German Law Journal (2022), **23**, pp. 891–899
doi:10.1017/glj.2022.52

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Anything Goes in Private Law Theory? On the Epistemic and Ontological Commitments of Private Law Multi-Pluralism*

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(Received 22 June 2022; accepted 22 June 2022)

Abstract
This article argues that the *New Private Law Theory* (NPLT) recently proposed by Grundmann, Micklitz, and Renner is radically multi-pluralist, in that it combines pluralism along a multitude of dimensions with the absence of any organizing or constraining principle on the meta level. Consequently, the NPLT makes no epistemic commitments about private law truth or ontological commitments about private law reality. The article raises the question of whether a theory which makes no such commitments is a theory at all. Indeed, a site where quite divergent epistemic and ontological commitments are equally acceptable is not usually referred to as a theory but as a democracy. Therefore, the article discusses how NPLT could be turned into a democratic theory of private law. It concludes that to that end, NPLT's selection of materials should be more diverse, in particular, less economically oriented, less Eurocentric, and more inclusive of various critical perspectives.

Keywords: Pluralism; legal epistemology; legal ontology; skepticism; democratic private law

A. Introduction

The book *New Private Law Theory: A Pluralist Approach* by Stefan Grundmann, Hans-W Micklitz, and Moritz Renner brings together and discusses a dizzying collection of fragments on modern private law and its theory.[1] The book consists of as many as twenty-seven chapters organized in five parts, plus a long introduction. Each chapter raises and addresses important questions. It is easy to image the lively discussions in the classroom during a private law theory course based on this book. And it is certainly tempting also for any commentator to throw oneself into any of these debates. The aim of these brief comments, however, is a much more specific one. Here, I would like to address, and take seriously, the book's claim to offer not a mere collection of materials but a new private law theory in its own right.[2]

The article is organized as follows. Section B argues that the New Private Law Theory (NPLT) is a pluralistic theory along several different dimensions, which makes it a multi-pluralist theory. Section C contends that, in addition, the theory's pluralism is radical in that it does not offer any organizing or constraining principle, which makes it a radically multi-pluralist theory.

*The online version of this article has been updated since original publication. A notice detailing the change has also been published.

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[1]Stefan Grundmann, Hans-W Micklitz, & Moritz Renner, New Private Law Theory: A Pluralistic Approach (2021).

[2]Stefan Grundmann et al., New Private Law Theory: A Pluralistic Approach ix-x, 2 (2021).

Fundamentally, NPLT makes no epistemic commitments—about private law truth—or ontological commitments—about private law reality. Section D discusses whether a theory which makes no such commitments is a theory at all. Indeed, a site where quite divergent epistemic and ontological commitment are equally acceptable is not usually referred to as a theory but as a democracy. Therefore, section E discusses whether NPLT could be turned into a democratic theory of private law. Finally, section F concludes.

B. A Multi-Pluralist Approach

In its subtitle, the book announces "a pluralist approach." Moreover, the authors—hereafter GMR—present the novelty of their theory in five theses, the first one of which is: "New Private Law Theory is pluralistic."[3] However, that is far too modest. In reality, the book adopts a plurality of pluralisms. These include at least the following seven dimensions:

I. Disciplinary Pluralism

First, the book is strongly committed–indeed, first and foremost–to disciplinary pluralism. According to the authors, "private law theory must open the view to other neighbouring disciplines, above all the other social sciences such as sociology, philosophy and history."[4] Thus, as they explain, "disciplinary pluralism prevents private law jurisprudence from simply adopting the guiding paradigm of a single discipline."[5]

II. Methodological Pluralism

Secondly, as the authors underline, their theory is also pluralist in method.[6] This commitment refers not only to the quite diverse repertoire of methods adopted within each of the disciplines involved in their multidisciplinary approach. It also concerns, quite prominently, interdisciplinary methods. These include most notably the methods of law and economics, which, as they point out, today is not only dominant the US, but "has a strong claim to dominance in Europe as well."[7] However, as they stress, GMR are more generally committed to "interdisciplinary diversity."[8]

III. Legal Pluralism

Thirdly, the book endorses legal pluralism. This commitment is twofold. First, according to its second thesis, NPLT "is comparative."[9] This means that it "takes into account different legal systems, but also different theoretical traditions."[10] In other words, the theory is committed to the idea that there exists more than one legal system, which is the basic assumption of comparative law.[11] This may perhaps seem an obvious—indeed banal—starting point for any private law theory, but it is not. Many contemporary private law theories are explicitly or implicitly universalistic—or semi-universalistic, claiming to apply, for example, to "the

[3] *Id.* at 1.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 2 ("our new private law theory is pluralist in method.").
[7] *Id.* at 15.
[8] *Id.*
[9] *Id.* at 2.
[10] *Id.*
[11] *Cf.* Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65 AM. J. COMPAR. L. 3 (2017) (Explaining comparative law's 'epistemic commitment to detotalization (national law simply cannot be all the law that matters) and to deterritorialization (the law that matters simply cannot stop at national borders)").

https://doi.org/10.1017/glj.2022.52 Published online by Cambridge University Press

common law."[12] Secondly, the book also endorses legal pluralism in the wider and more habitual sense of accepting the idea that there exist different types of law and legality, in particular law beyond the state. The book discusses the latter, for example, with reference to transnational law.[13]

IV. Value Pluralism

Fourthly, as the authors explicitly point out, their NPLT "is pluralist" also "in values."[14] These values include "legal values," which are "values very explicitly enshrined in rules fundamental to the legal architecture,"[15] as well "constitutional values," in other words, the objective value system as expressed, for example, in the German constitution.[16] However, the NPLT's pluralist approach is also committed, more widely, to "the normative model of value pluralism," that characterizes contemporary constitutional democracies.[17]

V. Constitutional Pluralism

Fifthly, the NPLT seems committed also to constitutional pluralism. It is true that the book does not pay much attention to the debate in Europe on the relationship between the constitutional orders of the member states' laws, on the one hand, and the EU's constitutional order, on the other, in particular whether this relationship is hierarchical, in accordance with the Court of Justice of the European Union's (CJEU) doctrine of supremacy, or heterarchical, as constitutional pluralists claim.[18] However, the absence of any commitment to a hierarchical relationship between national and EU private law suggests that the book does not side with proponents of a monistic European private law order. Indeed, it does not even discuss the widely accepted idea of a multilevel system of European private law. Moreover, it is not difficult to see how the constitutionalization of both the national private laws and EU private law—the latter via the Charter of fundamental rights—respectively, could lead to very similar clashes between different sets of constitutional values, or different understandings of the same value.[19]

VI. Authorial Pluralism

The book offers one theory, but each of the chapters is signed by only one of the three authors, while the long and important introductory chapter is unsigned, as well as unnumbered, which, I suppose, means that it was co-authored by GMR. This authorial choice raises the intriguing question of where exactly the NPLT is formulated and expressed, only in the introduction or

[12]*See, e.g.,* PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 1 (2019), 1 *passim*. Critical in this regard, see Martijn W. Hesselink, *Justice in Transactions: A Public Basis for Justifying Contract Law?*, 17 EUR. REV. CONT. L. 231 (2021).

[13]GRUNDMANN ET AL., *supra* note 2 at ch. 25.

[14]*Id.* at 2, ch. 7.

[15]*Id.*

[16]*Id.* at 25, ch. 8.

[17]*Id.* at 2.

[18]*But see* GRUNDMANN ET AL., *supra* note 2, at 358 (invoking Neil MacCormick, the first advocate of constitutional pluralism in a discussion of the *Gruber* case (CJEU, 20 January 2005, C-464/01, ECLI:EU:C:2005:32), in support of the argument against a necessarily uniform conception of the consumer across the EU: "The idea of constitutional pluralism clashes with a European legal order that claims the ultimate and the superior authority to decide for the European Union as a whole on the concept of a consumer. Constitutional pluralism supports the idea of diversity; this means there could well be differences in the interpretation of what dual use means. MacCormick could be understood as advocating a European consumer law that defines a common platform but that leaves room for national variations.".

[19]*See, e.g.,* CJEU, C-36/02, *Omega*, ECLI:EU:C:2004:614 (Oct. 14, 2004), (concerning the meaning and implications of human dignity, which however is not discussed in the book).

https://doi.org/10.1017/glj.2022.52 Published online by Cambridge University Press

throughout the entire book. In the latter case, the theory reflects also what one might call authorial pluralism, given that the positions taken in the various chapters frequently diverge.

VII. Editorial Pluralism

Finally, there exist two language versions of the book, one in German, published in 2015, and the other in English, published in 2021.[20] And there are some striking differences between the two. In particular, in the German version: A) the book was "edited *and* written" ("*herausgegeben und verfasst*");[21] b) the title is "*Private Law Theory*" ("*Privatrechtstheorie*") not *New* Private Law Theory; c) there is not the subtitle "a pluralist approach;" d) it says, in its opening sentence, that the book is a "reading book and a manifesto at the same time" ("*Dieses Buch ist ein* Lesebuch *und ein* Manifest *zugleich*");[22] e) it consists of two volumes; and f) it includes the readings or "reference texts," which there constitute the bulk of the text. In other words, and no less intriguingly, the book also seems to represent a case of what might be called editorial pluralism, where the original German version was presented as a collection of materials on private law theory, while the new English version offers its own theory, in other words, NPLT.

In sum, the first and most striking feature of the book is that it adopts not a merely pluralist approach, as it claims, but, in fact, a multi-pluralist—or even hyper-pluralist—one.

C. Radical Multi-Pluralism

Regarding any kind of pluralism, we can distinguish between radical—or foundational—and constrained forms of pluralism. In the latter case, the plurality is understood to be subject to some type of organizing principle, for example a form of hierarchy, a priority rule, or some other procedure. In the case of radical pluralism, instead, the plurality of items are on an equal footing, without any hierarchal or constraining principle. Indeed, in the case of radical pluralism the different units—values, legal orders, constitutional orders, respectively—may well be incommensurable. Does NPLT subscribe to radical pluralism? It seems that it does, on two different levels. First, for each of the different pluralisms mentioned above, and second, regarding the relationship among them.

As to the first level, for example, when the book endorses value pluralism it does not present any hierarchy among values. Nor does it consider one of the values, for example autonomy, private law's ultimate value, to which other values, like utility and community, are subjected.[23] Also, the book does not seem to be committed to any limitation of the set of values that might be relevant for private law, or to the idea that relevant values must at least be commensurable.

Similarly, when it comes to disciplinary and methodological pluralism there does not seem to be any hierarchy either, or a method for determining how the various methods should be combined. There is a very interesting chapter, chapter one, addressing this issue from the perspective of the judge, asking what is inside and outside the law. That chapter—authored by Stefan Grundmann—expresses sympathy for Esser's hermeneutical method as well as for Raz's theory of legal interpretation—especially, it seems, for the former—assimilating the two on account of their strong openness towards insights deriving from other disciplines. However, that chapter does not seem to commit the entire book—and its theory—methodologically to Esserian hermeneutics or Razian positivism— as least not exclusively. In other words, the book, the theory, seems to be somewhat committed to Essserian hermeneutics, *among other things*. And because the book does

[20]Stefan Grundmann, Hans-W Micklitz, & Moritz Renner, Privatrechtstheorie (2015).

[21]Emphasis added.

[22]Geundmann et al, *supra* note 20, at 1 (emphasis in original).

[23]In this latter sense, for contract law, see e.g. Hanoch Dagan & Michael Heller, The Choice Theory of Contracts 7 (2017) ("we recognize autonomy as contract law's ultimate value"). And for property law, see Hanoch Dagan, A Liberal Theory of Property 36 (2021) ("autonomy as the ultimate value"). Grundmann et al, *supra* note 20, at 37 ("does not subscribe to foundational value pluralism.").

https://doi.org/10.1017/glj.2022.52 Published online by Cambridge University Press

not limit the set of potentially relevant disciplines or methods at the outset, nor present a hierarchy among them—even though de facto it treats the social sciences, in which GMR seem particularly interested, as more equal than others—this suggest that the disciplinary and methodological pluralisms underlying NPLT both are radical too.

This brings us to the second level, which is the meta-level of the relationship among the different types of radical pluralism that the book endorses—legal, value, disciplinary etc. Is there any hierarchy among these various pluralisms? Here too, the answer seems to be negative. In theory, hermeneutics could be the overall approach towards combining these various types of radical pluralism. The book would, then, offer a hermeneutical private law theory, thus constraining the pluralism on a meta-level. However, that is not what it seems to do. While Esser's hermeneutics was meant as a method for answering legal questions, or questions of law from the internal perspective, as opposed to questions about the law from the external perspective, the scope of the book—and of NPLT—is clearly not limited to such legal questions of what, in our case, the private law is on a certain matter. This is so for the simple reason that the book does not adopt the internal perspective of any given legal system. It addresses questions about private law from the external perspective as much as questions of private law from the internal perspective. In other words, another—eighth—type of pluralism seems to be underlying the book, what we might call quisitional pluralism.[24] Indeed, the book does not seem to want to limit private law theory to any specific questions, or to adopt any hierarchy among them, for example considering some questions more fundamental than others, or indeed, to assume commensurability among them, which means that the book adopts radical quisitional pluralism. And given that, more generally, the book—and the theory presented in it, in other words NPLT—does not seem to be committed to any organizing principle for the relationship between these different types—or dimensions—of radical pluralism, and between their respective implications, it seems to be committed to radical multi-pluralism.

D. Anything Goes?

Is there a point where radical multi-pluralism becomes an instance of epistemological anarchism, where "anything goes," in the famous slogan of Paul Feyerabend,[25] or indeed a form of skepticism?

Radical multi-pluralism seems to be fundamentally non-committal both epistemologically and ontologically. The term "epistemic commitment" refers to binding oneself—revocably—to certain claims being true or false, or to a certain way of arriving at the truth. As to the latter, think for example, of a legal method, or, more recently, of legal "imaginaries." An "ontological commitment" means being committed to certain things being there to exist–to be real—or not to be there, or to a certain mode of being for a thing that exists. For example, in legal scholarship, legal positivism is committed to the idea that the existence of law depends on social facts, while law and economics, at least in its welfarist form, is committed to the reality of preferences, and constructivists are committed to antirealism—in other words, the notion that no reality exists beyond the social construct.

Is a theory that refrains from making any epistemic or ontological commitments a theory at all? When a given theory leaves open the possible truth of many—perhaps unlimited—different, mutually

[24]Similar in this respect, at first sight, Marietta Auer, Zum Erkenntnisziel der Rechtstheorie: Philosophische Grundlagen multidisziplinärer Rechtswissenschaft 51 (2018), who does not distinguish between the question of what the law is here and now on a certain matter and the normative, evaluative, historical, comparative, empirical questions of what the law ought to be, would be better to be—by some standard, for example, efficiency—was in the past, is elsewhere, and has as its consequences—for example compliance—in other words, between positive questions of law and normative, evaluative, historical, comparative, empirical questions about the law, and between the internal perspective and the external perspective, or relatedly, between discourses of law-application and discourses of law-making. However, crucially, in her understanding of multidisciplinary legal scholarship all approaches to law share the *same* epistemic goal of furthering our understanding about society through the medium of law. Therefore, her philosophical theory of multidisciplinary legal scholarship is best understood as a form of—epistemically—constrained multi-pluralism.

[25]Paul Feyerabend, Against Method: Outline of an Anarchistic Theory of Knowledge 1 (1993).

https://doi.org/10.1017/glj.2022.52 Published online by Cambridge University Press

incompatible claims, and methods for arriving at the truth, and possible combinations among them, while it also leaves open the existence of many—again, perhaps unlimited—different realities, then does that not amount to a form of skepticism? An epistemological skeptic doubts the possibility of knowledge, while an ontological, or metaphysical, skeptic doubts the existence of reality. Does not the non-exclusion of a seemingly infinite number of possible legal truths and legal realities amount to a form of epistemic-ontological skepticism?

And if not skepticism, then, it seems, radical multi-pluralism constitutes at least a form epistemic and ontological agnosticism. But, again, can a theory be epistemically agnostic? That seems a contradiction in terms. This suggests that perhaps the book does not offer a theory of private law after all. Maybe rather than presenting its own theory it is a book about existing private law theories, more specifically about new private law theories—in the plural.

It is noteworthy, in this regard, that the German version of the book was dedicated explicitly to the students, young scholars and scholarly friends at the Humboldt University and at European University Institute.[26] Doubtlessly the book will prove to be a treasure trove for years to come for everyone interested in private law theory. Especially, it introduces the English speaking world to many highlights from continental European private law theory of the Twentieth Century, in most cases for the first time. This can only benefit the transatlantic debate on private law theory. I, for one, have always been struck by the fact that in North American accounts, the history of contract theory seems to start in 1981, with the publication of Charles Fried's *Contract as Promise*.[27]

Having said that, the next edition—which will certainly come—could perhaps be expanded with a second volume—a third one in the German edition—in order to including more contributions from female authors as well as from scholars in the Global South. This latter suggestion is particularly relevant also for my next and final remark.

E. Private Law Theory and Democracy

A site where quite divergent epistemic and ontological commitment are equally respected is not usually referred to as a theory but as a democracy. Democracies do not commit to one single epistemology or ontology. They allow for—indeed welcome—different, incompatible—and sometimes incommensurable—truth claims and understandings of reality. In particular, in a democracy citizens respect one another, as well as non-citizens, independently of their respective epistemic and ontological commitments. Citizens do not require each other to grant equal epistemic authority to the same persons and institutions. Nor is agreement among citizens on the reality, for example, of climate change, systemic racism, or the existence of human personhood from the moment of conception, a precondition for democracy. Nor, indeed, do citizens expect each other to be consistent, in this regard, across these different issues, and many others; they accept—and expect—epistemic and ontological zigzagging. And that is fine. It is not a pathology of a democracy that it is not based on a clear view—*ex-ante*—of what is true and real.

Rather, it is a key role of democracy to help citizens, as co-authors of the laws, to reach more clarity about the truths and understandings of reality that should underly the laws to which they will be bound as their addressees. And this applies as much to private law as to any other branch of rules that claims authority over people.

The book discusses the Hayekian view concerning the epistemic role of markets—decentralized knowledge, the marketplace of ideas.[28] However, it could perhaps have said more about the epistemic role—also for private law—of democracy. While the wealth of ideas and insights that the book

[26]Grundmann, et al., *supra* note 20 ("Den Studierenden, jungen Wissenschaftlern und wissenschaftlichen Freunden der Humboldt-Universität und des Europäischen Hochschulinstituts.").

[27]Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1st ed. 1981). A second edition was published by Oxford University Press in 2015.

[28]Grundmann et al., *supra* note 2 at ch. 1, 12.

https://doi.org/10.1017/glj.2022.52 Published online by Cambridge University Press

presents could—and perhaps should—indeed play a role in interpreting existing private law, as the hermeneutical perspective suggests, they are at least as important in showing us how we could—and perhaps should—move beyond our existing private law, through a democratic private law reform.

The book dedicates one chapter—chapter nine—to "democracy and private law." There, it offers mostly a historical reconstruction of the role of legislatures in private law making and of different views on that role.[29] My suggestion is that the book could have gone a step further and grounded its epistemic and ontological agnosticism in a firm commitment to democratic private law. This would then have raised the important question of which constraints, if any, would follow from such a commitment. And to the extent that it does indeed lead to some constraints—which is to be expected because not just anything goes in a democracy—then insofar the book would indeed have offered a theory of private law after all: A democratic theory of private law.

What would be the epistemic and ontological commitments of a democratic private law theory? A normative theory of democratic private law is a theory which claims that private law ought to be democratic and—vice versa—that a democracy ought to have a private law.[30] Such a theory can be morally grounded in an equal right for each person to private and public autonomy,[31] which can be further grounded in a general right to justification with reasons that no one can reasonably reject.[32] The theory is, thus, committed ontologically to the reality of morality, in particular the existence of better and worse moral reasons—about right and wrong—and epistemically to the possibility of learning in this regard—moral cognitivism—while it is ontologically agnostic about the reality of objective values, the existence of better and worse ethical reasons—about good and bad—and epistemically agnostic about the capability of value judgements for truth.

Moral learning about what we owe to each is other is collective learning.[33] It takes place through democratic deliberation in the public sphere, which is the contestatory and justificatory practice of reason-giving.[34] While the validity of moral reasons does not depend on empirical circumstances—they are abstract or categorical—the determination of their concrete implications always requires the consideration of facts. This is the core of the "materialization" thesis, which rejects a purely formal, abstract understanding of private rights and obligations, of private autonomy, and of interpersonal justice. And the reasons given from the point of view of everyone concerned, including notably those at the periphery of society, are required in order to be able to determine whether a certain rule—in our case, of private law—would be morally right or wrong, just or unjust, violate someone's human right or not.[35] Therefore, the democratic theory of private

[29]The question of democratic private law does not necessarily coincide with the institutional division of labor between courts and legislatures; the relationship is much more complex. *See* HESSELINK, *infra* note 30 at ch. 3. For an account of the common law as democratic law, see SEANA SHIFFRIN, DEMOCRATIC LAW (2021).

[30]See MARTIJN W. HESSELINK, JUSTIFYING CONTRACT IN EUROPE: POLITICAL PHILOSOPHIES OF EUROPEAN CONTRACT LAW ch. 3, 9 (2021); MARTIJN W. HESSELINK, '*Towards a Critical Theory of Justice in European Private Law,* EUI DEPARTMENT OF LAW RESEARCH PAPER 33 (2022); MARTIJN W. HESSELINK, *The Right to Justification of Contract*, 33 RATIO JURIS 196 (2020); Martijn W. Hesselink, *Democratic Contract Law*, 11 EUR. REV. OF CONT. L. 81 (2015).

[31]JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

[32]RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE (2013).

[33]The hermeneutics discussed in chapter 1 seems solipsistic at times. Compare Michelman's critique of the Dworkinian ideal judge Hercules, "an imaginary judge of superhuman intellectual power and patience who accepts law as integrity" (RONALD DWORKIN, LAW'S EMPIRE 239 (1986)) As Frank Michelman, *The Supreme Court 1985 term-Foreword: Traces of Self-Government*, 100 HARV. L. REV. 76 (1986), rightly points put "[w]hat is lacking is dialogue. Hercules, Dworkin's mythic judge, is a loner. He is much too heroic. His narrative constructions are monologues.".

[34]This includes learning about whether an ethical reason—say, about the ultimate value of private law—reaches the moral threshold level of reasonable non-rejectability.

[35]This is the moral-epistemic reading of standpoint critique. For the latter, see, e.g., Sandra Harding, *Rethinking Standpoint Epistemology: What is "Strong Objectivity?"*, 36 CENTENNIAL REV. 437, 438 (1992) (arguing that in order to have a full understanding of the world we cannot dispense with the perspective of currently marginalized persons). *See also* Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science, in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020) (pointing out that standpoint theories, as critical theories, seek to empower subjects by helping them forge liberatory self-understandings.)

https://doi.org/10.1017/glj.2022.52 Published online by Cambridge University Press

law has a further epistemic commitment, to the epistemic dimension of the public sphere, where under ideal circumstances–in the expression of Habermas–"the unforced force of the better argument" would prevail.[36] Needless to say that our current circumstances are far from ideal. Insofar, democracy is always "still to come;"[37] all we can hope for is that the democratic private law theory gives us a sense of where to go, while remaining sufficiently grounded in where we are now in order to be realistic.[38]

Certain Kantian theorists understand private law as being grounded exclusively in moral reasons, concerning the boundaries between individuals determined by their equal negative liberty.[39] However, the better view seems to be that private law making is legitimately informed by various types of reasons—not only moral, but also ethical and instrumental ones—but that, also with regard to private law, reasons about right and wrong—which include reasons referring to human rights, whose primary effect is horizontal, and justice, both interpersonal and distributive—should have priority over reasons referring to good and bad—which include reasons about values, as well as reasons about good and bad consequences, such as preference (dis)satisfaction. Non-moral reasons, that thus legitimately inform private law making, subject to morality, will require the consideration of all affected interests, preferences, and practical concerns. This characteristic of private law being situated between considerations of facts and norms provides a further reason for the democratic theory of private law's commitment to the epistemic role of the public sphere.

A democratic theory of private law is mostly procedural and will not make any very concrete recommendations regarding private law rules, rights, obligations, and remedies. This is the case precisely for the epistemic reason that the private law theorist inevitably enters the debate from a particular standpoint and lacks the points of view of all others concerned by these private law rules.

What does this mean for NPLT? Could the book's pluralist approach meaningfully be re-read as presenting a democratic theory of private law? In particular, could perhaps the collection of materials and their critical discussion by GMR be understood as showing what a democratic debate could look like? The answer is mixed, I think. It certainly does a better job than all the monistic essentialist theories which claim that private law should be based on one essential ultimate value, and then proceed by showing what this would lead to—typically, an ideal system—without explaining how in a pluralist society, where people adhere to different values, such a theory could legitimately become the normative foundation for the basic structure of private, which is part of the basic structure of society. Moreover, the book does not adopt a merely normative point of view. Quite the contrary: As said it presents various different types of insights, coming from a diversity of disciplines, obtained through various methods, and responding to different questions,[40] which is appropriate if the aim is to foreshadow and facilitate a democratic debate. In particular, it can contribute to bringing clarity as what it means specifically for private law, rather than some other legal branch, to realize certain rights, values, or objectives.[41] Naturally,

[36]This should not be confused with decisionism. A democratic vote can never determine the validity of a moral claim. In the words of Habermas, democratic votes, while necessary for practical reasons—we need rules in order to coordinate our actions—constitute always only a "caesura" in an ongoing, fundamentally infinite, debate, which can always be reopened by offering a better argument.

[37]*Cf.* Jacques Derrida, Spectres de Marx 110–11 (2006).

[38]Rainer Forst, *A Critical Theory of Transnational (In-)Justice: Realistic in the Right Way, in* The Oxford Handbook of Global Justice 451 (Thom Brooks ed., 2020).

[39]Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (2009); Ernest J. Weinrib, The Idea of Private Law (1995).

[40]In this respect, the book differs from Hesselink, *supra* note 30, which discusses only normative political questions and from the specific perspective exclusively of contemporary political theories.

[41]Naturally, this would be democratic deliberation about what private law could and should do in the here and now, not under ideal circumstances. As Aditi Bagchi, *Distributive Injustice and Private Law*, 60 Hastings L. J. 105, 134 (2008), points out, for example, under non-ideal circumstances—in other words, our circumstances—any plausible case for a division of labor between private law, on the one hand, and tax and transfer, on the other, concerning distributive justice, collapses.

https://doi.org/10.1017/glj.2022.52 Published online by Cambridge University Press

the book could never replace actual democratic deliberation, for the simple reason that it could never substitute the political agency—in other words, citizens giving themselves the private laws that will apply to them—which is the democratic essence of collective self-determination. But there is nothing wrong with theorists offering potentially relevant insights, as long as they do not aim to replace democratic law making.[42]

On the other hand, however, the book does too little. First, its epistemic and ontological agnosticism implied by its radical multi-pluralism goes too far to be compatible with a plausible normative theory of democratic private law. It would at least have to address how a democratic society could and should go about filtering out reasons that should not be admitted as grounds for the justification private law. Secondly, as a collection of views prima facie pertinent to the democratic debate on private law, the book is too one-sided and insufficiently inclusive. The fragments of private law theory presented and discussed in the book are heavily tilted towards an understanding of private law first and foremost as an economic institution—and thus, it seems, towards a materialist understanding of private law—while arguably private law, or at least its basic structure, is also part of the basic socio-political structure of society—and informed also by non-materialist considerations referring to moral principles and ethical values. Moreover, for moral and epistemic reasons—reasons of epistemic justice—NPLT needs to engage much more than it presently does with different private law views, not only, for example, from feminist theory, critical race theory, and decolonial theory, but also coming from the various peripheries of the private law debate, including notably the Global South. Indeed, it would have to make a genuine attempt to include views which, in the debate so far, have been "unheard of,"[43] or have been considered unrealistic, indeed utopian.[44] As said, doing epistemic justice to the accounts of everyone concerned, is a core democratic concern.[45]

F. Conclusion

In this article, I argued that the New Private Law Theory is radically multi-pluralist, in that it combines pluralism along a multitude of dimensions with the absence of any organizing or constraining principle at the metalevel. Consequently, the NPLT makes no epistemic commitments, about private law truth, or ontological commitments, about private law reality. I questioned whether a theory which makes no such commitments is a theory at all. Indeed, a site where quite divergent epistemic and ontological commitment are equally acceptable is not usually referred to as a theory but as a democracy. Therefore, I discussed how NPLT could be turned into a democratic theory of private law. I concluded that to that end NPLT's selection of materials should be more diverse, in particular, less economically oriented, less Eurocentric, and more inclusive of various critical perspectives.

[42]For Marietta Auer's philosophical theory of multidisciplinary legal scholarship see AUER *supra* note 24, Auer's philosophy has no determinate place for political agency. On her view, the fact that the democratic lawmaker has made certain choices—in other words, the domestic lawmaker has excluded certain options—does not seem to constrain in any way the answer to legal questions. Alle perspectives—and hence all options—seem to be still on the table: There is no fundamental difference between what the law is here and now, as legitimately posited by the democratic law maker, and what the law is elsewhere, was in the past, should be, et cetera.

[43]*Cf.* RAINER FORST, NORMATIVITY AND POWER: ANALYSING SOCIAL ORDERS OF JUSTIFICATION 5 (2017).

[44]In this latter sense, see also DAGAN & HELLER, *supra* note 23, at ch 11, with the crucial difference, however, that their theory proposes to offer utopian alternatives for individuals to choose from as their private law—individual self-determination—whereas the idea here is rather to ensure that utopian proposals enter the democratic debate as proposals for private law reform—collective self-determination—which may include notably proposals for new mandatory rules.

[45]On epistemic justice, see MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007). Specifically with reference to contract law, see LYN KL TJON SOEI LEN, *Hermeneutical Injustice, Contract Law, and Global Value Chains*, 16 EUR. REV. CONT. L. 139 (2020).

Cite this article: Hesselink MW (2022). Anything Goes in Private Law Theory? On the Epistemic and Ontological Commitments of Private Law Multi-Pluralism. *German Law Journal* **23**, 891–899. https://doi.org/10.1017/glj.2022.52