GUNTHER TEUBNER*

State Policies in Private Law? A Comment on Hanoch Dagan

The comment focuses on the question how the public/private divide influences the legitimacy of private law's references to state policies and public values. The thesis is to separate the public/private divide from the distinction between state and society as well as from the distinction between public law and private law. The traditional private/public duality is dissolved into a plurality of social segments. The "public" then reappears within each social system—now in a different sense—as that system's expression of its intrinsic normativity, which private law legitimately takes into account.

I.

Hanoch Dagan asks the question, "whether state values, whatever their institutional origin, have a legitimate role to play in private law."[1] Are state policies valid arguments in private law? His answer is a decisive Yes and No. Using the example of marital property, he asks: is population policy a legitimate argument in issues of marital property after divorce? No, because "promotion of a population policy cannot plausibly inform the entitlements of husband and wife against one another."[2] Should "divorce law . . . address the issue of gender discrimination"? Yes, because gender inequality is not a problem merely for women individually but also for the institution of marriage. The distinction is intuitively plausible. Of course, Dagan does not just express his personal political preferences but offers a well-reasoned argument.

He pleads for a "middle ground" position between what he calls autonomist and instrumentalist theories of private law. Against autonomy, he argues that private law necessarily holds a "thick perfectionist view of society." Against instrumentalism, he points to "normative constraints entailed by the bipolar structure of private

* Professor of Private Law and Legal Sociology, University of Frankfurt / Main, and Centennial Professor, London School of Economics.

1. Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809 (2008).

2. *Id.* at 823.

law litigation."[3] His thesis in short: private law needs to be "responsive both to (minor) bipolarity constraints on the one hand, and to social values appropriate to the pertinent category of human interaction on the other."[4] At the same time, he does not put into doubt the highly controversial private/public dichotomy; instead, he reaffirms it emphatically.[5] Nothing in his argument, he insists, necessitates the collapse of the private-public distinction, although his account does require a rephrasing of its foundations.

But then Dagan introduces an enigmatic criterion. Public values are legitimate in private law only when they do "not impose external goals on the parties' bipolar relationship, meaning goals that are alien or even potentially subversive to their relationship."[6] An "external social value" that "threatens to have an illegitimate impact from outside" would not be allowed to enter private law.[7] That raises a crucial question: What is the relation that establishes the boundary between what is internal and what is external? Is it really, as he suggests, the bipolar relationship between the parties, i.e., the litigation relation between plaintiff and defendant?

In my view, this enigmatic criterion upon which Dagan's whole argument relies is in fact undermining the public/private distinction, which he, however, wants to maintain. With the internal/external distinction, the identification of public values with state policies, which he suggests, can no longer be maintained. I suggest that Hanoch Dagan's enigmatic distinction between internal and external public values will become plausible only after rethinking the public/private divide.

II.

It has almost become a ritual these days to de-construct the private/public distinction.[8] The problem is, however, that nobody knows how to displace it, not to speak of how to replace it. Political philosophers have again and again analyzed the breakdown of the boundary between state and society, but what they offer instead is a diffuse

3. *Id.* at 811.
4. *Id.* at 811.
5. For a recent extensive analysis of the private/public distinction and the relation between private law and the state, see Nils Jansen & Ralf Michaels, *Private Law and the State: Comparative Perceptions and Historical Observations*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 345 (2007); Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 845 (2006). For its relevance in the transnational context, see PEER ZUMBANSEN, THE LAW OF SOCIETY: GOVERNANCE THROUGH CONTRACT, *available at* http://ssrn.com/abstract=988610 (2007).
6. Dagan, *supra* note 1, at 823.
7. *Id.* at 823.
8. For an influential argument, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

politicization of the entire society.[9] Similarly, the distinction between public law and private law has been attacked by numerous legal scholars but has merely been substituted by the vague assertion that private law is pervasively political.[10] Hanoch Dagan rightly warns against such a pervasive politicization of private law that he calls radical instrumentalism. But does that mean we have to stay with the unfortunate public/private dichotomy?

My argument starts with the obvious observation that the public/private distinction is an oversimplified account of contemporary society. More controversially, my argument continues that any idea of a fusion of public and private spheres is equally inadequate. *As an alternative conceptualization, I propose that the public/private divide should be replaced by polycontexturality*.[11] The claim is this: contemporary social practices can no longer be analyzed by a single binary distinction, neither in the social sciences nor in law; the fragmentation of society into a multitude of social segments requires a multitude of perspectives of self-description.[12] Consequently, the distinction of state/society which translates into law as public law vs. private law—which Hanoch Dagan defends vigorously—will have to be substituted by a multiplicity of social perspectives which need to be simultaneously reflected in the law.

Private law will need to re-enforce its elective affinity to the contemporary plurality of discourses—not only its affinity to the economy as it is predominantly understood today, but also to the many contextures of intimacy, health, education, science, religion, art, and media. This would lead to a thoroughgoing reflection within private law about the distinctive proper rationalities and proper normativities of these various realms of discourses, as opposed to the mere invocation of individual private autonomy.

The point is simultaneously to de-politicize private law and to de-economize it, to distance it not only from the "public sector," i.e., from institutionalized politics, but also from the "private sector," i.e., from

9. *Locus classicus,* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans.,1992); considerable refinements of his analysis in JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY ch. 8 III (1996).

10. *E.g.,* David Kennedy, *Background Noise? The Underlying Politics of Global Governance*, 3 HARV. INT'L REV. 52 (1999); Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, *in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda G. Dallmeyer ed. 1993).

11. This concept has been coined by Gotthard Günther, *Life as Poly-Contexturality*, *in* BEITRÄGE ZUR GRUNDLEGUNG EINER OPERATIONSFÄHIGEN DIALEKTIK I 283 (1976), and has become one of the central elements of autopoietic social and legal theory, see for example Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, 69 MOD. L. REV. 327 (2006).

12. For the full argument on polycontexturality and private law, see Gunther Teubner, *After Privatisation? The Many Autonomies of Private Law*, 51 CURRENT LEGAL PROBS. 393 (1998).

rational economic action. This is indeed what Hanoch Dagan does—at least implicitly. When he rejects the use of population policy as a guideline for marital property law, he argues for a de-politicization of private law. When he rejects calculating the "accurate valuation of both spouses' contribution, taking into account non-market work and interpersonal support,"[13] he argues for a de-economization of private law which is also implicit in his critique of legal economics as a radical version of legal instrumentalism.

It has become commonplace today to stress the difference of an efficiency-driven private law from the regulatory policies of the welfare state and to stress the autonomy and decentralized rule production of the former from central legislative intentions of the latter.[14] It is much less well understood that private law cannot be identified simply with juridification of economic action. Indeed, this has been the great historical error of mainstream private law doctrine: "Private law has become the domain of property and economic relations."[15] Contract law has increasingly been reduced to the law of market transactions. The law of private associations has been boiled down to the law of business organizations. Property law has been understood as nothing but the basis for market transactions, and tort law as the set of policies and rules that internalize economic externalities and eradicate third party effects.

These are understandable errors, of course. Legal doctrine had to adapt to the double Great Transformation of the twentieth century, the victorious imperialism of both the economic and the political systems that have divided the social world into two great spheres of influence. On the one side, economic action developed totalizing tendencies in its society-wide expansion and transformed non-commercial social relations, e.g., the relationships of the classical professions to their clients, into profit-oriented economic relations. Private law followed this ongoing commercialization of the social world, sometimes reluctantly, always obediently. On the other side, there was the apparently unstoppable growth of the welfare state, transforming all types of social activities into public sector services. Accordingly, private law abdicated its responsibilities for the societal responsiveness of these activities in favor of governmental policies and public law principles. This error has been the common starting point for the great influential ideologies, liberalism and socialism, in their countless variations and combinations. Their disagreement was about one, and only one, alternative, whether private law should re-

13. Dagan, *supra* note 1, at 820.

14. For an influential economic interpretation of contract, see OLIVER D. HART & JOHN HARDMAN MOORE, CONTRACTS AS REFERENCE POINTS, *available at* http://ssrn.com/abstract=944784 (2006); Oliver E. Williamson, *The Lens of Contract: Private Ordering*, 92 AM. ECON. REV. 438 (2002).

15. KLAUS F. RÖHL, ALLGEMEINE RECHTSLEHRE: EIN LEHRBUCH (2d ed. 2001).

flect either economic efficiency or governmental policies, either principles of economic autonomy or of political intervention. *Tertium non datur*. Both political ideologies have assisted in creating the contemporary legal institutions which stress, albeit in different forms, the interplay of the political and the economic sector. At the same time—and this is my central point—they have neglected or instrumentalized other sectors of civil society. Thus, the public/private distinction was able to survive in spite of the reality of thoroughgoing functional differentiation of society.

If there is one lesson that private law could learn from contemporary social theory then it is the lesson that social autonomy, i.e., the capacity for self-regulation of a social segment, is not confined to the market mechanism of the economy but is realized via different forms in many other social worlds of meaning. There is a group of theories which explore the bewildering diversity of conflicting rationalities. Theories of discourse plurality *á la francaise* celebrate *le différend* between conflicting *genres* of hermetically closed language games based on different grammars and life practices.[16] The more sober Anglo-American New Institutionalism distinguishes a plurality of governance regimes that produce specific routines, normative patterns, and institutional requirements, and analyzes the resulting politics of inter-institutional conflicts.[17] German neo-romantic autopoiesis imagines a rich plurality of self-producing contextures in which specific operations, codes, and programs emerge and shape the rich tapestry of the many social worlds, but wholly without a prestabilized harmony.[18] In light of these theories, private law would need to redirect the rather confused debate about its conceptual and normative unity and to focus attention on how to calibrate its conflict-resolving doctrines and procedures to the politics of collision between different discourses, institutions, and systems.[19]

Yet another group of theories attempt to draw normative consequences from this discursive pluralization. Critical theory takes for granted a plurality of different life-world discourses with different logics of argumentation and develops normative arguments for their

16. *See* JEAN-FRANCOIS LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE (1987).

17. Most explicitly, Roger Friedland & Robert Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions, in* THE NEW INSTITUTIONALISM 232 (Paul DiMaggio & Walter Powell eds., 1992); *see also* Walter W. Powell & Paul J. Di Maggio, *The New Institutionalism in Organizational Analysis*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (1991); W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (1995).

18. *See* Niklas Luhmann, *The Paradox of System Differentiation*, *in* DIFFERENTIATION THEORY AND SOCIAL CHANGE 409 (Jeffrey C. Alexander & Paul Colomy eds., 1990).

19. *See* Gunther Teubner, *In the Blind Spot: The Hybridization of Contracting,* 8 THEORETICAL INQUIRIES IN LAW 51, 67 (2007); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

compatibilization.[20] Post-modern social and legal theory discusses a plurality of structural places, of autonomous sites of power, knowledge and law production, making a case for local micropolitics.[21] Theories of directly deliberative polyarchy observe the emergence of hybrid public-private governance regimes which operate autonomously as problem solving units and which, if suitably institutionalized, will generate new forms of deliberative coordination and social learning.[22] Communitarian theories distinguish between different "spheres of justice" which institutionalize diverse moral ideas about equality. They postulate that political legal institutions need to abandon their universalist ambitions and draw upon this particularistic norm formation.[23] Since private law is intimately linked to spontaneous norm production, private law theory should make use especially of those theories that stress the aspect of spontaneous self-organization, autonomous setting of boundaries, and the emergence of genuine forms of normativity within social fields.

There is, however, one crucial normative consequence to be drawn from the pluralism of private autonomies. The remarkable responsiveness which private law has in the past developed toward economic markets by elaborating complex commercial contracts, business organizations, economic property rights, and business standards, may serve today as the great historical model for its relation to other autonomous discourses in civil society. The precarious balance between self-regulation and intervention which private law has maintained in its relation to economic markets needs to be institutionalized in other sectors of civil society.

A non-reductionist concept of private law, thus, would identify many social spaces where spontaneous norm-creation is the source of law. Against the autonomists, Hanoch Dagan rightly stresses "the rich social fabric that serves as the inevitable context for the parties' relationship."[24] The astonishing pluralism of new forms of voluntarily chosen intimacy relations and the abundancy of new contracts about intimate partnerships provide an example of non-economic private law in civil society. Spontaneous rule making processes in civic movements and in non-profit private organizations provide another. *The main challenge for private law theory today, I submit, is to re-*

20. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

21. *See* ZYGMUNT BAUMAN, POSTMODERN ETHICS (1993); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION ch. 6 (2003).

22. *See* MICHAEL C. DORF & CHARLES F. SABEL, A CONSTITUTION OF DEMOCRATIC EXPERIMENTALISM (2003).

23. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY (1984); PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 229 (1992).

24. Dagan, *supra* note 1, at 813.

think the one autonomy of the free individual into the many autonomies of different social worlds—into the autonomy of configurations of intimate life, health care, education, research, religion, art, the media—to whose fundamental principles private law needs to be responsive. This challenge is not taken up by autonomists who cherish the traditional private autonomy of individual actors and fail to take into account the autonomy of different worlds of meaning in which private law operates today. It is not taken up by instrumentalists either who reduce private law to a mere instrument of political or economic rationality. The central role of private law, it seems to me, is to juridify diverse processes of decentralized spontaneous norm-formation in civil society which are fundamentally different from processes of political regulation by the central authority of the state. Private law's job in this broader sense is to constitutionalize spaces of social, not only of individual, autonomy. This constitutionalization has two dimensions. One: to constitutionalize not only autonomy of individual actors but the autonomy of many diverse social configurations. Two: to constitutionalize not only economic forms of action but in particular non-economic forms of contracting and other modes of consensual action, idiosyncratic private ordering, standardization, normalization, codes of practices, formal organization, and loosely organized networks in different monocontextures of civil society. This would be my reformulation of Hanoch Dagan's central thesis that private law needs to be responsive to "social values appropriate to the pertinent category of human interaction" which in my view is neither private nor public, but polycontextural. And I would dare to interpret Hanoch Dagan's words, that private law "varies with the divergent categories of social settings in which it is situated"[25] and that private law "institutions both construct and reflect the ideal ways in which people interact in a given category of social contexts (e.g., market, community, family)."[26] Dagan himself—against his declared intention—is *de facto* replacing the private/public distinction by polycontexturality.

III.

This then opens the crucial questions: What are the conditions of the possibility of private law's responsiveness to social polycontexturality? Under what circumstances will private law develop sensitivity toward spontaneous norm making in different social worlds like education, research, media, art, health? Not by implementing some state policies and public values as Hanoch Dagan still suggests. It will do so rather by exclusively referring to the inner normativity of diverse social institutions which are clearly different from the policies of the state.

25. *Id.* 815.
26. *Id.* 815.

In this perspective, Hanoch Dagan's distinction internal/external would take on a different meaning. "Internal" would no longer refer to the narrow bipolar litigation relation between plaintiff and defendant but instead to the broader "living legal relation" between the actors involved, to their social interaction and to the encompassing social system in which their concrete relation is embedded. "External" would refer to political and economic processes which tend to impose their orientations on the socially embedded relation. Indeed, it is private law's constitutional role to protect the integrity of the socially embedded relation against those intrusions if they are not compatible with them.[27] Of course, this does not isolate private law from the public policies of the state and from the efficiency requirements of economic action. But it creates a mechanism which filters out state policies and economic imperatives when they are not compatible with the inner normativity of the social institution involved.

In this sense, the public/private divide takes on a new meaning. It is radically separated from the state/society distinction as well as from the public law/private law distinction. Indeed, it stands orthogonal to them. The traditional private/public duality is dissolved into a plurality of social segments (polycontexturality). The so-called "public" politics and the so-called "private" economy are only two of a whole variety of social segments. However, the "public" then reappears within each social system—now in a different sense—as that system's expression of its intrinsic normativity, which private law legitimately takes into account. In contrast, the category of "private" would then be reserved to the pursuit of individual and collective actors' self-interest. This resonates, of course, with the work of legal philosophers like Lon Fuller or normative sociologists like Philip Selznick who stress the intrinsic normativity of social institutions.[28] In my formulation, however, "public" in this new sense would refer to an internal reflection process within the focal social institution which decides on the balance between its social function and its contributions to individual and collective actors. Of course, private law does not and cannot dictate this reflection process. Instead, it needs to be responsive to it and simultaneously participate in it through judgments in individual litigation, which are in their turn exposed to the continuing reflection process.

To summarize my argument, the public/private divide needs to undergo a dialectical *Aufhebung* in the double sense of destruction and preservation.

27. Gunther Teubner, *Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes*, 9 SOC. & LEGAL STUD. 399, 410 (2000).

28. *See* SELZNICK, *supra* note 23; LON FULLER, THE MORALITY OF LAW (1969).

(1) The simple duality needs to be destructed and replaced by the multiplicity of social perspectives which then are reconstructed within the law.

(2) In a very limited sense, the old public/private divide will be preserved insofar as this divide is understood as the difference between political and economic rationality, which, however, are only two among many other social rationalities.

(3) In a different sense, the public/private divide is preserved since it reappears in each contexture of polycontexturality as the precarious difference between societal responsibility and the pursuit of actors' interest, and private law needs to be responsive to this divide.

To allude to some examples: why is expert liability extended to third parties outside the expertise contract? The reason is not the protection of the third party's interest but the creation of a symmetric liability toward both members of the project which protects the integrity of expertise as a social institution. Banks are blocked from striking guarantee contracts with family members of the debtor because the integrity of intra-family communication is protected against the intrusion of economic rationality. Many of the enigmatic con-tort relations are not just impositions of judicial activism, they are rather the legal reformulation of spontaneous orders in different social fields. Good faith obligations do not refer to state policies, but rather to the *idées directrices* of multiple social institutions. Constitutional rights in the "private" sphere are not transfers of state constitutional rights from the vertical relation state-citizen to the horizontal relation between citizens; instead, they protect the integrity of individual and social autonomy against anonymous social processes within different sectors of society. All these examples have in common is that they make private law responsive to the public dimension of social configurations which have nothing to do with state policies.[29]

In one sentence: Hanoch Dagan's ultimate aim which is "to fracture and multiply human authority" is better served by the many sites of polycontexturality than by the simple "differentiation between the private and the public."

29. Focusing on these examples I tried to work out some of the public dimensions of private law. On expert liability: Gunther Teubner, *Expertise as Social Institution: Internalising Third Parties into the Contract*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 333 (David Campbell, Hugh Collins & John Wightman eds., 2003). On bank guarantees by family members without income: Gunther Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken*, 83 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFTEN 388 (2000). On con-tort relations: Gunther Teubner, *Hybrid Laws: Constitutionalizing Private Governance Networks, in* LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 311 (Robert A. Kagan et al. eds. 2002). On good faith obligations: Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 MOD. L. REV. 11 (1998). On horizontal effects of constitutional rights: Teubner, *supra* note 11.