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ARTICLE

A Private Law Theory for Sustainable Legal Education?

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Abstract
New Private Law Theory ("NPLT") offers itself as almost a natural fit for legal education and in particular—I argue—legal education in the climate crisis. Yet, the world climate hardly features in the book and its impressive resource list. Without claiming to fill any existing gaps in the book, the Article seeks to articulate NPLT's relevance to sustainable legal education and at the same time tease out what facing the, social, fact of the climate crisis would add to NPLT's already rich framework.

Keywords: Private law theory; legal education; sustainability; positivism; critical approaches

A. Introduction

Law students around the world have finally started wondering what their professional responsibility is and should be in connection with the climate crisis.[1] Not only does sustainability seem to "sell" in the market for law programs,[2] it appears that increasingly our professional community acknowledges the need to extensively reconsider legal education.[3] Even on a conservative estimate, it seems undeniable that the climate crisis and sustainability will feature in law curricula with enhanced prominence and in an growing breadth of subjects.[4] Doing this well, however, cannot be limited to the level of positive law—in fact, the complex nature of the issue[5] requires its incorporation in the legal curriculum to be seriously grounded in theory. At first glance, New Private Law Theory (NPLT) seems to provide a great basis for this work. Section I elaborates on this apparent fit at the hand of the five core theses of NPLT described by Grundmann, Micklitz

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[1]*See* LAW STUDENTS FOR CLIMATE ACCOUNTABILITY, https://www.ls4ca.org/ (last visited Mar. 31, 2022); WORLD LAWYERS' PLEDGE ON CLIMATE ACTION, https://lawyersclimatepledge.org/ (last visited Mar. 31, 2022).

[2]To my knowledge, the recently inaugurated LLM in Law and sustainability at Utrecht University is still unique in the European panorama for its aspiration to cut across disciplines. More generally, LLM and other post-graduate education programs on environmental law, law and sustainable development and energy or natural resources have become increasingly popular over the past years.

[3]*See* Irish Rule of Law International, *Climate Change & Sustainability: Why legal education in IRL needs an overhaul*, IRISH RULE OF L. INT'L (Nov. 1, 2021), https://www.irishruleoflaw.ie/climate-change-sustainability-why-legal-education-in-irl-needs-an-overhaul ("More books, study learning materials, and lecture time are needed to cover climate change and sustainability issues to give students a contemporary legal education today.").

[4]Dan Farber, *Climate Change in the Law School Curriculum*, LEGAL PLANET, Nov. 11, 2021, https://legal-planet.org/2021/11/11/law-school-and-climate-change/.

[5]But incidentally, the same could be said of digitalization and platformization.

and Renner (GMR) in their introduction.[6] The five core theses of NPLT are therein reframed as cornerstones for sustainable legal education, showing their resonance. In the second part, in turn, I highlight certain tensions between NPLT's structure and horizons, on the one hand, and theoretical and practical developments relevant to law and sustainability debates, on the other.

B. NPLT Core as Blueprint for Sustainable Legal Education

As has been suggested by others in this special issue, NPLT is an outstanding educational tool.[7] The connection with education is evident not only in the authors' acknowledgements directed at students in different European institutions, but perhaps even more importantly in the book's methodology, consistently connecting the use of "canonical" theory with a concrete example extracted from case law and then circling back to various options in positive law approaches to the question.[8] The book's pedagogical value is reinforced by its online appendix, a database including all the main reference texts in open access and translated to English.[9]

In fact, the book is apt to be used as an educational tool: the core elements in the theory seem almost conceived as a blueprint for contemporary legal education, and in particular they resonate directly with plausible requirements of *sustainable* legal education. "Sustainable" legal education is still hard to define—I am using this shorthand to indicate legal education that both makes students aware of the substantive connections between law and sustainability in a broad sense and ultimately yields legal practitioners whose daily practice is informed by sustained engagement with such knowledge.[10] Thanks to the increased awareness of the imminence of the threats posed by global warming and other approaching environmental tipping points,[11] sustainable legal education is an emerging theme. Young has recently articulated some core tenets of a more sustainable legal education, along matters of substance, methodology and approach:

> First, I offer an argument about substantive law. Lawyers dealing with climate change—either in teaching, research, practice or broader advocacy—require proficiency across different areas of law, not just law seeking to limit greenhouse gas emissions. Secondly, to better understand how these areas of law fit together, and how they should fit together, there is a need to engage with theory—including but not limited to theories of fragmentation and regime interaction in international law. Students should be encouraged to ask fundamental questions about the functions of legal rules, institutions, and constitutional orders. Thirdly, legal education must incorporate a critical perspective, which encourages ethical and moral evaluations as well as strategic awareness. Engaging with critical perspectives also enables us to ensure that legal action to address climate change does not perpetuate structures within the international legal system that have historically marginalized and disadvantaged some members of the international community.[12]

[6]Here, I am adopting the same abbreviation used by other contributors to the special issue in their pre-published drafts, on the assumption that the authors have implicitly sanctioned its use.

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

[8]This is a methodology Micklitz has written about in the past. *See* Hans-Wolfgang Micklitz, *The Bifurcation of Legal Education–National vs. Transnational*, *in* LEGAL EDUCATION IN THE GLOBAL CONTEXT 43–60 (2017).

[9]*See* NEW PRIVATE LAW THEORY, http://newprivatelawtheory.net (last accessed May 15, 2022).

[10]This definition leaves out an aspect that others have started to consider, namely the sustainable running of legal education on a day-to-day basis, including use of power sources, materials, etc.—this could extend to, e.g., travelling practices, including the environmental cost of intercontinental moves for educational purposes. None of these aspects are considered in the present paper. *See* THE SOCIETY OF LEGAL SCHOLARS, https://www.legalscholars.ac.uk/the-law-school-and-the-climate-crisis/ (last accessed May, 15, 2022) (giving the broader agenda set out by the UK's Society of Legal Scholars).

[11]*See* Timothy M. Lenton, Johan Rockström, Owen Gaffney, Stefan Rahmstorf, Katherine Richardson, Will Steffen & Hans Joachim Schellnhuber, *Climate Tipping Points—Too Risky to Bet Against*, 575 NATURE 592 (2019).

[12]*See* Margaret A. Young, *Climate Change and Law: A Global Challenge for Legal Education*, 40 UNIV. QUEENSL. L. J. 351, 353 (2021).

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Young's blueprint is helpful as a starting point, but it seems warranted to think that further reflection is needed, in particular—albeit not exclusively—on how it can be translated to private law. In the following sections of this short article, I will show how the five core theses of NPLT are a promising stepping stone for exactly this translation work. In each thesis, I have simply replaced "sustainable legal education" for "New Private Law Theory" so a reader who does not have fresh memories of the five original theses can easily reverse-engineer them.

I. Thesis One: Sustainable Legal Education Is Pluralistic—It Must "take into account the findings of different disciplines in order to develop an adequate description of society."[13]

The climate crisis is one of the obvious external phenomena which are laying bare the limitations of positivistic legal education. Understanding the role of law in the crisis and the meaning of material and scientific developments to legal questions requires different tools than those of systematic doctrinal analysis. This fact may be underplayed by some of those who still see doctrinal scholarship as the almost exclusive tool academia must generate for legal practice,[14] but it is beyond doubt that mastery of the (climate) science has become an essential tool in law and sustainability, not only in climate litigation. Any serious considerations around, for example, contract law in the circular economy requires knowledge of production mechanisms, waste disposal chains, and so on.[15] This external knowledge must be empirical as well as theoretical in nature: "findings of different disciplines" may refer to knowledge of relative footprints[16] as well as, for instance, to social theories of consumption that go beyond the individualist paradigm of traditional as well as behavioral economics.[17]

NPLT involves "drawing on the insight and knowledge which exists in a whole range of disciplines beyond legal doctrine—legal and social theory,"[18] which in particular calls to resist reductionist temptations to gold-plate one form of interdisciplinarity or theory.[19] This is particularly crucial in legal education: while there is arguably no harm in individual scholars focusing on one specific "law and" approach throughout their careers, a similar single-mindedness in education would evidently fail to make students appreciate complexity—including, and perhaps especially in the context of the climate crisis.

II. Thesis Two: Sustainable Legal Education Is Comparative—It Takes Into Account Different Legal Systems, but also Different Theoretical Traditions.[20]

As a global problem, sustainability cannot be unpacked, understood or addressed within the conceptual and physical limits of a specific jurisdiction.[21] Furthermore, the need for speed in sustainability policy means any new development, pioneering enterprise or promising idea should be

[13] *See* Stefan Grundmann, Hans Micklitz & Moritz Renner, New Private Law Theory: A Pluralist Approach (2021), at 1.

[14] *See infra* under III: NPLT is application oriented.

[15] *See, e.g.*, the multiple chapters devoted to production processes, technological and economic insights in Bert Keirsbilck & Evelyne Terryn, Consumer Protection in a Circular Economy (2019).

[16] *See, e.g.*, Hans Micklitz, Nikola Schiefke, Christa Liedtke, Peter Kenning, Louisa Specht-Riemenschneider, & Nina Baur, Onlinehandel im Spannungsfeld von Verbraucherschutz und Nachhaltigkeit, Sachverständigenrat für Verbraucherfragen (2020) https://www.svr-verbraucherfragen.de/wp-content/uploads/201110_SVRV_PB3_Onlinehandel_DEU_bf.pdf.

[17] *See, e.g.*, Jenny Rinkinen, Elizabeth Shove & Greg Marsden, Conceptualising demand: A distinctive approach to consumption and practice (2020).

[18] *See* Grundmann et al., *supra* note 13 at 10.

[19] This reminds us that teaching "theory" is not in itself a guarantee of methodological openness. For an argument in this direction, see Guilherme Vasconcelos Vilaça, *Why Teach Legal Theory Today?*, 16 German L.J. 781 (2015).

[20] Grundmann, Micklitz, and Renner, *supra* note 13 at 2.

[21] *See also* Young, *supra* note 12 at 362.

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circulated broadly irrespective of national or disciplinary border. Comparative law, in this respect, appears as a fruitful and even necessary aid. As GMR posit, however, "a pure functionalist understanding and use of comparative law is not enough".[22] The so-called functional method of comparative law has been long accused of both downplaying differences among legal systems and silencing plurality *within* systems by reducing normative complexity to one—possibly idiosyncratically selected—function.

"Sustainability functionalism," in this respect, would be no less problematic than more traditional functional comparisons. Obviously, sustainability is contentious ground, with different understandings, agendas and strategies at play: we can hardly doubt that rights-of-nature activists and Blackrock's CEO,[23] while all arguably invested in the sustainability policy debate, have rather different priorities and preoccupations. Far from being tantamount to a form of both-side-ism, then, NPLT's methodology of "plural comparison" is not only a necessary prerequisite of its critical commitment—see thesis five, but also a fundamental feature of its translation for sustainable legal education: students should be trained to see sustainability debates as variously situated and *still* learn to recognize and appropriate what different contributions have to offer for their academic and professional growth.

III. Thesis Three: Sustainable Legal Education Is Application Oriented. "It is precisely the concrete problems of private law and the application of theoretical insights to these problems that make it possible to fruitfully combine the findings of different disciplines and traditions."[24]

This is a core insight in the matching between NPLT and sustainable legal education. Educating more sustainable lawyers, as Young admits, requires theory. Not only will positivist teaching alone not suffice, context—including the one coming with comparisons—without theory is also doomed to fail. If students are indeed, per point two, to discern input coming from different corners, they need the theoretical tools to do so—to organize, rank, challenge and so forth. In fact, one could say, this is exactly the work law students are traditionally trained to do by relying on one theory—legal positivism. Young's call, then—when she lists "legal pluralism, polycentric governance, systems theory, earth-systems jurisprudence, theoretical and historical accounts of the commons and common-pool resources" as some relevant theoretical approaches—is in fact highlighting the need for *theories*, not a single theory.[25] Pluralist theoretical teaching going way beyond the classic handbook distinctions between positivism and natural law, liberalism and critique, deontological and utilitarian approaches is what sustainability *practice* requires.

In the context of sustainable legal education, "application-orientedness" requires much more than thinking about rules in connection with their impact on individual cases; in this, NPLT's vision of such orientation is a needed bridge between diverging positions in legal academia which are coming to the surface in several contexts. This is, indeed, fraught terrain. Against shifting positions in legal research and its funding, increasingly the fear is spreading that legal research is losing its relevance for legal practice—a criticism famously articulated in the US context by Chief Justice Roberts a good decade ago,[26] which has resurfaced more recently in the United

[22]*See* GRUNDMANN ET AL., *supra* note 13 at 2.

[23]*See* Larry Fink, *2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter ("We focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients").

[24]GRUNDMANN, MICKLITZ, AND RENNER, *supra* note 13 at 3.

[25]*See* Young, *supra* note 12 at 363.

[26]For a highly enjoyable reaction, *see* Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in Eighteenth Century Bulgaria*, 18 GREEN BAG 2D 251 (2015).

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Kingdom with the input of another Supreme Court justice.[27] Theory minded scholars can be tempted to react to these accusations by entrenching in their positions, calling out the methodological and theoretical underpinnings of such doctrinal critiques and countering that legal scholarship carries responsibilities to a wider community than practicing lawyers.[28] Since legal education, including sustainable legal education, requires academics of different orientations to cooperate fruitfully, how to reach a compromise?

NPLT's orientation towards application is of help: it does not seem to reify what a "problem of private law" requires in the way that Roberts-style critique does, but rather to take a constructivist stance where there is space to say that more or less any sufficiently complex problem can become "a private law problem" at the one or the other stage. This understanding is reinforced by the "problems" identified in the book's two central parts, which are what the theories are called to relate to: the concrete cases identified in each chapter as starting point are important illustrations, but it is not always the case that the analyzed theories have to offer much insight on the specific outcome or reasoning in the case. As a largely sociologically informed theory of law,[29] NPLT is in a position to recognize that in principle the *type* one ascribes to a certain theory should not be leading in deciding about its incorporation and relevance. This stays true even though the authors include as a restriction that theories must "have been 'reconstructed' from a legal value perspective." [30]

IV. Thesis Four: Sustainable Legal Education "is neither state centred nor exclusively national. It deals with private law wherever this exists—in the nation state, in the European Union and in transnational contexts."[31]

The fourth thesis seems to express GMR's commitment to various manifestations of transnational law and private ordering.[32] This is a crucial affinity between NPLT and the emerging areas of law and sustainability. Not only are developments in this area transnational in the way that has been traditionally associated with the term, they are transnational to the extent that given the shared challenge sustainability poses to humankind, developments taking place locally both *rely on* and further *influence* activities taking place elsewhere. This is particularly obvious with reference to climate litigation, but holds well, *mutatis mutandis*, for developments in the area of private regulation, market regulation and emission markets.

A now, classical example is, of course, the influence the Dutch *Urgenda* case *and* namesake foundation have exerted and still exert on litigation elsewhere: the claimants in the recent Italian *Giudizio Universale* suit[33] have made clear that not only their case is to an extent modelled on the legal grounds of the original *Urgenda* claim, they have in fact been extensively consulting with the Dutch legal team as well as, crucially, consulting the same climate science expertise group in order to put together the factual basis of the claim.[34]

[27] *See* Andrew Burrows, *The Lionel Cohen Lecture 2021*, UKSC 14 https://www.supremecourt.uk/docs/lionel-cohen-lecture-2021-lord-burrows.pdf (last accessed May 15, 2022).

[28] *See* Geoffrey Samuel, *What is the Role of a Legal Academic? A Response to Lord Burrows*, 3 J. Soc'y for Advanced Legal Stud. 305 (2022).

[29] *See* Grundmann et al., *supra* note 13 at 35.

[30] *Id.* ("We welcome and advocate the broad inclusion of social theory—in combination with traditional legal theory – when it comes both to addressing doctrinal questions and to applying and further developing the law, but only such theories that have been 'reconstructed' from a legal value perspective").

[31] *See* Grundmann et al., *supra* note 13 at 4.

[32] The distinction seems necessary to the extent that the book devotes two separate chapters to the two phenomena. Indeed, private ordering need not take place *beyond* the nation state.

[33] *See* Climate Case Chart, http://climatecasechart.com/non-us-climate-change-litigation/.

[34] *See* Eleonora Marrocco, *Universal Judgment: The First Climatic Cause in Italy—Interview with Prof. Michele Carducci*, Ecologica, (July 7, 2021), https://www.ecologica.online/2021/07/07/giudizio-universale-la-prima-causa/; Michele Carducci, *Are Climate Change Litigations Possible in Italy?*, Blogdroiteuropéen, (June 17, 2020), https://blogdroiteuropeen.com/2020/06/17/featured/.

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Legal education needs to help students identify entanglements between private law and sustainability "wherever they exist:" think of legal officers at institutions drafting circular procurement contracts, ESG investments and green credit, "green" tenancy, food supply chain terms and conditions or energy contracts. The transnational dimension is in particular relevant from the perspective of preventing "carbon leakage" of sustainability measures and more generally understanding the full implications and context of an every-growing score of initiatives, policies, decisions.

V. Thesis Five: Sustainable Legal Education "reflects critical approaches to private law. Both belong together. [It] 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."[35]

As we have seen above, Young expressly posits that sustainable legal education needs to engage with critique. She points to two different ways in which climate change action needs to explicitly consider distributional dimensions, namely the disparate impact of climate mitigation measures on indigenous and other vulnerable peoples and the generational gap highlighted by cases like Australia's Youth Verdict case. Young's conception of critique is broadly resonating with NPLT's articulation, even though the latter is more layered. GMR seem to understand critical engagement first and foremost as an epistemic standpoint, "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."[36] However, they are of course aware of the type of critique echoed by Young's distributional concerns—as reflected by their reference to, in particular, Duncan Kennedy's work which made distributional analysis prominently enter private law scholarship. We may thus assume that such critique will also be part of the constant self-reflection the authors call for.

Crucially, GMR's critical self-reflection expressly invites engaging beyond eurocentrism and global north perspectives in implementing comparisons and selecting non-legal insights. This is objectively a sore point in discussing comparative private law didactics, which has long entrenched notions like "comparability" alongside obviously tainted understandings of "legal families" and reinforced received ideas about private law neutrality through various forms of functionalism. In this respect, the book helpfully highlights how law and economics has famously helped further undermine comparative law's neutrality credentials with the help of the controversial legal origin theory. While the book shows well how problematic both the theory itself and its reception have proven, it also traces how the legal origins debate has pushed comparative lawyers to engage with colonial legacies and the political and institutional choices obscured or undermined by legal origins literature.[37]

C. NPLT as Systems Theory and the Compartmentalization Problem

Despite all the resonance between NPLT's core theses and an agenda for structurally incorporating sustainability in one of the core tasks of legal academia—legal education, the book itself offers little in the way of reflections or materials on private law and sustainability. In fact, a traveler from a different universe finding the book in the future would not at all be able to guess that pretty much every year between publication of the book's German twin in 2015 and the Cambridge University Press 2021 version ranks among the ten hottest years on record. This is particularly remarkable of a book which is self-declaredly "application–oriented," as sustainability and climate change risk

[35]*See* GRUNDMANN ET AL., *supra* note 13, at 4.
[36]*See* GRUNDMANN ET AL., *supra* note 13, at 5.
[37]GRUNDMANN, MICKLITZ, AND RENNER, *supra* note 14, Chapter 5.

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have been extremely high on the agenda of many of the areas which are of interest to the authors—from finance to corporate social responsibility. Remarkably, the most prominent mentioning of the climate question within the book comes with the discussion of *Private law and democracy* in chapter nine and implicitly adopts a framing—separation of powers and judicial activism/discretion—that has made the *Urgenda* case more controversial than, for instance, its German counterpart.[38] The chapters on Values—chapter seven; Risk, Tort and Liability—chapter fifteen; Organizations and Public Goods—chapter twenty-two, in contrast, see (surprisingly) little references to sustainability or ideas of ecological crisis.

At a micro level, engaging with sustainability may certainly have put some statements to the test. To give but one example: the growing human rights turn in climate and environmental matters[39] seems to cast a new light on the idea of "constitutionalization of transnational law" that is occasionally hinted at in the book.[40] While it may still be possible to claim that, "In all likelihood, the constitutionalization of transnational law can only be achieved through the very process that is its defining feature: a communicative process transcending the boundaries between domestic and international, between private and public law,"[41] this communicative process may look a whole lot different if seen in the light of increased calls for climate change accountability.[42]

In all fairness, however, a version of NPLT that would have—incidentally or—structurally engaged with sustainability would have likely been a very different book throughout—so I will not spend the final part of this paper reproaching the authors for not having written s*ustainable new private law theory*. However, I think highlighting, here, certain ways in which sustainability may engage with the book's tenets is of value, not only because the authors have expressly invited supplementation—in fact, such engagement may invite reflection on certain underlying choices and allegiances which the authors claim or ultimately hold. In particular, I think there is a tension between NPLTs declared attention for *critique* and its close proximity to systems theory.

I. Pluralism and Operative Closure

NPLT's claim to disciplinary openness has been discussed above: the authors claim that all disciplines are suitable for inclusion in NPLT's paradigm *insofar as* they can be or are translated to legal discourse. This stance is in fact a relatively faithful reflection of the cognitive openness of legal systems to external *facts* in the systems theory paradigm: it does however entail that, by virtue of the system's *operative closure*,[43] external knowledge needs to be reified in order to be "brought in."[44] This specific filter, in fact, goes beyond restricting access to disciplines and thinkers that

[38]*See* BVerfG, 1 BvR 2656/18, Mar. 24, 2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html. For a challenge to this framing, see Christina Eckes, *Separation of Powers in Climate Cases: Comparing Cases in Germany and the Netherlands*, VERFBLOG, (May 10, 2021), https://verfassungsblog.de/separation-of-powers-in-climate-cases/.

[39]*See* Julie Fraser & Laura Henderson, *The Human Rights Turn in Climate Change Litigation and Responsibilities of Legal Professionals*, NETHERLANDS Q. HUM. RTS (2022).

[40]*See* GRUNDMANN ET AL., *supra* note 13 at 28 (juxtaposing ideas of "self-constitutionalization" with approaches "which, under the heading of global constitutionalism, elaborate an international constitutional order that delimits private rights under reference to human rights"; the theme comes back in Chapter 16—Digital Architecture of Private Law Relations—especially qua "societal constitutionalism").

[41]*Id.* at 483.

[42]Procedurally, by enlarging the scope of world citizens and entities who would need to be included substantively, by bringing to the forefront pressing human rights concerns associated to climate instability and environmental degradation, not to mention concerns on behalf of non-human entities. See also, in this Special Issue, Chantal Mak's contribution explicitly drawing a connection between constitutionalization and communication theories.

[43]Tellingly, the aspect of systems theory most extensively discussed in the book. *See* Chapter 4, *Private Law and Theories of Communication* for which the second chapter from Luhmann's *Law as a Social System*—that is, the one devoted to operative closure—is one of the two main reference texts.

[44]This follows from the basic articulation specific to the legal system, which distinguishes norms and facts. To the extent that non-legal knowledge is not providing norms, it must be that it ultimately provides facts.

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have already done the "translation work"—a good example of which is the chapter on Private Law and Sociology, chapter three, understandably centered around two thinkers who both gave private law a prominent position in their social thinking: it quite systematically favors more positivist approaches *to social sciences* over critical and constructivist takes.

While examples of this type abound, I would like to focus here on one that is situated at the very inception. GMR prominently rely on hermeneutics[45] and, while the chapter which more specifically delves in it—chapter one: *The inside and the outside of law?*—focuses on Esser, Grundmann treats us to a small diversion on Gadamer's contribution, namely "a much more dynamic and relational concept of what happens during an individual's reconstruction of documents, utterances and the world around them." This conception is relational insofar as, Grundmann observes, Gadamer puts the focus not on the document or the individual but on *the reconstruction as such*, that is in fact the relation between document and interpreter. This poses us before an apparent contradiction: while the book nods approvingly to Gadamer's relational hermeneutics, and despite their reliance on hermeneutics as a privileged interlocutor throughout the book,[46] GMR do not seem to ever question the core separations instituted by existing legal arrangements: "contracts," "markets," and so on are all seen as relatively self-standing social facts in some sort of normative relation with the law—rather than as intrinsically co-constituted by the law. In this optic, the failure to incorporate the climate crisis or other normatively salient human constructs—only one chapter is devoted to digitalization—grounds the authors in social science positivism more than in any strongly constructivist tradition. While legal positivism is, in fact, to an extent problematized in several places, the epistemological status or attitude of other disciplines considered in the first part is hardly discussed—exemplary in this sense is, again, the comparison between Weber and Durkheim, which focusses mainly on their different understanding of freedom of contract but says little about the methodological differences between the two; in particular, it seems to me that Weber's resistance to the social science positivism of his time and its attempts to formulate social laws rather than understand contextualized social action is of importance for the transmission of his work to a legal audience.[47]

II. Systems, Earth System and Private Law

What does this have to do with sustainability? In fact, one can hardly accuse systems theory of having no interest in the environment: Teubner, for one, has made important contributions to environmental law[48] and significant strands of environmental law theory in this century connect directly to systems theory or borrow some of its language. However, the limitations of this approach are indirectly captured by Young where she explains—with multiple examples—that in the climate crisis *we are all climate lawyers*.[49] Classic system-theoretical approaches are comfortable compartmentalizing law and theories on the basis of certain functions, but such compartmentalization proves inadequate against the over-encompassing nature of human impact on the climate[50] and ecosystems and with a view to supporting transitions that need to be both

[45]*See* Hanoch Dagan, *"New Private Law Theory" As a Mosaic: What Can Hold (Most of) It Together?*, In this issue.

[46]*See also* Grundmann et al., *supra* note 13 at 12 ("At its core, the idea as applied to law is that communication is an ongoing process that develops out of the interplay between the parties to the communication . . . and that in this process the various preconceptions of the parties are all relevant, to be bought together, to be altered and to be perfected over and again").

[47]*See* Max Weber, Weber: Selections in translation 3–6 (1978), Alan Sica, *The Emergence of Sociology and Its Theories: From Comte to Weber*, 2 *in* The History of Continental Philosophy (Alan D. Schrift ed., 2010).

[48]*See* Environmental Law and Ecological Responsibility The Concept and Practice of Ecological Self-Organization (Lindsay Farmer, Declan Murphy, & Gunther Teubner eds., 1994).

[49]*See* Young, *supra* note 13 at 356.

[50]It is possible to trace the "Anthropocene" as far back at the 17th century, but an acceleration of human impact has taken shape since the second half of the 20th century. *See* Simon Levis & Mark Maslin, *Defining the Anthropocene*, Nature 519, 171 (2015).

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far-reaching and quick. "Earth system law," among others, is an emerging approach that owes much to systems thinking but explicitly seeks to overcome compartmentalizations that "make law more reductionist, increase the risk of creating contradictions within law, and undermine law's overall effectiveness in addressing earth systems transformations."[51]

From this perspective, engagement with emerging debates on sustainability would pose an interesting theoretical challenge by highlighting the tension between NPLT's more constructivist elements and its embrace of positivism in various forms. Systems theory is, in other words, the red thread connecting the book's tendency to pigeonhole critique and the missing engagement with sustainability debates. From the perspective of critical scholarship, indeed, it is difficult not to notice that approaches that would be seen to belong to this tradition tend to appear not so much where classical core notions and presented and could be challenged, but in somewhat pre-determined areas: most notably, the chapter on Non-discrimination—chapter fourteen, with a contribution by Catharine MacKinnon paired to a, comparably skeptical, paper by Alexander Somek, and a classical piece by Foucault somewhat unsurprisingly featuring in the chapter devoted to Private Power—chapter thirteen. My reading of the book as well as the index, however, suggest that the notion of power is hardly recurring in chapters other than the one specifically referring to it in its title;[52] this makes it look somewhat consistent that MacKinnon's feminist perspective appears in the chapter on non-discrimination but that, for instance, feminist critiques do not feature in the chapters devoted to contracts or legal personhood. Anna Grear's work casting the disembodied personhood of corporations as the real "anthropos" in Anthropocene discourse is but one prominent example of legal theory which aims to bring critique to the core of private law institutions in the specific context of the ongoing environmental crisis.[53]

Take the questions raised by a very recent shareholder lawsuit by NGO Client Earth against the Board of Directors of—no longer Royal Dutch—Shell, which claims the Board has violated its legal duties under UK company law for not implementing a climate plan ambitious enough to safeguard the company against long-term climate risk.[54] The cases raise some questions which are entirely novel and also renew some other questions which have been recently posed by other cases: what does an accelerating climate crisis entail for the understanding of a company's interest? What is the standard against which companies—and here their directors—can be held? In particular, to what extent is it a normative standard—what a reasonable director should do—and to what extent is this standard colored by practice—what other reasonable directors are doing?[55] To what extent is techno-optimism, such as promises of carbon capture techniques, geo-engineering and so *in the future* a sufficient legal defense to temper obligations to act *now*? From the perspective of company law, the lawsuit represents a very concrete instance of conflicting notions of corporate interest: how should the company's short- and long-term interests be balanced against each other when possibly conflicting? But also, different forms of risk calculation may be brought up

[51]*See* Louis J. Kotzé, Rakhyun Kim, Catherine Blanchard, Joshua Gellers, Cameron Holley, Marie Petersmann, Harro van Asselt, Frank Biermann, & Margot Hurlbert, *Earth System Law: Exploring New Frontiers in Legal Science*, 11 EARTH SYST. GOV. 100126, 3 (2022).

[52]*See* GRUNDMANN ET AL., *supra* note 13 at 28 (While a "power problem" is mentioned with reference to dominant actors on the internet at page 28, the chapter devoted to the *Digital Architecture of Private Law Relations* seems to evaporate the power question in the contraposition between code and societal constitutionalism).

[53]*See* Anna Grear, *Legal Imaginaries and the Anthropocene: 'Of' and 'For,'* 31 L. CRITIQUE 351 (2020); Anna Grear, *Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric 'Law and Anthropocene 'Humanity,'* 26 L. CRITIQUE 225 (2015).

[54]*See* ClientEarth Communications, *We're Taking Legal Action Against Shell's Board for Mismanaging Climate Risk*, CLIENTEARTH, (Mar. 15, 2022), https://www.clientearth.org/latest/latest-updates/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/.

[55]See on this in particular the forthcoming exchange between Laura Burgers and Benoit Mayer in Transnational Environmental Law. Mayer's contribution is already published in early access mode, see Benoit Mayer, *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation*, first view TRANSNATL. ENVIRON. LAW (2022). Burgers' response on file with the author.

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when it comes to assessing the long-term risk, which again courts would have to consider and review. Engaging with these questions seems to require social theories that go beyond limited practice communities—hence clearly beyond the lessons one can draw from the likes of Bernstein—and engage with the broader social meanings of (public acquiescence to) nonchalant corporate behavior.[56] It will also require comparing traditional theories of economic activity with accounts that incorporate awareness of planetary boundaries and, more broadly, a willingness to critically engage with natural and "exact" sciences beyond classic questions of certainty and proof.[57]

D. Wrapping Up

In conclusion, this comment has sought to use NPLT as a first step towards translating an agenda for sustainable legal education to the domain of private law. I hope to have shown, within the limits of the given format, that this is a worthy application of NPLT's method and core theses. Through its substantial engagement with positivist traditions *and* its openness to all knowledge that matters to a relevant—broadly defined—legal problem, NPLT offers a credible plan and even a plausible checklist for integrating sustainability in the core of the legal curriculum. At the same time, the contribution has sought to trace back the lack of engagement with sustainability *within the book* to a tension intrinsic to the authors' close affinity with classical systems theory: the tension between systems' epistemological constructivism and the operative closure requiring compartmentalization and a strong "filter" that entails a degree of flattening of external knowledge to a form of factual input. It seems to me that the success of GMR's proposal to their global audience,[58] that is its suitability for a broad reception and long-term relevance, hinges in no little part on its practical ability, in the coming years, to incorporates different types of knowledge—and critique—that go beyond sub-systems and take stakes with the high degree of interconnectedness displayed by several of the wicked problems that, also, private law will have to deal with in the current century. Both private law theory and sustainable legal education seem in the midst of an accelerating transition. The authors have certainly done impressive work to further fuel such development.

[56]*See, e.g.,* Clemens Kaupa, *Smoke Gets in Your Eyes: Misleading Fossil Fuel Advertisement in the Climate Crisis*, 1 J. EUR. CONSUMER MKT. L. (2021).

[57]Incidentally, it is worth mentioning here how developments in so-called attribution science have quickly made many caveats voiced in the past as to the viability of climate tort sound rather obsolete. *See* Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 57 (2020).

[58]*See* GRUNDMANN ET AL., *supra* note 13 at 3, 32 (In the introductory chapter, alternatively described as "a global legal community" and "the whole legal community" (32)).

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