

Book Review

Hanoch Dagan: *Reconstructing American Legal Realism & Rethinking Private Law Theory*. Oxford University Press, Oxford 2013.

Andrew Halpin*

What is required these days of legal theory, or jurisprudence in the Anglophone part of the world, is not altogether clear. The idea that the theoretical branch of academic law could be secured as legal philosophy, with a primary focus on municipal law, sustained a period of reinvigoration and flourishing for jurisprudence following the publication of Hart's *The Concept of Law*, but more recently that approach has given rise to doubters and detractors. Even among those who wish to hold onto Hart's analytical tradition, there are serious misgivings that this can be applied so crudely to municipal law, and a number of efforts have been made to amend Hart in ways that can deal with the phenomena of transnational law or other forms of non-state law (Culver and Giudice 2010; von Daniels 2010; Croce 2012). More fundamental objections that have questioned the taking over of the province of jurisprudence by legal philosophy include Allan Hutchinson's efforts to radicalise jurisprudence (Hutchinson 2009). The title of a recent article by Roger Cotterrell makes the challenge unequivocal: 'Why Jurisprudence is not Legal Philosophy' (Cotterrell 2014).

Yet this countering of legal philosophy with a focus on municipal law as a secure basis for legal theory can be destabilising in a number of ways. In one respect, there is a lack of a definite subject matter. As William Twining, an energetic supporter of expanding the subject matter of jurisprudence, has pointed out, there still needs to be a central recognition of the jurisdiction-specific study of law in a more expansive understanding of legal theory (Twining 2009). In another respect, there is the risk of legal theory freed from the constraints of an analytical grasp of the narrowly

* Professor of Law, National University of Singapore.

legal being seized by normative ambitions and made subject to restrictive political agendas, thus imposing a different type of limitation on the remit of jurisprudence (Halpin 2010). An underlying problem for both of these concerns is how to establish legal theory as a distinctively legal theory. A related concern is that legal theory might reasonably be expected to engage with the substance of the law.

In this troubled setting for legal theory, Hanoch Dagan's efforts to produce a theory of law through a reconstruction of American legal realism are to be welcomed as offering thoughtful and stimulating responses to the basic problems that legal theory needs to grapple with. His more recent book (Dagan 2013), reviewed here, follows on from his earlier treatment of property (Dagan 2011) in a book whose ambition is measured by the three levels on which his theory of property operates. There Dagan provides an analysis of property in the law; he locates this analysis within a general jurisprudential outlook on law; and, he ties in his understanding of property to a political ideology dominant in western democratic societies. His theory of property is, in turn, pluralist in a technical analytical sense, realist in a jurisprudential sense, and pluralist in a liberal ideological sense. The present book expands and refines Dagan's approach, in tackling private law more generally, but more significantly in addressing a number of possible objections that might be raised against his reconstructed realism.

Dagan's theory remains a theory of municipal law, but as a matter of focus rather than necessary restriction. Reconstructed realism for non-state law is still a fairly open question (Dagan 2013, 128 n88). However, the crucial advantage of Dagan's approach is that his theory of law is founded on what he perceives to be truly distinctive about law, and about law as it is practiced. And so it has promise of delivering a theory of law in the fullest sense.

1. Dagan's ambitions for legal realism

Within an introductory first chapter and a fuller treatment of his attempt to reconstruct legal realism in chapter 2, Dagan spells out the fundamental premise of his entire enterprise. It amounts to this: only the realists (that is, the American legal realists) have identified the truly distinctive character of law, and so only a realist theory of law will be capable of portraying a full picture of law. In more detail, the distinctive character amounts to a state of accommodating three irreducible tensions; and the failings of competing theories of law amount to latching onto one side of one of these tensions, and distorting it as a full representation of law's character (Dagan 2013, 2, 3, 8 15, 67-68).

Dagan openly admits that he is reconstructing rather than expounding an historically accurate realist conception of law, but claims to be doing so in the spirit of charitably combining the key insights of the American legal realists (Dagan 2013, 2-3). This enables Dagan to make a simple and bold challenge to any alternative theory of law, represented here in words taken from the opening pages of chapter 2, and the concluding page of the book:

Legal realism [...] stands for a specific conception of law irreducible to any other. [...] the legal realists' rich account of law as an ongoing institution (or set of institutions) accommodating three sets of constitutive tensions—between power and reason, science and craft, and tradition and progress [...]. Law can neither be brute power nor pure reason; it cannot be only a science or merely a craft; and it is neither concluded by reference to the past nor fully understood by a future-oriented perspective. Legal realists reject all these reductionist conceptions of law, which are in vogue in contemporary jurisprudence. [...] legal realism, by accommodating these three constitutive and irresolvable tensions, captures law's irreducible complexity [...].

[The realist legacy] captures a deep truth about the law, which is obscured both by legal formalists and legal monists as well as by the purported heirs of legal realism who discarded it in favour of a refinement of one feature of this complex conception of law. (Dagan 2013, 14-15, footnote omitted, 223.)

Chapters 3-10 unpack this premise in a variety of ways. They also build upon it. In chapters 3 and 4, Dagan allows the nature and role of legal theory to receive direct attention. In both chapters this is closely linked to a realist understanding of law. Chapter 3 emphasises an ambivalence between rational self-interest and other-regarding benevolence (or concern for communal interests) in the law as manifested in both law's subjects and law's servants—the judges. Dagan presents this double ambivalence or duality as helping to explain further the first constitutive tension between reason and power (Dagan 2013, 69-70). Of particular significance are a couple of concluding remarks in which Dagan draws from Christopher McCrudden (McCrudden 2006) in suggesting that the intellectual discipline of law has something distinctive to offer the social sciences, and then develops the prospect for legal theory to play an active role in nurturing the proper normative attitude towards specific institutions (Dagan 2013, 83 and n58). Chapter 4 reinforces the claim that legal theory has its own intellectual identity, neither collapsing into neighbouring disciplines nor being assimilated into the practical wisdom of professional practice. Dagan sees legal theory performing a synthesising role across the different (disciplinary and professional) discourses on law, while retaining a unique focus on 'law as a set of coercive normative institutions' (Dagan 2013, 85, 93, 97). He also takes the opportunity for pressing the claims of legal realism to fulfil this potential for legal theory (Dagan 2013, 95-96), and then again draws out an essentially critical aspect of legal theory's attachment to the specific condition of law: 'a reconstructive stage guided by the dynamic understanding of law as a great human laboratory continuously seeking improvement' (Dagan 2013, 96).

The remaining chapters of the book, 5-9, then convey Dagan's theory of law as affecting private law. Chapter 5 explores the debate between an autonomist understanding of private law values (as being isolated from broader social values and springing instead from the correlative positions of the parties in a private-law relationship), and the instrumentalist understanding that private law is merely

another form of legal regulation serving the promotion of public or collective values. Dagan rejects this dichotomy in insisting that the correlative entitlements of private law represent an ‘ideal vision of the pertinent category of interpersonal relationships’ (Dagan 2013, 127), and as such must be subject to collective values. Acknowledging pertinent categories, or a taxonomy of private law, forms the subject of chapter 6. However, taxonomy is recast here in a realist light as being dynamic, open to critical scrutiny, and more flexible (Dagan 2013, 137-42). Chapter 7 examines how remedies can be seen as substantively affecting the range of legal rights available, rather than being detached from a primary definition of the available rights. Like Dagan’s approach to taxonomy, this creates a more supple understanding of private law, but Dagan is quick to point out that this does not mean a descent into particularism or chaos (Dagan 2013, 133, 139, 145). It does, nevertheless, bring with it an explicit endorsement of pluralism (Dagan 2013, 159-60).

Chapter 8 provides the deeper theoretical underpinning for Dagan’s reconstructed realist understanding of private law. The key elements here depend on an initial assumption that society enshrines a liberal commitment to autonomy and individual choice. Once this is accepted, it follows for Dagan that law will display structural pluralism embodying a plurality of values, while also exhibiting a moderate perfectionism in ascertaining the appropriate balance or mix of values for each social or interpersonal context—manifested for property law in a specific property institution. This chapter connects tightly with Dagan’s earlier book on property, and could stand as an elaboration of the theoretical approach taken in that book. Apart from the deeper theoretical work undertaken here (which embraces Berlin’s value pluralism, Raz’s perfectionist liberalism, and a subtle distinction between foundational and normative pluralism, which enables Dagan to suggest that foundational monists may yet recognise the values of structural pluralism as instrumentally serving their preferred basic value), the argument is coordinated around Dagan’s appeal to the observational accuracy of the structural pluralism of his reconstructed realism (Dagan 2013, 162-63, 191-92), culminating in the recognition of a normative role for legal theory that is latent in a fully accurate picture of property institutions:

[T]he main task of property theory is to distill the distinct human ideals of the various property institutions, to elucidate the ways each of them contributes to human flourishing, and to offer, if needed, a reform that would force these property institutions to live up to their own implicit promises. (Dagan 2013, 191.)

Chapter 9 tackles a final objection that Dagan’s reconstructed realism, displaying structural pluralism with a normative perfectionist edge, cannot be reconciled to the rule of law. Dagan’s strategy here is to divide the demands of the rule of law into two, providing guidance and acting as a constraint on official power, and then to demonstrate with practical illustrations how these two demands can be met by his account of law. This chapter then serves to reinforce the observational accuracy of

structural pluralism made out in the previous chapter, together with the normative appeal of an approach which defends expectations and strengthens guidance, because the values being promoted in a specific private law institution fit what is regarded as appropriate, or even just, in society's understanding of the context in which that institution is found (Dagan 2013, 222).

2. Beyond realism?

If the three constitutive tensions identified by Dagan represent an accurate, realist, portrayal of the state of law; if, moreover, these tensions are irreducible; then certain implications follow both for the practice of law (or legal doctrine) and for legal theory. Dagan himself does not dwell on the full extent of these implications. First of all, each side of each of the three tensions is not in itself an uncontested position. Whose power, which reasoned account of the law, what scientific understanding, which deployment of craft, whose account of tradition, and which vision of progress, all amount to questions with a variety of possible answers. Secondly, the state of tension apparent in the three pairings indicates further variations in the way, or the point at which, each tension is resolved: how much power and how much reason, etc., on a particular occasion.

Although Dagan speaks, in the passage excerpted above, of the irreducible and irresolvable character of the three constitutive tensions, there is an obvious sense in which the tensions must be resolved, for any law to emerge at all. Now if on every occasion the tensions were resolved, and let us also suppose the preliminary contestability of the positions at each side of the tensions were similarly resolved, by some overarching normative viewpoint, then that normative viewpoint would effectively circumvent the tensions as representing a full account of the law; in other words, the tensions would be reducible.

On the other hand, if those tensions (and the preliminary contestabilities) could not be resolved by a common normative viewpoint, the tensions would be irreducible but then correspondingly the realist portrayal of law would be descriptively impoverished. All that could be said would be that somehow or other on every occasion requiring legal regulation these tensions get resolved, and that these are the factors (although the precise standing of each factor remains contestable) that may potentially play a part. This latter option would retain the realist portrayal of law in terms of the three constitutive tensions but would necessarily open up the space for a plurality of normative arguments over how law should develop, rather than running smoothly into an attached normative outlook.

So it would appear that if Dagan wishes to retain the distinctive character of law as only portrayed by realism, in terms of the three constitutive tensions, our attention is diverted elsewhere in seeking a convincing normative theory of how law should develop. As we have seen, Dagan does provide a detailed and impressive normative theory of law encompassing a moderate perfectionism. However, the consequences of accepting the points raised here are twofold: that Dagan's normative theory cannot be realist (in the sense he gives to realism); and that being external to

a realist account of law, it is but one contender as a normative complement invited by a realist portrayal of the state of law.

In this light, Dagan's structural pluralism and moderate perfectionism have to be regarded as not inherently realist but reliant on their own normative convictions and arguments. There is enough material in the book to point us in this direction, in seeing Dagan's efforts as providing a normative theory of law for western liberal democracies. The plausibility of this position cannot be fairly assessed here; Dagan's arguments are subtle and draw on a rich array of sources. Yet the very richness of his position does provide some ground for thinking that his is unlikely to be immediately recognised as the only normative account of law in western liberal democracies: notably, when it claims to reconcile foundational monism with foundational pluralism within structural pluralism.¹

The need to go beyond a stark realist portrayal of law is not new; nor is it alien to the realist tradition to seek to accommodate a normative softening of an otherwise descriptive starkness to which realism might be prone. Karl Llewellyn's 'situation sense', to which Dagan refers (Dagan 2013, 55-58), provides a glaring illustration. However, on delving deeper into Llewellyn's use of situation sense, it becomes apparent that the particular appreciation of the situation required comes not from a legal skill but from a common understanding. For Llewellyn a 'situational concept' lacks definition such as a formalist lawyer might impose but rather springs from a layman's understanding (Llewellyn 2011, 107).

William Twining takes the point further in suggesting that Llewellyn's notion of situation sense had its origins in commercial contexts where there existed a tightly-knit mercantile community with a well-established consensus on what the context required. For the judge or lawyer to possess situation sense in order to read a context correctly, it follows that what is required is not greater legal understanding but a closer affinity with the community affected by the context. Twining refers to Lord Mansfield dining regularly with merchants, to illustrate the point. He also speculates on the prospect of judges dining with trades union leaders. (Twining 2012, 224-25.)

In the absence of a community consensus, or in the presence of conflict between different sub-communities, Llewellyn's situation sense has no traction, and the confidence in law ascertaining the 'felt demands of justice' (Llewellyn 1960, 38), replicated in Dagan's 'legal optimism' (Dagan 2011, 31; 2013, 65, 138, 186), is misplaced. In the case of property law, the conflicting interests of different sub-communities (of landlords and tenants, of mortgagors and lenders, of landowners and ramblers, of farmers and ranchers, of spouses and creditors, etc) are rife.² And

1 At a concrete level, Dagan claims that a challenge to his normative approach must provide 'a detailed demonstration of its superiority' (Dagan 2013, 219), but this sidesteps the real challenge that comes not from a demonstrably superior but from a demonstrably alternative approach—a fairly easy option to demonstrate in an environment of value pluralism.

2 This is clearly illustrated in the conflicting interests (and values) evident in how an entireties estate should be viewed under USA law, a topic given particular significance in Dagan's earlier book. There he reports the different responses in state laws to this question (Dagan 2011, 9 and n15).

if a situation sense cannot be found within the resources of the law, as depicted by realism, then the felt need for a normative resolution of law's stark tensions has to be sought elsewhere, and is open to multiple responses.

3. Concluding remarks

What Dagan provides, in both this book and his earlier book on property, is a serious, well informed, and penetrating account of the workings of law, faithful to his realist commitments. From his detailed understanding of the workings of law Dagan operates effectively to challenge theoretical speculations that drift away from the realities of the practice of law, or need to suppress the observable variety of legal forms in order to promote a tidier theoretical construct. His theoretical censures are generally balanced and even-handed.³

More broadly in the service of legal theory, Dagan's work sets not simply a realist agenda but an attainable agenda for theory that is distinctively legal, in the sense of promoting theory that does engage primarily with law as it is practised. Where I have suggested, in the confines of this review, that his work might be questioned is in linking a normative theory into the realist account of the state of law, rather than seeing that account as providing an arena for different competing normative theories to engage with and seek to further refine the law. Space does not permit that debate to run its course here. What can be suggested is that the envisaged debate introduces the possibility of considering the relationship between descriptive legal theory and normative legal theory in a fresh way, and were that possibility to bear fruit it would also be testimony to the rich stimulation provided by Dagan's book.

³ As an example, see his treatment of Kennedy and Weinrib towards the end of chapter 9 of the present book.

Bibliography

Cotterrell, Roger: 'Why Jurisprudence is not Legal Philosophy'. 5 *Jurisprudence* (2014) forthcoming.

Croce, Mariano: *Self-sufficiency of Law. A Critical-institutional Theory of Social Order*. Springer, Dordrecht 2012.

Culver, Keith and Michael Giudice: *Legality's Borders. An Essay in General Jurisprudence*. Oxford University Press, Oxford 2010.

Dagan, Hanoch: *Property. Values and Institutions*. Oxford University Press, Oxford 2011.

Dagan, Hanoch: *Reconstructing American Legal Realism & Rethinking Private Law Theory*. Oxford University Press, Oxford 2013.

Halpin, Andrew: 'The Province of Jurisprudence Contested'. 23 *Canadian Journal of Law and Jurisprudence* (2010) 515-535.

Hutchinson, Allan: *The Province of Jurisprudence Democratized*. Oxford University Press, Oxford 2009.

Llewellyn, Karl: *The Common Law Tradition. Deciding Appeals*. Little, Brown & Co, Boston 1960.

Llewellyn, Karl: *The Theory of Rules*. Edited with an Introduction by Frederick Schauer. Chicago University Press, Chicago 2011.

McCrudden, Christopher: 'Legal Research and the Social Sciences'. 122 *Law Quarterly Review* (2006) 632-50.

Twining, William: *General Jurisprudence. Understanding Law from a Global Perspective*. Cambridge University Press, Cambridge 2009.

Twining, William: *Karl Llewellyn and the Realist Movement*. 2nd ed. Cambridge University Press, Cambridge 2012.

von Daniels, Detlef: *The Concept of Law from a Transnational Perspective*. Ashgate, Aldershot 2010.