

New Private Law Theory

The Core Ideas

A NEW PRIVATE LAW THEORY AS APPLIED SOCIAL THEORY

1 *Five Theses for a New Private Law Theory*

What is new about *New Private Law Theory*? We try to answer this question with five theses:

Thesis 1: **New Private Law Theory is pluralistic.** The theory of private law must take into account the findings of different disciplines in order to develop an adequate description of society. It is therefore beyond question today that the findings of law and economics hold important insights for legislation and the application of law. The survey of a single neighbouring discipline, however, necessarily leads to a reduction in complexity. This reduction in complexity is helpful for developing theoretical models, but insufficient for adequately coping with legal problems. Law and economics today not only forms the ‘mainstream’ of private law thinking in the USA, but it increasingly gains ground also in Europe. Nevertheless – or precisely for this reason – private law theory must also open the view to other neighbouring disciplines, above all the other social sciences such as sociology, philosophy and history. We therefore understand private law theory in a very broad sense as a reflection of interdisciplinary findings in private law discourse. This concept appears to be unique so far.¹ It is further justified and explained in Section B of this introduction. Disciplinary pluralism prevents private law jurisprudence from simply adopting the guiding paradigm of a single discipline. It is, at the same time, aware of the fact that a genuine legal evaluation is always necessary in order to integrate the findings of other disciplines and to use them appropriately in theory and practice. This approach not only corresponds to the ‘polytheism of modernity’ (Max Weber) in functionally

¹ In a first answer to a prior edition of this book (in German), Marietta Auer terms this search for the use and the relative weight (and ‘order’) between answers found in diverging neighbouring disciplines as the core thrust of modern/future private law theory (or more generally legal theory), the main research path to follow now. See M. Auer, *Erkenntnisziel der Rechtstheorie: Philosophische Grundlagen pluridisziplinärer Rechtswissenschaft* (Baden-Baden: Nomos, 2018), especially pp. 43–56; more hesitant still her book review of the prior German edition in 216 *Archiv für Civilistische Praxis* 2016, 805–10.

differentiated societies. It also corresponds to the normative model of value pluralism that characterizes the constitutional systems of modern democracies. The attempt to draw on this pluralist value base and reformulate it with a view to systemization and coherence could be called a mosaic theory. It is characterized by the fact that it is built from many single pieces of different colours, shapes and origins, yet the pieces that contribute to *one* design.

There are three caveats. The first is about law and economics in areas of business and economic organization that occupy a considerable part in this book. Here, it would come to throwing out the baby with the bathwater not to rely on law and economics. The question is rather how other theoretical approaches can be combined with it, namely economic sociology, theories of political philosophy or constitutionalization. A radical view would have avoided economics altogether. The second caveat is about homogeneity of design. Combining a heterogeneous set of theories is bound to result in a certain syncretism – or, to put it more neutrally, in a ‘combination theory’. However, our approach proposes a clear set of steps – a methodology – of how to assess the heterogeneous material (see in detail in Section B.I). How it works can best be shown, and also be tested on the spot, with case studies. This is what we propose, and this justifies the rich set of twenty-seven case studies in twenty-seven chapters – based on what are considered core, or even *the* key texts in the disciplines most concerned and on a seminal, illustrative case. The last caveat is that traditional private law theory, for instance contract theory, is, of course, not excluded. This relates, in contract theory, to such contributions as Charles Fried, Stephen Smith, Hanoch Dagan and Michael Heller, or Peter Benson.² Social theory complements traditional private law theory most vigorously, breathes new life into the discussion, but does not substitute it. As the novelty of our approach lies, however, more on the side of the social sciences than on the side of traditional private law theory, the former is more thoroughly considered here than the latter (although traditional private law theory itself is particularly lively recently). Thus, our new private law theory is pluralist in method and values; at the same time, it proposes a structured methodology of assessing how and with which significance to integrate the heterogeneous and rich input.

Thesis 2: New Private Law Theory is comparative. It takes into account different legal systems, but also different theoretical traditions. A pure functionalist understanding and use of comparative law is not enough (see Chapter 23). Rather, it has to be complemented by a reflection of legal culture and legal history that takes differences seriously (Chapter 5). In selecting texts of reference for our book, we place the European and US legal traditions at the centre. While ‘European’ does not include all of the EU’s 28, now 27, member states, the selected texts do draw on all the major (ex-)member state legal traditions – a far broader collection than has previously been attempted – namely the English common law, along

² See, in the Anglo-American world, C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (MA: Harvard University Press, 1981); S. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004); in the last few years P. Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge / MA: Harvard University Press, 2020); H. Dagan / M. Heller, *Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017); and also P. Sapra, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford: Oxford University Press, 2019).

with the French, German and Italian civilian traditions. We are thus opening up a dialogue of private law theories that is not only bilateral but multilateral.³ The necessary limitations correspond both to the background of the authors and to the manifold connections of the traditions. The exclusion of other perspectives, in particular those of the Global South, but also from Eastern Europe, is not intended.⁴ If three scholars with European background, trained in Germany, propose such a path towards a new private law theory and are fully aware of certain preconceptions they carry, the hope would be that a hermeneutic circle of rich and diverging inputs is opened. The theory would then have to stand the test of acceptance by the relevant legal community – here a global legal community – as described in Chapter 1.

Thesis 3: New Private Law Theory is application oriented. This book is not dedicated to the philosophy of law, but to the applied theory of private law. It is precisely the concrete problems of private law and the application of theoretical insights to these problems that makes it possible to fruitfully combine the findings of different disciplines and traditions. This book wants to counteract the disintegration of social science disciplines, which at the end of the nineteenth century had already come close in political science and economics. This approach is intended to fundamentally challenge the fragmentation of the social sciences, which, at that time were united under a single banner as *Staatswissenschaften* (in Germany) and *Nationalökonomie* (in Austria). The methodological touchstone for this merger of traditions of thought is hermeneutics, and its idea of constantly moving back and forth between text and preconception, between fact and norm – and thereby aiming to bring them increasingly in line with one another. Most discussions in the book – while using different sources and disciplines – will be organized around particular issues: the structure of negotiation, for example, the problems of contractual long-term relationships, transnational rule-setting. Each chapter will open and close the discourse with a particularly relevant example case in order to illustrate the added value of an application-oriented theory of private law. The methodology of the book is explained in more detail in Section C of this introduction.

Thesis 4: New Private Law Theory is neither state centred nor exclusively national. It deals with private law wherever it exists – in the nation state, in the European Union and in transnational contexts. With this broadening of perspective, the methodology and subject

³ With this framing of the material (a plurality of both disciplines and legal traditions not found elsewhere in the current literature), the book follows an approach of ‘super-diversity’ – indeed, this constitutes its core feature. Super-diversity in the social sciences describes a situation characterized by the coincidence of several criteria of strong diversity, such as a university characterized both by a strongly international faculty and student body and by a strongly cross-disciplinary mixture – such as the European University Institute, Florence. For this concept, see for example, S. Vertovec, ‘Super-Diversity and Its Implications’, 29 *Ethnic and Racial Studies* 1024–54 (2007) (Director of the Max Planck Institute for the Study of Religious and Ethnic Diversity); J. Blommaert / B. Rampton, ‘Language and Superdiversity’, 13(2) *Diversities* 1–21(2011); T. Ramadan, *On Super-Diversity* (Berlin: Witte de With & Sternberg, 2011).

⁴ V. V. Palmer (ed.), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd ed., Cambridge: Cambridge University Press, 2012), and T. Duve, ‘Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive’, Max Planck Institute for European Legal History research paper series, No. 2012/01, abbreviated English version: European Legal History Global Perspectives Max Planck Institute for European Legal History, research paper series No. 2013–06.

of private law thinking change. Beyond the recognized interpretation methods of national law, a European methodology has long been established. In the transnational area, state legislation has only a limited effect, whereas private rule-making is omnipresent. Especially in the transnational space, however, we see that theoretical concepts such as the paradigm of constitutionalization are not only adopted from national traditions and continued, but can even offer new orientation. The theme of transnational ordering is important for the book in several respects, not only in Chapters 25 and 8 (on transnational law and constitutionalization proper), but also for societal order more generally (Chapter 6) and private ordering in particular (Chapter 26). It constitutes, however, a core example rather than the primary theme of the whole monograph.

A private law theory that is committed to these theses needs a broad and stable foundation. For us, the foundation is formed by a canon of almost seventy texts of reference⁵ which deal with private law from very different perspectives. This canon naturally represents a subjective selection of the three authors, all German but trained in looking beyond the legal discipline and into different legal orders in Europe and the world. The canon has developed over several years in intensive discussions, in exchanges with a multiplicity of younger and more senior colleagues from different legal traditions. Our book tries to bring the different texts from different disciplines into conversation with each other. To this end, it groups the reference texts around central questions of private law and at the same time integrates them with the legal doctrinal analysis of example cases. Overall, the selection of texts, let alone their analysis and presentation in the twenty-seven chapters, bears a European understanding of what private law theory stands for. An American selection of texts would look different, as would a selection of texts that would bring together the Global North and the Global South, or focus on the relationship between Western, Central and Eastern European countries. We understand this limitation as an opportunity and as an offer. Therefore, the book is only a beginning, which hopefully will be taken up by an entire scientific community. Only then it can really lead to success.

Thesis 5: New Private Law Theory reflects critical approaches to private law. Both belong together. A pluralistic private law theory has to take critical approaches seriously and keep a certain distance from one-sided solutions to legal problems, whether they come from economics or from political and social sciences. This plea, of course, requires a clarification of what critical theory is and what kind of role is attributed to critical legal scholarship. The benchmark of critical approaches was the social question right from the early twentieth century on: how to deal with and how to integrate the new working class – or more generally, ‘the masses’ – into a legal order that is based on formal equality. O. von Gierke lamented the missing socialist oil in the drafting of the German Civil Code. A. Menger and H. Kantorowicz attacked the formalistic and positivistic concept of the German Civil Code upfront.⁶ In France, J. Carbonnier, L. Duguit and others fought about

⁵ In fact, we go far beyond the seventy or so texts by recommending four to six texts in each chapter as further reading.

⁶ O. von Gierke, *Die Soziale Aufgabe des Privatrechts* (Berlin: Springer, 1889), p.10; E. Kantorowicz, Was ist und Savigny? *Recht und Wirtschaft*, 47–58, 76–79; A. Menger, *Das Bürgerliche Recht und die Besitzlosen*

the pros and cons of legislative measures implementing social considerations into the Code civil. The 1968 revolt in many Continental European countries revitalized this critique and led to a politicization of private law (a good decade later followed by one at the EU level), as did the financial crisis of 2007/2008. Critical approaches have, in recent decades, taken up other pressing social issues, most importantly issues of race and gender discrimination (see Chapter 14).

A relatively new strand of critical legal scholarship questions the way in which legal history and comparative law still follow an implicit European messianism through their focus on the Western European legal traditions⁷ and through the neglect of private law systems outside the rather narrow European or even EU–US perspective.⁸

Duncan Kennedy and others powerfully paved the way with an even more ‘critical’ theory, emphasizing that all legal practice decision-making is bound to be primarily politicized.⁹ What does this mean for new private law theory? In *Critical Legal Thought*, C. Joerges and D. Trubek¹⁰ highlighted the difference between theory of practice – theory as representation of the world as it is, where theory is expected to produce guidance for social action – and theory as practice, where theory’s goal is to change the way in which we think and not to contribute to change the world. Our approach may in fact not (fully) embrace either of these positions. However, what it argues for is a constant critical self-reflection of one’s own preconceptions and a more adequate and in fact rather representative reflection of the breadth of thinking about social order in private law.

What follows in this introduction outlines – in its three sections successively – (i) *what* is meant and encompassed by the term ‘(new) private law theory’ (theoretical approach, see Section B), (ii) *how* this private law theory can be applied to specific core questions of private law (Sections B and C) and (iii) *which* questions of private law are covered in this way (Section D).

2 Applied Private Law Theory: Two Examples

Legal theory allows for a reflection of law within the law itself.¹¹ Unlike legal doctrine it can transcend the inside of the law and look outside – perceiving society as a whole. To do so,

Volksklassen: Eine Kritik des Entwurfs eines Bürgerlichen Gesetzbuches für das Deutsche Reich (Tübingen: Laupp, 1890; 4th ed. 1908, Digitalisat).

⁷ T. Duve, ‘European Legal History: Global Perspectives’, Max Planck Institute for European Legal History Research Paper Series no. 2013–06; O. Moréteau / A. Masferrer / K. A. Modéer, *Comparative Legal History* (Cheltenham: Edward Elgar, 2019).

⁸ G. Frankenberg, *Comparative Law as Critique* (Cheltenham: Edward Elgar, 2016); J. Husa, *A New Introduction to Comparative Law* (Oxford: Hart, 2015); U. Kischel, *Comparative Law* (Oxford: Oxford University Press, 2019); M. Siems, *Comparative Law* (2nd ed., Cambridge: Cambridge University Press, 2014).

⁹ See, for instance, D. Kennedy, ‘Critical Theory, Structuralism and Contemporary Legal Scholarship’, 21 *New England Law Review* 209–76 (1986); D. Kennedy, *A Critique of Adjudication [Fin die Siècle]* (Cambridge / MA: Harvard University Press, 1997); for a critical view by Hart, see H. L. A. Hart, *The Concept of Law* (2nd ed., Oxford: Clarendon Press, 1994), pp. 238–76.

¹⁰ C. Joerges / D. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Bremen: Schriftenreihe des Zentrums für Europäische Rechtspolitik, Volume 11, 1989), Introduction, p. 7.

¹¹ On the epistemological preconditions for this notion of legal theory see especially N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), pp. 55–6.

legal theory must build on the insights of other disciplines. Legal theory translates these insights into the language of the law. Legal doctrine can benefit from the translation: with the help of legal theory, it can get a more adequate picture of the social contexts in which legal rules take effect (or not).

What does this mean for private law? What is a contemporary private law theory and what is its purpose? The following examples will serve to illustrate our answers to these questions.

a Case Example 1: Transnational Corporations and Human Rights

In May 2009 a US district court in Pasadena, California, had to decide a rather unusual case.¹² The plaintiffs in this class action lawsuit on appeal were employed by suppliers of Wal-Mart in China, Bangladesh, Indonesia, Swaziland and Nicaragua. The plaintiffs, listed under the pseudonym Jane Doe et al., sued Wal-Mart for damages based on violations of labour protection. From the perspective of a district court in California, this claim is surprising: the plaintiffs are employed by foreign companies in foreign countries, where US and California labour law does not apply. There is no contract between the plaintiffs and the respondent, as the plaintiffs were hired by legally independent suppliers. However, the plaintiffs base their claims on the fact that Wal-Mart had its suppliers agree to a Code of Conduct containing certain minimum standards of labour protection. The district court discusses various doctrinal concepts under California law which might support the plaintiffs' claims: a contract with third-party beneficiaries, Wal-Mart being the plaintiffs' joint employer, a negligent breach of a duty to monitor suppliers and an unjust enrichment of Wal-Mart by the mistreatment of the plaintiffs.

In the end, the district court affirms the first instance's dismissal of the claims. It argues that the claims cannot be based on any of the alleged doctrines under California law. This result shall not be put into question here. However, a legal decision is well-argued only if it fully reflects all pertinent facts and considers all the relevant arguments. And it is at this point that the use of a private law theory reflecting the social context of legal rules and decisions becomes apparent.

What is the legal context of the Wal-Mart case? The first thing that stands out is Wal-Mart being a retail giant and a large transnational corporation. Increasingly, such transnational corporations are publicly held accountable for the violation of human rights and environmental protection standards in their production processes (see Chapter 22 on corporate social responsibility). Following a private law theory approach does not mean that general policy considerations should simply be imported into legal discourse. Rather, it is about taking a deeper look, both with regard to the description of a social phenomenon and with regard to its translation into legal terms.

¹² *Doe v. Wal-Mart Stores Inc.*, 572 F.3d 677 (9th Cir. 2009), compare H. Revak, 'Corporate Codes of Conduct: Binding Contract or Ideal Publicity?', 63 *Hastings Law Journal* 1645–70 (2012); A. Beckers, 'Globale Verhaltenskodizes. Rechtsvergleichende soziologische Jurisprudenz', in B. Lomfeld (ed.), *Die Fälle der Gesellschaft: Eine neue Praxis soziologischen Jurisprudenz* (Tübingen: Mohr Siebeck, 2015), pp. 197–211 ('Doe v. Wal-Mart').

In a first step, it will then become apparent what it actually means that Wal-Mart is a globally active corporation. Evidently, Wal-Mart has not integrated its global supply chain within a unified corporate structure; rather, Wal-Mart Inc. is connected to its suppliers solely on a contractual basis. However, the contracts between Wal-Mart Inc. and its suppliers expose a manifestly hierarchical structure. Through its Code of Conduct (and probably also by other means), Wal-Mart Inc. exerts a far-reaching influence on the daily business of its suppliers. Thereby, the supply chain of Wal-Mart Inc. is located in a grey area between the legal categories of either company law or contract law.

For shedding light on this grey area, theories of institutional economics and economic sociology (see Chapters 3 and 17) seem most promising. Both disciplines can build on a long tradition of research on ‘hybrid’ forms of organization between hierarchical corporate structures on the one hand and horizontal market exchange on the other. They see corporation and contract not as categorically distinct, but rather as two positions in a large continuum of governance alternatives for organizing economic transactions. In between, endless variations of co-operation are conceivable: networks, so-called relational contracts, organized market places with their own trade rules (see Chapter 26). Such hybrid forms of co-operation are especially important in transnational constellations, where there is no unified company and no unified contract law and where traditional legal systems provide little legal certainty. This is the pathway to the deterritorialization of national contract law in global value chains.¹³

These considerations suggest that it is impossible to adequately grasp the doctrinal impact of *Doe v. Wal-Mart Inc.* when looking at it only through the lens of national contract law. In order to overcome this problematic methodical restraint theoretical legal sociology provides important insights: since public and private international law are not able to entirely govern cross-border constellations, economic actors have begun to make their own transnational law (see Chapter 25). A pertinent article on this phenomenon is tellingly titled ‘Wal-Mart as a Global Legislator’.¹⁴

When acknowledging the lawmaking function of transnational corporations, a normative follow-up question necessarily arises: how can such phenomena of private ordering be legitimized and what are their limits? Are these global legislators bound to respect human rights? What role is there for CSR? Here, the debate on transnational law can draw on the extensive discussions on the constitutionalization of private law that has

¹³ F. Cafaggi ‘New Foundations of Transnational Private Regulation’, 38 *Journal of Law and Society*, 20–49 (2011); D. Wielsch, ‘Global Law’s Tool Box: How Standards form Contracts’, in H. Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution*, (Munich: C. H. Beck, Oxford: Hart, Baden-Baden: Nomos, 2013), pp. 71–112 at 72–3; J. Salminen / M. Rajavuori, ‘Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and Framework for Analysis’, 26 *Maastricht Journal of European and Comparative Law* 602–27 (2019); K. H. Eller, ‘Private Governance of Global Value Chains from Within: Lessons from and for Transnational Law’ (2017) 8 *Transnational Legal Theory* 296–329; P. Paiement, *Transnational Sustainability Laws* (Cambridge: Cambridge University Press, 2017); B. Reinke / P. Zumbansen, ‘Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on “Global Supply Chain Liability”’, in S. Schiller (ed.), *Le Devoir de la Vigilance* (Paris: Lexis Nexis, 2019), pp. 157–83.

¹⁴ L. C. Backer, ‘Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator’, 39 *Connecticut Law Review* 1739–84 (2007).

been going on since the 1920s (Chapter 8). Thus, *Doe v. Wal-Mart Inc.* becomes a test case for a contemporary theory of human rights in private legal relations. The discussion on how to conceptualize such impact in a coherent doctrinal manner has only begun.

b Case Example 2: The Mystery of Direct Discrimination

In a 2008 preliminary ruling procedure, the European Court of Justice had to answer the question whether there is direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, publicly states that he needs to comply with his customers' requirements if they refuse to receive technicians of Moroccan origin.¹⁵ The court answers this question in the affirmative – and that seems intuitive. As the court rightly observes, such public statements can 'strongly dissuade certain candidates from submitting their candidature and, accordingly, [...] hinder their access to the labor market'.¹⁶ Furthermore, it is obvious that the exclusion of certain candidates because of their ethnic origins is based on an irrational and thus per se inadmissible criterion.

When taking a closer look, however, the situation turns out to be less clear. Just consider the case from the employer's point of view. The employer will probably argue that they are not racist in any way and that the motivation to exclude Moroccan job applicants is not based on their origin as such. Instead they point to their clients' preferences – and they might even be right when suspecting them of racist prejudice. From a merely economic standpoint, the employer acts most rationally when adapting their offer to their client's 'requirements'. If one puts all reasonable doubt regarding the accuracy of the employer's evaluation of their client's preferences aside and assumes that there are indeed such racist inclinations, the following question arises: can it be justified without further normative reasoning ('categorically') to dismiss their hiring policy by qualifying it as an act of direct discrimination?

This change of perspective reveals a structural problem of anti-discrimination law. Philosophy and gender studies construe this problem as a question of diverging concepts of justice (see Chapter 14). Does anti-discrimination law aim at establishing an obligation to justify a private decision in a rational way, based on the paradigm of equal treatment (treating 'like as like' and 'unlike as unlike')? If that is so, the European Court of Justice's decision seems questionable as soon as one considers the economically consistent argument of the employer. Or is anti-discrimination law about actual equality and the inclusion of disadvantaged social groups? Is non-discrimination the new value that the European legal order has generated and that forms part of a European identity?¹⁷ This

¹⁵ *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, ECJ, C-54/07, 2008 I-5187. For a full reconstruction of the litigation through the lenses of the various participants, see, B. Kas, 'Hybrid Legal Remedies in the EU Social Legal Order', PhD EUI Florence 2017, <https://cadmus.eui.eu/handle/1814/46964> (last accessed 15 December 2019).

¹⁶ *Ibid.*, section 25.

¹⁷ R. Münch, *Die Konstruktion der Europäischen Gesellschaft: Zur Dialektik transnationaler Integration und nationaler Desintegration* (Frankfurt am Main: Campus Verlag 2008).

approach could justify the decision to the extent that the affected job applicants belong to a structurally disadvantaged social group.

But even though this latter approach based on substantial equality seems very persuasive, it raises some unanswered questions.¹⁸ It seems hardly consistent with a liberal understanding of individual rights that one's claims to a certain treatment depend on whether one belongs to a certain group that suffers from discrimination and exclusion. And how can group-related discriminations be reliably identified, ranked – and even legally qualified?¹⁹ A private law theory that builds on the insights of other social sciences can help to answer these questions. This is also indispensable for the further development of a coherent doctrine of non-discrimination in private law. Today, non-discrimination law forms an integral part of Western legal systems;²⁰ at the same time, it reveals the limits of the traditional liberal legal thinking that is the foundation of Continental European private law codifications (see Chapter 10). As for now, it is still entirely unclear which paradigm could eventually replace the nineteenth-century model of a formalist private law – or if the growing complexity of social ties rather suggests a return to a renewed liberal model of private law.²¹

B APPLICATION I: WHICH THEORIES, WHAT RECONSTRUCTION IN LAW?

Interdisciplinary insight has become such a self-evident objective of contemporary legal research that it seems almost redundant to explain its value, or the necessity of endeavours like the present one devoted to making such insights visible. The examples provided in the previous section should have already served to show the practical and concrete value of interdisciplinary engagement with legal issues. Nevertheless, the theories and texts of reference compared and contrasted in this book have previously been considered together in only a few cases, although they deal with shared questions of private law. Thus, many of the chapters in this book draw on texts of reference that have never before been analysed in conjunction. To elaborate: some of the analyses in the book admittedly draw on a prior pedigree of cross-disciplinary comparison/integration, but most prior research in this vein is limited to enhancing legal analysis with only one particular approach – institutional economics, for example – and without speaking to private law theory more generally. This book makes visible a number of previously unexamined theoretical connections relevant

¹⁸ A. Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (Oxford: Oxford University Press, 2011).

¹⁹ R. Xenidis, 'Transforming EU Equality Law? On Disruptive Narratives and False Dichotomies', 38 *Yearbook of European Law* (2019), available at <https://doi.org/10.1093/yel/yey005>.

²⁰ For an in-depth analysis, see C. Barnard, *EU Employment Law* (4th ed., Oxford: Oxford University Press, 2012); M. Grünberger, *Personale Gleichheit* (Baden-Baden: Nomos, 2013); D. Schiek / L. Waddington / M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart, 2007).

²¹ With strong arguments for the latter position see K.-H. Ladeur, 'Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels: Zugleich ein Beitrag zur Bedeutung der ökonomischen Analyse des Rechts', 64 *RabelsZ* 60–103 (2000) and also, albeit with a rather different theoretical approach, H. Dagan / M. Heller, *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017).

to private law theory, in most cases by bringing together two or more influential neighbouring disciplines, or by putting topical national discourses in dialogue. Such comparisons have seldom been made, despite the fact that the texts of reference juxtaposed in every chapter are generally each a classic of their corresponding discipline. They speak to the same problem, for example, ‘negotiation’, the function of contracts and the ‘justice of consensus’ (see Chapter 11). This lacuna may be partially due to the fact that the texts of reference are taken not just from different disciplines – again, using Chapter 11 as an example, from legal scholarship, empirical behavioural research and game theory, and institutional economics, respectively – but may also result from their embeddedness in different linguistic traditions and scholarly debates. Our approach allows us to connect strands of thinking which all too often remain disconnected (see also Chapter 23 on the interaction between the functional method and law as a product). Therefore, we systematically try to overcome such boundaries in our broad, pluralistic new private law theory.

1 *Broadly Comparative and Interdisciplinary Approach*

Proceeding in this manner – by combining different ways of integrating and combining sources of knowledge – the book develops a novel perspective on the ‘foundations of private law’.²² This is a two-fold approach which hitherto would seem not to exist, or at the least not in a consistent and systematic manner.

The approach taken here is a broadly interdisciplinary effort to analyse and understand concrete questions of private law – such as negotiation and the justificatory power of consensus (Chapter 11), information rules and their justification (Chapter 12), the foundations of anti-discrimination law (Chapter 14), risk, tort and liability (Chapter 15), the digital architecture of private law relations (Chapter 16) or long-term contractual relationships (Chapter 17), etc. The first aspect of our approach is to integrate interdisciplinary perspectives on legal questions from ‘law and’ perspectives that draw on one discipline – such as the perspective of law and economics for instance – into a broader perspective of ‘law and (all) relevant neighbouring disciplines’ – thus combining law with pertinent insights from across the social and behavioural sciences. The idea motivating the arrangement around core questions – concrete, ‘substantive’ questions of private law – is precisely to make it possible to encompass not just one neighbouring discipline, but all those that meaningfully contribute to answering the question at stake. At the very least, our hope is to give the chosen approach a greater chance of success. Therefore, this first aspect of the new pluralist theory involves drawing on the insight and knowledge which exists in a whole range of disciplines beyond legal doctrine (legal and social theory), and applying it to concrete problems confronted in private law.²³

²² See, R. Brownsword / H.-W. Micklitz / L. Niglia / St. Weatherill (eds.), *Foundations of European Private Law* (Oxford: Hart, 2011).

²³ On the centrality of this claim for the politics of science, particularly in Germany, also, however, in Europe as a whole, as well as on a global scale, see Council of Science and Humanities in its first report on the legal sciences in Germany: Wissenschaftsrat, *Perspektiven der Rechtswissenschaften in Deutschland*, Drs. 2558-12 of