

Introduction

The private law research agenda is undergoing a process of amplification with regards its areas of research and intentions. The former naturally demands we give attention to the foundations and justifications that undergird private law rules, institutions, and practices. This in turn enables us to examine why private law has not traditionally shown sensitivity to considerations and requirements related to poverty. Indeed, many of the problems involving private law and poverty are explained by the configuration of private law. Tackling poverty from the private law perspective therefore begins with the indispensable task of broadening the comprehension of this portion of the law whose purpose or functions do not in fact exclusively engage the 19th century individualistic premises that forged it, just as it actually fails to fully commit to its formalist commitment to the criteria of corrective justice.

In what follows, the ways that private law might contribute to addressing the contemporary challenges associated with poverty will be evaluated. I will argue that incorporating poverty into the range of issues subject to private law is pertinent to the degree that both the individualist lens and formalist focus solely on corrective justice of private law be abandoned. Instead our interest should be the altruist dimensions of private law together with adopting a much more robust vision of

¹ I am grateful to the comments by the members of the Legal Philosophy Research group at the University of Girona at a seminar discussing a draft of this piece.

² Professor at the Universidad Adolfo Ibáñez Law School in Santiago, Chile, Doctoral candidate at the Universitat de Girona. Email: esteban.pereira@uai.cl y esteban.pereira@udg.edu.

private law, one that admits corrective justice objectives, but also objectives of distributive and punitive justice. To begin, the individualist foundation and the connection to corrective justice that together explain the neglect in private law of the most disadvantaged classes will be demonstrated. Then the place of altruism and the diversity of ends that coexist in the rules, institutions, and practices of private law will be presented. Lastly, certain observations will be formulated that might contribute to addressing the problem of poverty using private law.

1. Private Law, Individualism, and Formalism

A standard legal rule in 19th century legislation is the presumption of knowledge of the law's dispositions across the distinct components of the community. That expectation is categorically stipulated, as it is in other codifications, by Article 8 of the Chilean Civil Code.³ The rule is justified by the legal certainty and impartiality that it provides those to whom the laws are addressed, favoring them through the neutrality and formal protection of their interests. It also, however, obscures the traditional neglect in private law of the most disadvantaged social classes.⁴ No one can allege fault through ignorance of the law without presupposing that all members of the community possess the material, social, and cultural resources required to be aware of and understand the law effectively. As everyone knows, this is not the case: what in fact results is uniform application of legal rules despite differences that exist between privileged and dispossessed

³ "No one can argue ignorance of the law after it has entered into force."

⁴ In this piece I understand private law as what is denominated civil law in the continental tradition. I will not, therefore, address dimensions related commercial law, labor law, or regulatory sectors that could be included following an Anglo-Saxon understanding of private law.

classes. The problem is that this observation is obviously anything but new. Even during the 19th century, Anton Menger warned of the tensions present in the German Civil Code (or BGB). Beyond its renowned legal technique, the BGB embodied the ideology of the bourgeois revolution founded on egoism, “and imposed on the poor classes through legislation.”⁵ The postulates of political individualism that are consecrated in the BGB favored an absolute notion of property rights, unlimited identity for the autonomy of private contracts and, furthermore, the establishment of a formal cover for the legal and material inequality among the legal subjects.

What lies behind this lack of concern? Since its modern origins, private law has been devised along individualist principles. These parameters exalt the individual as basic element in the private law phenomenon and, more importantly, the resulting severance of the interest of the agents themselves from anyone whose interests do not intersect with theirs. As Giovanni Tarello pointed out, an early obstacle that the process of codification faced in the late 18th century and early 19th century was the plurality of *status* for different individuals or distinct class identities that influenced the application of the civil codes understood as simple, clear, and succinct codes. A simple private legal system required a sole legal subject because differentiation between subjects would require amplifying the set of legal rules to accommodate the particular definitions, characteristics, and regulations corresponding to each category of subject. This is why, along with establishing an abstract category for subject or person to which private legal rules apply, the code

⁵ Menger, Anton, *El Derecho Civil y los Pobres* (trad. Alfonso Posada), Granada, Comares, 1998, p. 139.

writers appealed to an egalitarian ideology manifest in a form of equality before the law. This form of equality “meant no other than the singleness of the legal subject, which is why it represented, rather than some political ideology, a technical instrument to simplify legal systems.”⁶ It was only with the establishment of the Code that the singleness of the individual and the simplification of legal dispositions and reasoning were achieved.

Menger’s rejection of the German civil legislation can be understood accordingly. An egalitarian application of the law to its distinct subjects should not be adopted because it would benefit the more advantaged classes and be detrimental to the needier ones. A serious alternative would be, of course, to implement elaborate a system for the differentiated application of the code among the members of distinct social classes reflecting the peculiarities, difficulties, and needs of each. This was, in fact, Menger’s solution. He recommended that an exception for the excuse of ignorance of the law be authorized, for the equal application of law across classes, insomuch as awareness of the law were presumed equal, would reproduce the inequalities between the classes and situate the needy classes in an even more unfavorable position.

As is known, Menger’s proposal is not exempt of drawbacks. Formulating a differentiated private law according to social class would affect the regulatory ideal of legal certainty. This ideal involves both knowledge and understanding of the law on the part of the citizens and the law’s instrumental efficiency in protecting their

⁶ Tarello, Giovanni, “Ideologías del siglo XVIII sobre la codificación y estructura de los códigos”, en su *Cultura Jurídica y Política del Derecho* (trad. Isidro Rosas Alvarado), México D.F., Fondo de Cultura Económica, 1995, p. 50.

interests. If the standard strives for the comprehensibility, reliability, and predictability of law, then, cabining private law according to social group could result in bias against those in unfavorable situations, those whose realities led to differentiated legal demarcation.⁷ Similarly, doubts have been expressed regarding the legitimacy of establishing special legal rules for the poorest, as this would imply an impaired institutional treatment in that their dignity and capacity to exercise their autonomy in legal relations would not be respected, even to the point of treating them as “second-class citizens.”⁸

The issue that I would like to note is that this rule that presumes knowledge of the law responds to individualist exigencies associated with the impartiality and neutrality that this approach offers legal subjects without distinguishing between them. It is a rule that supposes common characteristics among individuals that in reality do not exist, and in fact reveals the deep rift among the demands of different members of the community. The equal application of the law finds its justification under beliefs that hold that individuals enjoy equivalent rational, cultural, and social competency to handle legal interactions and, therefore, are in a symmetrical relation that allows each to negotiate and define their binding obligations freely.⁹ If such presuppositions were correct, an egalitarian application of the civil legal rules would also be an adequate application of those rules.

⁷ From this perspective, see: Ferrer Beltrán, Jordi y Fernández Blanco, Carolina, “Proyecto sobre indicadores de seguridad jurídica en Iberoamérica”, en Cruz Moratones, Carles et al. (eds.), *Seguridad Jurídica y Democracia en Iberoamérica*, Madrid, Marcial Pons, 2015, pp. 243-263.

⁸ Cantuarias, Fernando, “Robin Hood reloaded. Quitándole al rico para robarle al pobre”, SELA 2005: *Derecho y pobreza*, Buenos Aires, Editores del Puerto, 2006, p. 103.

⁹ In accordance with Chile’s Supreme Court, the force of Enlightenment postulates in the codifications is revealed by virtue of the role of autonomy and the will: ‘the autonomy of the will is founded on the Enlightenment principles of liberty and freedom themselves that translate on the legal level to equality and legal freedom of the parties’ Corte Suprema, 21/06/2011, Rol: 4260-2011.

Yet the beliefs that justified these allegations has been contradicted by the evidence. Individuals are subjected to different degrees of social and economic inequality that lead to varying ability to negotiate and contract obligations. The breakdown of the Enlightenment premises of symmetry led to the transformation of equal application of the law into an instrument for the strong to use against the weak, whose interests were not considered at the founding moment of the body of norms. The initial wager of private law on impartial legal treatment became, once implemented, a rigid system that consolidated unjust social hierarchies and proved sterile in the face of the conditions of inequality, redistribution, and poverty. This is still the case for most Latin American civil codes, and has not been fully corrected in contemporary codification processes.¹⁰ Despite these processes, at issue are postulates that are susceptible to reformulation because of the state of substantively diverse factors they must deal with, a state in which the presumption of symmetry between the participants appeared to be sufficiently valid so that each person is both binded and in a position to freely decide their personal life plans.

Individualism proposes a sharp separation between self-interest and the interests of others and hence that benefits must fall exclusively to that individual who obtains them and, similarly, that losses should only be borne by those responsible for them, without any need for the benefits, losses, or their consequences to be shared or extended to any other agents. This prism reveals with

¹⁰ No se detectan mayores innovaciones en el marco de la codificación contemporánea suscitada en algunas legislaciones de Latinoamérica, como ocurre en las legislaciones boliviana [1975], peruana [1984] y argentina [2014], pese a la participación de exigencias públicas en materia de propiedad. Un cierto matiz al respecto, fue introducido por el artículo 421 del Código Civil brasileño [2002], al consagrar la función social como restricción de la libertad contractual, prescribiendo que “la libertad de contratar será ejercida en razón y en los límites de la función social del contrato”.

precision the traditional legal treatment of crucial concerns in private law including property, contracts, torts, and unjust enrichment. While the regulation of property is derived from the principle of exclusive control of the owner over her goods, control rightfully exercised independently from the political community, the governing principle in contracts is that of autonomy, according to which each contracting party can only bind herself by her own decision and do so according to the terms that she esteems reasonable.¹¹ Likewise, in tort law it is assumed that the harms must be exclusively borne by the victim, yet there do exist reasons that justify attributing them to a separate third party. Lastly, when wealth is unjustifiably displaced such that one party benefits to the detriment of another, the increase in wealth must be restituted to its owner by virtue of the requirements associated with unjustified enrichment.

One aspect that cuts across these spheres of private law is the dissociation of the individual from the rest of the persons that form part of the private legal setting. This is why, from an individualist viewpoint, the presumption of knowledge of the law is suitable, for it formally favors the protection of the rights of each agent in that it is presumed that each makes their legal decisions independently, without collaboration or solidarity. Matters that go beyond the immediate sphere of the individual tend to escape the focus of interest of private law to the degree that these matters challenge the fragmentation advanced by individualism. In this way the matter of poverty has moved away from the concern of private law without

¹¹ Regarding the conceptual relationship between poverty and exclusion in legal phenomena, see: Spicker, Paul, "Exclusion and Rights, en Williams, Lucy, Kjønsstad, Asbjørn & Robson, Peter (eds.), *Law and Poverty. The Legal System and Poverty Reduction*, London & New York, Zed Books, 2003, pp. 124-136.

attracting due attention. The manner in which this branch of the legal system was conceived explains why private law comes up against significant obstacles against addressing poverty.¹²

The individualist commitment of private law coexists with the excessive formalism that is displayed by the flourish for internal logic in the philosophy of private law. This 'internalism' consists of a vision of private law that seeks internal justification rather than justifying itself in terms of its functional efficacy in accomplishing external purposes. This zone of reflection has focused effort on exposing and reformulating the purposes of private law to determine its identity and central aspirations. This debate was influenced early on by the tension that exists between searching for the proper ends of private law and the entrance onto the scene of market dynamics seen through the lens and the influence of the economic analysis of law. Ignoring the subtleties that must be introduced in order to speak of the economic analysis of law, its variants suggest that private law should pursue ends that are foreign to its rules, institutions, and practices, ends that are associated with economic efficiency or resource maximization. In this sense, the economic analysis offers an external framework for the understanding of private law that appeals to objectives exogenous to its rationality, objectives whose source is found in the strategic rationality of the market.

¹² Because of length limitations I cannot take up the concept of poverty here. In the context of the debates over it, I hold that among the approaches that should be functional for the reconceptualization of private law in light of the problem is the one focusing on capacity proposed by Amartya Sen, with the considerations added by Martha Nussbaum. They demonstrate the various modalities through which poverty deprives individuals of their elementary capacities and, ultimately, affects their agency and basic freedoms. See: Sen, Amartya, "Capacidad y bienestar", in Nussbaum, Martha C. y Sen, Amartya (comps.), *La Calidad de Vida* (trad. Roberto Reyes Mazzoni), México D.F., Fondo de Cultura Económica, 1996, pp. 53-83.

The most robust version of the ‘internalist’ vision was defended by Ernest J. Weinrib, who proclaimed that “the purpose of private law is to be private law.”¹³ Weinrib’s provocative words call private law theorists’ attention to the need to attend to the conceptual and institutional structure of this particular field of law. On the basis of strictly formal dimensions of analysis designed in terms of the correlative relation of enforceable rights and duties among the participants, his methodology enables him to assert the autonomy of private law against the functionalist parameters of the economic analysis of law. That analysis proposed substituting tools, methodologies, and desire for greater pragmatic effect for the preoccupation with questions associated with the justification of private law rules and institutions in terms of values. The emergence of the focus on market dynamics forced a reevaluation of private law in terms of its strategic rationality and of ends extrinsic to private legal practices in a search for a “less dogmatic” understanding that would provide “more answers.”¹⁴

If private law must seek to serve purposes that involve economic efficiency, then it ceases to be what private law is. This subordination implies an admission of the dependence of the private law system on market criteria, dependence that effectively makes private law an instrument to achieve objectives that are external to its practices. Still, what is so peculiar about private law that makes it cease to be private law if it strays from its internally derived purpose? The correlational interaction between participants in private law practices involves a commitment to

¹³ Weinrib, Ernest J., *The Idea of Private Law*, Oxford, Oxford University Press, 2012, 2^a ed., p. 5.

¹⁴ Cooter, Robert y Ulen, Thomas, *Derecho y Economía* (trad. Eduardo L. Suárez), México D.F., Fondo de Cultura Económica, 1998, p. 237.

corrective justice that is both justificatory and conceptual. Its canons give a satisfactory account of the logic that governs relations between private individuals by virtue of its conceptual structure of correlative rights and obligations and, similarly, the various legal concerns and prescriptions of private law are legitimized through accordance with the requirements of corrective justice. This idea adapts well to the design of private practices and as a substantive criterion it bolsters their justification and, furthermore, conserves the independence of private law from a strategic rationality focusing on the consequences and results of its rules, institutions, and practices. Herein lies the explanation of why private law can only be what it is conditioned to be: a peculiar mode of interaction governed by the principles of corrective justice.

The profound attraction of this line of argumentation in private law philosophy has to do with its defense of the autonomy of private law as an object of reflection. Yet the methodology adopted to guarantee that independence has led to a formalist commitment to corrective justice. The correlational structure of its practices neutralize functionalist attempts to force private law to serve efficiency or social welfare objectives by treating them as external to its formal scheme. The coherence of this internal comprehension of private law depends, however, on a sole criterion – that of corrective justice. The monist formalism of this position has enabled it to withstand some of the charges inspired by the economic analysis of law, but it has also pushed the comprehension of private law to a point of formalism that in turn only recognizes the value of corrective justice as the sole purpose to which its rules, institutions, and practices should aspire.

One thing about these two phenomena that interests me is that the 19th century grounding of private law on individualism and the dissociation between the individual and the rest of the community have been reinforced through the internalist approach taken up by private law theorists. This approach has favored the adoption of a methodological monism when establishing the proper ends of private law. Private law, the thinking goes, is a question of corrective justice. The problem with this way of tackling the challenge of Law and Economics is its precipitous renunciation of problems that go beyond the direct interaction of the parties involved, such as wealth redistribution and poverty reduction. If the internal logic of private law is valid and correct, then addressing such matters means doing something that is distinct from what private law does. In the next section I will introduce the principle of altruism into the phenomenon of private law and evaluate it as an alternative to the individualist model, along with an allegation that objectives other than corrective justice, such as distributive and punitive justice, are also pertinent.

2. Altruism in Private Law

Altruism has remained fairly absent from reflections on private law.¹⁵ The minor attention it has received can of course be explained by the degree to which private law is committed to individualist premises. Despite this, from the predomination of individualist principles according to which interests are starkly distinguished as of the self or of the other it does not follow that appeals to

¹⁵ See Kortmann, Jeroen, *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio*, Oxford, Oxford University Press, 2005.

reevaluate that demarcation are irrelevant. Altruism has been understood to mean “a will to act in consideration of the interests of other persons, without necessity of ulterior motives.”¹⁶ This reading of altruism differs from the ingenuous version traditionally rejected in the work of moral philosophers that involves self-sacrifice or the most radical version of the Good Samaritan. A reasonable version merely requires some preoccupation for the needs and interests of others, not an utter renunciation of self-interest or boundless self-sacrifice in favor of others.¹⁷

The presentation of this sort of idea in legal matters could provoke suspicion that we are not talking about private law. Things appear less evident, however, when we attempt to untangle the various dimensions of analysis that are pertinent in private law’s institutions. This is demonstrated, in part, by introducing a distinction between form and substance into private law. Although private law is characterized by a formal image and structure, one that is accentuated in the internal scheme forwarded by Weinrib, there exist numerous spheres in which substantive considerations turn out to be pertinent. This occurs, for example, in contract law, which has traditionally been committed to strictly formal criteria required for the creation and validity of contractual obligations. Even the right to contract reflects a weakening privilege of formal reasons over substantive considerations. Progressively, judges are opening up formal agreements to examine the substantive foundations for the imposition of contractual obligations and going beyond merely considering the conditions for formal subscription to the instrument.

¹⁶ Nagel, Thomas, *La Posibilidad del Altruismo* (trad. Ariel Dilon), México D.F., Fondo de Cultura Económica, 2004, p. 89.

¹⁷ A similar strategy is defended in Dagan, Hanoch, “In Defense of the Good Samaritan”, *Michigan Law Review*, Vol. 97, No. 5, 1999, pp. 1152-1200.

The theory of unpredictability illustrates quite well the preoccupation over substantive dimensions in contract law. If, for circumstances unforeseeable at the moment of the contract, changes occur that, while failing to make compliance with the contractual obligations impossible, make those obligations excessively onerous, the situation justifies judicial revision of the contract terms, perhaps renegotiation of the terms by the parties, or, in certain cases, the rescission of the contract. Despite the formal agreement by both parties under the original conditions of the contract, substantive reasons are considered in the face of new circumstances that are not imputable to the debtor but that could economically ruin the debtor. Still, no matter how reasonable revising, renegotiating, or rescinding the contract might seem, there exists a strong formal reason against such action.

Contract law, acutely driven by individualism and the canons of corrective justice for exchanges, is structured on the basis of the obligatory force of the contract. According to this classic principle, contracts are binding the same way laws are binding; that is, unconditionally and without exception. Accordingly, Article 1545 of the Chilean Civil Code establishes that any contract legally entered is law for the contracting parties.¹⁸ The relation between contract and legislation is, of course, metaphorical, but it sheds light onto the intensity of the commitment that the contracting parties assume when they autonomously and willfully enter a legal agreement. The agreements they form must necessarily be followed, even when they subsequently fall out of agreement with the terms and, moreover, when following the agreement occasions losses for them.

¹⁸ In similar terms, see Articles 959 CCCNarg; 1361 CCpe.

Pacta sunt servanda constitutes a formal reason to conclusively impose compliance with the contractual stipulations by those who created them. If the obligation was legally contracted, then, it must be obeyed by the contracting parties under the original terms of the agreement. The act of entering into contract in accordance with the legislation in force, full knowledge of which is presumed for all parties, is a formal reason for obliging compliance with its terms. Circumstances such as economic disadvantage, contractual injustice, or prejudice towards one party do not therefore receive attention as they are considered irrelevant. What are the conditions under which the binding force of the contract shields situations of clear contractual injustice?

The binding effect is a formal reason for the judge to apply a contract according to its original stipulations without examining the substantive reasons which might countervail its application. If, however, the adjudicator gives attention to the substantive factors and considers the normative application of the compliance requirement mistaken, the formal reason for compliance is avoided and *pacta sunt servanda* is tossed out. One peculiarity of formal reasons is that they are considered irrelevant for a set of questions underlying contractual ties even when they coexist with substantive reasons that, to the contrary, invite nuance and contextualization. The scale tends to tip towards the latter. As Atiyah suggests, “at the same time, we must all be aware of the fact that the power of formal reasons in contract law and, in truth, probably in all law, has been weakening in recent years. More and more often courts appear disposed to investigate the transaction, open up, and go beyond

formal reasons, and consider the substantive reasons for the creation or negation of the obligations.”¹⁹

Duncan Kennedy has proposed taking up the contrast between form and substance in the sphere of private law adjudication. Behind the distinction between form and substance, spheres of values in constant conflict can be detected. On many occasions, judges shift between formal and substantive dimensions in their decisions, in light of allegations or models of argumentation which possess substantive features. In these occasions judges may react to observations that are of either an individualistic or altruistic nature. As I have suggested, political individualism maintains a rift between self-interest and the interest of others and denies that the gains or losses resulting from a given activity be borne by anyone other than the person who has obtained or suffered them. As for altruism, it “is the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others.”²⁰ Kennedy's suggestion for dealing with the rupture advanced by individualism is dissolving the border between the interests and needs of oneself and those of others, thus inviting us to share and make reasonable sacrifices. This ideally relates to the expectation of distributing advantages and renouncing to some of our gains, as well as participating in some of the losses of others.

Kennedy's thesis is that there are underlying issues related to the dispute between form and substance in private law that reflect the counterposed values of the two attitudes. The application of a formal rule to a particular case, such as the

¹⁹ Atiyah, P. S. “Form and Substance in Contract Law”, en su *Essays on Contract*, Oxford, Clarendon Press, 1986, p. 116.

²⁰ Kennedy, Duncan, “Form and Substance in Private Law Adjudication,” *Harvard Law Review*, Vol. 89, 1976, p. 1717.

binding force of a contract, can be evaluated from two viewpoints in tension. Seen through an individualist prism, *pacta sunt servanda* offers legal security and neutrality in contracts and therefore, even when one of the contracting parties might be ruined because of it, the imposition of compliance with the original terms of the pact is correct. From an altruistic viewpoint, however, the legal contractual rule could be seen as excessively rigid in certain circumstances, in which case its application, in light of the substantive considerations surrounding the contractual relationship, becomes inappropriate.

While separating the interests of the contracting parties favors a categorical application of the binding effect of the contract, consideration of the interests of others often recommends neutralizing the rule in favor of one of the mechanisms contemplated in the framework of theory regarding unforeseeable circumstances. In the same way that the difficulties of Article 8 of the Chilean Civil Code were previously revised, the formality of Article 1545 justifies a bifold evaluation. From an individualist perspective, formal application guarantees neutrality while under an altruist reading the legal rule ignores allegations and interests of individuals and social groups that were not considered in its 19th-century conceptualization.²¹ In other words, the reality does not correspond to the image of the unique subject upon which the codification is based.

²¹ Menger correctly affirmed that there is tight connection between the formal dimension of private law and its lack of concern for the situation of the most disadvantaged classes. According to Menger, “prejudices of the proletarian class stem from, most of the time, the fact that, *starting with a formal viewpoint*, legislation establishes the same rules for Law, both for the rich and the poor, as social positions, starkly different, of both requires different treatments.” Menger (1998), p. 136, italics added.

The theory surrounding unforeseeable circumstances represents a robust indicator of the pertinence of substantive considerations in private law and, furthermore, is proof of the presence of altruistic components in its structure. Although a contracting party may benefit from a change in circumstances following the contracting the moment, renouncing the gains that result from the changed circumstances may be considered reasonable if it serves the interest of the other party and does not take advantage of benefits fortuitously obtained. This is even clearer in the requirement of reciprocal duties when renegotiating contractual terms to mediate between the parties after an unforeseeable event has altered the original conditions of the agreement. It is obviously not necessary to lodge a legal complaint to assert unforeseeability in private law systems to demonstrate the pertinence of altruism in private law; it suffices to demonstrate that, once all the normative commitments of this branch of legal phenomena are teased out, individualism is not their sole source.

Reexamining the various concerns of private law reveals the presence of altruistic dimensions in it. This can be seen, for example, in the way property rights have been reconceptualized since the original 19th-century codifications. Referring to the codes, property was understood as a set of faculties, suggesting the owner is that person who has the power to exercise those faculties. Formally, thus, possession is the right to arbitrarily use, enjoy, or dispose of an object. Some nuance, however, must be introduced. Article 582 of the Chilean Civil Code, after establishing these classic prerogatives of ownership, prescribes that the prerogatives can be exercised freely “not being against the law or against the rights

of others.” The introduction into the Code, by the eminent Venezuelan poet and jurist Andres Bello, of the idea of others’ rights as limiting the arbitrary exercise of the right of ownership is another indication of the tension between individualism and altruist ideals. The owner of a good may freely use, enjoy, or dispose of that good to the degree that such action does not infringe the rights or interests of the rest of the members of the community. We have here an altruistic factor that is an alternative to the presumptive individualistic understanding of property in our civil codes. Accordingly, this reading allows for the construction and systematization of a theory of immissions; that is, of a cast of suppositions in which the exercise of property rights would be restricted, and could even involve liability when the interests of another individual are harmed.

Likewise, in the field of contracts there exist signs of altruistic elements. A good part of the reformulation of contemporary contract law relates to the relevance of unfavorable circumstances for certain contracting parties. Consumer rights in particular can be interpreted as an effort to protect the weaker contracting party, an effort that considers the asymmetrical contracting power of numerous contracting parties, given the failure of the 19th-century codification to satisfactorily deal with the situation. The rise of regulatory sectors outside of civil legislation represents an attempt to correct for the original lack of concern in private law for individuals who do not possess the social or material conditions to fully and effectively perform autonomously in contractual relationships.

That said, there is a principle within contract law that is key in the configuration of contractual obligations. The principle of good faith in contracts

reflects a sophisticated understanding of how contractual obligations can be abused and denature the instrument. It requires the contracting parties to behave in accordance with certain standard throughout the term of the contractual relationship. One application of its requirements lies in the pre-contractual information disclosure requirements all parties must meet. During the negotiation phase of a contract – the phase upon which early codification concentrated its attention – the parties must act through clear, authentic declarations without hiding central questions in the contract that could benefit them. A naïve version of altruism might suppose that the contractual bond ceases to be one and begins to operate as a dispositive of renunciation of one's own benefits and interests in favor of others'. This, however, would be mistaken. In private law, formulas derived from the starting point of renunciation do not, in general, exist, especially in the sphere of contract law.²² Still, this is not what my more moderate reading of altruism proposes. Under this reading, the parties are not required to disclose everything that they know about the conditions surrounding the contract, but rather only that which is indispensable for the contractual interests of the other party to be satisfied. As the interest of others is relevant, the contracting parties must collaborate, taking into consideration the expectations of information that their counterpart has for the transaction.²³

²² For justification of redistributive duties in private law, see: Lewinsohn-Zamir, Daphna, "In Defense of Redistribution Through Private Law", *Minnesota Law Review*, Vol. 91, 2006, pp. 326-397.

²³ In this sense, see: , De la Maza Gazmuri, Íñigo, "La buena fe como dispositivo de ponderación", en su et al., *Estudio de Derecho de Contratos. Formación, cumplimiento e incumplimiento*, Santiago de Chile, Legal Publishing Thomson Reuters, 2014, pp. 201-228. Another example can be seen in the charge of mitigated contractual damages on lenders who, for their part, find their justification by the good faith principle.

In tort law, for its part, altruism is apparent in the different hypotheses to treat losses occasioned by accidents that must be distributed between several responsible agents. Standard regulation in systems of civil responsibility establishes that damages provoked from the top part of a building must be borne by all those who are found in that location. The burden is thus supported by all without differentiation unless it can be determined with precision which person among them caused the damage.²⁴ Such consideration, to spread the responsibility for the illicit act, is also reflected in situations where harms are caused by a plurality of subjects. In these cases, and contrary to the treatment of this situation in contract law, the general rule is to impose a system of solidarity to repair the harms unjustly caused.

Lastly, refund rights also reflect altruistic logic in civil matters. When someone receives a benefit without justification, such as a payment, that increases their wealth and decreases the wealth of the other party, that amount or its comparative worth must be restituted. If the individualist prism was the only pertinent one in private law, there would be no reason to configure such refund rights. The cleavage between the person who suffers a loss and the one who gains would cede the gain in favor of the consolidation of that party's right. As this is not the case, there exists an obligation to retribute the unjustified gain to its original owner. Renouncing the gain does not only follow from the absence of title to justify

²⁴ Artículos 2328 CCch; 1760 CCCNarg.

the transfer, but also involves consideration of the wealth and interests of those who suffered losses as a result of the payment.²⁵

Up to now I have tried to illustrate the conflicting dimensions underlying private law. Following Kennedy, in the adjudication of private law, substantive questions are considered not only because there exists *one* normative parameter to guide decision-making. We have, on one side, an individualist parameter and, on the other, an altruist one. Under a diverse variety of central private law institutions lie altruist allegations. The altruist impulse to challenge the rift between self-interest and the interests of others is, as will be argued later, crucial in the attempt to conceptualize how private law might address poverty. That said, earlier I indicated that the individualist prism explains why private law has remained insensitive to problems like the ones studied in this work. I have yet to address the formalist methodology that has garnered much interest in private law theory and its resolute monist commitment to the criteria of corrective justice.

Despite the unquestionable reserves I have to subscribing to Weinrib's internal logic thesis for the understanding of private law, I grant that it is a paradigmatic vision in that it seeks to assure the independence of private law from functionalist schemes. The difficulty lies in how it bases the autonomy of private law on its structural commitment to the precepts of corrective justice. The direct interaction between the parties of a private legal relation is intertwined with the idea of balance and correlation between the rights and duties of each participant. The problem with assuming this perspective is that private law cannot be anything

²⁵ On altruism in restitution law, see: Dagan, Hanoch, *The Law and Ethics of Restitution*, Cambridge, Cambridge University Press, 2004, pp. 86-122.

other than private law. To put it another way, its propositions are analytically linked to corrective justice.²⁶ Its adoption, following this line of investigation, is incompatible with other versions of the idea of justice, such as distributive or punitive justice.

The monism of the private law's propositions strengthens the coherence of private law but it also constrains its theoretical aspirations. A robust version of private law would necessarily address criteria from corrective, distributive, and punitive justice. This distribution has been developed in certain areas of private law. The results of the work done differ depending on the area – in tort law, for example, or contract law. While in the former area considerable efforts to reinforce the pertinence of a robust conception can be observed, in contract law the efforts have been weaker and their influence is clearly less significant.

With regards tort law, Tsachi Keren-Paz has called attention to the need to redirect analysis and legal doctrine towards redistributive purposes. An egalitarian theory of rights to damages requires the establishment of differentiated levels of diligence for distinct groups of individuals, drawing attention “to the ways by which the rules of torts affect members of disadvantaged groups, such as women, minorities, and the poor.”²⁷ For his part, Anthony Kronman brings out the necessity of constructing contract law theory based on distributive justice, to the degree that the idea of voluntary agreements cannot be separated from distributive

²⁶ On corrective justice's insufficient explanation of private law, see: Steel, Sandy, “Private Law and Justice”, *Oxford Journal of Legal Studies*, 2013, Vol. 33, No. 3, pp. 607-628.

²⁷ Keren-Paz, Tsachi, *Torts, Egalitarianism and Distributive Justice*, Hampshire, Ashgate, 2007, p. 6. For the distributive justification of tort law, see: Papayannis, Diego M., *Comprensión y Justificación de la Responsabilidad Extracontractual*, Madrid, Marcial Pons, 2014, en especial, pp. 271-348.

commitments.²⁸ His classic analysis does not avoid the temptation to suggest that all interaction between contracting parties is important if it is useful for the promotion of distributive justice, but moved the distribution of resources into the center of contract law.²⁹

Punitive components in private law are another characteristic element in legal practices. While they are not always expressly contemplated in civil legislation, they have penetrated into several spheres of tort law. Retributive or dissuasive variations challenge the principle of full reparation called for in corrective justice, for that principle stipulates that all harm must be compensated, but that *nothing more* than the sum of that harm be awarded.³⁰ Under certain hypotheses, it is held that awarding a *quantum* of compensation corresponding to the amount of the losses occasioned by the harmful agent is insufficient if the sum of money serves ends distinct from the mere correction of the harm. If the illicit act is especially serious or the wealth capacity of the harmful agent is privileged, infringing the principle of integral reparation and incorporating punitive considerations into civil responsibility, and therefore increasing the *quantum* of compensation, is allowed. Punitive damages, in effect, take up distributive characteristics when they are accorded following deep pocket doctrine, which adjusts the damages the author of a

²⁸ Kronman, Anthony T., “Contract Law and Distributive Justice”, The Yale Law Journal, Vol. 89, No. 472, 1980, pp. 472-511.

²⁹ This strategy was taken up from a reading of Rawls in Scheffler, Samuel, “Distributive Justice, the Basic Structure and the Place of Private Law”, Oxford Journal of Legal Studies, Vol. 35, No. 2, 2015, pp. 213-235.

³⁰ On dissuasion in purpose of private law, see: Tan, Yock Lin, “Deterrence in Private Law”, en Robertson, Andrew y Tang, Hang Wu (eds.), The Goals of Private Law, Oxford & Portland, Hart Publishing, 2009, pp. 311-339.

harm must pay in relation to their economic resources, the disadvantaged situation of the victims, and the comparative risk of suffering certain accidents.

The pertinence of private law in addressing problems related to social inequality, wealth redistribution, and poverty reduction, then, necessarily involves two orders of considerations. On one side, private law must be reformulated in light of the proper requirements of the principle of altruism and, on the other, a robust version of private law must be formulated – that is, a model of understanding private law that includes, among its objectives, principles of distributive and punitive justice as well as corrective justice. In the last section such a strategy will be explored and some ideas about possible ways for private law to demonstrate a serious concern for the most disadvantaged classes of society will be offered.

3. Private Law and Poverty

As can be appreciated, the shift from an examination of the altruistic dimensions of private law to an argument related to poverty must overcome several obstacles.³¹ Even if one accepts that altruism exists together with individualism as a normative parameter of private law, or that the two can operate together to refine legal solutions and practices, from neither of these observations does it necessarily follow that private law directly affects poverty. In effect, it does not. It should be carefully noted that the avenue of private law for the resolution of social problems is inevitably less effective than other legal pathways. Public law possesses without

³¹ Regarding the difficulty of conceptualizing and measuring poverty, one illuminating work might be: Sen, Amartya, “Conceptualizing and Measuring Poverty”, en Grusky, David B. & Kanbur, Ravi (eds.), *Poverty and Inequality*, Stanford, Stanford University Press, 2006, pp. 30-46.

doubt greater tools – both conceptual and regulatory tools – to tackle such problems. Nevertheless, the relative weakness of the private law is not a sufficient reason to preclude incorporating a concern over poverty into the private law agenda. Even if its ability to overcome poverty is insufficient, that does not mean that it is completely irrelevant.

Following this point of view, I maintain that the positioning of altruism in private law matters offers pathways for the direction that serious efforts to address the problem of poverty within this field of the law might take. Yet, as I have also suggested, reading private law rules from an altruistic stance constitutes but one strategy for taking up the challenge, a strategy that must be complemented by the configuration of a robust notion of private law that incorporates standards of corrective, distributive, and punitive justice in the comprehension, justification, and objectives of its rules, institutions, and practices. Why, then, do we not sharpen the distributive consequences of the various institutions of private law? Redesigning the private law program to address poverty through distributive dimensions presents at least two problems: its lack of novelty and its compatibility with the existence of poverty.

As indicated before, the distributive aspects of tort law and, to a lesser degree, contract law, are treated in the philosophical work behind private law. Insisting on those analytic coordinates runs the risk of placing all the pertinence of private law to poverty on its actual redistributive capacity. This, in turn, still meets with some skepticism from a good number of private law scholars and the results of such an action would depend on a variety of variables and nuances and could even

have regressive consequences. Another problem is that distributive justice is not the only lens through which private law can be interpreted. Its theoretical mission can not only be designed with the goal of distributing economic resources to the most vulnerable and needy members of society. The most severe difficulty regarding the distributive position of private law, however, is that its many versions are in fact compatible with the phenomenon of poverty. With this affirmation, my intention is to underscore the fact that the redistributive returns that can be obtained in private law areas do not imply any eradication of poverty, but rather a mere mitigation of its noxious effects. Distribution as aspiration does not seek to provide a solution for disadvantaged classes as much as it aims to reorganize the allocation of resources and attend to the particular necessities and conditions of individuals. It is more an appeal against the egalitarian treatment of subjects that, as mentioned, has been in force since the original 19th-century codification, than a means for the eradication of the affliction of poverty. That is why it is possible to maintain that the distributive component of private law is compatible with a level, be it marginal, of poverty. This is where its inevitable conceptual limitation arises.

A different question arises from altruism. Promoting it in private law matters requires recognition of the other, attending needs and interests that are not one's own and encouraging, in certain circumstances, renunciation or self-sacrifice that derives from the need to both share some of one's own gains and bear some of others' losses. The strength of altruism's appeal is the imposition of standards, requirements, and demands for reciprocal behavior that arise from the conjunction of individual expectations and are not, by definition, compatible with poverty. While

a distributive conception of private law can coexist with certain levels of poverty, the fundamental allegations of altruism proclaim the need to overcome it, demonstrating greater sensitivity to the problem. Such a position may, of course, be excessively naïve, but it has been so modestly explored in private law that it is not possible to reject its pertinence out of hand either. Altruism in private law is not to be erected as a solution to poverty, but rather as a basis that must be adopted to begin tackling poverty through private law. It is difficult to see how poverty could be combated in this area of the law without the promotion of an altruistic ideal.

Reflection over possible ways to address poverty through private law has often focused on distributive duties. Such suggestions, paradoxically, have not been persuasive. At a previous meeting of SELA, more than a decade ago, Carlos Rosenkrantz denied that private law could contribute to reduce poverty. His central intuition was that such an objective pertained to a social collective, not to individuals. Reducing poverty is an aspiration of all individuals taken collectively; concerning ourselves with it would therefore require employing mechanisms germane to that class of concerns. Drawing a dividing line between private and public law in terms of what kinds of relations each sphere regulates, his categorical conclusion was that “the reduction of poverty cannot be invoked as a principle of private law.”³² With regards what was argued earlier, even though there are instances in contract and tort law – often understood as the core of private law – where distributive objectives are present, these instances are marginal and

³² Rosenkrantz, Carlos, “La pobreza, la ley y la Constitución”, SELA 2002: El derecho como objeto e instrumento de transformación, 2003, p. 243.

limited.³³ They are marginal because they are not accepted in paradigmatic cases and, hence, limited because it is impossible for private law to be absolved from the type of direct relations between individuals that it regulates. In Rosenkrantz's reading, the public law is that which must take up questions of poverty.

His words are especially interesting for my explanatory purposes. The traits of private law that Rosenkrantz identifies express precisely the insufficiency of approaching the problem through the distributive objectives that are present in the central spheres of this area of law. The results of that approach will inevitably be marginal and limited. This is why I have attempted to alter the strategy and put the accent on reformulating the principle of individualism using the principle of altruism as regulative ideal for private law rules, institutions, and practices. The astute observation of Rosenkrantz that reducing poverty cannot be invoked as a principle of private law is eye-catching. It is completely effective, of course, seen through the lens of individualism. The pertinence of poverty, however, cannot be discarded so easily under the revised principle of altruism. Rosenkrantz might be trying to say that, following the individualist principle under which private law was forged, addressing poverty cannot be part of the private law program. The tension that he reaffirms between objectives of individual and collective nature sheds light in the same way. For poverty to be addressed through private law, a reformulation of its foundations is necessary. Its viewpoint must be displaced from utter individualism towards altruism, according to which the division between self and other is not so cutting. I believe it is by using these coordinates that it becomes recommendable to

³³ Rosenkrantz (2003), p. 244.

explore the altruistic optic in private law without restricting its capacity to overcome the actual distributive effects it has on poverty.³⁴

One avenue for this that is as provocative as it is precipitated would be arguing for tearing down the barriers that separate private and public law. Although generous studies have very recently been generated offering new, alternative ways to understand the relationship between the two domains of law and updating the doctrinal criteria that have traditionally motivated their separation, it is not necessary to provide reasons to satisfy that aspiration.³⁵ It is enough to call attention to the fact that, in the legal-private phenomenon, public and social dimensions inevitably exist.³⁶ They cut transversally across questions relative to property, contracts, torts, and unjust enrichment.³⁷ It is much more decisive, and necessary, to stop for a moment and examine a reason behind the insistence that private law corresponds to a zone radically opposed to public law, than to categorically deny that ‘public’ considerations play a role in the rules, institutions, and practices of private law. These particularities have justified the marginalization of private law in current efforts to address the challenges associated with poverty.

³⁴ In a subsequent meeting of SELA, Pablo Ruiz-Tagle picked up the idea of Rosenkrantz that poverty has a collective character that primarily affects public law. Where he diverged, however, was on the real autonomy of private law from poverty that authorized it to turn deaf ears to calls for a solution. In his words, “if we can conclude that poverty is related to the impossibility of accessing property, contractual ignorance, and precarious, inhuman family relations, then it seems to me that private law must also make consideration for the circumstances of extreme poverty, by which I understand indigence, exclusion, and marginalization.” Ruiz-Tagle Vial, Pablo, “Pobreza y creación de derechos fundamentales”, SELA 2005: Derecho y pobreza, Buenos Aires, Editores del Puerto, 2006, p. 79.

³⁵ See Hedley, Steve, “Courts as Public Authorities, Private Law as Instrument of Government”, en Barker, Kit y Jensen, Darryn (eds.), *Private Law. Key Encounters with Public Law*, Cambridge, Cambridge University Press, 2013, pp. 89-116.

³⁶ This was anticipated in Renner, Karl, *The Institutions of Private Law and their Social Functions* (trad. Agnes Schwarzschild), London & Boston, Routledge & Kegan Paul, 1949.

³⁷ See Dagan, Hanoch, “The Public Dimension of Private Property”, *King’s Law Journal*, Vol. 24, 2013, pp. 260-288

At the outset of this piece I indicated that the methodological approach that has the most repercussion in the contemporary literature of private law philosophy is the internal perspective hailed by Weinrib. Its primary virtue is also its greatest defect. The formalism championed by Weinrib to propose that private law can be nothing more than what it is – *private* law, or corrective justice – without admitting any components or objectives extrinsic to its rationality and mode of interaction between parties, reinforces the distinction between private and public law. Moreover it ensures the autonomy of the former from the latter, and from the instrumental logic of markets. This scheme, however, also perpetuates the lack of concern and sensitivity of private law to the necessities and circumstances of the most disadvantaged classes.³⁸ The search for a coherent system in which the interaction between participants is solely regulated by the parameters of corrective justice supposes a monist commitment that is incompatible with the diversity of purposes that private law might serve by considering corrective, distributive, and punitive justice. This diagnostic can be extrapolated if formalism is conjugated with the search for solutions to the needs of the poorest social classes. It is not difficult to anticipate that the rejection of this argument might hold that, however legitimate the cause of eradicating poverty and social inequality may be, it falls outside the ambit of private law, for it goes beyond the particular form of relationship between individuals that determines its internal logic.

³⁸ For a critical evaluation of the isolation of private law from collective demands or questions with a public dimension, see: Dagan, Hanoch, “The Limited Autonomy of Private Law”, *The American Journal of Comparative Law*, Vol. 56, No. 3, 2008, pp. 809-833.

This rejection is not as much a consequence of an emphasis on internal coherence, or internalism, as it is of formalism. In this class of argumentation, the demand of all internalism for independence from the market and its instrumental rationality results in the paradoxical subordination of independence to formalism, leading to a dense theoretical restriction of private law. The aspiration for independence ends up preventing it from considering problems that betray any key internal principle in the regulation of private interaction. This belief, however, is misplaced. We must not lose sight of the emphasis that advocates of internalism places on the social practices of the participants in each setting. Accordingly, asking the meaning of a practice in private law inevitably requires the identification of the meaning by those who accept private law rules as truly reflective of genuine behavior patterns.³⁹ An internal approach to private law must consider the relevance of every participant's position, for without it the explanation of the phenomenon is unintelligible. When the different ways that participants conceptualize their acceptance of the rules are considered, it becomes very difficult to exclude allegations related to justice in its various facets. Similarly, it should not appear odd that it makes sense to some of them that some of the legal rules to which they subscribe have the intent of addressing the poverty and social inequalities from which they suffer. The invitation to reconceptualize private law in these terms represents in fact an internalist hermeneutic exercise of who we are and what are most substantive aspirations are. If, on the contrary, we maintain the exclusion of such matters and simply exogenous concerns, the formalism adopted

³⁹ Hart, H.L.A., *El Concepto de Derecho* (trad. Genaro R. Carrió), Buenos Aires, Abeledo-Perrot, 1963, pp. 102-113.

by the internalist approach acts as dispositive that limits the self-understanding of private law.

From this perspective, internalism is not conceptually bound to the incompatibility of objectives in private law, or to the renunciation of collaborating towards social goals that affect people who participate in private law transactions.⁴⁰ Those analytical dimensions depend more on consideration of a truly internal understanding of private law rather than the conceptual boundaries imposed by its formalism. The private law system evolves through rules, institutions, and social practices whose meanings are determined from the interior. If we want to sharpen our understanding of what private law is, it makes sense to draw attention to a fistful of substantive problems and disputes that operate behind the structure in private law that is in appearance merely formal and individualist. If the internalism of private law genuinely represents a preoccupation with the internal dynamics of the phenomenon, then the reasons for which the participants in it accept the legality of its rules takes on significant relevance. It is only through evaluation of these matters that it is possible to fully exercise our interpretative faculties to assess the merits of the professed justifications and refine our understanding of the private law phenomenon.

⁴⁰ Tal expectativa se refleja en la propuesta de redirigir la sistematización del derecho privado a la producción de los elementos necesarios para la conformación de un ‘derecho privado social’. Si bien ello se encuentra de manifiesto en las distintas reglas de protección de la parte más débil de las relaciones jurídicas contractuales, los propósitos redistributivos de bienestar no son completamente realizadas por estas regulaciones. Como es sugerido por Thomas Wilhelmsson, su materialización puede ser efectuada desde el interior del derecho privado, conjugando sus fines con las aspiraciones del derecho de contratos. De modo tal que podemos preguntarnos, “¿hasta dónde puede la autonomía del derecho contractual tradicional ser reemplazada por la solidaridad del derecho social al formular los principios generales del derecho de contratos?” Wilhelmsson, Thomas, *Critical Studies in Private Law*, Dordrecht, Kluwer, 2010, p. 15. Cursivas del original.

Is it really inapposite to address poverty through private law? The configuration of private law in accordance with its individualist commitment and internal optic of corrective justice led to a formalist manner of understanding it that neglected a good number of the central intuitions and substantive circumstances of many of its participants. Consideration of solidarity, common interest, and concern for others cannot be wholly excluded from private law. At the least, they cannot be disassociated from a robust conception of private law. By robust conception I mean one open to the reevaluation of legal rules, institutions, and practices to update them for settings obviously distinct from those in which modern private law was articulated. The fall into obsolescence of the 19th-century theoretical premises that inspired the codification movement makes it necessary to adapt private law accordingly, and in some occasions to reformulate more appropriate premises. Assessing the pertinence of substantive reasons and considerations that represent the meaning of social practices within the private law sphere corresponds to the issues that its participants deem relevant. According to an internal vision of private law, only their role should be decisive in the reflection over what it is, not an unrestricted commitment to certain formal criteria of analysis that define what is relevant and what is not from an individualist perspective.

Calling attention to the role of altruism in private law does not represent an intention to deny the obvious: the basis on which private law has traditionally been conceived is that of individualism. The observation seeks to show that individualist parameters are not the sole ones in play when we attempt to understand private law. Certain legal rules, institutions, and practices in the private law phenomenon

can also be analyzed through an altruistic lens, even when they only seem to reflect the cleavage between the interests of the different participants. Including an altruist standard in the reflection over and evaluation of private law not only reinforces and paves the way for a robust conception of private law, but would also help private law regain relevance. If private law has lost some of its epistemological value, it is because of the conformity of its theorists in avoiding the debate of truly interesting topics, especially those related to the determination of its concerns and proper purposes.

A private law that did not solely bind itself to the canons of corrective justice but included distributive and punitive objectives would be a much more satisfactory version of the private law that renounces these dimensions in favor of formal coherence. Likewise, the reading of private law in purely individualist terms only leaves one way of seeing matters in this branch of the legal system. By neglecting altruistic dimensions – that are already present in some areas of private law – the domain's lack of sensitivity to the predicament of the poor is reinforced. I do not argue that making better use of altruistic principles in private law would represent the last word in the fight to reduce poverty in our societies, but I believe it should be the first one.

If my analysis is correct, an indispensable task will be distancing private law scholarship from its individualist and formalist dimensions. On the contrary, this fertile field for development and reflection will remain blind to developments in all the others and neglect an entire class of problems that do not solely reflect the interaction of parties seen through the lens of corrective justice. Clearly, it has not

been my intention to bring decisive, conclusive arguments regarding the relation of private law to poverty. I do not believe that my arguments have been excessively modest either. In my presentation and evaluation of the operation of altruistic principles in several areas of private law, a point of departure for rethinking private law from the perspective of the poorest classes materializes. Its role in the analysis and reformulation of private law's rules, institutions, and practices, as well as the distributive objectives that have developed beside them, could open ways for private law to take up matters of social justice. Here the total scission between self-interest and the interests of others turns out unsustainable and unnecessary. This is why the articulation of a robust understanding of private law requires, among other things, breaking down the insensitivity of private law to the plight of the poorest and revolting against their exclusion by considering their participation in the phenomenon of private law and fight against poverty. In other words, an exercise devised following these coordinates would mean taking seriously the challenge raised by Menger nearly two centuries ago, a challenge that has been dramatically made evident by the recent difficulties of the liberal postulates that orient this branch of the law.