Private Law and Political Economy

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15. Private Law and Political Economy

Marija Bartl

Abstract

This chapter discusses the 'political economic' approach to private law. The political economic approach is instrumental for the study of private law's role in making, and eventually remaking, different social institutions and processes, such as markets, global value chains, corporations, globalisation etc. In this chapter then, after situating the intellectual locus of 'private law and political economy', I first outline how law and political economy scholars view the social institution of markets, which is often the locus of their scholarly interest (Legal Context 1). Second, to exemplify the kind of inquiry that one may encounter in this line of scholarship, I ask what role private law plays in fostering either more emancipatory ('freedom') or more coercive ('exploitation') side of markets as social institutions. To do so, I start by discussing how private law enables the more coercive side of markets, by way of narrowing down what unfair exploitation and unjust enrichment stand for (Legal Context 2).[1] I then turn to outline how private law may foster more emancipatory side of markets, by means of expanding what 'private' stands for (Societal Implications).

1. Introduction: On 'Law and Political Economy' as an Approach to Studying Law

In recent years, one of the most prominent new trends in legal scholarship has been titled 'law and political economy'.[2] Political economy stands for the study of 'co-constitutive' relationship between politics, law, and economic practices and processes, in how societies materially and socially reproduce themselves. The lens of law then serves as an entry point for 'law and political economy' scholarship. However, law

1 R. L. Hale, 'Force and the State: A Comparison of Political and Economic Compulsion', *Columbia Law Review* 35 (1935), 149–201.

2 The tradition of the study of 'political economy'—that is, of the political constitution of economy—is historically the longest one, including famous economists and social theorists, such as Adam Smith, David Ricardo, Karl Marx, and Max Weber.

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remains just that—an entry point—to a more complex reality that cannot be untangled without understanding the operation of economics or politics, as well the insights of scientific disciplines that study them.

Importantly, law and political economy is not an external perspective on law imported from a different discipline, such as is the case with law and economics (neoclassical economics/microeconomics), law and literature (literature/literary criticism), law and behaviour (behavioural psychology) and so forth.[3] Instead, it is an interdisciplinary perspective on society, which sees law, alongside politics and the economy, as elements that together co-constitute (a large chunk of) our social reality.

This integrative perspective is usually achieved by placing a particular social institution—such as the market, value chains, the corporation etc.—at the centre of the analysis. Law is then used as the entry point for studying how this institution is made to operate in society, including its emancipatory as well as coercive dimension.[4] A law and political economy approach thus (definitionally) cuts across the boundaries of scientific disciplines, using insights from law, economics, politics, geography, and religion, to understand how various social institutions are made and can be remade.[5]

In terms of the questions that scholars of law and political economy ask, one can find more traditional critical questions, such as a) what are the distributive impacts of existing legal categories, rules and principles in the market economy, that is, who stands to gain or lose (debtors, creditors, workers, employers, rich, poor, tenants, homeowners etc.)?;[6] usually followed up by more transformative questions, such as b) how does one change the distributive patterns of law if those, in confrontation with empirical realities, asymmetrically privilege certain groups above others?[7] More recently, the question occupying much scholarly attention has been c) what is the role of law in co-producing various economic and societal problems we face today, such as climate change,[8] growing inequality,[9] or exploitation along the value chain?, often followed by the inquiry d) how could law contribute to solving some of the societal problems it co-constitutes, including the socio-political routes for advancing such proposals for change?[10]

In this chapter I aim to do three things. First, I outline how law and political economy scholars view the social institution of markets, which is often the locus of their scholarly interest (Section 2). Second, to exemplify the kind of inquiry that one

3 M. Bartl and J. C. Lawrence, *The Politics of European Legal Research: Behind the Method* (Cheltenham: Edward Elgar Publishing, 2022).

4 S. Deakin et al., 'Legal Institutionalism: Capitalism and the Constitutive Role of Law', *Journal of Comparative Economics* 45 (2017), 188–200.

5 M. Weber and S. Kalberg, *The Protestant Ethic and the Spirit of Capitalism* (London: Routledge, 2013).

6 The question of law's distributive role was central to one of the predecessors of LPE, namely critical legal studies. The most important figures in that group are Duncan Kennedy, Roberto Unger, David Kennedy, all from Harvard.

7 Ibid.

8 See Chapter 1 in this volume.

9 See Chapter 11 in this volume.

10 For instance, at the University of Amsterdam, these questions are dealt with in a major research project titled Sustainable Global Economic Law.

may encounter in this line of scholarship, I ask what role private law plays in fostering either more an emancipatory ('freedom') or more coercive ('exploitation') side of markets as social institutions. To do so, I first discuss how private law enables the more coercive side of markets, by way of narrowing down what unfair exploitation and unjust enrichment denote (Section 3).[11] I then turn to outline how private law may foster more emancipatory sides of markets, by means of expanding what 'private' stands for (Section 4).

2. Legal Context

a. Markets are Legally Constituted

Law and political economy scholarship starts from an obvious, but in recent decades somewhat neglected, fact. Namely, markets are social institutions, that is, collective agreements about norms and behaviours in pursuance of a social objective.[12] If markets are social institutions, rather than some natural self-regulating systems, how shall we think about the objectives pursued by markets, and the ways by which they are pursued? To approach this question, we need to look back in history.

Market economies have emerged first at the level of states, as national markets (only in the 19th century for most of Europe),[13] and later expanded to what we often describe today as the 'transnational' or 'global market'.[14] Markets' existence and modes of operation depend on many things, such as the availability of transport, (information) technologies, and suitable geographies, to name a few. But most importantly, markets fundamentally depend on political will, rules, and enforcement that make it possible in the first place.

There can be no markets, as we conventionally understand them today, without private law, be that contract or property law, and the coercive state apparatus to back it up. These are the basic preconditions of market economies, as also stressed by the World Bank, which considers the rules of property and contract as central elements to the 'rule of law'.[15] Most market economies, however, that are typified by such a thin set of private legal rules, as the World Bank considers fundamental, would be very similar to the markets seen in 19th-century Europe: characterised by rampant exploitation of

11 Hale, 'Force and the State '.

12 J. Turner, *The Institutional Order: Economy, Kinship, Religion, Polity, Law, and Education in Evolutionary and Comparative Perspective*, 1st edn (New York: Longman, 1997).

13 P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

14 C. Joerges, *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart Publishing, 2011).

15 'These are: "reforming laws" (i.e. drafting substantive laws, for simplicity often categorised under five main headings: property; contract; company; bankruptcy; and competition); and "reforming institutions" ("including courts, legislative bodies, property registries, ombudsmen, law schools and judicial training centers, bar associations, and enforcement agencies")', in G. Barron, 'The World Bank & The Rule of Law', *Development Studies Institute* 5.70 (2005), https://www.files.ethz.ch/isn/137920/WP70.pdf, p. 19.

the poor, including children, women, and racialised groups.[16]

Yet rampant exploitation has not been, and need not be, the only face of markets. In fact, whether this is the case will ultimately depend on rules and institutions (including private law) underpinning the market. In several European states, Canada, Japan, and to a lesser degree in Australia and the US, over the course of the 20th century, a number of laws were put in place to ensure that it is not those who control most capital[17] that dictate the acceptable levels of pollution in society, degree of safety at work or the minimum rates of pay. Equally, a strong representation of workers' collective interests via trade unions has also played a central role in ensuring that workers have benefited from increased social product in the post-World War II decades.[18] In contrast, in both the 'Global South' and many post-communist countries, the struggle for even rudimentary market regulation is still ongoing—often hampered (to say the least) by multinationals from the 'Global North' populating these 'emerging' economies, precisely to capitalise from this regulatory vacuum.[19]

Another important development we have witnessed over the past years and decades is the creation of 'regional markets', comprising more national markets, in many parts of the world (Latin America, Southeast Asia, Africa, Europe). The successful establishment of such markets requires an abundance of laws and public interventions. In the European Union (EU), for instance, the 'integration through law' [20] has been primarily directed at putting in place a *common* and later *internal* market—by liberalising the movement of goods, services, capital, and labour across the EU. This so called 'negative integration[21] has been complemented by 'positive integration',[22] which has tried to reinstate some of the protections previously liberalised away.[23] All these regulatory efforts by the EU have given shape to the internal market—enabling and constraining, emancipatory and coercive.[24]

The further liberalising push came from what we can call '(second) economic globalisation'. This has predominantly taken off over the past forty years, having been facilitated by the rulemaking and standard setting of several international institutions (including the World Trade Organisation, Organisation for Economic Co-operation and Development, International Labour Organisation etc.) across a number of key fields (including trade law, investment law, international labour standards, tax

16 E. P. Thompson, *Whigs and Hunters: The Origins of the Black Art*, 1st edn (London: Penguin, 1977).

17 By 'capital' you can understand: large companies, their management, rich individuals, large shareholders etc.

18 F. W. Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot be a 'Social Market Economy', *Socio-Economic Review* 8 (2009), 211–250.

19 J. P. Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol: Bristol University Press, 2020).

20 J. H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal* 100 (1991), 2403–2483.

21 See Chapter 3 in this volume.

22 See Chapter 4 in this volume.

23 T. Piketty, *Capital and Ideology* (Cambridge, MA: Harvard University Press, 2020).

24 In an interesting contribution, Kukovec discusses some of the distributive consequences of the internal market for the more recently acceded member states. See D. Kukovec, 'Law and the Periphery', *European Law Journal* 21 (2014), 406–428.

standards etc.) Equally the rules of 'private governance' (technical standardisation, private regulatory regimes, International Organisation for Standardisation (ISO) standards, financial standardisation etc.), gave further shape to this global market, stepping in where the public regulation was missing.[25] These rules work to furnish market actors with, for instance, a plethora of technical specifications or standard derivatives contracts that enable global trade and exchange. Overall, global markets, legally enabled but thinly shaped, make private autonomy and freedom of contract paradoxically at their strongest.

In a recent famous book in the law and political economy tradition, *The Code of Capital*, Katharina Pistor argues that globalisation is in fact private.[26] What she means by this is that globalisation is furthered by private law and private actors. In Pistor's account, globalisation is driven by transnational corporate legal practice, which shapes the contours of global markets in the interests of their clients, by skilfully employing the rules ('modules') of property, contract, bankruptcy, corporate law, and financial law from two main jurisdictions (New York and England) to create various private law instruments, such as derivatives, trusts, financial products etc. Relying thus mostly on freedom of contract, they use the modules of private law to 'code' assets (material or immaterial), adding value to them by attributing priority, guaranteeing durability, ensuring convertibility, and warranting universality of claims. Since such advanced legal services are available only to those who already possess high levels of capital, private globalisation drives inequality, insofar as it enables the rich to get richer, while leaving everyone else worse off.

Three important take-aways can be derived from the previous discussion. First, from the perspective of law and political economy, there are no 'free' markets. At least not as institutions somehow operating of their own accord without law and political intervention (the myth of 'self-regulation' and 'invisible hand'). Rather, many rules are in fact necessary to make markets/market economies exist and function.[27] Second, the objective of markets—to whose advantage/disadvantage they operate and with what consequences—will depend to a great degree on the rules (including laws) which they are made off. Third, the mediation between public and private power in the constitution of market operation is dependent on fundamental private law categories—such as protection of property, the enforcement of contracts, as well as rules on setting up and dissolution of legal persons—which will gain a greater importance in the global markets, where public regulation is less available.

25 The conventional knowledge is that since there are no 'public institutions' at a global level, such as those present at the national level, private governance needs to step in, to enable market functioning.

26 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019).

27 Joerges, *Karl Polanyi, Globalisation and the Potential of Law.*

3. Markets and Private Law

The emergence of market economies in the 19th century (for most European countries) was at least in part an emancipatory project, based on the idea of 'freedom' of contract. In that new era, people of a certain gender, age, and sex, were able to conclude contracts as free and equal individuals with equal standards of care and responsibility expected from them. This new institutional framework promised a break from the bonds of feudalism where status previously ruled. The contract was now to assume its place.[28]

The relationship between freedom and its opposite—coercion and exploitation (usually attributed to feudalism)—was anything but straightforward, however, even in market economies. While capacity to contract on equal terms remains fundamental, not only to day-to-day transactions, but to transformative projects as well,[29] the coercive dimensions of markets have been and are pervasive.

In the following two subsections, I will outline the uneasy relationship between freedom and exploitation in private law. I will argue that those markets based on a thin private law infrastructure are invariably the ones to show their most coercive and exploitative face, insofar as such markets are uninterested in the pervasive condition of economic duress and disregard 'social responsibility'. The awareness of this fundamental weakness of private law also serves as an invitation to both rethink private law as an institution in its own right, as well as produce other market-shaping rules that would remedy this myopic private law vision.

a. Freedom to Exploit: The Property Trap

When starting our law degrees, we are presented with private law as a body of rules enabling individual freedom, choice, and commerce. Exploitation is straightforwardly banished from it. In fact, in most private rulebooks in Europe (and elsewhere) you will find provisions such as this:

> DRAFT COMMON FRAME OF REFERENCE, II.-7:207: Unfair exploitation
>
> A party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was **dependent** on or had a relationship of **trust** with the other party, was in **economic distress** or had **urgent needs**, was **improvident**, **ignorant**, **inexperienced** or lacking in. **bargaining skill** and (b) the other party **knew or could reasonably be expected** to have known this and, given the circumstances and purpose of the contract, **exploited the first party's situation** by taking an excessive benefit or grossly unfair advantage.[30]

28 M. Weber, *Economy and Society*, I (Oakland, CA: University of California Press, 1978); O. E. Williamson, 'The Economics of Organizations: The Transaction Cost Approach' (1981) 87 American Journal of Sociology 548.

29 P. Williams, 'The Obliging Shell: An Informal Essay on Formal Equal Opportunity', *Michigan Law Review* 87 (1989), 548–577.

30 Study Group on a European Civil Code and the Research Group on EC Private Law (Aquis Group),

If any one party uses dependency and trust on the one hand, or economic distress, urgent needs or ignorance on the other, to gain excessive benefit or unfair advantage out of the contract, that constitutes unfair exploitation. In such a case, the exploited party can ask a judge for a cancellation or a modification of such disadvantageous contract.

Yet, the elephant in the room is; what is not considered exploitation under this legal framework? In the economy we all well know, very few people (but the holders of large capital) are in a situation of no economic distress to take a job, for instance. Our economic system depends on there actually being a sufficient degree of economic distress, by a sufficient number of people, so that some people have to take up all kinds of contracts, including physically demanding, demeaning, and badly paid jobs. The US legal realist Robert Hale famously argued at the beginning of the 20th century that the system of exclusionary property rights ensures that those who have property, or productive capital, do not have to share it with others—unless those others without property or productive capital enter into some relationship of subordination (a wage contract) in order to provide themselves and their families with the most basic needs, such as food and shelter.[31] What remains of 'freedom' of contract in the case of such widespread economic necessity?

But even within the remit of this foundational paradox, what has historically been considered 'unfair exploitation' as opposed to 'freedom of contract' has changed considerably. In the past, children aged nine could work in mines, fourteen hours a day, six days a week—something entirely within the bounds of their (parents') 'freedom' of contract.[32] Today, such employment would be subject to criminal sanctions across the world—despite the fact it unfortunately still happens all too often.[33]

In many countries, minimum thresholds for age, pay and safety-at-work have been implemented through regulation—providing a different pre-configuration for the 'freedom' of contract. Regulating what is considered as belonging within the ambit of 'freedom of contract' is a reaction to the foundational duress on which market economy is based. Interestingly, however, many such pre-configurations of 'freedom of contract' have been taken out of what we consider 'general contract law'. In continental Europe, they are usually not found in civil codes, but have been confined to their own 'special' fields, such as labour law, tenancy law, consumer law, in order not to disturb the founding fiction that people are equal and free from duress of all kinds.[34]

Given this legislative handiwork, what today remains encompassed within the ambit

'Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition' (2009), https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf, p. 212.

31 R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', *Political Science Quarterly* 38.3 (1923), 470–494.

32 Atiyah, *The Rise and Fall of Freedom of Contract*.

33 See International Labour Organisation, 'Child Labour', *International Labour Organisation*, https://www.ilo.org/global/topics/child-labour/lang--en/index.htm

34 H. W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic', *Journal of Consumer Policy* 35 (2012), 283–296.

of the 'unfair exploitation' as mentioned above? The provision is mainly applicable to the misuse of trust in personal relations, remaining oblivious to more structural types of inequalities.[35] It could be applicable, for instance, in cases of sham 'self-employment' across all kinds of delivery services. Yet, this has only ever exceptionally been the case. For instance, a Canadian court recently declared 'unconsciousable'[36] an arbitral provision determining the Netherlands as the applicable jurisdiction in a dispute between Uber and one of their drivers.[37] It is telling that this case caused great surprise, and critique, in common law systems:[38] these rules were intended for specific (individual and occasional) weaknesses and vulnerabilities of contractual parties rather than more structural inequalities. This also makes any other non-general-private-law route (for instance via labour law) a far more attractive forum to pursue such claims in places where they exist, such as the EU.[39]

b. Freedom to Enrich Yourself: The Privity Trap

Another way to look at how private law shapes markets, via the tension between freedom and exploitation, is to consider how it goes about distributing the benefits of social cooperation. This is particularly salient in the context of global markets and global value chains, where only a very thin layer of market-shaping laws exists. To demonstrate this, we will examine a famous US legal case.

In 2009, the California Court of Appeal rendered its judgement in *Doe v Wal-Mart*.[40] The case was brought as a class-action[41] by the workers of suppliers to Wal-Mart, a major discount supermarket chain in the US, for sweatshop conditions of their work. Due to the previous scandals, Wal-Mart had introduced a 'code of conduct' for its suppliers, requiring foreign suppliers adhere to local laws and standards regarding pay, hours, forced labour, child labour, and discrimination. The code of conduct further included a paragraph titled the 'Right to Inspection':

35 The examples in the Draft Common Frame of Reference Comments are of this kind. See Study Group on a European Civil Code and the Research Group on EC Private Law (Aquis Group), 'Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Articles and Comments [Interim Edition]' Outline Edition', https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf, pp. 215–218.

36 The common law doctrine of 'unconsciousnessability' may be seen as a parallel to unfairness in continental European legal systems, or 'unfair terms' in EU consumer contracts. Cf. H. Beale, *Contracts Law: Ius Commune Casebooks for the Common Law of Europe* (London: Bloomsbury Publishing, 2010).

37 *Uber Technologies Inc. v Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118.

38 See D. Brodie, 'Fair Bargains and the Gig Economy', *University of Strathclyde* (15 July 2021), https://www.strath.ac.uk/humanities/lawschool/blog/fairbargainsandthegigeconomy/

39 See J. Toh, 'Another Win for Workers: Uber Drivers are Employees', *Social Europe* (22 September 2021), https://socialeurope.eu/another-win-for-workers-uber-drivers-are-employees

40 The decision, *Jane Doe, et al. v Wal-Mart, Inc.*, No. 08–55706 (9th Cir. 2009).

41 Class actions, as the procedural law institution, enable collective action claims in the US that should enable people to tackle also some more structural problems in the economy. Of course, the problems with this type of legal action remain considerable. See T. L. Russell, 'Exporting Class Actions to the European Union', *Boston University International Law Journal* 28 (2010), 141–180.

> To further assure proper implementation of and compliance with the standards set forth herein, Wal-Mart or a third party designated by Wal-Mart **will undertake affirmative measures, such as on-site inspection of production facilities**, to implement and monitor said standards. Any supplier which fails or refuses to comply with these standards or does not allow inspection of production facilities is subject to immediate cancellation of any and all outstanding orders, refuse [sic] or return [sic] any shipment, and otherwise cease doing business [sic] with Wal-Mart.

The claimants, suppliers' workers, contended that while Wal-Mart presented itself to the public as being socially responsible, it knowingly overlooked and ultimately benefited from the despicable conditions of their work. More specifically, Wal-Mart purposefully failed to monitor their suppliers based on their code of conduct—with only 8% of the audits being unannounced and most of the workers having been coached on how to respond to the auditors.

On this basis, the four courses of action were presented against Wal-Mart. First, that the claimants were third-party beneficiaries of the Code of Conduct. Second, that Wal-Mart was their employer. Third, that Wal-Mart was negligent in its duty to monitor. Fourth, that Wal-Mart was unjustly enriching itself at the expense of the claimants. The Court of Appeal found the claim unjustified on all four counts.

First, given that the Code of Conduct did not postulate that Wal-Mart had the obligation to monitor (i.e. Wal-Mart has no obligation but only a right to take affirmative measures), the workers could not have been the intended beneficiaries of the statement. By the parties to the agreement between Wal-Mart and its suppliers, the claimants could not be seen as third-party beneficiaries. Second, despite the claimants' contention that Wal-Mart exercised control over their day-to-day employment, the supply contract terms did not constitute (in the Court's view) such a level of control to merit a claim that an employment relationship had been established. Third, Wal-Mart was also not acting negligently vis-à-vis the conditions of work of the claimants—since it never undertook the obligation to monitor their work conditions to start with.

Finally, and most relevantly for our purposes, the claimants raised the question whether Wal-Mart had unjustifiably enriched itself at their expense. While they worked in deplorable conditions for little-to-no pay, Wal-Mart made huge economic profits. The Court responds to this somewhat bluntly, asserting that:

> The lack of any prior relationship between Plaintiffs and Wal-Mart precludes the application of an unjust enrichment theory here. [...] no other [than employment contract] plausible basis upon which the employee of a manufacturer, without more, may obtain restitution from one who purchases goods from that manufacturer.

What matters for the Courts is the lack of any prior direct bilateral, inter-pares relationship—the privity of contact. And yet, it is exactly this condition that makes private law the enabler of the exploitation in global value chains. In many sectors of economy, transnational or global value chains can be properly described as 'captive'[42]

42 F. Cafaggi and P. Iamiceli, 'Unfair Trading Practices in Food Supply Chains. Regulatory Responses

where the lead firms—such as Wal-Mart—exercise exorbitant power over the suppliers in all aspects of business production. They can usually change terms at will, dictate prices and production deadlines, and move to another producer as and when they please. In this context, having such a narrow definition of 'unjustified enrichment' makes it possible for companies such as Wal-Mart to set the contractual conditions unilaterally and grossly in their favour. This allows them to cream off the lion's share of benefits from social cooperation—whilst leaving workers in Bangladesh (for instance) extremely poor, dispossessed, unhealthy, and often dead.[43]

4. Societal Implications: Transforming Markets via Private Law

Today, private law enables deeply unfair distributive patterns (especially across the global trade sphere) where only a fraction of the global population enjoys some sort of protection. Unless one qualifies, for instance, as a protected worker or a consumer in a particular jurisdiction, very little can be expected from general private law. This situation is further exacerbated by the increasing prevalence of private international law rules, which enable the spread of general private law norms—but without its protections.[44] This private law myopia renders this body of rules a 'regressively distributive' institution: a set of rules that turn markets into systems of exploitation rather than emancipation, shifting both benefits of cooperation and power from the 'have nots' to the 'haves'.[45]

And yet, as this chapter made clear previously, this need not be the case. Historically, we have seen that markets, in all their forms (whether more coercive or more emancipatory, more cooperative or more competitive, more extractive or more generative), all inherently depend on a set of rules and institutions to shape their purpose and operation. One of the core insights of the law and political economy literature is, however, that if we truly want to make better use of markets as social institutions we need to go beyond just tinkering at the edges, adjusting the 'protective' rules only. These remain geographically bound and permanently the exception—forever trailing and failing to address the extractive activity taking place under general private law. As Pistor and Martijn Hesselink[46] both argue, we must go after general private law norms in their own right—contract and property law for sure, but also company, financial, insolvency law etc. Only if we change the ground rules can we think of more inclusive and fair forms of market economies.[47]

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and Institutional Alternatives in the Light of the New EU Directive', *European Review of Private Law* 27 (2019), 1075–1113.

43 See Accord, 'Safe Workplace', *Accord on Fire and Building Safety in Bangladesh*, https://bangladeshaccord.org/

44 Pistor, *The Code of Capital*.

45 B. Milanovic, *The Haves and the Have-Nots: A Brief and Idiosyncratic History of Global Inequality* (New York: Basic Books, 2010).

46 See Chapter 2 in this volume.

47 Pistor, *The Code of Capital*.

How to do that? Most generally, what is required is the redefinition of what 'private' means. For instance, in company law scholarship, one has to open the backbox of corporate purpose and the role of profit as we increasingly see in the discussion on the importance of social enterprises,[48] steward ownership,[49] social purpose of companies[50] or social/solidary economy.[51] In property circles the questions of common, shared and public ownership—as opposed to exclusionary individual ownership—are gaining more attention.[52] At the same time, older questions of workers participation in the governance of firms, as well as economic democracy, are beginning to gain traction,[53] while reining in the excesses of global value chains via hard law (in both the UN and the EU) even stands a fighting chance of legislative success.[54] All these accounts and proposals aim to unsettle the conception of the 'private', opening private law to more social and socially responsible alternatives. They move the discussion away from transactionalism (to a more relational understanding), away from profit-making (to prioritising social purpose); and away from exclusionary property rights (to sharing and holding in common).

There are however also other transformative dynamics at play that will have a fundamental role in rethinking private law. Perhaps the most notable private law transformation of late stems from so called 'climate litigation'. Claimants in several EU member states have succeeded in relying on novel interpretations of rules on negligence, duty of care and causality, in order to mandate not only their governments,[55] but also the private parties to cut their CO2 emissions.[56] Another notable development is the 'rights of nature' movement, which has seen the rights pertaining to rivers, mountains or other ecosystems being introduced into national constitutions from Latin America

48 See European Commission, 'Social Enterprises', *European Commission*, https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu/social-enterprises_en

49 See Purpose, 'Steward-Ownership. For an Economy Fit for the 21st Century', *Purpose Economy*, https://purpose-economy.org/en/

50 F. Laloux, *Reinventing Organizations: A Guide to Creating Organizations Inspired by the next Stage in Human Consciousness* (Millis, MA: Nelson Parker, 2014).

51 See Social Economy, 'The Social Economy', *Social Economy EU*, https://www.socialeconomy.eu.org/the-social-economy/

52 A. Di Robilant, 'The Virtues of Common Ownership', *Boston University Law Review* 91 (2011), 1359–1374.

53 D. Ellerman, *The Democratic Worker-Owned Firm: A New Model for the East and West* (Abingdon: Routledge, 2021).

54 For the UN, see Business & Human Rights Resource Centre, 'Binding Treaty', *Business & Human Rights Resource Centre*, https://www.business-humanrights.org/en/big-issues/binding-treaty/; For the EU, see European Commission, 'Corporate Sustainability Due Diligence', *European Commission*, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en

55 See Urgenda, 'Landmark Decision by Dutch Supreme Court', *Urgenda*, https://www.urgenda.nl/en/themas/climate-case/; Other climate case summaries available at *Climate Case Chart*: http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/; http://climatecasechart.com/non-us-case/a-sud-et-al-v-italy/; http://climatecasechart.com/non-us-case/klimaticka-zaloba-cr-v-czech-republic/

56 See Clearly Gottlieb, 'Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company', *Clearly Gottlieb* (30 June 2021), https://www.clearygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company

to New Zealand, giving such entities better institutional representation and a louder voice.[57] Finally, advocacy for the rights of future generations (those which will inherit a very different, slightly less inhabitable planet) has also gathered attention, both in case law and via new institutions, such as the Ombudsman for future generations.[58] These approaches expand the 'private' in another sense, adding a new set of issues and actors to whom we as societies owe respect and responsibility.

All these developments are not only worthy of study for theoretical interest (via bachelor or master theses, for instance) but are also laying the new ground rules for the behaviour of private and public actors, as well as re-shaping the markets and worlds that private law students are entering as we speak. Hence, it is worth paying attention to this transformative 'bread and butter' of future private law.

5. Points for Reflection

Q1: What is the political economy?

Q2: What is the role of law, and private law, in the making of the political economy?

Q3: What does it mean that private law 'constitutes' markets?

Q4: What do we mean by the 'distributive impacts' of private law?

Q5: What are the boundaries of freedom in private law—in national, regional and global contexts?

Q6: How does economic globalisation change the regulatory settlement achieved at the national level in many European countries?

Q7: What is the role and importance of private law for socio-ecological transformation?

Q8: Which private law field do you consider the most promising tool for transformation?

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57 L. Burgers, 'Private Rights of Nature', *Transnational Environmental Law* 11 (2022), 463–474.

58 See A. Vincent, 'Ombudsperson for Future Generations: Brin Intergenerational Justice into the Heart of Policymaking', *United Nations Chronicle* (11 June 2012), https://www.un.org/en/chronicle/article/ombudspersons-future-generations-bringing-intergenerational-justice-heart-policymaking

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