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Eller, K.H.

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Unboxing Transformative Private Law

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Unboxing Transformative Private Law

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Private law is tasked with two antagonistic missions in modern society; that is to facilitate steady ordering while allowing for openness and the autonomous pursuit of highly pluralistic life plans. The solution to the tensions resulting from this dual orientation towards stability and mobility is commonly found in the timeless abstractions of the legal institutions of property, contract, and personhood. In this view, (private) law becomes a passive and neutral enabler of change, irrespective of its direction. More drastically, the idea of law's impartiality in moderating social change has become a conceptual prerequisite for law's ability to serve both the status quo and future innovation. This is the deeper reason for the **puzzling fact** that the realist and critical tradition has left so little trace in the legal process. Their persuasive unmasking of law's inherent biases in privileging certain paths of innovation over others has paralyzed the concept of law in modern society.

Thinking of private law as being 'transformative' invites the possibility of defining the role of private law as constituting a medium of social transformation. Here, private law steps up to provide present-day answers to the impossible but necessary quest of the realist and critical tradition. To be sure, the attribute 'transformative' lends itself to a number of interpretations. For the purpose of this blog and the debate it hopes to initiate, this openness should be regarded an asset rather than as a disadvantage. The following

Author



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Klaas Hendrik Eller

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remarks on what 'transformative private law' could entail are formulated against this background.

To begin with, 'transformative private law' is quite likely not an emerging body of positive law; nor does it allude to a newly discovered function of law or suggest the installation of the values of social justice or sustainability at the top of legal maxims. Rather, it denotes an open intellectual endeavor to carve out the centrality of private law to grand societal challenges. Even if the ambition is decidedly not to solve such challenges *via directa* but through identifying legal leverages, the political nature of such a project is undeniable. Transformative private law hence finds allies in recent critical-analytical movements that have stressed the legal construction of social institutions, most notably **markets** or **supply chains**. A transformative private law draws on perceptive accounts of the formative role of private law. It rejects the idea of a 'natural', pre-political, or pre-legal order as a status quo that might be 'transformed', but rather assumes a continuous formation of social realities through private law and thereby detects possible sites of intervention. Related projects can be found under the flags of '**Law & Political Economy**', **economic sociology of law**, or socio-legal studies in various emanations.

The future of the Social Justice Agenda: Transformative European Private Law?

Almost 20 years ago, the **Social Justice Manifesto** rightly moved private law to the center of a value-driven discussion around the political and economic trajectory of the European Union. The task at the time was to counter the largely technocratic project of harmonization of private law and support an understanding of private law as not only reducing obstacles to trade but also positively contributing to building a Europe united in diversity. Consequently, the links between private law, identity, and democracy were central, and the Manifesto had (at least) one clear addressee, the European rule-setters of the Commission and the Parliament. 'Transformative private law' bears the potential to offer a contemporary reinterpretation of the Manifesto and to press ahead with its agenda.

A critique of private law can no longer be centered on the legislator, be it national or supranational. As much scholarship of the past decade has illustrated, private law is interwoven into questions of sustainability, inequality, and the environment at much subtler and enigmatic levels than that of identifiable legislative acts. Law's role in sustaining current models of socio-economic organization does not stem from section X of directive Y, but is anchored in law's imaginary of how political economy and markets should be organized by means of institutions like credit, property, labor, tax, money, or capital. Such imaginaries underlie both law as a professional practice and academic discipline and become more important with increasing complexity of society. They are not wholly at the disposition of the legislator—rather, changing imaginaries depends on a broader set of factors. Some of the most

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significant changes in the law are in fact brought about or implemented by judges (as shown i.e. in **Wieacker's** study of post-war German law), at the level of private standard contracts (e.g. in the **derivatives market**), or industry practice (e.g. on **sustainability reporting**). Many of these shifts are too fine-grained to ever become the object of public discourse or legislation.

While the Social Justice Manifesto sought for a place for private law in the euphoria towards an ever closer Union, a transformative perspective on private law today is concerned not primarily with private law design at a given constitutional moment. Rather, its contribution could be to put the purism of normative theories to the test and locate private law within the real-world contradictions of the global economic order. This would look behind the façade of the Habermasian idealizations of private and public autonomy that have dominated private law's glance at the social world. What sounds like a modest analytical ambition, in fact promises to be highly transformative: It permits the grasping of power dynamics, incremental processes, and remote effects that sit squarely with methodological individualism and its assumptions of what constitutes legitimate authority.

Transformative private law, individual agency, and democracy

Put this way, transformative private law brings to the fore the question of justice in private law, understood as both interpersonal *and* societal and as being shaped both at the micro *and* the macro level. It is this bridging that seems most difficult to penetrate in today's private law theory. Zooming into **'where the action is'** leads, in particular, rights-based and corrective justice theories to investigate the micro, while critical approaches are more often geared towards the institutional level. Transformative private law strives to overcome this cleavage and its underpinnings reflected by a division of labor between private law and regulation, as spelled out by, for example, Rawls. Excluding private law from the status of the basic structure of society has improperly exempted private law from reflecting upon its role beyond the interpersonal level—and it has precluded private law practitioners and scholars from thinking of private law as transformative.

On the other hand, public law and, even more so, constitutions, are seen much more comfortably as a vehicle of change. For instance, under the notion of **'transformative constitutionalism'**, a growing group of scholars explores the role of constitutional documents and courts in transitions towards equality and a culture of justification of power, predominantly in the countries of the Global South. Such **'activist constitutionalism'** makes use of provisions on positive and socioeconomic rights that have repercussions in the private sphere. It can pursue diverse political aims whose common denominator is the attempt to steer state action towards more just and equal societies.

Transformation of law qua law

Why is it that transformation through constitutional activism is championed as emancipatory, whilst transformative private law is suspected of having a **slight totalitarian undertone**? Two reasons come to mind: First of all, decades of thinking about private law as instrumental towards completing the Internal Market have overshadowed the fact that private law, even if geared towards substantive goals, always bears a specifically legal rationality of its own. When relegated to an expression of the legislator, we overlook law's force as an institution in its own right that empowers and disempowers people, organizations, states, discourses, and processes. This understanding of law—as a social system with its own resources and operations—suggests an inward turn and focusses on the legal process itself: *Law qua law* is transformative.

Secondly, if the transformative nature of private law originates from the internal coding of private law, not merely from an explicit agenda of transformation, this has implications for possible patterns of legitimacy of transformative private law. Parliamentary democracy only provides indirect and loose legitimacy for the subtleties with which private law codes, for instance, the global economy. Hence, surfacing these subtleties is clearly not at odds with democracy – it points to the *voids* of legitimacy in the current private law architecture. In so doing, transformative private law explores forms of democratic legitimacy beyond the parliamentary process. Self-reflexivity becomes the key desideratum of such law: It turns inwards in order to transform *itself* towards becoming more sensitive to transformative forces in *society*, for example, through the private law innovations lobbied for by private actors such as NGOs, certifiers, consumer associations, or other strategic litigants. It is this recursiveness between the transformative role of both law and society that augurs democratic transformation.

Foto: Olafur Eliasson, Whenever the Rainbow Appears (2010), Israel Museum, Jerusalem, photo by Klaas Hendrik Eller (2019)

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