Chapter 2 – Private Law and the Limits of Legal Dogmatics[1]

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1 Introduction: A Legal Problem

1.1 Wrongful Life

In 2005 the Dutch *Hoge Raad* (the Supreme Court) decided a wrongful life case.[2] This case concerned a woman who consulted her midwife during her pregnancy because there had been two instances of handicaps in her husband's family due to chromosomal disorder. The midwife did not think it necessary to investigate the matter any further. This was later considered a professional mistake, one with dramatic effects. When born, *baby Kelly* turned out to have serious mental and physical handicaps from which she suffered severely. The parents claimed damages – both on their own account and in Kelly's name – and their claims were upheld by both the Court of Appeal and the Supreme Court. The Supreme Court not only considered the strictly legal issues but also considered moral and pragmatic arguments which had been put forward against such so–called 'wrongful life claims'. First, there was the moral contention that sustaining these claims violated the principle regarding the dignity of human life, since it acknowledged that not being born is preferable to living in a condition like hers. Secondly, there was the pragmatic argument that sustaining claims like this would tempt doctors to practice 'defensive medicine' to avoid serious risk. Both arguments were carefully examined by the court and subsequently rejected. What does the Supreme Court in fact do here? Does it call out or explain the law to us? Or does it exceed its limits by elaborating on principles and policies, taking into account the moral grounds and the possible consequences of the ruling itself? In both directions the question arises: what constitutes the limits of private law?

1.2 Law without Limits?

The reasoning of the Supreme Court in this case exemplifies a pattern that is not uncommon in hard cases, at least not in our part of the world. In first instance it

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2 HR 18 March 2005, LJN AR5213 (*baby Kelly*).

reasons within the context of the accepted sources of law – in this case the relevant provisions of the Civil Code in an accepted interpretation. In hard cases though, the result of this approach is not completely satisfactory, since the decision is underdetermined by the law. On the one hand, the relevant rules and precedents do not offer sufficient guidance for a decision; while on the other hand, the decision reached cannot be sufficiently justified by the relevant rules and precedents. In the light of the relevant facts the law reveals certain 'gaps', as it were, which have to be filled by factors other than the accepted sources of law. Thus the Supreme Court appeals, in second instance, to principles and policies to fill these gaps in making and justifying its decision in the case at hand. Its reasoning can therefore be considered as a two–step line of reasoning, although the steps cannot always be clearly identified or separated.

This two–step line of reasoning, however, displays some specific characteristics about the limits of law. First, it shows us that the law has what, since H.L.A. Hart, has been referred to as an 'open texture', which means that its rules, precedents, or whatever standards of behaviour will always, in the end, prove to be indeterminate. This is the result of the general nature of the language used and the unpredictability of the social reality in which legal rules, principles, and precedents are applied.[3] Rules are not self–applying, as Wittgenstein noted, and their application is therefore intrinsically mixed with the facts of the case or, in other words, its context.[4] This is the meaning of the old Roman adagium *ius in causa positum* (the law is, in the end, given with the facts). The two–step line of reasoning displays the open texture of law, but it also shows us something of the more fundamental nature of law. The contextual gaps of the law are often filled by principles and policies, by values and practices, by idealistic and pragmatic notions.

This leads to an important distinction among three different dimensions of law, namely the positivistic dimension ('law as it is', accepted sources of law), the idealistic dimension (*de lege ferenda*, 'law as it ought to be') and the pragmatic dimension ('law in action', 'law as it turns out to be'). In a perfect world perhaps, these dimensions would coincide. We do not live in a perfect world, however, and we are brought up with the tensions between 'law as it is' and 'law as it ought to be', on the one hand, and between 'law in the books' and 'law in action' on the other. Moralists and realists have made a business of exploiting these tensions as a domain of research. Lawyers, judges, and courts tend to exploit them in finding an acceptable solution for a specific case. First, they appeal to the positivistic dimension to decide a case, but in hard cases they often appeal to the other dimensions as well (as they did in the *baby Kelly wrongful life* case). Law, then, seems to encompass more than we are inclined to think at first sight. What, then, are its limits? And how are we to find them?

These are highly disputed questions in legal theory. Three Grand Old Theories of law have haunted us for many centuries now. Legal positivism acknowledges the existence of idealistic and pragmatic dimensions, but considers those to be be-

3 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) 124.

4 L. Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell 1978) par. 84–87.

yond the limits of the law. It defines law by its positivistic dimension, the black letter law of our first intuition. Natural law theory, on the contrary, takes the idealistic dimension to be the defining characteristic element of law, whereas the positive norms are only shadows of these real norms, which lead a somewhat undetermined life "in the omnipresent brooding of the sky" (paraphrasing Oliver Wendell Holmes). Legal realism, lastly, considers the law to be the facts and practices that constitute legal norms and that precede and follow from black letter law. These three Grand Old Theories each take different characteristics of law to be defining: the positivistic, the idealistic, and the pragmatic dimension, respectively. As the German post–war legal philosopher Gustav Radbruch has shown convincingly, these dimensions are not to be considered as different conceptions of law but are inherent tensions *within* the concept of law. The different dimensions of law serve different values, that is, legal certainty, justice, and purpose respectively. The values can never be realised completely at the same time. In law, as elsewhere, inherent values rarely coincide, and mostly conflict with each other. The best one can do in legal practice is to look for and find an equilibrium which exemplifies an optimal combination of these values.[5]

What the Grand Old Theories share, in all their differences, is the mistaken view that the concept of law, and thus its limits, is the result of definition. In my view, instead of defining the concept of law we could do better to investigate the phenomena that present themselves as law (for example in the *baby Kelly* case). Paraphrasing Wittgenstein, one could say,

> Consider the phenomena we call 'law'. …What is common to them all? Don't say: 'There *must* be something common, or they would not be called 'law'' – but *look and see* whether there is anything common to all. – For if you look at them you will not see something that is common to *all*, but similarities, relationships, and of whole series of them at that. … I can think of no better expression to characterise these similarities than 'family resemblances': …law forms a family.[6]

If we follow Wittgenstein's suggestion – don't define the law, but look at it and investigate it – what do we see and find? Is the law demarcated along tight and neat boundaries, reflecting ontological differences, as the Grand Old Theories picture it? Or does it resemble a patchwork of family resemblances of positivistic, idealistic, and realistic dimensions, as the Wrongful life case suggests? Or is law without any limits whatsoever? What does the *baby Kelly* case actually show us, what can we learn from it?

Before we address these questions, a conceptual remark about the notion of the 'limits of law' merits attention. In this chapter we use the notion of the 'limits of law' in the sense of its boundaries, especially in relation to morals and politics. The question into the limits of law then is a question of demarcation: how do we, or how should we, demarcate law from those other domains of practical rationality? As the Grand Old Theories illustrate, this is the core question of legal philosophy into the very nature of the concept of law, which – of course – is also

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5 G. Radbruch, *Rechtsphilosophie* (Stuttgart: K.F. Koehler Verlag, 1975) 164–170.

6 L. Wittgenstein, *l.c.*, par. 66, 67.

relevant for private law. In this chapter, however, we also touch upon another dimension of the limits of law. As the *baby Kelly* case shows, the question of the boundaries of law is intrinsically connected to the limitations of law, in the sense of its shortcomings. One of the central aims of this book is to shed light on the ability of law to fulfil its basic societal functions, such as legal protection, regulation, dispute resolution, and pacification. One of the obstacles to fulfilling these functions is that private law is unable to draw its boundaries in a neat and predictable way. This, however, is not just a contingent fact. The issue is that private law, by its very nature, is unable to demarcate its domain once and for all in a definable way. Indeed this can be regarded as a limitation, as mentioned before. From another standpoint, however, it can also be regarded as a blessing since it ensures that private law is informed by moral norms and political goals. Whatever standpoint one prefers, it is one of the limits of private law that has to be taken into account in one's professional activities. Since the central aim of this book is not only to display the limits of law, but also to answer the question how to deal with them, we cannot ignore this dimension of our problem. We will return to this issue in the conclusion (section 5). Now let us try to look at our problem from a new, and hopefully unexpected, angle.

2 Solutions from Legal Theory

2.1 Law in Context

In his study *Law in Context,* William Twining gives us an anecdote from the days he lectured in private law at the University of Khartoum in Sudan. In his lecture he discussed a case in which a visitor at a zoo had been feeding a camel and had been bitten by the camel. The question of law was, of course, whether the zoo was liable for the injury caused. At the time a student raised his hand. The lecturer, happy with a question, interrupted his lecture to experience the following anti–climax. "Please, sir," the student asked, "why was the camel in the zoo?" This question puts everything into perspective. Why was the camel in the zoo, while they freely walk around in Sudan? What is the use of lecturing on the common law to an audience to whom the facts of the case are beyond comprehension? That law cannot be properly understood outside the context in which it is developed and learned, is Twining's conclusion, and he therefore pleads for an approach in law "to broaden the study of law from within."[7] In such a contextual approach there are no standard recipes in law. Lawyers should attend to the demands of the circumstances of the case – *pros ton kairon*, in the words of Aristotle[8] – and adjust their responses accordingly.

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7 W. Twining, *Law in Context. Enlarging a Discipline* (Oxford: Clarendon Press, 1997) 13.

8 Aristotle, *Ethica Nicomachea* (Amsterdam: Kalias, 1997) 106 (bk. II, par. 2, 4).

In my opinion Twining has a strong case, because the suggested approach is not one that is arbitrarily chosen, but is itself the result of relevant developments in law and its study. Let me try to explain this, starting with the contextualisation of law *itself*. Posner has named this phenomenon "the decline of law as an autonomous discipline", by which he refers to the blurring of the sharp boundaries between law, politics, and morality. Let me illustrate this development with examples from the European context, starting with the demarcation between law and politics. Influenced by the doctrine of the separation of powers, this demarcation was rather strict until the end of the 19th century. The content of law was determined by politics, while its shape and enforcement were by and large considered to be the result of doctrinal law. With the emerging welfare State this clear division blurred, because the law became an instrument of politics to change society, while at the same time the judiciary developed new legal standards for politics. As a result of both tendencies the domain of public law has grown, while its content became more and more subject of political controversy. The best example from the Dutch context is offered by the emerging principles of good governance in administrative law, such as the prohibition of the misuse of power and of *détournement de pouvoir*. Though these principles supply additional legal standards for government, their content is seriously disputed. Only recently, politicians complained that government is hindered by the fact that these principles of good governance bring the administrative judiciary too close to the business of politics.

The relation between private law and morality shows similar developments. Until the late 19th century, law and morality were strictly separated, the law enforcing minimal standards of behaviour, leaving the aspirations and ideals to critical morality. From the 20th century onwards, the boundaries were blurred in two opposite directions: the moralisation of private law, and the legalisation of morality. On the one hand, unwritten norms of a moral character got hold of the central doctrines of tort, contract, and property. Most of the classic decisions of the Dutch Supreme Court of the 20th century belong to this category. On the other hand, more and more social relationships were brought under the influence of the law, such as those between teacher and student, parents and children, and doctors and patients ('wrongful life' is an example). Again, the domain of private law has grown, but its norms are increasingly of a social *cum* moral nature and are therefore more disputed.

A telling case from recent years suggests that this development has come to an end. The case concerned an accident in which a boy named Jeffrey drowned in unexplained circumstances after his swimming therapy in a hospital pool. At the time he was under the supervision of his mother and a hospital therapist, but neither was at the poolside in time. The parents did not claim any monetary damages, but rather asked the court for a declaration that the hospital was liable, because that would help them cope with their loss. Should a court give such a moral declaratory ruling, even if it has been conceded that the hospital is liable for the accident? Should the judge become a psychological therapist, instead of the priest or

the psychiatrist? The Dutch Supreme Court denied the claim because of a lack of a legitimate interest of the claimants.[9] And that was the end of it.

These examples – however roughly sketched – show that there is every reason "to broaden the study of law from within" (as Twining has referred to it). Law cannot be understood properly – as perhaps in the late 19th century – without reference to politics and morals. Legal discourse has been extended far beyond the traditional boundaries and overlaps with political and moral discourse. As a matter of fact, in legal discourse we regularly appeal to moral principles and pragmatic arguments, besides traditional legal sources. In that sense, law is a meta–discourse, a discourse on other discourses. We could introduce the metaphor of demarcation by saying that the traditional legal sources constitute the inner limits of legal discourse, while principles and policies mark the outer limits. Most lawyers stay within the inner limits most of the time, appealing to statutes, precedents, or customary law. In hard cases, however, when the traditional sources are exhausted, we do in fact appeal to moral and political arguments, not *per se* however, but *as* legal arguments. Although we regularly appeal to other discourses than law, in law we do subject them to the limitations of legal discourse. After all, legal concepts determine what can be said (and thought) in law.

As a result, we have to be aware of two possible risks in this regard. On the one hand there is the risk of losing sight of these limitations. This is the pitfall of those lawyers who tend to forget the limitations of legal discourse, who trespass the boundaries of legal discourse unknowingly, and commit the sins of activism or moralism. They do speak in law, not as lawyers though, but as activists or moralists. On the other hand, however, we run the risk of not exhausting the possibilities because we tend to stay within the inner limits of legal discourse. This is the pitfall of the lawyers we tend to accuse of legalism, formalism, or black–letter law. Again, they do speak in law, and they even speak as lawyers, but they do not speak as open–minded lawyers. I will return to some examples of these pitfalls later on. For now, it suffices to conclude that the contextual approach of law holds between these two opposites. What, then, are the consequences for the study of law? This question will be addressed in the next section.

2.2 The Interdisciplinary Study of Law

One of the reasons "to broaden the study of law from within", as Twining has suggested and we have investigated, is the contextualisation of law itself. There is, nonetheless another good reason for this approach, and that is the contextualisation of *the study of* law (not of law itself). There are, of course, several ways to illustrate this. In legal theory it is an accepted proposition that the application of law, or the identification of a legal proposition, presupposes an interpretation of law. Apart from the facts, legal disputes are mostly disputes on different interpre-

9 HR 9 October 1998, NJ 1998, 853 (*Jeffrey*).

tations of the relevant law.[10] In hard cases different interpretations of law are supported by both parties, each struggling for recognition as the authoritative interpretation. These diverging interpretations are not always the result of mistake or bad faith (although they sometimes are), but of the different interests and perspectives of the parties, lawyers, and judges involved. Interpretation is therefore intrinsically interwoven with the argumentation of different positions.[11] Legal reasoning is essentially a practical syllogism, in which a case is confronted with arguments deduced from experience, and which results in a provisional solution. As Stephen Toulmin has shown us, this line of reasoning is always defeasible, that is, it can always be annulled by adding new information.[12] In this sense it differs from theoretical reasoning, which indeed has the potential to lead to certain and objective conclusions (given the premises). As a domain of practical reason, law lacks this comfortable certainty, leaving its practitioners to find their way in daily practice with no other means than experience and practical wisdom.

As we saw in the *baby Kelly* case, judges may appeal to those principles and policies in their reasoning beyond the more traditional legal sources. And as we argued above, this appeal is subject to the possibilities and limitations of legal discourse. If these observations hold, then this has implications for the nature of legal knowledge. We tend to consider 'thinking like a lawyer' as deliberating on positive law, that is, on the traditional legal sources. If we take the suggestion 'to broaden the study of law from within' seriously, however, then this is not enough and the legal student should learn to think like a sociologist, an economist, or a psychologist as well (recall the Jeffrey case). Or, perhaps, we should say that 'thinking like a lawyer' includes thinking like all these other professionals. A lawyer who understands law in its context will never restrict herself to the strictly legal domain, but will integrate sociological, economic, or psychological expertise. The professional knowledge of a lawyer extends beyond the strictly legal and will overlap with other disciplines. Also in this epistemological sense, law is a discourse on other discourses. In her day–to–day work a lawyer is, at the same time, to some extent an engineer, or an accountant, and such like. Not in the sense that she can replace their expertise, for example as an expert witness, but in the sense that she is capable of analysing the problem into its different aspects and addressing them on their own merits. Again, just like in speaking the legal language, we should realise that this knowledge is applied in a legal context and is therefore subject to the limitations of law and legal discourse. At the end of the day, these elements have to be integrated in one legal judgment. One could even say, perhaps, that it is the particular expertise of the lawyer to integrate all these different kinds of knowledge in a legal judgment. Similarly, a legal scholar who understands law in its context will not restrict herself to legal dogmatics in the strict sense, but will include history, literature, anthropology, and so on. A contextual

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10 R. Dworkin, *Law's Empire* (Harvard and Cambridge, Mass.: Harvard University Press, 1986) 1–30.

11 P. Ricœur, *The Just* (Chicago and London: The University of Chicago Press, 2000) 109–127.

12 S. Toulmin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958) 107–113, 118–122, 141–145.

approach is necessarily an inclusive one, resulting in the interdisciplinary study of law.

In a similar tone of voice, James Boyd White has discussed the nature of the interdisciplinary study of law when he combatted 'doctrine in a vacuum' in legal education and pleaded for an interdisciplinary training. Such a training is not one of 'law *and* sociology', 'law *and* economy', or 'law *and* psychology', White argues, but one of 'law *as* (all these other things)'.

> This is a different view of interdisciplinary work from the usual models, for we are not interested in translating findings or even methods from one field to another; rather, in this kind of work each of the disciplines would be looked at as I suggest law should be looked at: as a language, an activity, and with an eye both to its special resources and to its limits.[13]

Put differently, 'thinking like a lawyer' implies thinking like all the others and training in the first should therefore encompass the latter. Not by imitating the sociologist, economist, or psychologist, but by being aware of the sociologist, economist and psychologist elements *in law*. After all, Twining wanted "to broaden the study of law *from within*" (not from the outside). A contextualist approach in law, therefore, implies more than just adding some social circumstances to our thinking and acting in law. It presupposes the capacity to switch perspectives, in the full awareness of the possibilities and limitations of each of the positions chosen (first and foremost the legal one). Contextualism is necessarily connected with perspectivism. There is no such thing as a "view from nowhere" (in the words of Thomas Nagel[14]), but only an observation from the viewpoint of the observer. Every observation presupposes a blind spot, which is the context that cannot be observed from the standpoint taken. One has to step aside to observe the blind spot, thus creating a new one.

2.3 Alternative Theories of Private Law

In this contextualist approach to private law, its limits then are fluid and constantly changing, depending on context and perspective. Are any alternatives available? There are two I can think of, and I call them 'back to dogmatics' and 'forward to policies' respectively. I hope to show that they represent extremes that should be avoided, since they commit the sins of respectively underexploiting legal discourse and trespassing the boundaries of legal discourse that we discussed above. The position taken here represents a middle position that, at least in my view, avoids the pitfalls of the alternatives while combining their advantages.

First, then, the programme of 'back to dogmatics', for which I take Weinrib's views to be exemplary. Weinrib is concerned with an understanding of private

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13 J. Boyd White, *From Expectation to Experience*, *Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press, 1999) 22.

14 T. Nagel, *The View from Nowhere* (New York, and Oxford, England: Oxford University Press, 1986).

law, his claim being that private law is to be understood in its own terms (and not in terms of its purpose). In Weinrib's view, private law is a self–understanding enterprise, that is, it is simultaneously *explanandum* and *explanans*, both an object and a mode of understanding. Thus understood, the idea of private law is considered to be a synthesis of three theses, namely formalism (the understanding of private law through its structure), corrective justice (the specification of this structure), and a Kantian notion of rights (the moral standpoint immanent in this structure).[15] In Weinrib's view, private law is autonomous, and he rejects any "law and …" approach as resulting in either reductionism or an infinite regress. Though he acknowledges that law can be understood in terms of its history, sociology, or economy, the understanding of law in its own terms – namely legal dogmatics in its purest form – is the only legitimate approach of law.

On the other hand, there is the 'forward to policies' program, for which I take Richard Posner's ideas to be exemplary. Posner offers a pragmatist program that is practical, instrumental, forward–looking, activist, empirical, skeptical and anti–dogmatic and experimental.[16] Posner's pragmatism is quite the opposite of Weinrib's formalism. For Posner, his law–and–economics program introduces in law the ethics of scientific inquiry, because economics is the instrumental science *par excellence*. Modern economics offers the theoretical framework for the empirical research in law. The economic analysis of law therefore denies law's autonomy; legal rules are viewed in instrumental terms. Both law and legal rules are analysed in terms of means to achieve certain ends, be it wealth maximisation or something else. Its moral concern is to serve the welfare of the non–legal community. Law itself is considered to be a mechanism for social control, to be replaced by more effective ones as soon as they are available. Legal dogmatics in its current form is pretentious, prejudiced, and uninformed, Posner concludes, and should be replaced by a more pragmatic program.

This is not the time and place to address both programs on their own merits, but I do want to make the point that the proposed 'law in context' approach holds the middle ground between both poles. In more abstract terms, the comparison can be framed as follows. Like Weinrib's program, the 'law in context' approach acknowledges a certain autonomy for law and legal dogmatics, though it does take into account the increasing importance of mutual influences between law and its contexts. There is no reason whatsoever to ban approaches that focus on law in context, though we should not forget that external influences are integrated into law. That is why we preferred the expression 'law *as* …' over 'law *and* …', since the former expresses this need for integration in law better than the latter. Like Posner's program, ours acknowledges that law cannot be understood properly without taking its context into account (economics included), though we should not reduce law to economics. Not only because there are other legitimate perspectives, but also because law cannot be understood properly in purely instrumental

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15 E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass. and London: Harvard University Press, 1995), 11–19.

16 R.A. Posner, *Overcoming Law* (Cambridge, Mass. and London: Harvard University Press, 1995), 11–15.

terms since it has and expresses values of its own. For that reason law cannot be made instrumental to any political purpose whatsoever; some purposes are simply contradictory to law's own values, such as the principles of legal certainty, justice, and purpose, distinguished by Radbruch.

'Law in context' then is preferable to 'back to dogmatics' and 'forward to policies'. In the first place, it holds the promise of better law than the alternatives. It is my conviction that contextualists do better as lawyers than formalists and activists, both with respect to the development of law and the deciding of cases. Secondly, and more importantly in this context, it provides us with a better understanding of law than the accounts of Weinrib and Posner do. Law is neither a mere instrument for policy, nor an island in itself. It is a social practice with a semi–autonomous language, methods, and values. The understanding of law then should not be merely reductionist or self–referential – as in the accounts of Posner and Weinrib – but should give insight into its relations with the different contexts in which it is developed and applied. 'Law in context' offers just that.

3 Philosophical Foundations

3.1 Private Law as a Battlefield

Private law belongs – along with medicine and theology – to the eldest of disciplines. In fact, the history of the university started in the 11th century in Bologna with the rediscovery and the study of the *Codex Iuris Civilis* of Justinian. From then onwards private law has always been – with variations in focus and method – the study of authoritative texts to solve cases. Private lawyers pretty much stuck to their methods, when science and technology emerged in the 17th century. Since the 18th century the study of society began to evolve and resulted in a process of *Ausdifferenzierung* of the various social sciences out of the shadow of the law. Economics emerged from the administration of government, political economy, and a new focus on the empirical effects of the law (Marx). Anthropology took its starting point in the study of law and legal practice in newly discovered cultures (Maine). The founding fathers of sociology took an interest in the process of modernisation in which law (like religion) played an important role (Durkheim, Weber). It is noteworthy that all the pioneers mentioned were lawyers by education: it was a new way of looking at law and society that started these new disciplines. Next, it was a process of specialisation – stimulated by external factors – that facilitated the development into separate, autonomous disciplines. This process of specialisation has, of course, advantages and disadvantages. On the one hand it focuses the necessary attention to make any progress whatsoever; while on the other hand it forces one to bracket off different procedures, methods, or perspectives, thus stimulating selective blindness. "Selective attention is one thing," Toulmin

writes, but "blinders are another".[17] I will try to illustrate this later on. For now, it suffices to conclude that the demarcation between legal dogmatics and the other social sciences is a contingent matter.

As a result of these developments, the study of private law is a battlefield. On the surface it has developed rather quietly since the days of its birth, the main development being the transition from a *Ius Commune* to national codified private law in the early 19th century with the emergence of Nation–States, and now with their erosion back into a European private law. Beneath the surface however, there is a lot more going on. First, the separation between the Natural Sciences and the Humanities – "The Two Cultures", as C.P. Snow put it[18]– has left its traces in private law too. Not only in topics of substantive law (like causation), but also in method. Traditional legal dogmatics has found its home in the humanities, but from time to time ideals and devices are borrowed from the sciences. Let me mention a few examples without pretending to be complete: Langdell's legal formalism, Von Savigny's *Begriffsjurisprudenz*, Kelsen's *Reine Rechtslehre*, and Hart's analytical jurisprudence. These and other movements in (private) law shared an inspiration in science, which manifested itself in the ideals of objective knowledge, a rational method, order and system in law, and a strict separation between law and politics/law and morals.[19] As such they were nearly always followed by a reaction in the form of a turn to society: legal formalism by Holmes's legal realism, *Begriffsjurisprudenz* by *Interessenjurisprudenz*, the analytical movement by the critical legal studies, and so on.[20] We find a pendulum located in private law going back and forth between system and society, logic and experience, technique and policy. This movement had a large impact, not only on the study of private law, but also on the practice and content of private law itself.

Next, there is the differentiation in different disciplines which has not left the study of private law untouched. Paradoxically, the early differentiation of the social sciences from law confirmed the core of the study of private law in its dogmatic, practice–oriented approach. It stimulated a professional ideology that legal dogmatics sticks to positive law and its application in cases, leaving out the rest. Let me try to explain this, explicating some of the 'blinders' I mentioned before. With regard to its subject matter from the start, legal dogmatics has been a study of authoritative texts, taking these texts as the sources of positive law. In limiting itself to texts, legal dogmatics has left practice to the social sciences. To fill the gap between the study of law and the social sciences in the late 20th century bridging (sub–) disciplines emerged, such as sociology of law, anthropology of law, psychology of law, and so on. A peculiar development, if one realises that sociology, anthropology, psychology and the others emerged from the study of law in

17 S. Toulmin, *Return to Reason* (Cambridge, Mass. and London: Harvard University Press, 2001) 42, 43.

18 C.P. Snow, "The Two Cultures and the Scientific Revolution", in *Public Affairs* (New York: Charles Scribner's Sons, 1971) 13–47.

19 K. Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer Verlag, 1979) 1–165.

20 A. Hunt, *The Sociological Movement in Law* (London and Basingstoke: The Macmillan Press, 1978).

the first place. This restriction to texts is one blinder of legal dogmatics, but not the only one. With regard to the purpose of the study of law, I have already mentioned that it has always been dedicated to cases, using authoritative texts as the *loci* for arguments in legal dispute. As such it operates between law and case, text and context, logic and experience. Legal dogmatics has thus always played an important social role, though at the expense of the formation of theory, which was left to other disciplines. With regard to the method legal dogmatics has always stayed close to text–analytical methods – whether the scholastic method, philology, or hermeneutics – thus leaving the use of empirical methods to other disciplines. These limitations make us aware that legal dogmatics has always been a limited enterprise: it restricted itself to positive law for pleading and solving cases by using analytical methods on authoritative texts. This is legal dogmatics in the proper sense.[21] As such, it has left empirical research into legal practice and the formation of theory to other social (sub–) sciences. Legal dogmatics has thus both defined law and its context, restricting itself to the former, and leaving the latter to other disciplines. Again, the study of law and thereby the definition of law itself appear to be a contingent matter.

Legal dogmatics has its own reasons, of course, to suggest otherwise. The authority of its expertise is underlined by the suggestion that its subject matter, purpose, and method are somehow 'given', thus resulting in the exclusion of different approaches to the study of law. As mentioned before, this focus is beneficial for the growth of knowledge within the given paradigm, but this is achieved at the cost of bracketing off different approaches and perspectives. In their day–to–day work however, legal scholars find themselves often referring to the demands of 'practice', which is an often used, and sometimes misused, expression. Sometimes it refers to the principles or policies involved, at other times to (aspects) of the context of the case, and again at other times to the particular preferences of the scholar. At this point my plea for a 'law in context' approach comes in, not as a radical alternative for the existing practice of legal dogmatics, but as a way of conceptualising the appeal to 'practice'. Does it refer to a calculation of consequences, to the social circumstances of parties involved, to the principles and policies lurking in the background of positive law, or to some other relevant context? This question can only be answered by changing perspective – from legal dogmatics to the economics, sociology, psychology, or history of law – not to end up finding ourselves in a different discipline, but to integrate this perspective in our own legal discourse. In its daily life, law *is* – besides everything else – economics, sociology, psychology, history, literature, and so on. Why then do we not integrate these perspectives in the study of law? The interdisciplinary study of law – properly understood – is meant to improve the study of law and thus to enhance our understanding of the law, no more, no less. What does that mean for the private lawyer's expertise? We will address this question in the next section.

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[21] Larenz, *l.c.*, 204.

3.2 The Private Lawyer's Expertise

In private law, as in other disciplines, our picture of professional knowledge has long been dictated by the model of technical rationality. According to this model professional knowledge is nothing more, or less for that matter, than the application of scientific knowledge, like a kind of technology. This model fits positivistic premises, of course, since it rests on the characteristic positivist separation of means and ends, facts and values. In law, it served the purpose of the separation of 'law as it is' and 'law as it ought to be', the latter being the domain of the politician or the moralist, and the former being that of the lawyer. In legal theory, it has found expression in the movements of legalism, formalism, the case method of Langdell, and Von Savigny's *Begriffsjurisprudenz*. In practice however, the model of technical rationality served a specific need for the justification of professional practice. The rise of positivism in the 19th century demarcated a shift from a 'legitimacy of character' to a 'legitimacy of technique': the privileges of the profession were no longer justified by the social position, honour, and the authority and character of its practitioners (their courage, wisdom, responsibility), but by the application of objective and rational scientific techniques.[22] Weber has framed this shift in the social domain as one from charismatic authority (depending on the person of the authority) to authority on legal and rational grounds (depending on the methods used).[23]

Since the decline of positivism however, this model of professional practice has been discredited, both for intellectual and social reasons. Socially, we have lost our appreciation for technocrats who instrumentally apply their scientific expertise for whatever purposes. The 20th century offers plenty of examples to justify this discontent. Intellectually, we have come to a different and more complex understanding of what it takes to participate in professional practice. Let me try to express that understanding by comparing the expertise of a private lawyer with that of a private legal scholar. Three differences come into view. The first is that the body of professional knowledge of lawyers practising in the field of private law is organised differently, not according to the principle of logical coherence, but according to that of practical utility. They are not so much interested in the system of private law, of course, as in its use–based organisation. Secondly, the professional knowledge of the private lawyer has a larger component of practical knowledge than that of the private law scholar, while the latter has a larger component of theoretical knowledge. On the difference between theoretical and practical knowledge, 'knowing that' and 'knowing how', *epistèmè* and *phronèsis* (as Aristotle would say), there is such a vast amount of literature that I will not discuss here.[24] For now, it suffices to say that the first is conceptual, propositional

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22 A. Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago and London: Chicago University Press, 1988) 184–195.

23 M. Weber, *The Theory of Social and Economic Organization* (New York: the Free Press, 1964) 328.

24 G. Ryle, *The Concept of Mind* (New York: Penguin Books, 1980) 28–32.

knowledge, while the latter is of a perceptual and dispositional nature. For that reason, practical knowledge is partly "personal knowledge", as Michael Polanyi would have it, or "tacit knowledge".[25] A practitioner usually knows more than she can tell. From both the first and the second difference, it follows that the professional knowledge of the private lawyer has a larger moral component than that of the private legal scholar. The practitioner knows better what to do under what circumstances, not only from a legal point of view but also from a moral point of view. In fact, it is part of her expertise to know in private law what to do and when, as it is the scholar's expertise to fit and explain this solution in terms of the system of private law. These differences are there not to be neglected, though they do not deny the connections between both types of expertise, as both the private lawyer and the private legal scholar would confirm. What they deny, though, is that the relation between both types of knowing is simply one of application, as the model of technical rationality would have it.

The private lawyer's expertise, then, is far more inclusive than we are inclined to think. It encompasses knowledge and competences, of a legal, moral, or some other kind, both explicitly and implicitly belonging to the lawyers' repertoire. In a case like the *baby Kelly wrongful life* case, for example, the Dutch Supreme Court considered not only the legal issues, but also the moral grounds for the different options, as well as their expected consequences. This includes moral wisdom, legal interpretation, financial calculation of the consequences, and a feeling of empathy with the parties, especially *baby Kelly*'s parents. In doing so, the judges appeal to different contexts of the case, bringing to bear their moral, economic, psychological, and other experiences. To get these different contexts into view the judge has to change perspective, subsequently taking a legal, moral, economic, or other perspective, and eventually integrating them into one decision that fits and justifies the law at stake.

Now compare this way of proceeding with the alternatives: excluding non–legal elements from the decision, and following policies of one's own preference. In my view, the contextualist approach promises more informed, and therefore better law. Now let us switch to the legal scholar. For the private law scholar who is trying to make sense of the ruling, there is not much difference. When she tries to understand the ruling, she can of course neglect all the expertise that does not fit into the model of legal dogmatics as a self–sufficient enterprise (as Weinrib's scholar would do). In my view, she would thus make poor sense of the ruling and she would not do justice to the court. On the other hand, she can try to reconstruct the ruling as an attempt to realise some predetermined extra–legal policy or goal (as Posner's legal scholar would do). Again, I think she would misunderstand the ruling and would not do justice to the court. In lieu of these options, she could also try to review the ruling from different perspectives, alternatively taking the moral, financial, psychological, and legal aspects into account. In other words, she could try to study the ruling in different contexts, thus bringing different kinds of expertise to bear. At the end of the day she will attempt to integrate these different kinds

[25] M. Polanyi, *Personal Knowledge: Towards a Post–Critical Philosophy* (Chicago and London: University of Chicago Press, 1958) 1962.

of expertise in a coherent understanding of the case, expressing her views on what the court has ruled and what this ruling attributes to the law. Of course, she may fail in doing so, but at least she has tried to come to a better understanding of the law than the available alternatives can provide.

4 Back to Law

4.1 Integrity in Law, and in Lawyers Too

So far we have argued the need for switching perspectives by taking different contexts into account, both in the practice and in the study of law. This approach holds the promise of better informed law as well as a more comprehensive understanding of legal practice. To fulfill this promise it is not enough to compare these different perspectives, we mentioned in passing, we really have to integrate them into our practice or understanding of the law. For James Boyd White this means that we have to put them together in something new that changes our understanding of the composite parts. "As lawyers we cannot simply accept the conclusions of others; we must make them our own, and to do that we must move out of the legal culture and into the other one."[26] For White, this process is very similar to that of the translation of texts, not as a simple substitution of words, but in the sense of creating a new discourse of meaning. In law itself this process is exemplified by the way the expertise of expert witnesses is integrated in legal deliberation and judgment. Forensic and psychiatric expertise is transformed into a legal judgment, but not without mutual influence and transformation. In the study of law, bridge–disciplines like the sociology or psychology of law illustrate the same point: their best practices are not to be considered as an application of sociological or psychological theory to law, nor as mere examples of legal imperialism, but as a contribution to new ways of looking, talking, and knowing.

In cases of the integration of non–legal knowledge, it is of course harder to pass Ronald Dworkin's integrity test than when we integrate just another legal case. Law as integrity requires an interpretive attitude: a specific case is interpreted as the best possible continuation of legal practice, thus fitting as well as justifying the practice as a whole. For legal cases this means that they are interpreted as an exemplification of the principles and values lurking behind legal rules and precedents. The question is then: what is the best realisation of these principles and values in this case? The answer to this question may, as we know, even contradict accepted interpretations of legal rules and precedents (*contra legem*).[27] Now, what happens if we try to integrate originally 'non–legal' knowledge in the body of legal knowledge, as in the examples given? The metaphor of translation

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[26] J. Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago and London, University of Chicago Press, 1990) 14.

[27] R. Dworkin, *l.c.*, 225–276.

sets us on the right track, since it makes us aware that intellectual integration is a matter of bridging cultures, that is, of languages, methods, and values. Take the example of a legal scholar and a scientist engaging in interdisciplinary research. They may be tempted to conceptualise the obstacles they encounter as differences in idiom, method, and values. The gap between their cultures almost seems unbridgeable then. Idioms cannot be translated without loss of meaning; different methods determine a different outlook, and both are in the end reducible to diverging beliefs and attitudes. Is there no way, then, to escape this fragmentation in our disciplines?

There is, and in my view it can be phrased like this. The crucial step is getting to learn to recognise the foreign elements in our own culture and thus (reciprocally) the characteristic elements in our own culture. What does the law do with forensic or scientific evidence? And what does that teach us about the legal outlook itself? How does the law conceptualise human relations, and what can we conclude about legal concepts? How do we strike the balance between the demands of safety and traditional liberty rights, and what does it tell us about these rights? How does the Dutch Supreme Court in its ruling in the *baby Kelly* case appeal to the moral principle of the dignity of human life? And what does that tell us about the relationship between law and morality? Such questions really draw our attention to interdisciplinary research, since they address the foundations of our own discipline as well. In law and its study, as in daily life, the communication with other practices cannot but influence our own practices. This is what intellectual integration is all about: a slow and difficult development of our own culture in the continuous contact with others, thereby opening new horizons, at the same time closing others.

The attempt to remedy fragmentation can be taken one step further, as a struggle against the fragmentation in ourselves. For this, we should start to consider diverging bodies of knowledge or conceptual frameworks as different communities thinking and talking. In the words of James Boyd White,

> We should conceive of the relevant world as a world of people talking to each other across their discourses, out of their languages, out of their communities of knowledge and expertise, and speaking as people seeking to be whole. We should try to write that way ourselves.[28]

Engaging in interdisciplinary research entails communication with representatives of other disciplines, getting to know their way of speaking and thinking, and thus (again, reciprocally) getting to know ourselves, as lawyers. As such it exemplifies the old Socratic wisdom in modern disguise: know thyself, as a lawyer. Self–knowledge cannot but serve a therapeutic purpose as well. The interdisciplinary study of law is not only a remedy for the fragmentation in law and our understanding of it, it is also a remedy for the fragmentation in ourselves. Changing perspective draws from different sources in us, restoring our blinders, fighting professional deformation, and leaving us as richer and more competent lawyers – not only and perhaps not even primarily because of our expertise, but at least as much

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[28] *Ibid.*, 20.

because of our imagination. The continuous contact with different perspectives and other disciplines therefore not only makes us better lawyers, but perhaps even better persons. After all, integrity not only characterises legal systems, but people as well.

4.2 Wrongful Life Readdressed

Let us, finally, readdress the wrongful life case with which we started. In the light of what has been said thus far it can be considered to be a serious attempt to integrate a moral perspective into the legal one, since it explicitly appeals to the principle of the dignity of human life. As such it deserves our praise. Faced with the moral nature of the issue at stake, the Dutch Supreme Court was not satisfied with taking the safe road, that is, an appeal to legal sources. The Court apparently also wanted to judge the issue on its own merits, thus trying to contribute to a public debate about a controversial matter. The Court chose for itself a specific ethos, as a moral guide in a pluralistic society. Of course the members of the Court would never admit to this, but it suggests the ambition to play a social role like a "philosopher–king" as identified by Plato. The question is whether the judiciary is equipped to fulfil the function of a moral compass in matters of substantial justice in a morally divided society. It may well be, as Sunstein remarks, that, "Like all of us, judges have limited time and capacities, and like almost all of us, judges are not trained as philosophers."[29]

Has the attempt of the Supreme Court to integrate a moral perspective into its ruling in the case of *baby Kelly* been successful then? In my opinion, the answer is negative. The Supreme Court undertook to investigate whether or not sustaining the claim for compensation of the parents of *baby Kelly* (both on their own account and in the name of Kelly) would constitute a violation of the principle of the dignity of human life. The Supreme Court addresses this question no less than three times – in the context of its quashing several arguments of the defendants/appellants – showing a gradual integration of this argument in the reasons of its decision. Let us analyse the argument closer. First, the Court states that the implicit recognition of the birth of a handicapped child as 'injury' – in establishing a causal relation between the midwife's fault and the damage to the plaintiffs – does not imply any judgment whatsoever on the value of that child as a person or its existence (consideration 4.4). The argument is not yet integrated in the final reasons here; it is more or less added as a side comment, an *obiter dictum*. Second, the Court states that sustaining the parents' claim for non–material damages – which is the decision of the Court in this context – does not imply that the child is a source of grief to them, but rests exclusively on the judgment that the midwife's fault infringes the fundamental rights of the parents (consideration 4.10). The Court seems to suggest a specific reading of its own decision here: we should see

[29] C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass. and London: Harvard University Press 1999) 249.

it as a consequence of the fault, not as a judgment on the meaning of the life of the child. The argument is therefore better integrated here than in its first use. Even more integrated is the third occasion of use, when the Supreme Court deals with the defence that the damages cannot be determined, since if the fault would not have been committed, *baby Kelly* would not have been born at all. The Court rejects this defence on the legal ground that the damages should be estimated in a case like this. Sustaining this claim does not in any way imply that the existence of Kelly should be valued lower than her non–existence, the Court argues, but rests on the recognition of the unlawfulness of the acts by the midwife and the hospital. Holding them liable does not infringe Kelly's dignity, the Court concludes, but, on the contrary, facilitates her – as far as money ever can – to lead a human life (consideration 4.15). Here the argument is most fully integrated, because the Court finally provides a reason why the principle of human dignity is not infringed. But is it a good reason?

I do not think so. Although it looks plausible enough – at first sight it even looks like a truism – it changes the nature of the argument it seeks to refute. First, it addresses not so much human dignity in an abstract sense – as it was put forward by the defendants – but the dignity of this specific existence, the life of *baby Kelly*. Next, human dignity does not function as a ground for the judgment – as it was used by the German *Bundesverfassungsgericht* ("Die Verpflichtung aller staatlichen Gewalt, jedem Menschen in seinem Dasein um seiner selbst willen zu achten …, verbietet es, die Unterhaltsplicht für ein Kind als Schaden zu begreifen") – but as a goal of the ruling (the possibilities for Kelly to lead a human life). As a result, the appeal to human dignity has been transformed from an argument of principle to a pragmatic argument.[30] In short, the Supreme Court did succeed in integrating this moral argument into its ruling, but not without a fundamental transformation of its nature. Is this a serious flaw? I think it is, for two reasons. First, it misses the point of the argument of the opponents. Nobody in his right mind will deny that compensation for damage will put *baby Kelly* in a better position to lead a human life, but that was not the argument of the plaintiffs. Their argument was that doing this will infringe the principle of the dignity of human life, and this still holds true. Besides, the argument of the Supreme Court justifies too much. The proposition that compensation for damage will put the victim in a better position to lead a human life is valid for almost any medical liability claim. In fact, the Court confines itself to a policy of victim protection.[31]

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30 P.S. Attiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Inaugural lecture, delivered before the University of Oxford on 17th February 1978) (Oxford: Oxford University Press, 1978).

31 The line of reasoning followed here is borrowed from an earlier publication: M.A. Loth, "Engaged in a search for justice: over grenzeloze aansprakelijkheid en de moeizame integratie van een moreel principe", in M. Buijsen (ed.), *Onrechtmatig leven? Opstellen naar aanleiding van baby Kelly* (Nijmegen: Valkhof Pers, 2006) 40–47.

5 Conclusion

Starting with the ruling of the Dutch Supreme Court in the *baby Kelly wrongful life* case we asked ourselves: what constitutes the limits of private law? The Grand Old Theories defined fixed limits, as we mentioned, but they do not fit the growing complexity of legal practice today. So we changed our strategy and asked ourselves what law actually shows us. At closer inspection we found that it shows a patchwork of characteristics or family resemblances, in different combinations in changing circumstances. The *baby Kelly* case is just one example of a hard case in which the Dutch Supreme Court explicitly appeals to a moral principle and empirical effects to justify its ruling (besides the traditional appeal to legal sources). As such, it is a perfect illustration of the way the positivistic, idealistic, and pragmatic dimensions of private law interrelate.

What specific legal theory then offers the best account of the current practice of private law? In this chapter it is argued that the 'law in context' approach offers the best possible theory, both in terms of fit and in terms of justification of current legal practice. First, it does justice to the most prominent developments in law itself in the 20th century, which can be characterised as a 'contextualisation' of the legal system (by which we refer to the blurring distinctions between law, politics, and morality). Second, it seems a perfectly natural consequence of the developments in the study of law, which have resulted in a prominent position for the interdisciplinary study of law. In all respects, 'law in context' seems preferable to the most likely alternatives 'back to dogmatics' and 'forward to policies'. I have tried to present 'law in context' as middle ground between both alternatives, combining their virtues while avoiding their vices. Perhaps both alternatives can be considered as reminiscents of a surpassed positivistic ideology, but the argumentation of that hypothesis would need more attention.

The question, then, is how legal dogmatics – itself the product of contingent developments – can be enriched by the 'law in context' approach. In the most general terms, the recipe is twofold. First, we must keep an open eye for the contextuality of law and legal phenomena and be ready to give the contextual dimension of law its due. In legal practice this is stimulated by the prominence of the facts and the training of legal practitioners in their dealing with them. Their expertise contains a good deal of practical wisdom and a strong hold on moral attitudes, which is constantly triggered and strengthened. No practitioner in her right mind would deny – in principle or in practice – the contextuality of law, unless she is misled by some legal theory like Langdell's legal formalism, Von Savigny's *Begriffsjurisprudenz*, or Kelsen's *Reine Rechtslehre*. In legal dogmatics, however, it is much harder to keep an eye open for the contextuality of law. Legal scholars deal differently with law and are more subject to methodological schools and convictions. Here my second device applies. Legal scholars should do better in interdisciplinary research, not as an escape from the application of the results or methods of other disciplines in the domain of law, but as a way of changing perspective to grasp otherwise unnoticed aspects of the practice under research. This is not the "law *and* …" approach that is viewed

critically by so many, but a "law *as* …" approach that James Boyd White has addressed.

Interdisciplinary research entails both a broadening of the horizon as well as an intellectual integration of the results. From this perspective we have readdressed the ruling of the Dutch Supreme Court in the case of *baby Kelly*. The integration of a moral argumentation – though most promising at first sight – turned out to be less than a success at closer analysis. The Court ended up surrendering to a policy of victim protection (a perfect exemplification of the 'forward to policies' approach). The reason is that it unconditionally placed the decision in the service of the humanity of the life to be lived by Kelly. There are other techniques for the integration of moral and pragmatic arguments, however, that can avoid this pitfall. The Court could have, for example, restricted its ruling to this specific case, or it could have used specific legal concepts as an intermediary for moral considerations. These techniques of integration deserve more attention than received in this chapter. The same goes for the techniques of interdisciplinary research in legal dogmatics, as a way of enriching the study of law. There is gold in those hills, but we have not yet sufficiently explored them.[32]

Let us, finally, return to the twofold problem of the limits of private law from which we started. As we noted from the start, the problem of the boundaries of private law is intrinsically connected to that of its limitations, in the sense of its shortcomings. What, then, are the consequences of the conclusions drawn for the way we should deal with private law and its inherent limitations? Three consequences can be stated explicitly. First, we must be cured of our obsession with neat and timeless boundaries between private law on the one hand, and morals and politics on the other. This obsession is a residue from legal thinking of a different age, and rests on a picture of private law that is less accurate than it ever was. The 'law in context' approach is presented as a remedy for this obsession that reminds us that private law is in constant interaction with morals and politics through the intellectual and moral operation of integration. Next, however, we must be aware that this does not mean that private law loses its own specific characteristics. On the contrary, it is on the basis of continuing reflection on legal concepts and legal argumentation in the context of their use that we constantly renew and reinvent our legal repertoire. For that reason the ideal of 'law as integrity' is constantly challenged through the comparison and confrontation of our legal perspective with other than strictly legal ways of seeing and speaking. Finally, we have argued that if we succeed in achieving some success in this renewed way of dealing with private law, this has unavoidable consequences for legal dogmatics as well. We concluded, paradoxically, that we will reach a better insight into the specific nature of private law if we integrate different perspectives and viewpoints, that is, if we open up legal dogmatics to the interdisciplinary study of law. Only then, we will be able to face the limits of private law.

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[32] This seems to be the attitude of prominent legal scholars in the Netherlands as well, such as J.B.M. Vranken, *Algemeen Deel* (vervolg) (Deventer: Kluwer, 2005) and H. Nieuwenhuis, *Waartoe is het recht op aarde?* (Den Haag: Boom Juridische Uitgevers, 2006) 1–32.

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