

Economics and Philosophy in Private Law Theory

10th MetaLawEcon workshop

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Law and Economics scholars have long argued not only that economics can predict court decisions and normatively guide lawmakers but that it provides, or even reveals, the underlying economic logic of disparate areas of law, prime examples being contract law and tort law. Part of the initial appeal, and success, of economic analysis is related to this consequentialist view of (private) law in terms of incentive effects and social welfare.

To these positive claims some economists have added critical ones. Doctrinal legal scholarship based on concepts, form and system was enriched and sometimes even replaced by a parsimonious theory with explanatory power. Philosophical theories of private law based on autonomy, corrective justice and other moral principles have been seen as indeterminate: they cannot easily account for patterns in case outcomes and doctrinal details and it is for functionalist justifications or political economy explanations, to fill those gaps. Lawyer-economists have also argued that those moral concepts have no life of their own but are dependent on their contribution to further consequentialist goals like efficiency or a more equal income distribution.

Philosophers and doctrinal legal scholars have responded to this challenge in a variety of ways, both negatively, suggesting that economics is incapable of accounting for the conceptual structure, bilateral and backward-looking character of private law, and with positive claims, refining traditional and constructing new non-instrumental accounts.

In subsequent rounds of internal and external criticism the rival accounts have become more nuanced and sophisticated. For instance, many economists now admit that law does not only address “bad” people who need economic incentives: one of the functions of private law is expressive, that is to inform all people, including “good” people, what kind of behaviour is expected from them.

Where does this debate about the role of economics and philosophy in private law scholarship stand now and where should it go? This is the main question we shall address in an interdisciplinary workshop at the Bucerius Law School in Hamburg.

More specific issues to discuss include the following:

- What do, and should, private law theories try to achieve? What are the epistemic and normative virtues private law scholarship should aspire to?
- What are the *explananda* of private law theory: case outcomes, judicial behaviour, legal reasoning, doctrines, structures, institutions, ideological constructs?
- In what respects are economic theories superior to philosophical accounts or vice versa? Is it possible, and desirable to combine or integrate these rival theories, “vertically” or “horizontally”?

- What is private law *for*? Oxford legal scholar Tony Weir once suggested that even to raise such questions about doctrinal “ragbags” such as tort law is “silly.” Does doctrinal legal scholarship provide credible alternative accounts of (areas of) private law that are neither “economic” nor “philosophical”?
- What is the optimal level of generality in private law theory? Given the cultural diversity and temporal variation in law, how should scholarship go beyond a particular jurisdiction at a particular moment in time? Can philosophy reveal commonalities behind doctrinal diversity? Can economics?
- What is *private* about private law? In what sense are publicly enforceable interpersonal obligations private? If private law *qua law* is public, hence political, is there any room for recognising a distinctly *private* law at all?
- As property rights are established and redefined in light of policy goals; contracting practices are standardised and collectively regulated; compensation for accidents is often provided by various insurance schemes, is the domain of private law shrinking? Are non-instrumental theories losing in significance?

Papers on the questions above are especially welcome but submissions on any aspect of the general theme will be considered. Contributions from all relevant disciplines, using all methodologies are welcome.

There will be no participation fee charged for the workshop. Participants should make their own travel and accommodation arrangements.

If you want to present a paper, please submit an abstract of about 500 words for consideration to metalawecon@gmail.com by Friday, **15 March** 2019.

Selection of papers, as well as assigned discussants, will be determined by the convenors. The planned notification date is **30 March**. If your paper is selected you will be asked to provide a full draft no later than **20 June** to be circulated in advance among participants.

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MetaLawEcon is an interdisciplinary academic network focusing on foundational issues of Law & Economics. Gathering legal scholars, philosophers, economists and other social scientists across the globe, it has organised yearly workshops since 2010. Previous workshops were held at universities of Tilburg, Bielefeld, Frankfurt, Hull, Debrecen, Amsterdam, Lille, Helsinki and the European University Institute near Florence.