us, more or less straightforwardly, to what John Rawls calls the 'liberal principle of legitimacy'.

> [O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy. […] Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification.[13]

By a 'political' conception of justice, Rawls means one detached from any deep-seated metaphysical, religious or ethical commitments that divide reasonably as well as obdurately the members of the community. That is the essential basis of political liberalism. In this 'political not metaphysical' guise, liberalism brackets all questions of fundamental value and endorses the ideal of a freestanding politics.[14] Accordingly, justice in a liberal society concerns the distribution of the residual and universal good of freedom among individuals presumably leading a life governed by a robust and personal conception of the good.[15] The liberal solution to the problem of political justification in an egalitarian political culture is

[9] Alexander Bickel, *The Least Dangerous Branch*, 16–23.
[10] See Barry Friedman, 'The Birth of an Academic Obsession'.
[11] Alasdair MacIntyre, *After Virtue*, 23.
[12] See Ronald Dworkin, *Taking Rights Seriously*, 180–83, 272–78; Dworkin, *A Matter of Principle*, 181–204; Dworkin, *Justice for Hedgehogs*, 330–31.
[13] John Rawls, *Political Liberalism*, 137. Charles Larmore, 'The Moral Basis of Political Liberalism', 606, remarks that the Rawlsian formulation 'reflects … the abiding moral heart of liberal thought'.
[14] See John Rawls, 'Justice as Fairness', 230; Charles Larmore, 'Political Liberalism', 353–57.
[15] Alasdair MacIntyre, 'The Privatization of Good', 345–46.

thus 'equal freedom for all'.[16] Official decision-making is governed by the common interest of all persons – even persons who value nothing else in common – in securing the conditions for individual self-determination. In circumstances of entrenched ethical and metaphysical disagreement, that is the only form of collective life that is truly 'for the people and by the people'.

Yet this only carries us so far. People disagree not just about the good life but about political justice as well. 'There are many of us, and we disagree about justice,' writes Jeremy Waldron.[17] There is more:

> [W]e not only disagree about the existence of God and the meaning of life; we disagree also about what counts as fair terms of co-operation among people who disagree about the existence of God and the meaning of life. We disagree about what we owe each other in the way of tolerance, forbearance, respect, co-ordination, and mutual aid.[18]

The anxiety of political justification builds up, as the problem of disagreement within liberal politics is brought to the level of conscious awareness. The very problem that liberalism is constructed to avert – interminable disagreement among equals – is reproduced within a political culture domesticated by liberal rationality. Moreover, the disagreement is replicated when we move from the first-order or substantive question of political justice – what laws should we have? – to the second-order or institutional question of authority – who is to say so? The 'counter-majoritarian difficulty' is the ultimate expression of this liberal conundrum.

Thus far, we have put ourselves in the shoes of the political official. Yet in our political culture there is an important class of officials that supposedly acts on legal instead of political grounds. Judges are the paradigm. Of their responsibilities wrote Sir Francis Bacon, 'Judges ought to remember, that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law'.[19] Judicial authority is largely status-based, for judges are typically drawn from the lot of experts – the jurists – in determining what is legally required. This notion that there is a distinctive type of expert decision-making that is governed by legal as opposed to political reasons is what I shall call in this book 'legalism'.

The jurists trained in the medieval universities rose to a prominent position in the continental society of the Late Middle Ages.[20] But their authority was gradually challenged in the modern period, as humanist and then enlightened culture flourished, and eventually clashed head-on with the political and philosophical conceptions that triumphed in the wake of the liberal revolutions. In modernity's eyes, the professional elitism, arcane traditions and classical sources treasured by the jurists educated in the *mos italicus iura docendi*, students of a *ius commune*

[16] See Jeremy Waldron, 'Theoretical Foundations of Liberalism', 129.
[17] Waldron, *Law and Disagreement*, 1.
[18] ibid.
[19] Francis Bacon, *The Essays*, 65.
[20] Paolo Grossi, *L'Ordine Giuridico Medievale*, ch VI.

forged from Roman materials, did not meet the emerging standards of social equality and critical rationality.[21] In view of that, it comes as no surprise that some of the commanding voices in the tradition of liberal political thought viciously attacked the legal profession. John Locke complained about the 'artificial ignorance and learned gibberish' of lawyers.[22] Jeremy Bentham went on a crusade to 'to pluck the mask of Mystery from the face of Jurisprudence'.[23] And the austere Immanuel Kant, contrasting the a priori labours of the philosopher to the dogmatic adherence of the jurist to the sources of law, wrote that 'a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain'.[24] The authority of the legal profession declined, its place disputed by philosophers disparaging the *ius commune* and proclaiming a 'law of reason'.[25]

The remarkable thing is that the jurists managed to restore their social authority within the nascent liberal political culture. Former outcasts in modern culture and foes of liberalism, they became the protagonists of the liberal project of political justification. The monumental work of transformation matured in the German universities of the nineteenth century, taking final form in classical private law doctrine. It comprised two large movements. First, responding to the contempt of modern philosophy for jurisprudence, the jurists transformed legal expertise from a type of practical wisdom into a scientific discipline; this imparted epistemic dignity on their profession. Secondly, they read classical liberalism, in the Kantian form of the will theory, into the sources of the *ius commune*; this made their materials look suitably modern. At the end of the process, they had reinvented themselves, through their newborn science, as the principal custodians of liberal rationality. Finding unsuspected elective affinities between liberalism and legalism,[26] they wove them together, inventing what I call 'liberal legalism'.

Yet the history of modern legalism has been, just like that of political liberalism, a wobbly ride. In the mid- to late-nineteenth century, law as a discipline was compared to Euclidian geometry, regarded in the Enlightenment as a paradigm of scientific knowledge.[27] Legal argument was, in Max Weber's phraseology, a type of 'logically formal rationality'.[28] A century later, a leading legal philosopher such as Dworkin conceded unfalteringly that 'Law … is deeply and thoroughly political'[29] and that 'legal judgments are pervasively contestable'.[30]

[21] António Manuel Hespanha, *Cultura Jurídica Europeia*, 180–92.
[22] John Locke, *An Essay Concerning Human Understanding*, 362.
[23] *Quoted in* Gerald Postema, *Bentham and the Common Law Tradition*, 268.
[24] Immanuel Kant, *The Metaphysics of Morals*, 23 (Ak 6:229).
[25] Franz Wieacker, *A History of Private Law in Europe*, §§ 15–19.
[26] In social theory, 'elective affinity' (*Wahlverwandtschaft*) is a Weberian adaptation of a concept from chemistry previously applied by JW Goethe to romantic relationships. See Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, 263. See also Andrew McKinnon, 'Elective Affinities of the Protestant Ethic'; HH Gerth and CW Mills, 'Introduction', 62–63.
[27] See, eg, Friedrich Carl von Savigny, *Of the Vocation of Our Time for Legislation and Jurisprudence*, 38–39.
[28] See Max Weber, *Max Weber on Law in Economy and Society*, 59–64.
[29] Ronald Dworkin, *A Matter of Principle*, 146.
[30] Dworkin, *Law's Empire*, 411.

Although strongly committed to the project of disentangling legal argument from the realm of what he calls 'personal or partisan politics',[31] Dworkin's jurisprudence falls way short of the scientific aspirations of the mid-nineteenth-century legal mainstream. Duncan Kennedy captures the *Zeitgeist* with trademark wit:

> There is no extant theory that threatens to end the current ideological conflict about method by compelling a consensus about how judges can and should be neutral. Indeed, the current multiplicity of contradictory theories of neutrality seems a powerful, though of course not conclusive refutation of all of them. I am an admirer of their work of mutual critique. I endorse Dworkin's critique of Richard Posner along with Andrew Altman's critique of Dworkin and Fiss's doubtless forthcoming critique of Altman, and Posner's critique of Fiss (if there is one) and on around the circle. This is not musical chairs but more like a game of 'Penelope,' in which each writer simultaneously weaves his own and unweaves others' work.[32]

* * * * *

The agenda of this book is to improve our understanding of how we got to the contemporary predicament. It sets us on a long exploratory journey – a philosophical history – of liberal legalism, from its inception in the mid-nineteenth century, the moment in which the jurists forged an alliance between political liberalism and legal expertise, to the contemporary anxiety about the possibility of both a liberal solution to the problem of political justification and of law as a respectable form of expert knowledge.

Each stage in the history has a substantive or political and a methodological or epistemic element. The former is the liberal political theory of the era – eg, the will theory in the nineteenth century or the social liberalism of the inter-war period – purporting to provide a solution to the problem of political justification. The latter is a conception of legal science or method – eg, legal formalism in the nineteenth century or the teleological jurisprudence of the inter-war period – supposedly vindicating the access of the expert to the political choices embodied in the law. In sum, each stage in the sequence corresponds to a form of consciousness integrating a political theory with a jurisprudential conception.[33] The resulting synthesis is a moment in the drama of liberal legalism.

There are four such moments in my account:

(1) The rise of classical private law (*c* 1840–1914)
(2) The socialisation of private law (*c* 1900–1945)
(3) The politicisation of private law (*c* 1920–1970)
(4) The migration to constitutional law (*c* 1945–2001).

[31] Dworkin, *A Matter of Principle*, 146.
[32] Duncan Kennedy, *A Critique of Adjudication*, 91.
[33] I take the concept of a 'form of consciousness' from Raymond Geuss, *The Idea of a Critical Theory*, 4–44.

These are discussed in turn below.

(1) *The rise of classical private law*. The heroes of this moment are the German jurists of the Historical School – mainly Friedrich Carl von Savigny and Georg Friedrich Puchta – and their Pandectist heirs. The classical scheme integrated the will theory of law and the jurisprudence of legal formalism.

The will theory, articulated in lasting philosophical form by Kant in the *Rechtslehre*, posits that each person is a will absolute within its rights as determined by a universal law.[34] There is a sharp distinction between duties not to violate other person's rights – duties of right – and duties to exercise one's rights as morality commands – duties of virtue; only the former are legally enforceable, and indeed it is the sole function of law to enforce equal freedom for every will.[35] Within a rightful legal order, persons waive their rights at their discretion, enter contracts that oblige them before other persons, and are liable to right their wrongdoings – in the eyes of the law they are abstract wills, universally free and equal.[36] Savigny and his followers held this theory to be immanent in a major division of the legal order they called 'patrimonial law', comprising the law of obligations and property law – that is, human relations over commodified goods.[37] The nineteenth century jurists contrasted this patrimonial law, essentially universal, with both public law, a normative order that expresses the particularities of a people, and family law, a realm of private relations between unequal and mutually dependent persons (husband/wife, father/child, and master/servant).[38]

Legal formalism was a method for the study and administration of positive law. It comprised two major sets of intellectual operation.[39] The first was the derivation of general principles – sometimes called 'leading axioms' – from the norms embodied in the sources of law. The claim was that a positive legal norm, the existence of which is a verifiable fact, entails a more general non-posited norm; for instance, the rules of battery contain by implication all the defining features of intentional torts. The second operation was the derivation of increasingly narrower or fact-specific norms from the general principles obtained, through a procedure that may be called 'analysis' or 'deduction'. Thus, from the concept of contract as a voluntary enactment of obligations and rights as between the parties follows a whole range of specific rules about, say, offer and acceptance or defences against liability. The ideal aim of this method was a coherent and gapless system of easily administrable norms.[40]

[34] Immanuel Kant, *The Metaphysics of Morals*, 24 (Ak 6:230–31).
[35] ibid at 9–22 (Ak 6:211–21).
[36] See, eg, Georg Friedrich Puchta, *Cursus der Institutionen*, I, 51.
[37] See, eg, Friedrich Carl von Savigny, *System of the Modern Roman Law*, I, 299–314.
[38] ibid at. 269–320. See also Duncan Kennedy, 'Savigny's Family/Patrimony Distinction'.
[39] Savigny, *System*, 211–39; Rudolf Sohm, *The Institutes*, 31–32.
[40] See Felipe González Vicén, 'Sobre los Orígines y Supuestos del Formalismo en el Pensamiento Jurídico Contemporáneo', 48–55.

(2) *The socialisation of private law.* The forerunners of this period were German as well – mainly Otto von Gierke and Rudolf von Jhering – but the heroes are the French *juristes inquiets*, namely Raymond Saleilles, François Gény, Léon Duguit and Louis Josserand.[41] They claimed that both the substance and the method of the classical theory failed on its own terms.

The social jurists argued that the will theory was ill adjusted to advanced industrial, urban and capitalist societies. They scorned the 'the majestic equality of the laws, which forbid poor and rich alike to sleep under the bridges, to beg in the streets, and to steel bread'.[42] They charged their predecessors with sociological blindness, arguing, for example, that it was a mistake to subject labour relations to the general norms of contract law on the thin ground that the same very abstract factual predicates – two or more wills fixing mutual obligations – recur in all 'contractual' settings. Legal doctrine had to be enriched with fact-sensitive concepts.[43]

They proposed two lines of reform of the will theory. One line was to narrow down the scope of the will theory, submitting vast areas of social life previously subsumed under the basic norms of property, contract, and tort to special laws. New branches of an often-baptised 'social law' – eg, labour law, anti-trust law, housing law and workers compensation – emerged. The governing idea was that in order to 'level the playing field', it was necessary to increase the regulation of those social arenas tilted in favour of dominant groups and interests – employers, landlords or businesses.[44] A second line of reform of the will theory was to tinker with the doctrines of private law itself. Ideas such as good faith, strict liability, abuse of right or substantive justice in contractual relations infiltrated the classical doctrinal scheme. In fact, according to the social jurists, quite a few of these notions had been around for many centuries, although they had been marginalised and misunderstood by the classics, who were embarrassed by the doctrines that did not fit neatly together with the will theory.[45] The social jurists recovered these doctrines and reshaped them, often pouring new wine into old bottles.

When it comes to methodology, they repudiated legal formalism, proposing instead a teleological jurisprudence.[46] The main point was that the classics held a static conception of the law. The social jurists argued that principles such as 'freedom of contract' or 'liability for injury' are dynamic, in that they point to certain goals or purposes, which the legal system aims to bring to the

[41] See Marie-Claire Belleau, 'Legal Classicism and Criticism in Early Twentieth-Century France'; Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', 37–38.

[42] Anatole France, *Les Lys Rouge*, 118.

[43] See, eg, Raymond Saleilles, 'Le Code Civil et la Méthode Historique'.

[44] See Franz Wieacker, *A History of Private Law in Europe*, 433–38.

[45] See, eg, Otto von Gierke, *Die soziale Aufgabe des Privatrechts*; León Duguit, *Les Transformations Générales du Droit Privé*.

[46] Rudolf von Jhering, *Law as a Means to an End*; François Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif*.

social world. When a principle crystalises in a doctrine or regime, it incorporates certain factual assumptions. If the factual context evolves or shifts, the rules and doctrines may no longer realise the principles or purposes underlying them. The classical doctrines of contract – one of their favourite examples – were premised on the assumptions of equal bargaining power and absence of external effects; but they were inadequate in contexts, such as that of labour agreements in an industrial society, housing tenure in circumstances of massive rural exodus, or stock trading in a capitalist economy, where those assumptions do not hold. Hence, they held that the 'mechanical' application of legal rules without an eye on their purposes or the teleological principles of the legal system was an abuse of deduction.

(3) *The politicisation of private law*. Beginning in the 1920s, the post-classical social consensus disintegrated. The protagonists of this period are the American Legal Realists, including Robert Hale, Karl Llewellyn, Jerome Frank and Felix Cohen. Their precursors were Oliver Wendell Holmes, Wesley Newcomb Hohfeld, Philipp Heck and René Demogue.

Their substantive view of law encompassed two dimensions. On the one hand, they collapsed the private/public distinction.[47] Both the classical and the social jurists were strongly committed to the normative significance of the distinction, although they understood it differently; for them, while private law protects individual freedom, public law – namely legislative and administrative interference with private transactions – is coercive in nature. The legal realists showed that this view fails to take into account the way in which the background rules of property, contract and tort restrain individual freedom and, symmetrically, the way in which legislative and administrative interference with private transactions, through such means as minimum wage laws or environmental impact assessment, purports to enhance the freedom of those who benefit from them. Indeed, since freedom as a social good is the ability to call on state force to support one's interest in a situation of conflict, freedom and coercion are but two sides of the same coin. The question is not whether or not to protect freedom but *whose* freedom, and to what extent, ought to be protected – an issue that is political in nature.

The second dimension concerns what has aptly been called the paradigm of 'conflicting considerations'.[48] It is the view that legal regimes usually strike a balance among a recurrent set of conflicting considerations, purposes, policies or principles. Private law embodies a series of judgments as to the relative 'strength' or 'weight' of such considerations – say, security in ownership versus security in transactions or fault-based liability versus loss-spreading – within the scope of application of a given regime.[49] In other

[47] See, eg, Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State'.

[48] See Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy', 104–15.

[49] René Demogue, *Les Notions Fondamentales du Droit Privé*; Philipp Heck, 'The Formation of Concepts and the Jurisprudence of Interests'.

words, one makes law by balancing competing reasons, as opposed to working out the implications of a single principle. It does not follow from the acknowledgement of conflicting considerations that laws are arbitrary, produced by the flip of a coin; what follows, given the pervasive contestability of balancing judgments, is that there are no demonstrably right answers.[50] People disagree reasonably and persistently about the justice of rival regime options, and that raises the issue of who is to be bestowed with the authority to settle such disagreements.

Turning to issues of method, the realists challenged at three different levels the distinction between law-making and law application. First, they picked various key legal concepts – eg, 'tort', 'contract', 'ownership' and 'right' – and showed that they could not perform the gap-filling work that both classical and social jurists, in different ways, ascribed to them; for the most part, outcomes presented as implications of those concepts concealed a balancing judgement.[51] Secondly, the realists showed that legal rules are often indeterminate, given conflicting canons of statutory interpretation and the subtleties of *stare decisis*;[52] hence, there are plenty of gaps, conflicts, and ambiguities in the body of legal rules, requiring the interpreter to balance at his own peril the background considerations at stake.[53] Thirdly, the realists paved the way for the critical scrutiny of positive law, picking on Holmes' famous aphorism that 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV';[54] even where legal authority is clear, disagreement may legitimately break over the issue of whether it commands the conclusive allegiance of the law applying official – at this level, legal argument boils down to balancing the most fundamental conflicting considerations of justice, certainty, legitimacy, equality, and the like.[55]

(4) *The migration to constitutional law*. The realist critique generates a novel predicament. On the one hand, since law-making routinely involves controversial balancing judgements, there is wide room for disagreement within liberal justice, which becomes what WB Gallie calls an 'essentially contested concept';[56] accordingly, the political legitimacy of a norm can no longer be assessed in terms of its content, which is reasonably contested, but must be gauged procedurally. On the other hand, since legal argument often involves precisely the kind of contested balancing judgements underlying legal

[50] See Ronald Dworkin, *Taking Rights Seriously*, 31–32, 36, 68–71, 279–90.

[51] Oliver Wendell Holmes, 'Privilege, Malice, and Intent'; Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning'; Felix S Cohen, 'Transcendental Nonsense and the Functional Approach'.

[52] Karl N Llewellyn, 'A Realistic Jurisprudence – The Next Step'; Llewellyn, *The Bramble Bush*; Jerome Frank, *Law and the Modern Mind*.

[53] See, eg, Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz'.

[54] Oliver Wendell Holmes, 'The Path of the Law', 1001.

[55] See Gonçalo Almeida Ribeiro, 'Judicial Activism and Fidelity to Law'.

[56] WB Gallie, 'Essentially Contested Concepts'.

regimes, it is virtually impossible to draw a neat line between law and politics; accordingly, the ideal of law as a form of expert knowledge is compromised.

The shift of focus from substance to procedure – from the content of the law to the authority to make laws – produces a remarkable transformation in legal culture. Whereas liberal legalism in its classical incarnation took the form of a theory of private law – the realm where individuals face off as free and equals – the collapse of the private/public distinction and the emergence of conflicting considerations press upon the legal establishment the institutional questions within the province of constitutional law. These are no longer peripheral and secondary, as they were for the nineteenth-century jurists, but central to the project of liberal legitimacy and legal expertise; liberal legalism is now headquartered in constitutional law.

This means that all private law, to the extent that it strikes a balance among conflicting considerations, becomes a constitutional matter – a phenomenon that has been phrased 'the total constitution'.[57] The issue is which institution is to make the choices underlying ordinary laws, particularly whether – and to what extent – final authority should be assigned to the judiciary. In the discourse of contemporary constitutional theory, all manner of disputes, including those that involve private actors, are said to trigger directly or indirectly constitutional scrutiny, under the form of rights-based review,[58] and the problem is to determine to what extent a court can substitute for its own the legislature's assessment of the relative strength of the conflicting considerations at stake. The catchphrases are 'proportionality review' and 'judicial deference'.[59]

Moreover, as the contemporary 'post-national constellation'[60] of governance comprises multiple levels of law-making and of judicial review, the issue of authority is no longer confined to the 'counter-majoritarian difficulty' in its original form. On the one hand, domestic courts, such as the German Federal Constitutional Court, are bound to decide whether and to what extent they should review laws generated by supranational structures such as the European Union.[61] On the other hand, transnational courts, such as the European Court of Human Rights, are bound to decide whether and to what extent they should review laws generated by national political processes, laws that often have already been subject to judicial review by domestic courts.[62] Multi-level judicial review takes place 'in the shadow of ideology',[63] and is denounced

[57] See Mattias Kumm, 'Who Is Afraid of the Total Constitution?'

[58] See Gonçalo de Almeida Ribeiro, 'The Effects of Fundamental Rights in Private Disputes'.

[59] See Duncan Kennedy, 'Proportionality and 'Deference' in Contemporary Constitutional Thought'; Robert Alexy, 'Balancing, Constitutional Review, and Representation'.

[60] Jürgen Habermas, *The Postnational Constellation*. See also Günther Teubner, *Constitutional Fragments*, 42–72.

[61] See, eg, BVerfG. 15 Dez 2015, 2 BvR 2735/14 [*Identitätskontrolle I*].

[62] See, eg, *SAS v France*, ECHR 1 July 2014.

[63] Duncan Kennedy, 'Political Ideology and Comparative Law', 38–39.

by those who claim that a court-centered understanding of rights moves the community away from political equality and 'towards juristocracy'.[64]

Two consequences follow for the project of liberal legalism. First, as the new paradigm of legal argument – balancing – blurs the distinction between political decision-making and legal reasoning, legalism crumbles. Even in its most sophisticated and seemingly technical form, that of proportionality analysis,[65] contemporary legal reasoning is open to the charge that it is politics in disguise. Secondly, the interminable debate within constitutional theory between the 'political'[66] and the 'judicial'[67] answers to the institutional dilemma – in their countless permutations – represents the failure of liberal rationality to produce a definitive solution to the problem of political justification. Therefore, the history of political liberalism from classical private law to the migration to constitutional law is at once the history of the only reasonable form of political community we can imagine *and* the history of liberal rationality gradually and relentlessly undoing itself.

That is an unsettling conclusion. Instead of turning us to quietism, skepticism or cynicism, however, it ought to inspire a thoughtful, broadminded and nurtured citizenship. The endless conversation among and within ourselves is an assurance that we are mindful of the fragility of our values and institutions, and cling to them not as 'dead dogma' but as 'living truth'.[68]

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The structure of the book does not correspond exactly to the sequence of moments outlined in the foregoing synopsis. Foundations have to be laid down for the historical narrative to take off. Thus, chapter one ('The Idea of Political Liberalism') seeks to establish the normative content and the social currency of political liberalism. The argumentative strategy is to proceed from uncontroversial platitudes of contemporary political culture to the less obvious commitments that are conventionally, albeit not always consciously, presupposed by them. Chapter two ('Kant and the Will Theory') is a critical exegesis of Kant's *Rechtslehre*, which I consider – for reasons that shall emerge in due time – to be the prototype of political liberalism and the definitive philosophical articulation of the will theory that was read by the classical jurists into the sources of the law. The historical narrative begins at this point. Chapters three ('The Rise of Classical

[64] Ran Hirshl, *Towards Juristocracy*.

[65] See Robert Alexy, *A Theory of Constitutional Rights*, 44–110; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality*.

[66] See, eg, Richard Bellamy, *Political Constitutionalism*, 90–141; Jeremy Waldron, *Law and Disagreement*, 209–312; Mark Tushnet, *Taking the Constitution Away from the Courts*, 6–32.

[67] See, eg, Ronald Dworkin, *Freedom's Law*, 1–38; Jürgen Habermas, *Between Facts and Norms*, 238–86; John Hart Ely, *Democracy and Distrust*, 135–80.

[68] John Stuart Mill, *On Liberty*, 40.

Private Law'), four ('The Socialisation of Private Law') and five ('The Politicisation of Private Law') present three moments in the philosophical history of liberal legalism. These are the moments concerning the rise and decline of modern private law. The fourth and final moment in the drama is the subject of the brief Epilogue ('Migration to Constitutional Theory'). Finally, the Appendix explicates the methodology of the project.

The contemporary scenery is painted in broad brushstrokes. The book presents a lopsided philosophical history of liberal legalism, focused on the decline of private law. Hence its title. Such imbalance is doubtlessly unfortunate. To some degree, it deprives us of the solace of intellectual closure and the satisfaction of symmetry. But how could it be any different? 'The owl of Minerva begins its flight only with the onset of dusk.'[69]

[69] GWF Hegel, *Elements of the Philosophy of Right*, 23.