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ARTICLE

Private Law Theory and the "Global Legal Community"

Ralf Michaels[1]

[1]Director, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany
Corresponding author: michaels@mpipriv.de

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Abstract
The suggestion that the new private law theory would have to stand the test of acceptance by the global legal community raises a question. Who is that "global legal community?" And does it go beyond Europe? Close reading demonstrates that the non-European world is present and hidden at the same time. It is present because much of the material presented, many of the theories discussed, have transnational materials. However, the non-European world is hidden at the same time because it remains unaddressed, marginalized, and ignored. Including the Global South would make necessary a more radical pluralization of private law theory. This opens up the possibility of new, very different idea of a global legal community that is more improbable but also more attractive.

Keywords: Coloniality; Global South; Pluriversality; private law theory

A. A Global Legal Community?

I. Washington, D.C., 2010

In 2010, comparative lawyers came together from countries all over the world, in Washington, D.C. The occasion was the Eighteenth World Congress of the International Academy of Comparative Law—the meeting place, so to speak, of the global legal community, if such a thing exists at all.[1] As is the tradition, the weeklong program provided for a free day in the middle (for sightseeing), and Fernanda Nicola and I decided to use the opportunity of so many scholars present for an experiment. We invited everyone among the Congress participants who preferred academic work over sightseeing to take part in a daylong private law theory workshop. All it took to participate was the submission of a "scrap," a single page laying out an idea about private law theory. Thirty participants provided such scraps and were able to present their ideas over the course of the day, loosely grouped according to broad topics.[2] The group was quite international—though, in retrospect, not as international as I recalled it—and most participants enjoyed the event. One, however, expressly did not. Placed towards the end, he used his time to complain: all presentations had been banal, and he had learned nothing new over the course of the day that he did not know from the first weeks of studying with Duncan Kennedy at Harvard.

LL.M. (Cambridge), Dr. iur. (Passau). Director, Max Planck Institute for Comparative and International Private Law, Hamburg; Chair in Global Law, Queen Mary University London; Professor of Law, Hamburg University.

[1]See the edited transcript of the closing plenary session at George A. Berman, Patrick Glenn, Kim Lane Scheppele, Amr Shalakany, David V. Snyder & Elisabeth Zoller, *Comparative Law: Problems and Prospects*, 26 AM. U. INT'L L. REV. 935–968 (2011).

[2]For a detailed report about the workshop, see Larry Catá Backer, *The 18th International Congress of Comparative Law*, LAW AT THE END OF THE DAY (July 27, 2010) http://lcbackerblog.blogspot.com/2010/07/18th-international-congress-of.html.

My first reaction was indignation. This was arrogant and insulting. It was insulting to the other participants, most of whom had put considerable effort into both their scraps and their presentations. But it also was insulting to us organizers who had designed the event. Was there really nothing more to private law theory than what Duncan Kennedy—whom of course we both admired—had already done?

My second reaction was resignation: Maybe he had a point. In fact, I had at times, during the day, shared his frustration—all the questioning of the public versus private distinction, all the emphasis on the inherently political character of private law, on the downsides of formalism, on the desire for private justice, the social embeddedness of private law, seemed somewhat stale, old hat. They might be new for scholars outside of North America and Europe, but they certainly were not for us. And perhaps my tolerance of such ideas coming from non-U.S. scholars was actually condescending, no better than the protesting participant's complaint.

This led to my third reaction: Were we, the protesting participant and I, merely arrogant Global Northerners? Maybe we had not listened enough? Private law has different meanings even between the United States and Europe;[3] it would be surprising if its theory could be universal. It may not be surprising or interesting to learn that private law has public overlays in Japan, too, but it certainly is interesting to learn the specific ways in which it does, given that the separation of state and society, so central to the development of private law in nineteenth century Germany, never made much sense in Japan. It may be banal to proclaim once again that the public versus private distinction is erroneous. But it is another question whether this statement, familiar especially from U.S. theories, is universal except in a very abstract way.

Yet Northern arrogance, thus my fourth reaction, could not be correct either. The protesting participant was not from either North America or from Europe; he was teaching at an Institution that belongs, in the broadest sense, to the Global South. How could I, a Global North scholar, claim that he, a Global South scholar, was insufficiently sensitive to the specificities of countries and societies outside of the Global North? But then how could he, a Global South Scholar, make such a typical Global North claim of universality?

This left me with my fifth and final reaction: Maybe the problem was not so much with different participants and their backgrounds but instead with the object itself. Maybe, private law theory itself is intrinsically a Global North Theory, tailor-made for the Global North, simply not sensibly applicable to the rest of the world except in neo-colonial fashion? And if so, what would follow?

B. The New Private Law Theory and the Global South

These thoughts came back to me when I opened "The New Private Law Theory" (NPLT), that pathbreaking new book put together by three admired colleagues.[4] One of the many traits of the book is its breadth that is not only methodological but also geographic. As the authors point out, while they "place the European and US legal traditions at the center,"[5] as concerns the EU; they 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 with the French, German and Italian civil traditions."[6] Here, private law theory becomes transnational, at least to a degree.

Yet, that the authors call this "super-diversity" seems a bit hyperbolic—even in Europe, there are more than the five traditions they name. In reality, the book "bears a European understanding of what private law theory stands for,"[7] and that means, more precisely, Western European: An

[3]Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMPAR. L. 843, 846–53 (2006).

[4]STEFAN GRUNDMANN, HANS-W. MICKLITZ & MORITZ RENNER, THE NEW PRIVATE LAW THEORY: A PLURALIST APPROACH (2021).

[5]*Id.* at 2.

[6]*Id.* at 2f.

[7]*Id.* at 4.

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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.[8]

What does this European character mean for a project of general theory? Is? The authors are aware that such a restricted approach might be problematic:

> 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 traditions and through the neglection of private law systems outside the rather narrow European or even EU-US perspective.[9]

In response, they suggest that "[t]he exclusion of other perspectives, in particular those of the Global South, but also from Eastern Europe, is not intended."[10] This cannot mean that the exclusion is accidental—the authors are clearly aware of it and clearly did not try to avoid it. The German original of the text has "*nicht bezweckt*,"[11] which suggests a better translation would have been "not intentional," but that helps only a little. Why was such inclusion not attempted in the name of "super-diversity"? Presumably, the answer follows from the authors' own expertise and biographical background. Thus at least Stefan Grundmann, during the book launch symposium, "We are not Global South, we are not Asian, we speak from our own background and hope to start a broader discussion." In the book, the authors proclaim that they are "fully aware of certain preconceptions they carry."[12] Of course, none of us can transcend our own particular backgrounds and preconception; awareness of our own situatedness must be an advantage. But unfortunately, although they elsewhere argue for "a constant critical self-reflection of one's own preconceptions,"[13] they do not tell us what exactly these preconceptions are. We may be able to extract some of these preconceptions from reading the text, but that, in all likelihood, will not by itself tell us whether the authors are actually aware of them.

This leads to a second question. The authors, aware of the geographically confined scope of their theory, suggest it "would then have to stand the test of acceptance by the . . . global legal community"[14] and hope "that a hermeneutic circle of rich and diverging inputs is opened."[15] When the authors thus expressly place themselves in "the hermeneutical tradition,"[16] I assume they are not referring to the relation between a reader and a text, and not always on that between law and facts,[17] but instead of mutual observation, of cross-cultural communication, mutual understandings. But is there an actual circle? Publication of the book in English certainly enables broader readership outside of German-speaking countries, but even if the book finds readers outside the Global North—which undoubtedly it will, this does not yet create a circle. If the authors are here speaking to an audience in the Global South, they certainly do not name them, and they do not, at least at this stage, seem to rely on actual input from that Global South; that should come later.

[8] *Id.* at 4. Elsewhere, they subscribe to "a perspective that is, if not quite global, at least European-wide and transatlantic." *Id.* at 11.

[9] *Id.* at 5. It is a bit ironic that for this point the German authors cite, mostly, more German authors—Duve, Frankenberg, Kischel, Siems—as well as some further European authors—Moréteau/Masferrer/Modéer and Husa, but of course it is doubly ironic for me as yet another German to point this out.

[10] *Id.* at 3.

[11] Stefan Grundmann, Hans-W. Micklitz, & Moritz Renner, I Privatrechtstheorie 2 (2015).

[12] Grundmann, et al., *supra* note 4 at ix ("a book that ... is bound to have a strongly subjective side as well.").

[13] *Id.* at 5.

[14] *Id.* at 3.

[15] *Id.*

[16] *Id.* at 12.

[17] *Id.* at 19.

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The suggestion that the theory "would then have to stand the test of acceptance by the ... global legal community" then raises a third question. Who is that "global legal community?" Does it even exist? Who belongs to it? How does it function, how does it communicate? The existence of a global legal community has often been postulated. Niklas Luhmann explained law as necessarily global, a subsystem of society—which he equally conceived of as global.[18] Mathias Albert, drawing on such theories, suggested juridification as a path towards organization of a world society.[19] Hauke Brunkhorst proposed that a global legal community could institutionalize democratic solidarity at the international level.[20] Klaus Günther suggested a "universal code of legality."[21] In addition to such sociological theories—yes, all by German authors—there are specific legal suggestions. International arbitrators can be understood as a global legal community; they certainly are a global epistemic community.[22] And Harold Berman's suggestions for a "World Law" rest on specific Catholic grounds and thus remind us of the original meaning of Catholic as all-encompassing.[23] These images of a global community are all, more or less, Northern images. Can they encompass the Global South?

Reading the book with such questions in mind, I found that the non-European world is present and hidden at the same time. It is present because much of the material presented, many of the theories discussed, have transnational materials. This is, indeed, almost unavoidable in a globalized world. However, the non-European world is hidden at the same time because it remains unaddressed, marginalized, and ignored.

This is not a particular shortcoming of this book; it is representative of much legal theory in general and certainly of much private law theory. What I sketch here should, therefore not be read so much as a criticism of the book in particular—nor overshadow its many strengths—but rather as a demonstration, in one example of the way in which a certain way of theorizing about private law universalizes Northern conceptions. In this regard, I take NPLT to be representative of private law theory in general, and my argument, sketchy as it may be, should be read as one about private law theory in general–its shortcomings, its need to pluralize, its potential.

C. Northern Cases

I. Case Example One: Transnational Corporations and Human Rights

How Northern is NPLT? Its treatment of its own case examples, to start with these, certainly is. Take "Case Example One," *Doe I v. Wal-Mart*, discussed in the book's introduction.[24] Employees of Wal-Mart's suppliers from several countries—China, Bangladesh, Indonesia, Swaziland, and Nicaragua—had launched a class action against Wal-Mart in California, and the main question was whether Wal-Mart could be held responsible for human rights violations committed by its suppliers.

A transnational case concerning relations between rich and poor countries. Rightly, the authors 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." They, therefore invoke, appropriately, transnational law, including the collapse of the public/private distinction. But strangely, beyond this aspect, transnationality hardly plays a role. What is not considered, for example, is

[18]Niklas Luhmann, *Die Weltgesellschaft*, 57 Archiv für Rechts- und Sozialphilosophie, 1–35 (1971).

[19]Mathias Albert, A Theory of World Politics (2016).

[20]Hauke Brunkhorst, Solidarity: From Civic Friendship To A Global Legal Community (Jeffrey Flynn trans., 2005).

[21]Klaus Günther, *Legal Pluralism or Uniform Concept of Law?*, 5 No Foundations 7 (2008), http://nofoundations.com/issues/NoFo5Gunther.pdf.

[22]Ralf Michaels, *Roles and Role Perceptions of International Arbitrators*, *in* International Arbitration and Global Governance 47 (Walter Mattli & Thomas Dietz eds., 2014).

[23]Harold Berman, *World Law: An Ecumenical Jurisprudence of the Holy Spirit*, 18 Fordham Int'l L. J. 1617 (1994).

[24]Grundmann, et al., *supra* note 4 at 6–8; Doe I v. Wal-Mart Stores Inc., 572 F.3d 677 (9th Cir. 2009).

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conflict of laws or comparative law–disciplines that would explicitly account for foreign private law.[25] The plaintiffs in the case lost under Californian law, and since no analysis of foreign law exists, it is not clear whether they would have stood a better chance under their home laws. Still, one of the interesting developments in the global regulation of production chains is that law reforms happen both in rich consumer countries and in poor producer countries.

Moreover, although institutional economics and economic sociology are called relevant, questions of comparative advantage are not discussed.[26] This means that the significant economic differences between the U.S. and the other countries remain unscrutinized, although these economic differences remain one of the core elements of many global production chains: Production is outsourced to foreign countries because it is much cheaper there. Private law theory cannot address this crucial fact unless these differences in economic situations across borders are addressed. This is odd, given that economic inequality is an important theme in private law theory otherwise.

Finally, the role of U.S. courts as world courts is not addressed, either.[27] The authors of the textbook call the plaintiffs' claim "surprising" from the perspective of a district court in California, in view of the fact that it concerns foreign plaintiffs and foreign injuries. They know of course that the claim is actually anything but surprising: In 2009, U.S. courts were still magnet fora—"as a moth is drawn to the light, so is a litigant drawn to the United States," in Lord Denning's much-cited words some decades earlier[28]—and the defendant was a U.S. company. In short, although used as an example for transnational law, the connection of the case to multiple jurisdictions and markets does not really play an analytical role.

II. Case Example Two: The Mystery of Direct Discrimination

This is the case also, although in a somewhat less pronounced fashion, in the second case example.[29] The case concerns the question of whether an employer in the Netherlands can discriminate against technicians of Moroccan origin because its customers refuse to receive them. Although this is, on its face, a purely inner-European case, raising interesting questions of discrimination law, the fact that discrimination is expressed against employees with a North African background gives the case a decidedly non-European element. That element is ignored. We do not learn why prejudices exist in the Netherlands specifically against people with a Moroccan background, though this certainly matters: Anti-Moroccan bias is also anti-non-European bias.[30] As a consequence, the whole idea of discrimination remains abstract, which must certainly be problematic for a private law theory that is sociologically informed.

The Court points out impacts on the labor market: "The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin . . . is clearly likely to strongly dissuade certain candidates from submitting their candidature." The court does not, and cannot, address the factor which is even more clearly likely to dissuade candidates—namely, the external

[25]*See* Rachel Chambers & Gerlinde Berger-Walliser, *The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison*, 58 AM. BUS. L. J. 579, 619–23 (2021). The court in *Doe I v. Wal-Mart* discusses only the conflict between the laws of California and Arkansas.

[26]Comparative advantage is mentioned, briefly, elsewhere in the book: GRUNDMANN, ET AL., *supra* note 4 at 465.

[27]*See* RALF MICHAELS, *Global Problems in Domestic Courts*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF LAW 165–176 (Sam Muller, Stavros Zouridis, Morly Frishman & Laura Kistemaker eds., 2011), https://www.hiil.org/projects/the-law-of-the-future-and-the-future-of-law/.

[28]Smith Kline & French Labs. Ltd. v. Bloch [1983] 1 W.L.R. 730 (A.C.) at 733 (Eng.).

[29]GRUNDMANN, ET AL., *supra* note 4 at 8–9; ECJ, Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, ECLI:EU:C:2008:397 (Jul. 10, 2008).

[30]Barbara van der Ent, *Discriminatie op de Arbeidsmarkt: Waarom Hebben 'Marokkaanse' en 'Surinaams-Hindoestaanse' Nederlanders Minder Kans op een Baan?*, 14 TIJDSCHRIFT SOCIOLOGIE 25–57 (2018); María Ramos, *Labour Market Discrimination Against Moroccan Minorities in the Netherlands and Spain: a Cross-National and Cross-Regional Comparison*, 47 J. ETHNIC AND MIGRATION STUD. 1261 (2021).

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frontiers of Europe. Moroccans in Morocco are, by and large, unable to apply for similar jobs in the Netherlands; they are also not protected similarly by European non-discrimination law. Equality inside the common market comes at the cost of inequality between the common market and areas outside of Europe.[31]

The case would thus have provided a fascinating opportunity to discuss issues of global, instead of merely infra-European, equality. Is it possible that we can have equality in Europe only on the basis of the wealth we derive from differences with the rest of the world? Or, contrariwise, is our European model of nondiscrimination potentially global?

III. Other Examples

It may seem unfair to pick at such length at the treatment of two cases that the introduction discusses only in passing. But the cases are used as examples, and their treatment sets the tone for the rest of the book. Indeed, this is a somewhat continuous theme in the book: many of the cases and hypotheticals discussed have strong transnational elements, and yet their transnational aspect, and especially the included relations between Global North and Global South, are ignored.

Thus, when the authors discuss *Urgenda*, the big Dutch climate change liability decision,[32] they discuss it, quite appropriately, as a problem of democracy.[33] The problem of democracy they see concerns the separation of powers and the relation between unelected judges and parliament as legislators. What remains unaddressed, puzzlingly, is the transnational aspect–the extent to which international and human rights law empowers judges vis-à-vis domestic legislators in foreign relations,[34] the question whether courts can shoulder the responsibility of saving the world,[35] the specific character of climate change as a global problem.[36]

Or, look at the treatment of the *Kiobel* case, the U.S. Supreme Court decision concerning Shell's responsibility for environmental damages in Nigeria.[37] The case is discussed first with a view to the concept of varieties of capitalism.[38] But the models of capitalism discussed are all Northern models, and the distinction of different capitalist "economies" cannot account for the essentially transnational—though not globally uniform—nature of capitalism as the ordering mechanism of the world. Consequently, it is difficult to place "economies" of the Global South within the analysis, and indeed Nigeria, the locus of the spillage, is not discussed.[39] Similarly Northern is the discussion of the role of Corporate Social Responsibility in the case–an important topic for transnational law. However, if enforcement of CSR codes is left to consumers, the ensuing "market for virtue" is a market within the Global North. And it remains confined, it seems, to Global North corporations. "I am not aware of any judgment of the Global North which is ready to accept extraterritorial liability of a transnational company for the infringement of international law whether it has

[31]*See also* Ralf Michaels, Gleichheit bei Rechtsvielfalt?, Rechtsvergleichung, Rechtsvereinheitlichung, Internationales Privatrechtin: Freiheit und Gleichheit im Privatrecht 119–197 (Martin Gebauer/Stefan Huber eds., 2022).

[32]Urgenda Foundation v. The Netherlands (2015) HAZA C/09/00456689The book still relies on the first instance decision; the decision by the Hoge Raad from 2019 is available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007; for a summary see Maiko Meguro, 114 Am. J. Int'l L. 729–35 (2020).

[33]Grundmann, et al., *supra* note 4 at 180-192.

[34]On this aspect see Christina Eckes, *The Urgenda Case is Separation of Powers at Work, in* Liber Amicorum Besselink 207–231 (N. de Boer, B. Michel, A. Nieuwenhuis, J.H. Reestman eds., Amsterdam, 2021).

[35]Bernhard W. Wegener, *Urgenda – World Rescue by Court Order? The "Climate Justice"-Movement Tests the Limits of Legal Protection*, 16 J. for Eur. Env'l & Plan L. 125–47 (2019).

[36]Michaels, *supra* note 22.

[37]Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Grundmann, et al., *supra* note 4 at 414–433.

[38]Grundmann, et al., *supra* note 4 at 417ff.; David Soskice & Peter A. Hall, Varieties of Capitalism (2001).

[39]Somewhat puzzlingly, Nigeria is considered "a cluster in itself" and "a unique type of capitalism" in Michael A Witt, Luiz Ricardo Kabbach de Castro, Kenneth Amaeshi, Sami Mahroum, Dorothee Bohle & Lawrence Saez, *Mapping the Business Systems of 61 Major Economies: a Taxonomy and Implications for Varieties of Capitalism and Business Systems research*, 16 Socio-Econ. Rev. 5–38, 22, 24 (2018).

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its business seat in the country or not," says Micklitz in the book[40]—does this insight not call out for further analysis?[41] He rightly draws attention to the fact that "[t]he international community or the countries of the Global North could not even agree on a non-binding transnational framework to respect and to enforce internationally agreed rules on human rights, health and safety, worker protections and the environment."[42] But there is, arguably, a huge difference between "the international community" and "countries of the Global North," and it is not clear a priori that the latter would necessarily pay attention to Global South interests.

D. Northern Theories

Granted, the book uses these cases only as entries into its discussion of existing private law theories; it "starts from texts."[43] Those texts, those theories, are drawn from Northern authors and inspired by Northern experiences. As the authors themselves say, "[t]his 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 . . . ."[44] 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."[45]What is Northern here is not, however, only the selection of the theories but also their treatment. Like the cases before, many of the theories discussed are stripped of their global and transnational elements.

Take, for example, the treatment of sociology and its—European—early heroes, Weber and Durkheim. The authors' interest in Weber is interest in "contemporary society,"[46] which means, apparently, European society. Weber, of course, had a broader, more global view of different kinds of society, though with modern European society at the top of a hierarchy. His modern society is thus defined in necessary juxtaposition with non-European societies.[47] Where he praises adjudication in Europe, he does so in juxtaposition with what he calls famously—and problematically—kadi justice. Where he discusses Western legal-rational authority, this takes place in juxtaposition to—pre-modern or non-European—other types of authority. The problem is not that only, or predominantly, Western theorists are collected, and the problem is certainly not that Weber is included. The problem is that what is presented on Weber is confined to his work on European modernity, and his theory remains partly unexplained.[48]

Similarly partial use is made of other theories. Law and economics is largely, confined to its U.S. variant, which ignores both that variant's not always healthy relations to the rest of the world—think of its impact on Latin America—and alternative economic approaches to law and development, inspired by Southern perspectives. Luhmann's systems theory is discussed, but not the limits to its transfer to non-European societies, indeed even to the United States.[49] Transnational law, as developed by Jessup, is introduced but without reference to

[40]Grundmann, et al., *supra* note 4 at 432.

[41]Much of US case law under the Alien Tort Statute—which allows actions only against non-US parties for violations of international law—is concerned with extraterritorial liability.

[42]Grundmann, et al., *supra* note 4 at 432.

[43]*Id.* at ix, 4.

[44]*Id.*

[45]*Id.* at 4.

[46]*Id.* at 64.

[47]Lutfi Sunar, Marx and Weber on Oriental Societies: In the Shadow of Western Modernity (2016).

[48]For critique of Weber, see Andrew Zimmerman, *Decolonizing Weber*, 9 Postcolonial Stud. 53–79 (2006).

[49]*See* Ralf Michaels, *Zugangsschranken – Rezeptionsprobleme der Systemtheorie in der U.S.-amerikanischen Rechtstheorie, in* Privatrechtstheorie heute 238–267 (Michael Grünberger & Nils Jansen eds., 2017).

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the Global South.[50] Concession contracts are discussed without the issue of exploitation. Global legal pluralism is discussed without regard to the origins of pluralism theory in colonial and postcolonial settings.

The Legal Origins approach is discussed at length,[51] but the countries discussed are all Northern countries; the critique is exclusively methodological: Selection of variables, downgrading of legal culture, downgrading of law. This is odd because the theory is colonial through and through.[52] At its origin lies the idea that economic progress can be explained as a function of the legal system and that colonies provide a particularly good testing ground because they were, allegedly, subject to a random distribution of common or civil law. That this distribution happened through imposition is not discussed, nor whether any consequences can be drawn on legal cultures more generally. In essence, common law and civil law are compared with regard to which of them was a better tool of colonization.

Other theories are used similarly. John Rawls is discussed as a general theorist, though many have pointed out that his theory of justices and political liberalism are really, in most ways, generalizations of a particular view of the United States. Amartya Sen, who was able to add important non-Northern perspectives to discussions of justice and liberalism, appears only as additional reading and with one rather unspecific sentence; he "opens up this picture to globalization, incremental improvements and pluralism." And although we do learn that "even the fundamental political freedoms are dependent on economic power situations,"[53] and "distribution of wealth is paramount,"[54] implications for the Global South are not addressed.

E. Northern Issues

Not only the cases and the theories used are Northern, however. So are the issues—the questions made, the assumptions made. For example, the authors suggest that "[i]n a globalized world, it has even become more frequent that value conflicts play out in private law constellations."[55] This seems plausible in more than one way. First, globalization increases the number of cross-country private law constellations and, therefore the number of profound clashes of values. Second, globalization has created a turn toward the private,[56] and value conflicts have followed suit. Why then restrict ourselves to value conflicts between the U.S. and Europe, as does the book? Why not the greater conflicts between Global North and Global South, or indeed those between the values of capitalism, on the one hand, represented to a large degree in private law,[57] and those of resistance? The restriction to U.S.-European relations betrays a somewhat limited view of globalization, limited both in geographical terms within the North and in ideological terms—decline of borders and of states.

One of these values is arguably the public/private distinction, and thus the existence of private law, itself? Although the distinction can be traced, in one way, back to Roman law,[58] its current form arose, arguably, in the eighteenth and nineteenth century Global North, though with differences between the United States and Europe.[59] It is, in this sense, peculiar to the Global

[50]Prabhakar Singh, *The Private Life of Transnational Law: Reading Jessup from the Post-colony, in* The Many Lives of Transnational Law Critical Engagements with Jessup's Bold Proposal 419 (Peer Zumbansen ed., 2020).

[51]Grundmann, et al., *supra* note 4 at 123ff.

[52]*Ralf Michaels*, The Legal Legacy of the Colonial Era, 4/2021 Max Planck Rsch. 16–21.

[53]*Id.* at 151.

[54]*Id.* at 152.

[55]*Id.* at 156.

[56]Michaels & Jansen, *supra* note 3 at 868.

[57]Katharina Pistor, The Code of Capital (2018).

[58]For the history, see Nils Jansen & Ralf Michaels, *Private Law and the State—Comparative Perceptions and Historical Observations*, 71 Rabels 345–97 (2007).

[59]Michaels & Jansen, *supra* note 3 .

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North and its own history—even when "understood in a broad sense, encompassing questions of regulation and rule-setting in particular."[60] And the distinction arises, no doubt not accidentally, during the heyday of colonialism—which itself was organized on the basis of much private law, starting with the private corporations established to colonize. It is, therefore, certainly of colonial interest as well but in ways very different from those discussed in the book.

Similarly confined is the discussion of private ordering—indubitably an important challenge to a state-based understanding of law.[61] The topic is discussed, but with references only to non-state law within Northern States. There is a discussion of Shasta County, the site for Ellickson' theories, but not of Micronesia and other non-Northern areas where private ordering has long been observed. There are discussions of the diamond trade, but confined to the United States as in Lisa Bernstein's studies, excluding global trade and indeed the problematic role of the diamond trade in Africa.[62] There are discussions of private law as represented by "Families, friends, firm" [63] but no focus on Asia where these three categories have indeed been merged in the past.[64] This limited focus is relevant. In a state-based system, private ordering stands in some necessary relation to the state—it must be isolated from the state, perhaps even protected by the state. This means that the nature of the state must also change the nature of private ordering, and private ordering is likely to mean something different in other types of states.

What, finally, about the book's own starting point—to "start from what law is?"[65] This legocentrism betrays a very Northern starting point. The authors are right, I think, to take law seriously, it is not taken seriously enough in many economic discussions of legal origins, and indeed in interdisciplinarity more generally.[66] At the same time, perhaps law, at least formal law, matters less elsewhere. And if so, a focus on law as a starting point must, from the start, make an analysis peculiarly Northern.

F. A Global Legal Community?

I have tried to demonstrate that the Global South is absent from the New Private Law Theory in two ways, one acknowledged and one unacknowledged. The acknowledged absence concerns the absence of voices from the Global South, be it private law theorists or be it other sources—case law, political statements, and the like. The book discusses Northern cases, Northern theories, and Northern issues. The authors, aware of this, wisely restrict their findings to Northern Society, though they find it possible that these findings could be expanded, and indeed invite reactions and dialogue from the Global South.

What could stand in the way of such dialogue is the second, unacknowledged absence of the Global South from the New Private Law Theory. Almost throughout the entire book, private law theories are presented without regard to the Global South. They are, thus, not only theories *from* the North, and *about* the North, and *for* the North, as is acknowledged. They also presume, albeit implicitly, that theorizing is possible without referencing the Global South. That would be possible, it seems, only if one of the assumptions were true: Either that the North can be thought of separately from the South, or that what is true for the North is true, by extension, also for the South. Either assumption, however, seems false. What I have tried to suggest is that Northern

[60]GRUNDMANN, ET AL., *supra* note 4 at 35.

[61]Ralf Michaels, *The Mirage of Non-state Governance*, UTAH L. REV. 31–45 (2010).

[62]For some aspects of this global trade see BARACK RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE (2017).

[63]GRUNDMANN, ET AL., *supra* note 4 at 490.

[64]Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000).

[65]GRUNDMANN, ET AL., *supra* note 4 at x.

[66]RALF MICHAELS & ANNELISE RILES, *Law as Technique, in* OXFORD HANDBOOK OF LAW AND ANTHROPOLOGY (Marie-Claire Foblets, Mark Goodale, Maria Sapignoli, & Olaf Zenker eds., 2020).

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theory, almost regularly, was created in direct relation to the Global South, either in direct juxtaposition or at its expense. Northern theory either presumes or creates a difference between North and South. If this is so, then presenting such a theory without its Southern counterpart strips theories of necessary elements.

This is not the specific fault of the authors of NPLT; it is implicit in most of our legal thinking. NPLT presents these theories as they often preset themselves. NPLT merely carries this absence further. However, the incompleteness of private law theories bodes badly for their expansion to the rest of the world. Proposing to universalize such theories by expanding them to the rest of the world amounts to an accidental attempt of epistemological colonization.

This may explain that the absence of the Global South from private law that is acknowledged—the absence of Southern voices—may be harder to resolve than the authors seem to imagine. Quite possibly—and this is at this stage only speculation—theorists from the Global South would have very little to contribute that would be constructive, but also little interest in doing so. They can contribute to the Northern project by mimicking Northern voices, though it is not clear that they could do better what Northerners do on their own turf, so to speak. They can try to translate the Northern project to the Global South but will need to be wary of the risk of epistemic self-colonization. Or, of course, they can present specifically Southern critiques of the Northern projects of theories.

That latter project—and of course I am again speculating—might be the most interesting and fruitful one. It may be possible to uncover, far better and more meticulously than I can do here, the colonial origins of existing private law theory. Such research could add a new, external, critique to the existing internal critiques of private law theory—from legal realism to LPE— that remain within the Northern-modern project that they critique. Whether this is true would of course need to be demonstrated. And whether there are theorists of the South who are not only capable of but also sufficiently interested in such a project remains an open question. Perhaps—my last speculation—private law theory is just not sufficiently interesting outside its own Northern context.

How could a private law theory that remains essentially Northern communicate with the Global South? Ultimately, that remains to be seen. However, I see three strategies, only one of which is actually promising. The first is universalization—the hope that the new private law theory, although developed in the North, can nonetheless claim universal acceptance. A similar argument has sometimes been made for human rights. I assume this is what the authors have in mind when they suggest that their theory "would then have to stand the test of acceptance by the . . . global legal community."[67] But like with human rights, mere universalization of European thought is unlikely to be successful, whether empirically or normatively.

A second strategy is restriction—yielding the claim to speak for the world, explicit acknowledgment that the theory is made only for the Global North. We find hints of such a strategy when the authors acknowledge that their book may speak in particular to Western societies.[68] Such an approach appears attractively modest. It also seems to make more justifiable the restriction to Northern materials and Northern values. But it cannot ultimately convince, either. As I have tried to show, such a restriction is not possible in a global world except through partial amnesia—the North has been built in relation to the South, and its actions have an impact elsewhere. Isolation, even if only epistemic, is not possible.

A third strategy, then, is pluralization[69]. This could mean what the authors envisage—the inclusion of non-Northern authors. However, if my suspicion is correct, such authors may be hard to find, at least if asked to participate in a project that is and remains, by its nature, specifically Northern. If private law theory is Northern, then pluralization to be meaningful must pluralize

[67]Grundmann, et al., *supra* note 4 at 3.

[68]Grundmann, et al., *supra* note 4 at x.

[69]Lena Salaymeh & Ralf Michaels, *Decolonial Comparative Law—A Conceptual Beginning*, 86 Rabels Zeitschrift 166–188 (2022).

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this concept itself. Such pluralism cannot be only methodological—a pluralism the authors espouse—but must also be epistemological and positional. We theorists must then accept the contingency of private law theory as explicitly Northern. We must be ready to engage seriously and nonhierarchically with radically different theories, including theories not of private law. We must be ready to listen without preconception. We must allow for, and theorize, the possible decoupling of non-Northern theories from an assumed universalization. But one can suspect that such a private law theory might have to substitute praxis for theory and norms for law. It might no longer be a theory of private law as such, but a theory of the particular role that the invention of private law has played in a specific place and time.

From this, a new, very different idea of a global legal community arises. We must give up the idea of a homogeneous concept of a global legal community and replace it with a radically pluriversal idea of a world of many worlds, with an acknowledgment of Global North-Global South tensions, of cultural pluralism with non-Western values, of economic inequality between North and South, for the epistemic inequality between quasi-universal Northern norms and laws and localized norms and laws from elsewhere, of neocolonial relations of control and extraction, most of which take place through private law relations. That community is infinitely more heterogeneous than the concepts presented in the beginning of this article, and indeed it is far more improbable. At the same time, it seems infinitely more attractive. Perhaps, against all odds, responses to this book will indeed, despite or because of concerns like mine, help bring such a community about.

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