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Review essay
Categories and concepts: mapping maps in western legal thought

Dimensions of private law
By Stephen Waddams. Cambridge: Cambridge University Press, 2003. 272 pp. ISBN 0521816432. £19.99.

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1. The question of classification

'Li omini e le parole son fatti.' (Leonardo da Vinci)[1]

It is quite extraordinary how, to this day, the matter of legal classifications should still raise so much anxiety amongst lawyers, particularly lawyers in England. After all, the time must be long gone when common lawyers may have felt under the threat of Rome and of her 'civilians' (those lawyers who were trained in the *jus civile*)[2] – and even today's impending 'danger' of joining Europe and its laws could hardly be convincingly fought off, one would think, by worrying about the somewhat fragile weapon of legal classifications.

So then why so much continuing anxiety about legal classifications? What might be at stake beneath or within the on-going debate on the desirability of mapping legal categories and legal concepts? A recent book by Professor Stephen Waddams of the University of Toronto returns precisely to that debate – the extent to which legal classifications might or might not be desirable – and it does so with much expertise and, as we will see, a wealth of historical information in support of the doubter. The result is a valuable book that should be read by all those who are interested in legal history and in comparative law, as well as in current legal problems such as whether a common law of Europe is possible or even necessary.

Nevertheless, one wonders whether the book under consideration has fully achieved the task in hand – or not. That task, it seems to me, cannot have been merely to restage, however instructively, some degree of scepticism about the enterprise of classification – and in fact, many of the arguments and materials included in the book (though by no means all of them) are likely to be familiar to a number of its readers. Surely, by contrast, the task of the book must have been to highlight what one could call the *question of classification* – whether legal classifications can really add anything substantial, or essential, to what one may or may not already know about the legal world such classifications are designed to map. My own view is that, contrary to their harmless appearance and in spite of the intentions of many proponents and users, legal classifications can and often do make all the difference, and that is perhaps one reason why they continue to cause so much anxiety amongst so many lawyers. More particularly, the anxiety could be triggered by the

1 'Men and words are facts' (1992, K 110 v) (author's translation).

2 This was Maitland's notoriously controversial thesis: Maitland (1957).

separations and oppositions that those classifications both lay out and eminently reaffirm – and by the ensuing estrangement such separations and oppositions can consequently evoke. Now, estrangement is not necessarily a bad thing and yet, in this case, it could signal a much larger problem – what could be the meaning of legal classifications and the legal 'territory' they presume to represent or picture, in a world where democracy and the rule of law seem to have themselves become rather boundless templates. The answer, however, is not, I submit, to go back to an imagined *corpus* of English law somehow purified of its many actual dimensions – as our book seems ultimately to suggest. Indeed, in my view, to turn to such a *corpus* would be just as problematic as postulating a classifiable legal territory of whatever shape or form. My point, accordingly, is precisely this. The alternatives typically on offer in the debate on classifications – a classifiable legal territory or an immemorial, pure *corpus* of English law – cannot be today successfully decided (if they ever could be) and this 'undecidability' might well be what the continuing anxiety about classifications could be more fundamentally about. To the extent that such a deeper anxiety hovers untouched over the arguments and materials of the book, its author in my view neglects a central challenge that can no longer today be credibly postponed – and, therefore, he does not make his case as forcefully as he might have initially hoped. In what follows, I first review the arguments and materials of the book, and then give some more thought to what I have called the question of legal classification.[3]

2. The many dimensions of private law

The subject matter of the work in question (its quasi-Cartesian object, one is tempted to say) is Anglo-American private law – or, what mutual rights and obligations individuals may have under Anglo-American private law. The author does not like maps, schemes or diagrams – that is, any pre-ordained attempt at sketching out 'the relation to each other of categories (organizing divisions) and concepts (recurring ideas) in private law' (p. 1). Instead, he argues, concepts have operated in Anglo-American law 'cumulatively and in combination' – which must then mean that no allocation of a particular legal issue to a single category can really be feasible or meaningful (pp. 1–2). Indeed, all sorts of people on all sorts of occasions have, the author recalls, argued the same: Oliver Wendell Holmes in the latter part of the nineteenth century, Lord Halsbury at the turn of the twentieth, and then Lord Wilberforce, R. Goff, Lord Nicholls, *Lister v. Hesley Hall Ltd*,[4] *Dobson v. Dobson*,[5] *Bazley v. Curry*,[6] etc. Not that legal classifications are unknown in the Anglo-American world. Blackstone, for one, famously spoke of legal maps and, in his *Commentaries*, of a general map of English law organised into rights and wrongs, and then rights of persons and rights of things, and private wrongs and public wrongs – but his proposed classification, many came soon to feel, was both over ambitious and somewhat too rigid. Or he set out to produce something 'more akin to the plan of an existing building than to a map of geographical territory' (p. 5). In particular, Blackstone's main failure was that he did not really discuss contract law – which had to wait for explicit recognition until after Powell's *Essay upon the Law of Contracts and Agreements* of 1790 and, more importantly, the translation into English of Pothier's highly influential *Traité des obligations*. Even then, English contract law

3 Contents and materials of the book are reviewed in section 2. For the question of legal classification, see sections 3 and 4.

4 [2002] 1 AC 215.

5 [1999] 2 SCR 753.

6 [1999] 2 SCR 534.

7 'Actual consent to be bound has been neither sufficient nor necessary in Anglo-American contract law: not sufficient, because it is ineffective in the absence of a bargain or a formality; not necessary, because contractual words and conduct are given effect according to the meaning reasonably ascribed to them by the promise, not that actually intended by the *promisor*' (Waddams, p. 7).

resisted the imposition of any single classifying concept – most obviously, consent.[7] What is more, its delictual and proprietary associations could perhaps be ignored but not erased by subsequent classification schemes.[8] Erasing such associations, our author points out, would have meant abandoning the central concept of breach of contract as a wrong, abolishing covenant and debt, renouncing equity as a source of contractual obligation, separating contract from property, and replacing the primary legal obligation of fulfilment of contracts – all far too radical changes in the absence of some codifying legislation (p. 8). Even such other schemes as for example Anson's – who in his *Principles of the English Law of Contract* tried to overcome the problems by multiplying rather than reducing the categories of obligation (contract, delict, breach of contract, judgment, quasi-contract, and miscellaneous) – attracted attention but failed to convince. Halsbury's *Laws of England* had 164 titles for the law, but, surprisingly, none for such things as public or private law, property, obligations etc. By contrast, Smith's *Leading Cases* managed to discuss much of the existing law on the basis of about 60 judicial decisions. At that time lawyers were thinking generally in terms of contract and tort – but neither Maitland nor Pollock approved of the effort (Pollock considered it a-historical). Unjust enrichment – which in 1914 had been pushed aside as a result of the continued attempt to classify all law as either contract or tort – would later on re-emerge from quasi-obscurity as fully independent of either.[9] This was of course a victory of the law of unjust enrichment and of the influence of academic writing – but it was also, our author feels, an implicit yet clear confirmation that no 'diagrammatic' classification can ever be exhaustive enough or unassailable. Not, at least, in Anglo-American law.

Why can Anglo-American classifications never be exhaustive or unassailable? First, our author argues, because maps, classifications, schemes and the like cannot be reconciled with change. Judges may well be deemed to declare the law, whether upon the use of maps or otherwise – but this fiction finally collapses when liability is imposed in novel circumstances. Secondly, there is no uniformity in legal decisions – neither where reasoning nor where conclusions are concerned. Thirdly, the historical separation in English law of courts of common law and of equity generated categories and concepts that are different depending on the jurisdiction of origin, and they have not yet been properly or totally integrated. Not only that but also, for example, the law of maritime salvage or of matrimonial obligations typically resist classification in terms of common law or equitable categories or concepts – for they have an altogether different history. Fourthly, classifications clash against the complexity of the relation between facts and law:

> 'The facts of the case are defined in relation to legal principles, but the principles themselves are formulated in relation to facts, real or hypothetical. Facts may be stated at countless levels of particularity, and legal issues and legal rules may be formulated at countless levels of generality.' (p. 14)

This is an important point for, our author continues, the selection of legally relevant facts is a question of judgment that, as such, can never be a truly separate affair from the formulation of the applicable legal rule. That is to say, 'facts are selected and then marshalled to fit perceived rules of law, but the rules themselves change in response to the facts' (p. 14). In particular, the instability resulting from such a predicament may soon let loose of any correspondence between the names of legal categories and what they suggest (pp. 15–16). And generally it may cause linguistic difficulties that may well have no genuine solution. Finally, other difficulties militating against classifications include the relation in English law between property and obligation, the appeal to judgment characteristic of the

8 '[T]he primary right of the promise remained a right to compensation for loss caused by wrongdoing, overlaid on the earlier concepts of covenant and debt, and supplemented by the power of the court of equity, where it thought it appropriate, to decree specific performance, to issue injunctions, and to declare and enforce trusts' (Waddams, p. 8).

9 Cf. *Fibrosa Case* [1943] AC 32.

legal decision-making process, the interaction between private law and public policy, the relation of judge-made law to legislation (they are not as separate as usually argued), and the near-impossibility in most instances of allocating a dispute 'to one concept or discrete set of principles to the exclusion of others' (pp. 20–1). That said, classifications may be perfectly valuable – they have, for example, a rhetorical use calculated to persuade. And yet, the sad point is that they tend to lack adequate historical foundations. So much so that thorough historical investigation will show how –

> 'non conforming instances have in the past been neither infrequent nor unimportant, and cannot therefore by measurable criteria be called marginal or insignificant; whether they can be called anomalous or unprincipled depends on the independent persuasive force of the principle to which it is asserted that they ought to have conformed, something that cannot be tested by historical evidence.' (p. 22)

Indeed, principles – categories and concepts – may well be used to condemn a past inconsistent with them but, then, such a past should not be summoned in support of those principles. Thus:

> '[a]n account of private law might possibly be supported entirely on non-historical grounds . . . but then the account would not necessarily reflect past or present law. On the other hand accounts that do claim to be descriptive of or supported by past or present law must reckon with the evidence of what the law has actually been.' (p. 22)

That Anglo-American legal categories and concepts may resist classification is easily shown. Take for example principle, utility and policy. Contrary to what one might expect, 'from a historical standpoint they appear rather as complementary strands in a single rope, or different dimensions of a single phenomenon' – witness for example the famous *Omychund v. Barker*,[10] whereby the language of William Murray (later Lord Mansfield), Dudley Rider (later Chief Justice of the King's Bench) and Lord Chancellor Harwicke unequivocally referred to principle, utility and policy at the same time (pp. 191–2). Our author reviews numerous instances where either principle or utility or policy were explicitly or implicitly taken to be the *exclusive* basis of private law (pp. 192–206). But such a position, he argues, clashes with much historical evidence that law can change by judicial decision so much that, in practice, the distinction between judicial and legislative functions becomes 'elusive' (p. 211). Or that expropriation, compulsory purchase, or eminent domain – the classic problem of *Bradford Corporation v. Pickles*,[11] *Allen v. Flood*[12] and one might add Josserand's '*abus de droit*' (1927) – are a question of both private rights and public interest (pp. 211 ff). Or that historically and analytically the status of maritime salvage is unclear (pp. 215 ff). Or, finally, that in private law compensatory considerations were often 'tainted' by punitive ones (pp. 217 ff).

Turn now to the distinction between property and obligation. Obviously Gaius knew what he was talking about when he separated rights *in rem* (against a thing) from rights *in personam* (against a person) from *actiones* (remedies) – but such expressions 'lack consistent meaning in Anglo-American law, and often both have been applicable simultaneously' (p. 172). There may be many reasons for such a plight – for example, the view that property is but a 'bundle of rights', or the linguistic opacity characteristic of the term (it is often unclear whether the law protects property in a strict or in a wider sense), or else the impossibility of establishing the 'true' nature of property (p. 173). On inspection, '[o]nce the concept of property has been extended beyond land and tangible things, there is no way of saying what is property, or what is not property, without consulting a particular system of law at a particular time' (p. 174). In fact, in today's intensely technological society property

10 (1744) 1 Atk 21.

11 [1895] AC 587, HL.

12 [1898] AC 1, HL.

(or some sort of proprietary interest) is often created entirely *ex novo* – perhaps by resorting to the rhetoric of property and despite pronouncements to the effect that, for example, 'information' is not a thing under the criminal law of theft.[13] Alternatively, the distinction between property and obligation blurs where – like in the case of conversion – a dispute over title to goods is actionable in tort, fault notwithstanding (p. 176). Or, where a proprietary right can never be enforced by injunction or, conversely, a contractual right (for example, a license for the use of land) *can* be enforced by injunction (pp. 177–8). Or, where an answer is sought for the question whether constructive trusts are *purely a* (proprietary) *remedy* (a solution that, Peter Birks believed, would inevitably lead to some random and unprincipled creation of property rights) (pp. 181–2 and n. 51; Birks, 1999(a), p. 686; Birks, 1999(b), p. 56 ff; Birks, 2000(b)).[14] Or, finally, where one considers tracing – whose 'reasons of justice have included concepts both of property and of unjust enrichment, and it is not possible to choose one of these to the exclusion of the other' (pp. 185–6; also Rotherham 1996; 2000).

Not even contract, wrongdoing or unjust enrichment can be persuasively presented as being in mutual isolation from each other, or else as being subordinated to one another. Instead, historical survey reveals that such concepts 'have often interacted with each other, and . . . cannot therefore be fully understood without attention to their mutual interdependence' (p. 142).[15] Neither can domestic obligations be wholly separated – nor in Anglo-American law have they ever been successfully separated – from other areas of private law. Indeed, contract, wrongdoing and unjust enrichment are clearly behind some of the dramatic changes that took place in the realm of family law in the second half of the twentieth century – and public policy too has been influential in that traditionally marginalised area of the law of obligations (Ch. 7).

Take contract. On closer examination, contractual liability cannot always be kept separate from other forms of private law liability – say on the basis that unlike physical harm, damage to economic interests affects the injured person 'only sometimes' (p 40, n. 5). Instances such as the U.S. decision in *International News Service v. Associated Press* (1918)[16] remind us that contractual liability may well be established in cases where there is *no* prior legal right – yet there is some wrongful conduct 'that has made it possible *thenceforth* to say that the plaintiff had a legal right' (p. 41, author's emphasis). Other well-known cases of contractual considerations blending with considerations of property, trust, wrongdoing and unjust enrichment include interference with contractual relations, use of land and sometimes chattels in contravention of contractual restrictions agreed by the previous owner, and cases where the claimant is a third party in respect of the defendant in breach (but the list, of course, is longer) (pp. 43–44). Recognising a direct action in tort has, in such cases, proved illusory (p. 47).[17] But, our author clarifies, the point really is that such examples demonstrate the 'instability of the methods of classifying obligations' (p. 48). Could those not be, for example, property damage cases, rather than contractual? And, on the other hand, do not they show obvious affinities with those regarding third party beneficiaries to contracts? The answer to both questions is yes, except that in the latter instance English law unlike American law had ironically come to *accept* 'the logic of a stringent classification of concepts' – only however to conclude that, regretfully, the result was clearly gross injustice.[18]

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13 *R v. Stewart* [1988] 1 SCR 963.

14 *Contra* see Waddams, pp. 182 ff.

15 On the interplay between contract, wrongdoing and unjust enrichment, see also Waddams, Ch. 8.

16 248 US 215 (1918).

17 See also Waddams, Ch. 8.

18 '[T]he beneficiary could not sue because she was not a party to the contract; the promisee's estate could sue, but could recover no substantial damages because it had suffered no loss' (p. 50).

Nor can the protection of reliance via estoppel be persuasively explained in terms of any other single concept. Close to both contract and tort, estoppel is neither always contractual (a means of enforcing promises) nor always tortious (a means of redressing wrongdoing) – nor, for that matter, is it always proprietary or always ever explicable in terms of unjust enrichment. This seems clear in many land cases – whereby the promisee relies on the promise only to find out that later on the promise is revoked. Typically in such cases there is no contract (the promise was gratuitous) and no property has been legally transferred – but neither, sometimes, is there any guilt or enrichment by the promisor (p. 59, n. 7). Nevertheless, equity protects the promisee and it does so based on a combination of considerations rather than on any one of them exclusively.[19] Indeed, equity does so with those contracts but also, for example, with contracts for the sale of land or with secret trusts (pp. 62–3). In such cases – and in many others – classification is either impossible or meaningless. Even –

> '[t]he establishment of a fourth category of obligations, or consignment of the reliance cases to a separate 'miscellaneous' category, would scarcely resolve the difficulties, because reliance has not been so much *separate* from the concepts of property, contract, tort, and unjust enrichment, as intimately linked with all of them.' (p. 79, author's emphasis)

Where Anglo-American tort law is concerned – our author argues – one of the most powerful arguments against classification lies in the ambiguous sovereignty of the principle 'no liability without fault'. Pollock and Wright doubted the existence of such a principle as far back as 1923 and 1939 respectively (p. 80) – but Lord Denning, too, voiced his scepticism on this on more than one occasion (p. 81). Cases of compensation without fault include – among others – the objective standard of competence (where inexperience, inherent incapacity, or a momentary or pardonable lapse of judgment do not generally count), the law of general average contribution in maritime law, expropriation or taking of land for public use, nuisance, flooding of land (whereby one landowner can preserve her own property only by damaging that of a neighbour) and other necessity cases, harm caused by unusual or hazardous enterprises (property can be destroyed in order to prevent fire, or criminal activities, or the spread of a disease etc.), the law of vicarious liability, the law of product liability, and the law that imposes liability for animals (cattle trespass, dangerous animals etc.). All these cases 'cannot be fully explained in terms of wrongdoing (in the ordinary sense of the word), but neither can they readily be explained in terms of any other single concept' (p. 82).[20] A general principle of strict liability is not easily formulated – in particular as it is difficult 'to distinguish an identifiable enterprise (to which is it judged to be feasible and desirable to allocate costs of the damage it causes) from the ordinary activities of everyday life' (p. 92). Nor does there seem to be much historical evidence in support of the view that strict liability is an anomalous exception to a general principle of fault – if, that is, one agrees with John Fleming (writing on the rejection of *Rylands v. Fletcher* in the High Court of Australia) that such a general principle could hardly be seen to have overtaken (at last) 'a rule redolent of archaism' (pp. 91–3 and notes).

Many more issues in Anglo-American private law seem to make the case for classifications rather impervious. For example, if the claimant suffered no loss, must wrongfully acquired gains be disbursed? This bitterly contested question has caused much conceptual agonising – not least because in many cases claimants do in fact suffer some loss, though a difficult one to quantify – and, yet, it is unlikely that this question will ever leave the shadowy territories that lie in-between restitution, contract, tort or property (pp. 107 ff.). For '[w]e may take the issue out of unjust enrichment, but it is not so easy to take unjust enrichment out of the issue' (p. 112). Sometimes

19 See *Gillett v. Holt* [2001] 1 Ch 210 (CA) at 225, 234 – in Waddams, pp. 61–2.

20 Waddams, Ch. 5, reviews individually each of the cases mentioned in the text and several others.

for example claimants have been able to recover a reasonable fee in spite of the fact that the tort had been waived. Here the law deems claimants to have given prior approval to the wrongful conduct by the defendant – but this *fictio* is neither accidental nor irrelevant. To insist that such cases have been concerned *only* with wrongdoing, and not also unjust enrichment, or contract, or other legal concepts would be, our author believes, 'to oversimplify' – as 'the contract that might have been made if the defendant had acted lawfully has often been an important consideration' (p. 112, author's emphasis). And what about those instances where judicial opinion is very significantly divided between compensatory, restitutionary and even proprietary considerations – for example, where claimants are awarded money as defendants have failed to respect restrictions on the use of land albeit doing so through no prejudice to the other party? Here the resolution of the issue could only come through the *simultaneous* application of elements of tort and elements of unjust enrichment (p. 117). And if this and many other cases of interdependence of legal concepts have often given the appearance of circularity to legal reasoning – well, our author observes, that 'does not show that the conclusions reached have been accidental, arbitrary, or unprincipled' (p. 119).[21]

3. Joanna Wagner, or Which is the body of law?

My aim thus far has been to follow as closely as possible the reasoning and materials of the book – to try and listen to them on their own terms. The gist of it, it has emerged, is a mainly historical argument against classification. On surface, Waddams does not absolutely deny the usefulness of classifications but, rather, he cautions against an excessive or improper use of them by lawyers. Yet such a cautionary note is rather strong – as even a mixed approach between what he characterises as the *internal* (descriptive) viewpoint of history and the *external* (prescriptive) viewpoint of classifications is looked upon by him with dislike. Surely, concurrence is largely unavoidable – for 'the assessment of what the law is at the time of assessment, or of what it was at any previous time, is itself a complex process' involving all sorts of interlocking operations (historical enquiry, judgment, synthesis, prediction etc.) (p. 222). Yet one should not underestimate how –

> 'concurrence carries the risk of distorting an understanding of the past. There is a danger that the universal idea may be used to excise or to marginalize aspects of the past that do not conform to it, while at the same time implying that the past, conveniently pruned by these means, offers support for the idea.' (p. 22)

Thus the *present* of any legal classification is firmly separated from and contrasted with the pre-existing, pre-eminent, immemorial *past* of legal history. That past, Waddams concedes, has many dimensions – here, the dimensions of Anglo-American private law. Yet for him that past is *one* and its integrity should be preserved. That is why the many dimensions of that past cannot and, indeed, should not be captured by any one classification, no matter how well thought out the classification is or well meaning its particular proponents.

The heart of the book, then, must really lie in the story of Johanna Wagner and the rival opera houses (Ch. 2). The background to the story is the rather brutal competition between two London theatre managers – Benjamin Lumley and Frederick Gye – for the services of one Ms Wagner, a singer of some fame. In November 1851 Wagner had agreed with Lumley on a three-month engagement and a fee of £1,200. While under the agreement Lumley was to make an advance payment on 15 March and Wagner start on 1 April 1852 – Wagner subsequently asks and obtains a postponement until 15 April. Meanwhile, however, Wagner has become increasingly unsure of the arrangement – not least because of her employer's supervening financial difficulties and subsequent failure to make

21 More cases of profits derived from wrongs are discussed throughout Waddams, Ch. 5.

the agreed advance payment. Thus, offered a better contract by Gye, Wagner takes up the offer and goes up to London. The debut, announced for 24 April at Covent Garden, is blocked by an injunction at Lumley's request restraining Wagner from appearing.[22] This leads to an initial 'contract' case (between Lumley and Wagner)[23] followed almost immediately by a second 'tort' case (between the two theatre managers).[24]

Neither the contract opera case – our book argues – nor the tort case could lend themselves to classification in a satisfactory way – except, that is, by distorting the past and the relevant historical record. First:

> 'the fact that the advance money had not been paid on 15 March – apparently an important breach of Lumley's obligation – was held by three judges not to be legally conclusive, and for three quite different and inconsistent reasons . . . This . . . shows how a fact, apparently relevant, may be made irrelevant by framing of the legal issues, or by findings of other facts.' (p. 27)

Secondly, the injunction against Gye was issued – on a strict interpretation – in the absence of any firm basis in either contract or tort.[25] Thirdly, Gye's conduct could well be classified as wrongful – as indeed *Lumley v. Gye* resolved to do – yet a close reading of the records shows that both the contract case and the tort one were dotted with all sorts of contract, tort, unjust enrichment, property and public policy considerations that make classification unconvincing. Clearly, courts in those instances used overall judgment, not logic (p. 36). And, clearly, they did not reach conclusions 'by allocating the facts to pre-existing categories, or by reference to anything like a pre-existing map or scheme, but by the operation of several concurrent and cumulative considerations' (p. 38).

What the above shows, in sum, is that – in the opinion of the author of our book – no external grid, picture or other image of the *corpus* of Anglo-American law would do. Instead, only some patient, internal, historical retracing of that *corpus* and of what is relevant at each point in time to a particular legal issue could realistically hope to produce useful if never final results. For Johanna Wagner has indeed some 'body' (or profile) at law but that body is not, and could never be, what might show up at any given time based on some clever yet essentially inadequate legal classification – nor, for that matter, what could appear on screen 'at the click of button' (Birks, 2000(a), p. xxx).

That might be so – but one wonders, does the strong cautionary note struck by Waddams and epitomised by the twin opera cases go far enough in bringing out the *question of classification*? There is no need here to rehearse the well-known reasons of the advocates of classifications.[26] Nor do we need here to contrast them with the reasons of the sceptics – our book, as we have seen, does it well.[27]

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22 'Just as Gye's victory was short-lived, so also was Lumley's, for in the end Wagner did not sing at either theatre, and the 1852 season was a disaster for Lumley, and for Her Majesty's Theatre, which closed from 1853 to 1855, Lumley attributing the closure largely to Johanna Wagner's defection. Lumley eventually lost his legal action against Gye for damages, so in the end Lumley, Gye, Wagner, and the opera-going public – everyone in fact except the lawyers – were all losers' (pp. 25–6).

23 *Lumley v. Wagner* (1852) 1 De G M & G 604, 21 LJ Ch 898, 16 Jur 871, 19 LT 264.

24 *Lumley v. Gye* (1853) 2 El & Bl 216, 22 LJQB 463 (demurrer) and (1854) 18 Jur 468 n., 23 LT 66, 157, 23 LJQB 116 n. (verdict).

25 Such an extraordinary result, our author interestingly adds, could only be explained by the likely hostility of the court towards Wagner and Gye – following a recent case where Lumley had profited handsomely from the contractual breach of another opera singer, thus showing how damages was a hopeless remedy in the circumstances.

26 Arguments and counter-arguments concerning the motion are authoritatively summarised by Birks (2000(a)).

27 Unfortunately, however, the book relies on but does not really discuss the work of Geoffrey Samuel advocating an epistemology centred around a *persona* understood as 'an actor not on a single stage; the actor is defined, at least in part, by changing sets and props depending upon the nature of the relations in play' (2002, p. 355).

Instead, let us take this opportunity to pause and simply consider how the alternatives typically on offer in the debate on classifications continue to be *either* a 'real' legal territory that can be pictured (proponents of classifications) *or* a legal *corpus* that, although some sort of reality too, could never be fully grasped by any one picture or classification (sceptical view). But then, one wonders, is it still so very meaningful today to draw firm lines between external and internal realities, between territories and *corpora*, between the perfect space represented by a good classification and the imperfect space represented by any one of the various dimensions of private law? In short, does the opposition between Johanna Wagner's *two bodies* – the internal body, so to speak (*corpus*, essence or structure), and the external one (its territory as represented by this or that classification) – does any such opposition really allow the question of classification to come any further into view? Or is it perhaps the case that inside and outside, territories and *corpora*, classifications and dimensions – these *all* raise problems that, paradoxically, become all the more pressing today as those territories and *corpora*, classifications and dimensions, come more and more intensely under scrutiny? And if that is the case, what then would be truly at stake beneath or within those territories or *corpora*, classifications or dimensions? What I would like to note here is that, ironically, both camps in the classification debate encounter but do not seem to notice a very central problem that, however, they both reaffirm through their silent backing of oppositional western rationalities – the problem, that is, of *legal space*. Both camps, in other words, concern themselves with what they take to be the reality of Anglo-American private law (territory or *corpus*) – but, then, they leave the conditions of possibility of that reality to the side. And yet, I argue, it is precisely the status of what is thus, each time, 'blotted-out' that might be so very eminently at stake in many of today's debates over the future of western democracy and the rule of law.[28]

4. Being territory, being *corpus*

Territories and *corpora* are undoubtedly a most interesting instance of human thought, particularly legal thought – and they do bring with themselves the problem of what should or could be included in those figures and what, by contrast, would be best left out of them. More fundamentally, however, both territories and *corpora* raise, I suggest, serious questions about the divisions and ensuing oppositions that they highlight – and so, therefore, they raise questions about legal thought itself.

More resolutely (in my view) than most other twentieth century philosophers, Martin Heidegger undertook the responsibility of showing how, from Plato onwards, what would one day be called 'western' thought has been continuously characterised by the rather troubling cipher of *separation* – thinking for us was always a matter of attributing different ontologies to not always necessarily separate beings. In that sense, modern western thought must be traced back to Cartesianism and its lasting but – for Heidegger – puzzling endorsement of Descartes' '*cogito ergo sum*'.[29] According to Cartesianism, it is one's own thinking I (somewhat concealed under the popular Latin rendition of Descartes' pronouncement – '*cogito*', '*I* think', '*ergo sum*', 'therefore *I* am') that each time provides the ultimate *certainty* of the existence of the object of that thinking (starting with one's own self). Or, to put it differently, the realisation of the *object* of thinking, human as opposed to godly thinking, follows from the separating of it from a thinking human *subject* (mind, spirit). Therefore, the old ontological question 'why is there something rather than nothing' is answered by the moderns by saying: because *we* doubt, we think, the existence of what *there is* (or, we are certain about things because we are able to think them). But – for Heidegger – it is precisely upon that inaugural, double gesture of separation of the *cogito* from the bare, undifferentiated fact of existing and, then, of the

28 I have argued this more fully in Stramignoni (2001, 2002, 2004).

29 In the natural sciences, by contrast, one will think of Galileo or Newton.

object from its subject that western rationality takes a new, reflexive turn in its obstinate if perilous *reification* of the world – a reification, in particular, that systematically *forgets* the *being* of what there is (Heidegger, 1927/1996).[30] By thinking the way we do, we put the world into 'boxes' (categories and concepts, territories or *corpora*) but then we end up treating them as natural or real or else as essentially or structurally true – thus forgetting or ignoring the unique being they originally are. Thus, in a world like today's where old differences are waning and new differences are apparently on the rise – the old question surfaces again: why is there something rather than nothing? Which is the reality we are looking for? What difference does it make? Can any such reality be successfully reproduced (the proponents of classification would answer yes) or can it not (sceptical view)?

If the difference between Joanna Wagner's two bodies (territory or *corpus*) lies in the gesture of separation that each time engenders them, then the larger question posed by such a gesture would seem to be – what is thought? Where and when, for example, does one's own thinking of 'love', 'fear', 'animal', 'table', etc. – occur? In short, which is the *place* of thought? Such questions are neither idle nor abstract – as the natural sciences are only now beginning to discover.[31] For a 'history of the present' (Foucault, 1976/1977, Ch. 1), moreover, such questions are of interest as they must have helped us focus on our different objects of knowledge by giving them (shall we say) colour, body, and articulation – by making them visible and helping us 'box' them.

Notoriously, and in spite of antiquity's penchant for heart, chest and *praecordia* (Onians, 1994, p. 23 ff.),[32] moderns took the *head* and in particular the cranium to be the place of thought[33] – but then, in time, they looked at head and cranium in radically different ways. As Georges Didi-Huberman elegantly reminds us (2000), modern scientific rationality has normally treated the head as a 'box' (thus favouring an *external* view of the head) (p. 9), yet at the beginning of modernity Leonardo had been fascinated by the *internal* rather than external aspects of it[34] and, in particular, by the 'system of contact' ('*système de contact*') between the cranium itself and what is enclosed by it – 'the mass of the brains, of course, but also the tissues, membranes, humours or muscles that clothe, protect, work as interfaces or isolate' (Didi-Huberman, 2000, p. 18).[35] In short, Leonardo had likened the head to an onion rather than to a separate, external container (as later moderns would do). In onions, Leonardo had noted, container and content coincide – an observation implicitly but importantly doing away with any pre-modern yet still current sense of hierarchy between centre and periphery (Didi-Huberman, 2000, pp. 18–20).

If the head is the modern seat of thought, the legal world is or often in modernity it has been taken to be the privileged place of legal thought. Thus, *placing* (legal) thought – in the specific sense of giving it a name and a fixed abode in the space and time of law – becomes a fundamental, even foundational gesture of western legal modernity. With it legal modernity, quite literally, *takes place* and *makes* all the difference. So much so that it is within the legal world and within the legal world only that, from now on, legal thought and the most significant products thereof should be found – or

30 That is what Heidegger called the question of being – of the being that each time *there is* (he called this '*Da-sein*', an intentionally vague term indicating the human being, whose own being is eminently implicated by this question).

31 For a review – in praise of human nature – see Pinker, 2002.

32 Interestingly, Greeks, Romans and Anglo-Saxons held the same view on this matter (Onians, 1994, pp. 38–9).

33 For antiquity, the head was rather the life or holy seat of life (Onians, 1994, pp. 96 ff).

34 '*C'est qui le fascine d'abord, dans le crâne humain, c'est ce qu'il nomme son «côtè interne»; c'est la «cavité des orbites», avec sa «profondeur» dissimulée; c'est, en general, tous les «trous visibles», et ceux qui se voient moins comme ces canaux par où, selon lui, les larmes remontent directement du coeur jusque vers les yeaux*' (Didi-Huberman, 2000, p. 15).

35 '*La masse du cervau, bien sûr, mais aussi les tissues, membranes, humeurs ou muscles qui enrobent, protègent, servent d'interfaces ou d'isolants*' (Didi-Huberman, 2000, p. 18).

so many moderns came to insist. That 'Pandora box' syndrome (the idea that the legal world and only the legal world must contain things legal) does, of course, make sense, at least *prima facie*. In modernity *we* think and act legally *in* courts, parliaments and universities – or so it would appear. Thinking and acting legally in courts, parliaments and universities must then mean that legal briefs, case law, legislation, academic research and other instances of legal thought must be part and parcel of the whole we think we inhabit (the legal world in question). As in our intensely word-oriented Judaic-Christian cultures such thought is at once elevated to an eminent position and then reduced to *categories* and *concepts*, such categories and concepts turn out to be both what helps *us* place legal thought and, recursively, the only place *of* legal thought. Indeed – or so it has often been argued – the absence of such categories and concepts must mean that *they* (the 'others') have no legal thought worthy of notice.[36] Alternatively, the absence of one or another of the authorised items on the list, or else the relative strength of one of them over the others, could nurture the broader but peculiar concern of *comparativism* with legal families and the like. Thus, for example, the absence of trust in a particular legal world could be seen to highlight the Englishness of English law (where trust flourished) and the otherness of others. Or else, the absence of a general principle of tort liability could be taken to underline, elsewhere, the Italianness of Italian law (where Art. 2043 of the *Codice Civile* asserts such a principle) and the otherness of others.[37]

Now, the Pandora box syndrome may well have helped our modernity frame legal thought as this or that part of an autonomous legal territory, legal *corpus* or legal family – it may well have helped us give each particular object of knowledge some colour, body and articulation at law – but it also has brought dramatically to the surface the deep, constitutive tension – separation, split, schism – of western thought, and of legal thought in particular. Which for example might be the body of (Anglo-American) law? Is it a territory that can be captured by a good (external) classification or is it a multi-faceted *corpus* that, as such, can only be represented through one of its many but ultimately inessential dimensions? The ensuing problem, however, is not so much which point of departure is true (external or internal, territory or *corpus*) – *pace* for example the parallel debate regarding whether a particular instance of legal thought provides evidence of the existence of a legal system or that of a pre-existing, underlying or surviving legal tradition. Nor, more generally, is the problem whether we are about to witness a clash of civilisations or, by contrast, the end of history. *Rather, the problem – and accompanying, continuing anxiety – seems to be that the alternatives on offer can never be successfully decided.* That is to say, the problem is that once territories or *corpora* are duly separated lawyers will attempt with increasing determination to manipulate them – they will single-handedly seek to 'box' them – only, however, soon to be displaced by those very territories or *corpora* in always new directions with the result, amongst other things, of being themselves eventually subjected to their own initial object of thinking. Thus, Foucault argued, subject and object are brought into the grip of a palpable tension whereby the subject remains inextricably tied up with its object and the object with its subject – in what could be aptly described as the impermanent gaze of a host of different histories, knowledges and *pouvoirs*.[38] Or, the long-standing Cartesian separation of an object from a subject – 'box' from master, ruled from ruler etc. – starts slowly at first, and then more and more pervasively, to blur. In short, it becomes *undecidable*.

Put differently, the problem today seems to be that categories and concepts as objects of legal thinking name a space that lawyers (like scientists but unlike angels) are only too keen to tread, and yet they can only tread within limits that, as it turns out, are just as baffling as they are productive.

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36 Legal pluralism has put the more extreme manifestations of that rather exclusionary attitude toward alternative forms of regulation to final rest (Roberts, 2005).

37 For a range of compelling alternatives to comparativism, see Legrand and Munday (2003).

38 This is, in many ways, the thrust of several of Foucault's works (1961, 1963/1973, 1976/1977).

So – the question now becomes – which is the subject and which the object? Modern legal spaces, no doubt, are more and more open spaces than ever before. That means that they can be inspected from within – the way Leonardo liked to do it with the human head: first with a knife, then with a brush (he called this method '*notomia*')[39] – or alternatively, they can be inspected from without. For example, Dürer – perhaps the most scientific of Renaissance visual artists, given his obsessive concern for Euclidean geometry – famously found a way of keeping the proportions of the head untouched while drawing them from every available, external point of view (Didi-Huberman, 2000, p. 22). That is to say, he succeeded to put the head in perspective – looking at it from without while each time creating a different visual place ('*lieu visuel librement mis en œvre*') (Didi-Huberman, 2000, p. 28). Similarly, to the extent that maps, schemes or diagrams may help us find *ex ante* our way into the world, a certain organisation of categories and concepts may well amount to a veritable map of a legal territory as this might look from without (this would be a Dürer-like approach). Alternatively, an opposite, internal *modus operandi* could be adopted (Leonardo's approach) whereby categories and concepts might evoke this or that legal *corpus*. Yet the more urgent point is that this modern anxiety to open up, chart or tread the space we have ourselves discovered or designed – Nietzsche in his madness might have diagnosed it as a crystal clear instance of all too crazy but all too human will to power – is also what may have left legal modernity, as it were, behind itself.

In suggesting this, however, what I wish to highlight is a position, not necessarily a failure – a sense of on-going displacement rather than of a place yet to be reached. I mean to suggest, in other words, that the different spaces that we have each time opened up, treaded or charted remain true for the different cultures that have expressed them – but, we should now recognise, they often turn out to be rather empty or ghostly places – or at least not as real or reliable spaces as initially believed.[40] In that case, the question becomes not so much which legal territory to classify or which *corpus* to retrace, but *how* is each time the territory or else the *corpus* evoked by our different legal cultures. For example, is the problem whether the tort law that has emerged in England since 1932 is a territory that can be mapped or, by contrast, a *corpus* that can never be completely reproduced – or is it rather, say, what linguistic, labour-related and life-shaping gestures might have locked the judiciary into the recursive consideration of a particular set of human activities as tortious or non-tortious? Is the problem whether a particular combination of categories and concepts gathered under the template of negligence will help us understand English law better – or is it also, and more problematically, what forces, currents and (strong) undercurrents such a template might or might not be capable of deploying to imbricate and redirect our sense of the self and of the other in the innumerable relationships of everyday life? And, finally, is our object of analysis (what each time we take to be the law) not the result of an eventful *heartland* that, as such, can only be wandered along (or perhaps even exited)[41] but never positively explored? This is what I would call the *matter* of legal space – a crucial matter that, in my view, necessitates some serious attention.

In particular, the matter of legal space would be not so much a physical, metaphysical or even a hidden reality, but rather somewhat of a fleeting event, an unexpected making sense, a momentous yet always momentary positioning – no longer, therefore, a question of internal or external, fixed or near-fixed, points of view but a question of just how each time and in different ways each legal

39 '*Le cose mentali che non son passate per il senso son vane e nulla verità partoriscano se non dannosa, e perchè tal discorsi nascan da povertà d'ingegno, poveri son sempre tali discorsori, e se saran nati ricchi, e' moriran poveri nella lor vecchiezza . . . E tu, che di' esser meglio il vedere fare la notomia che vedere tali disegni, diresti bene . . . che in tali disegni si dimostrano in una sola figura; nella quale, con tutto il tuo ingegno, non vedrai e non arai la notizia se non d'alquante poche vene; delle quali io, per averne piena e propria notizia, ho disfatti più di dieci corpi umani*' (Leonardo da Vinci, 1992, W 19070v).

40 For an argument that this might have always been understood to be the risk, see Rossi (1995).

41 A recent proposal of 'exodus' comes from Hardt and Negri (2000).

territory or *corpus* becomes what it is (taken to be). 'Boxing', we noted, helped us give our thought colour, body and articulation at law. English judges, for example, are still said to be and to act quite differently from their continental brethrens (Damaŝka, 1986). And in England the law of contract is still generally felt to have a different colour, body and articulation from other branches of private law. In both instances, a number of internal and external tensions are routinely examined. But, I suggest, a more urgent sort of question would no longer ask, so much, whether or not the judiciary or the law of contract etc. can or cannot be adequately mapped or classified. Increasingly today that seems to be an undecidable sort of query – one attempting to separate mapping territories (thus the proponents of classifications) from 'mapping maps' (like the sceptics ultimately do). Either way, it seems to me, *there is still some powerful mapping involved* – the 'boxing' attempts of the modern subject vis-à-vis (and this is the point) its increasingly intractable, increasingly imperious object (this or that judiciary, this or that law of contract, this or that concept of family etc.). As it turns out, lawyers of a 'civilian' persuasion prefer to map territories (legal systems or traditions) rather than maps. Those of Anglo-American persuasion, by contrast, prefer to map maps – to put what maps there are back into the familiar regions of an immemorial legal *corpus*. Both camps, of course, have their internal dissidents. And both hope to capture the object of their desires and to bring it home (that much is clear). But what, incredibly, is still little considered is how, self-confined into an intricate, Escher-like maze of territories and *corpora*, western lawyers remain put while everything else around them continues, thankfully, to move.

So, Foucault argued in his *Preface* to the *Order of Things* (1966/1970), the problem with mapping is not so much one of inclusion or indeed of exclusion – as the debate on legal classifications exemplified by the book under consideration continually if anxiously seems to presume. Much more fundamentally – for Foucault – the problem is the extent to which mapping can hide the *outside*, so to speak, of thought. Consider an exotic taxonomy:

> 'In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that . . . is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.' (Foucault, 1966/1970, p. xv, author's emphasis)

Thus, we come to realise, what is unthinkable about a classifiable legal territory *or* about an immemorial legal *corpus* is not simply what they define or prescribe as regular or exceptional (although that, too, can be rather problematic) – but that in separating regular and exceptional they localise what they separate, thus exorcising the possibility of thinking 'dangerous', unexpected, or imaginative combinations. Unthinkable is indeed the *site* of the resulting proximities – the common ground which made the distribution of each territory or *corpus* possible.[42] And, on showing that distribution while at the same time suppressing the very site that made it possible, each mapping exhibits a particular disorder but also 'a worse kind of disorder . . . I mean the disorder in which fragments of a large number of possible orders glitter separately in the dimension, without law or geometry, of the *heteroclite*' (Foucault, 1966/1970, p. xvii, author's emphasis). That is to say, where there is mapping there is no home for any other order – not even a utopian home.[43] Instead, there will be *heterotopias* – injunctions that simply yet powerfully disturb all established language as they 'desiccate speech, stop words in their tracks, contest the very possibility of grammar at its source; they dissolve the myths and sterilise the lyricism of our sentences' (Foucault, 1966/1970, p. xviii). Finally, mapping also speaks of aphasia – for being homeless (in the sense of being radically outside, neither included into nor excluded from any territory or *corpus*) must mean being radically

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42 'Where could they ever meet, except in the immaterial sound of the voice pronouncing their enumeration, or on the page transcribing it?' (Foucault, 1970, p. xvi).

43 Here Foucault seems to read Heidegger more radically than elsewhere.

unable to speak – and that, too, is the trouble with mapping. So, then, mapping points to a 'kind of thought without space, to words and categories that lack all life and place, but are rooted in a ceremonial space' (Foucault, 1966/1970, p. xix) – complex as it is strange, exotic, and unfamiliar. Thus, we suddenly come to realise, there is 'at the other extremity of the earth we inhabit, a culture entirely devoted to the ordering of space, but one that does not distribute the multiplicity of existing things into any of the categories that make it possible for us to name, speak, and think' (*ibid.*). Or, we suddenly discover the *other* that *we* are.

So, what is so problematic about mapping, according to Foucault, is the extent to which mapping blots-out 'outside' space ('*du dehors*') – thus neither so much the space that becomes visible from inside (here, the many dimensions of a legal *corpus*) nor the space that can be made visible from outside (the territory of a legal classification). Foucault adopts here a quintessentially Heideggerian insight – an understanding of things as world, finitude and solitude – that now becomes a strategy to make words and things move (Heidegger, 1929–1930/2001). What mapping urgently asks, Foucault suggests, is the question of order[44] – but then, in so doing, mapping interrogates less the structure of that order (whether internal or external) than one's distance from it.[45] Order – for Foucault – is

> 'at one and the same time, that which is given in things as their inner law, the hidden network that determines the way they confront one another, and also that which has no existence except in the grid created by a glance, an examination, a language.' (Foucault, 1966/1970, p. xx)

Order is both those regions – both the inside and the outside of life, both the already encoded and the reflexive code – and those regions *are* far from each other. But, Foucault continues, that is precisely the point. For between the inside and the outside, between the already encoded and the reflexive code 'there is a middle region that liberates order itself' (Foucault, 1966/1970, p. xxi). That middle region, that in-between,

> 'in so far as it makes manifest the modes of being of order, can be posited as the most fundamental of all: anterior to words, perceptions and gestures . . . more solid, more archaic, less dubious, always more 'true' than the theories that attempt to give those expressions explicit form, exhaustive application, or philosophical foundation. Thus, in every culture, between the use of what one might call the ordering codes and reflections upon order itself, there is the pure experience of order and of its modes of being.' (Foucault, 1966/1970, p. xxi)

The *pure experience of order – that* is, according to Foucault, what is more problematically at stake in things like a legal classification or a legal *corpus.*[46] Not just the reflexive code of the classification itself (what legal territory it presumes to represent) nor, by contrast, the encoded order of the historical record (a legal *corpus* with its multiple dimensions) – but the pure experience of order. That experience, Foucault noticed, emerges when we investigate the *space of order* through which knowledge was constituted, the epistemological field of a knowledge 'envisaged apart from all criteria having reference to its rational value or to its objective forms' (Foucault, 1966/1970, p. xxii). In short, that experience emerges when we engage not so much in the history of ideas or in the history of science as, rather, in a true 'archaeology of knowledge' (Foucault, 1966/1970, p. xxii).

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44 Comparative lawyers would be well placed to deal with the question of order, precisely because of their being "distant from home" – Stramignoni (2002 (b)).

45 That is, in my view, a central problem with constructivist epistemologies that aptly remind the enthusiasts of classifications of the artificiality of the legal sphere – yet imply for their analyses a stable and recurring object of sort that shows just the same drawbacks as the Cartesian object fatally criticised by Heidegger and Foucault. System theorists, by contrast, employ Heideggerian and Foucaldian insights to radicalise western liberal thought – an enterprise that opens, it seems, more questions than it hopes to resolve.

46 For a development of this insight, see Agamben (1998).

5. Conclusions

So, one might ask, where do the work of Heidegger and Foucault leave us in the classification debate? And where do they leave, in particular, judges and lawyers who are pressed by the urgent necessities of their daily legal business? It is difficult to obtain universal guidance here as, clearly, such a guidance would be part of the problem. Instead, the point is that we might need to suspend judgement – each one of us individually, or as a 'multitude' (Hardt and Negri, 2000) – and think legal mapping afresh. Gilles Deleuze, for example, indicated a particular way forward in a brilliant essay on the role of statements in discourse (*énoncès*) – that could be productively elaborated by lawyers (Deleuze, 1986/1999). Likewise, Didi-Huberman continues to probe the different places of thought in western art (*lieux de la pensée*) by experimenting on the possibility of 'touching' thought (*toucher la pensée*) (Didi-Huberman, 2000). So then, we might ask, will *we* be able one day soon to 'touch' the places of legal thought that we are as well as inhabit – thus recovering the distance that separates us inside as well as outside, privately as well as publicly?

Many more are working on the same wavelength as Heidegger and Foucault – expanding on their legacy. Heidegger, it is increasingly recognised, opened the way to an unparallel, critical reassessment of the Cartesian legacy of western thought – including legal thought – that can no longer be safely ignored. Later on, Foucault started along the same path – showing how, paradoxically, the relentless reification of the world by the subject, father, king or legislator brings into view the outside of the internal/external orderings on which modernity has based its powerful if precarious sovereignty over the 'other'. But then, as both Heidegger and Foucault understood, western ways of thinking must systematically leave out what a basic sense of justice would require us to tend to with no delay. What then seems to be the problem today – as far as the debate on legal classifications is concerned – is not so much that of ascertaining which might be Johanna Wagner's 'real' body (whether a classifiable legal territory or an unclassifiable legal *corpus*) but, rather, the pure experience of that body and the undecidability that it entails.[47]

For how could it ever be just that which could never be properly decided?[48]

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47 For one example, see Vandervelde (1992) (regrettably, this important article is ignored by Waddams in his book).

48 For a powerful attempt to answer to this difficult question, see Derrida (1994).

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