

INTRODUCTION

New Private Law Theory—A Very Brief Introduction

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The field of private law theory is currently experiencing an unexpected revival both in Europe and in the United States.¹ The quasi-monopoly of the economic analysis of law,² especially in the field of business law, is (again) challenged by diverse approaches inspired by analytical philosophy³, social theory⁴, or political economy⁵.

Yet these different strands of thought appear strangely disconnected in at least three respects. First, they seldom speak to each other. Instead, there is a proliferation of highly specialized publications, conferences and debates within sub-disciplines such as law & economics or law & society.⁶ Second, debates in private law theory seem increasingly detached from discussions of case law and black-letter rules, instead focusing on policy perspectives.⁷ Third, they often lack historical context and fail to engage with the rich tradition of nineteenth and twentieth century legal thought.⁸

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¹E.g., HANOCH DAGAN & BENJAMIN C. ZIPURSKY (EDS.), RESEARCH HANDBOOK ON PRIVATE LAW THEORY (2020); THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020); with a particular focus on Germany. PRIVATRECHTSTHEORIE HEUTE – PERSPEKTIVEN DEUTSCHER PRIVATRECHTSTHEORIE (Michael Grünberger & Nils Jansen eds., 2017).

²Most prominently RICHARD A. POSNER, ECONOMY ANALYSIS OF LAW, (9th ed. 2014); see also GEORGE L. PRIEST, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY (2020).

³E.g., Kit Barker, *Private Law, Analytical Philosophy and the Modern Value of Wesley Newcomb Hohfeld: A Centennial Appraisal*, 38 OXFORD J. LEG. STUD. 585 (2018).

⁴E.g., RECHT UND SOZIALTHEORIE IM RECHTSVERGLEICH: INTERDISZIPLINÄRES DENKEN IN RECHTSWISSENSCHAFT UND -PRAXIS (Stefan Grundmann & Jan Thiessen eds., 2015).

⁵E.g., Jerediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784 (2020).

⁶With regard to this particular divide ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 7 (1991).

⁷For the U.S. in particular see RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 6 (2016).

⁸A case in point is the “New Brandeis movement” in US antitrust law (see Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710 (2017)), the proponents of which seem to take no account of the long-standing intellectual tradition of ordoliberalism around thinkers such as *Franz Böhm* and *Walter Eucken*. This is surprising given their very similar focus on the protection of market conditions for real competition rather than the maximization of consumer welfare (as advocated by the formerly dominant “Chicago School” of antitrust law). On ordoliberal theories of competition see STEFAN GRUNDMANN, HANS-W. MICKLITZ, & MORITZ RENNER, NEW PRIVATE LAW THEORY: A PLURALIST APPROACH ch. 6, 13 (2021).

This special issue, which is based on our recently published book on *New Private Law Theory: A Pluralist Approach*⁹ aims to directly address these shortcomings. Based on canonical texts,¹⁰ our book aspires to develop a theory of private law that is (1) pluralist with a view to integrating different theoretical and interdisciplinary perspectives, (2) application-oriented with a view to its relevance for concrete legal cases, and (3) historically conscious with a view to its place in the tradition of Western legal thought. In this volume, a group of renowned scholars of private law theory from different countries and diverse intellectual traditions explores and discusses the perspectives of such a theory.

Clearly, the publication of our eponymous book is only a starting point for New Private Law Theory (NPLT). Thus, the contributions to our book launch event in December 2021 that are compiled in this special issue can be considered a snapshot of the discussions the book has inspired – and will hopefully continue to inspire.

The contributions to this special issue all share the main objective of NPLT: To ensure that private law, while “normatively closed,” can be as “cognitively open” as possible.¹¹ In order to develop an adequate description of society, private law theory must consider the findings of different disciplines beyond law.¹² To this end, the introduction to our book formulates the programme of NPLT in five theses.¹³ These five theses are reflected in the contributions to this special issue.

A. Our First Thesis Is That NPLT Is Pluralistic

Mindful of the “polytheism of modernity” (*Max Weber*) it must look beyond the increasingly mainstream approach of law & economics and open the view to other neighboring disciplines such as sociology, philosophy, and history. The contributions to this volume clearly outline the challenges that this approach is inevitably confronted with. Hanoch Dagan frames the main challenge as a question: If NPLT is to be pluralist, a “mosaic,” then what can hold it together?¹⁴ Dagan suggests, much in line with our general approach, that the answer to this question can be found in the “normative filter” of private law theory as a theory of justification. Daniel Markovits situates the challenges of a pluralist theory of private law in the intellectual history of the legal discipline. As Markovits demonstrates, the classical legal genre of the casebook offers an important point of reference, but also of differentiation for NPLT’s case-centered, interdisciplinary approach. Yet we are more hopeful than Markovits with regard to the future of law as an academic discipline.¹⁵ In our optimistic view, the interdisciplinarity that NPLT advocates for will reinforce rather than weaken the necessity of a normative filter that, as Dagan argues, only legal theory can provide.

This normative filter, in the words of Giorgio Resta, entrusts legal reasoning with a “gatekeeping function.”¹⁶ It implies a necessary scepticism towards the normative claims of any single discipline.¹⁷ This also holds true for those of the “economic analysis of law.”¹⁸ At the same time, Resta

⁹GRUNDMANN ET AL., *supra* note 9.

¹⁰Available on the book website: <http://newprivatelawtheory.net>. Most of these texts have been published with German-language introductions in *PRIVATRECHTSSTHEORIE* (Stefan Grundmann, Hans-W. Micklitz, & Moritz Renner eds., 2015).

¹¹NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 101 AND 106 (2004); GRUNDMANN, ET AL., *supra* note 9, at 101; Cf. Giorgio Resta, *Is Law Like Social Science? On ‘New Private Law Theory’ and the Call for Disciplinary Pluralism*, in this issue.

¹²GRUNDMANN, ET AL., *supra* note 9, at 1.

¹³*Id.* at 1–32.

¹⁴Hanoch Dagan, “*New Private Law Theory as a Mosaic: What Can Hold (Most of) it Together?*”, in this issue.

¹⁵Daniel Markovits., *A New Genre for a Discipline Made New*, in this issue.

¹⁶Resta, *supra* note 11.

¹⁷GRUNDMANN, ET AL., *supra* note 9, at 2.

¹⁸Resta, *supra* note 11 (citing GUIDO CALABRESI, *THE FUTURE OF LAW & ECONOMICS. ESSAYS IN REFORM AND RECOLLECTION* 2 (2015)).

makes a convincing case for placing greater emphasis on the humanities and not restricting the interdisciplinary dialogue to the social sciences.¹⁹

B. Our Second Thesis Posits That NPLT Is Comparative

Although the NPLT approach is necessarily rooted in a Northern/Western, (Continental) European, and more specifically German legal tradition, it aims at incorporating perspectives from different legal systems. Guido Alpa's contribution to this issue specifically demonstrates the richness of Italian private law discourse and its importance for the trajectory of European private law. This holds as true for the sociology of law²⁰ as it does for the discussion around the "constitutionalization"²¹ of private law.²²

Of course, the Italian perspective still shares many of the normative background assumptions that NPLT rests upon. A much bigger challenge for NPLT will be to engage with perspectives from the Global South, as the contribution of Ralf Michaels makes clear.²³ Michaels rightly points out the epistemological blind spots of NPLT as a private law theory of Northern origin. At the same time, he seems doubtful whether private law theory as such would survive its own decolonization.²⁴ Once again, our position is more optimistic: We think that NPLT can and should inspire criticism and engagement from voices of the Global South. Yet, "like with human rights,"²⁵ internal and external critique—as Michaels rightly emphasizes the postcolonial perspective can be both—will ultimately strengthen an emerging global discourse rather than put it to an end.

C. Our Third Thesis Holds That NPLT Is Application Oriented

Much in the spirit of the casebook design of our book, Simon Deakin's contribution uses a real-world case to illustrate the continuing relevance of private law theories concerned with the "social question."²⁶ The case of P & O Ferries exposes the shortcomings of short-sighted "economic analysis of law" perspectives that disregard both market structures and distributive questions. It is cases like this where NPLT can bring its interdisciplinary approach to full fruition. This is also impressively demonstrated by Chantal Mak's analysis of the Dutch *Shell Nigeria* case.²⁷ Taking hints from NPLT's discussion of systems theory and discourse theory,²⁸ Mak applies a Habermasian framework in order to illuminate the discourses of justification and application constituting the field of corporate human rights responsibility. At the same time, she uses insights gained from her case analysis for marking the necessary theoretical limitations of a Habermasian approach.

D. Our Fourth Thesis Posits That NPLT Is Neither State Centered nor Exclusively National

As Candida Leone's contribution to this issue shows the problems contemporary private law is confronted with necessitate an approach that transcends the boundaries of national private laws.²⁹

¹⁹*Id.*

²⁰GRUNDMANN, ET AL., *supra* note 9, at ch. 2.

²¹*Id.* at ch. 8.

²²Guido Alpa, *About the Methods of Studying Private Law: An Italian Perspective*, in this issue.

²³Ralf Michaels, *Private Law Theory and the "Global Legal Community"*, in this issue.

²⁴*Id.*

²⁵*Id.* at n. 62.

²⁶Simon Deakin, *Private law and the New Social Question*, in this issue.

²⁷Chantal Mak, *Civil Courts and Delocalized Justice: Reflections on Shell Nigeria Cases in Light of Communication and Constitutionalization*, in this issue.

²⁸GRUNDMANN, ET AL., *supra* note 9, at ch. 4.

²⁹Candida Leone, *A Private Law Theory for Sustainable Legal Education?*, in this issue.

This is especially apparent in the challenges posed by climate change, which are increasingly addressed by litigants in private legal actions. As Leone convincingly argues, these challenges also concern legal education, which should integrate transnational perspectives in its discussion of genuinely transnational problems.

E. Our Fifth Thesis Is That *NPLT Reflects Critical Approaches to Private Law*

Martijn Hesselink makes clear that this tenet entails both epistemological and normative commitments.³⁰ While NPLT might not subscribe to each and every of Hesselink's normative conclusions, we would strongly agree that a private law theory that takes social complexity seriously must accommodate for pluralism both in an epistemological and in a normative sense. Marisaria Maugeri's contribution³¹ shows that a critical position in this sense informs NPLT's reception of intellectual traditions such as Continental European ordoliberalism³² and, at the same time, its perspective on contemporary legal problems such as the regulation of digital ledger technologies.

We are deeply impressed by these contributions to our book launch symposium. For us, they demonstrate that NPLT has already become the "starting point for discussions that have yet to take place."³³

³⁰Martijn W. Hesselink, *Anything Goes in Private Law Theory? On the Epistemic and Ontological Commitments of Private Law and Multi-Pluralism*, in this issue.

³¹Marisaria Maugeri, *Smart Contracts, Consumer Protection, and Competing European Narratives of Private Law*, in this issue.

³²GRUNDMANN, ET AL., *supra* note 9, at ch. 6.

³³*Id.* at 32.