Three Models of Transformative Law

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Transformative Law Encounters

In a previous post on the Transformative Private Law Blog, Martijn Hesselink calls "the idea of transformative private law a little scary". The intuitive reason for Hesselink to be scared seems to be one of instrumentalization. Does the adoption of the term 'transformative law' imply a transformation of (private) law into a mere tool for achieving political objectives? Interestingly Hesselink in the moment of encountering fear also decries that the renaming of the Centre for the Study of European Contract Law (CSECL) to the Amsterdam Centre for Transformative Private Law (ACT) "constitutes a break with the centre's explicit commitment to the European project". Instrumentalization in other words seems to be perfectly ok if the instrumentalization is the right one. On this background, Hesselink advocates for an understanding of transformative law as the critical engagement with actual societal transformations instigated through (private) law thereby recycling a classical critical theory approach. Adopting such an approach would, however, indicate that there is nothing new under the sun, as self-proclaimed 'critical' approaches to society and its law has been with us at least since the enlightenment.

In another post on this blog, Klaas Eller, on the other hand, embraces what Hesselink finds scary as he bluntly admits that "the political nature of such a project is undeniable", when referring to the launch of Centre for Transformative Private Law. At the same time, Eller greatly reduces the radicality of the 'political proclamation' by stating that "'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." Instead, he reduces the proclaimed novelty of transformative (private) law to the excavation of the constitutive function of law in relation to non-legal social processes, most notably market and supply chain based social processes, and the active role of law in moulding them. Transformative (private) law thereby assist in the deconstruction of the traditionally dominant narrative of private law as an 'apolitical phenomenon'. Hence, the difference between the positions of Eller and Hesselink seems to be rather minimal in the end. The former focuses on the positive potential of transformative (private) law, while the latter emphasises the potentially negative consequences of an open-ended commitment to 'the concept of transformative law'.

Theorizing Transformative Law

But maybe transformative (private) law can be the trigger of a more ambitious program for rethinking the theoretical basis for our understanding of law and its position in society? A program which goes beyond emotion and ideology. One way of dealing with both the emotional state of feeling scared and the devotion to ideology is, as also argued by Karl Mannheim back in 1926, to deploy an analytical lens, i.e. to substitute emotion and ideology with sophisticated theorizing. A form of theorizing which only is possible if deployed while maintaining proper analytical distance to the object matter. On this background one might distinguish between three models of transformative (private) law: Instrumentalization, Political Programming or Normative Selection, with the latter providing a third way between the two hitherto dominant approaches.

Instrumentalization

In 1937, Franz L. Neumann published 'The Change in the Function of Law in Modern Society' in which he departed from the distinction between 'voluntas' and 'ratio'. If the law is determined by the former, so Neumann, it implies that the law is politically made and if by the latter the law rests on its own principles. A law based on 'ratio' in other words allows it to incorporate or not whatever input it might receive from the political system on the basis on its own principle based discretion. Neumann's intervention might be read as a reaction to Carl Schmitt's unapologetic plea for 'voluntas' as the source of law in his infamous 1934 article 'Der Führer schützt das Recht'. Hence, the intuitive fear of Hesselink has obvious historical reasons and leads directly into a larger debate on the (lack of) autonomy of law.

Political Programming

Niklas Luhmann followed in the footsteps of Neumann when he warned against 'goal-oriented programming of the law', with such type of programming being the (not so) distant cousin of instrumentalization. A warning issued based on firsthand experiences of the practices of the National Socialist regime and associated legal arbitrariness but also, in a far less existentialist sense, the experience of the failures of the episteme of 'political planning' in relation to political economy in the 1970s after the optimism and hype concerning the possibility of realizing political objectives through law which was rampant throughout the immediate post WWII decades. Hence, when Eller call transformative law 'a political project' the optimism of the *le trente glorious* and the *Wirftchaftswunder* and the belief of transformation through (private) law comes to mind. An optimism which Eller seems to share with Ioannis Kamporakis who explicitly seeks to reinvigorate the ideal of planning while also calling for a recasting of the concept of legal instrumentalism.

Normative Selection

The concept of 'Normative Selection', implies a dynamic view, i.e. a time perspective, on legal normativity. In the context of a distinction between coherency, connectivity and possibility norms, the time perspective implies a foregrounding of possibility norms, understood as norms aimed at maintaining structural openness for the future, i.e. the broadest possible number of future choices. The concept of possibility norms aligns

with the concept of transformative law insofar as it implies asking how norms transform over time and what the function of norms is in a world that is in constant flux. Also back in the 1970s, Luhmann famously introduced the distinction between cognitive and normative expectations. Cognitive expectations, structurally dominant within economy, science, and technology, tend to change in the face of disappointment. If a business venture does not give the expected return of investment, it is closed or the business model changed and if a scientific experiment does not verify a given hypothesis the hypothesis is rejected. Normative expectations, dominant within moral, legal, political, and religious communication, on the other hand, tend to be upheld even in the face of disappointment. A murder is committed but the criminalization of murder is nonetheless upheld.

This important and clever insight however made Luhmann to develop an overly static notion of norms. But norms are not only upheld, paradoxically they change too, as can be empirically observed by the simple fact that the prevalent (legal) norms in society are different today than they were five, fifty or five hundred years ago. The crucial question is therefore the pace, the speed, in the change of norms and that relative to the speed of change in societal communications characterized by a structural dominance of cognitive expectations. So, the first premise of transformative law is that norms and with it law itself is in constant transformation. Law cannot be anything else than transformative.

The second premise of transformative law is that the transformative force of law is intrinsically linked to the tripartite schemata between variation, selection, and restabilisation within which societal evolution unfolds. The structure of societal evolution means that social processes are faced with a constant pressure to select, 'to choose', between alternative futures. Such selections of course unfold differently in different settings and circumstances just as different actors tend to be foregrounded as the responsible addressees. But nonetheless, rather than TINA (there is no alternative), there is *always* an alternative in a complex society as complexity implies variation and that something must be selected and something else not. Societal evolution, as also meticulously reconstructed by Hauke Brunkhorst in his magnum opus Critical Theory of Legal Revolutions, is *structurally conditioned* by the existence of norms guiding the selection of future paths.

Normative guided societal evolution has however been affected by recent societal developments. A crucial characteristic of societal development over the past fifty years or so is a relative increase in the centrality of cognitive expectation based forms of communication. The predominance of economism, i.e., structural liberalism, and digitalization, as well as a focus on risk rather than danger were and are central indications of this. In addition, politics and law have themselves become increasingly cognitivised and rationalised, as expressed, for example, in discourses of 'managerialism', 'law and economics' and 'science-based risk regulation.' It is here that a transformative law sets in with the hypothesis that what we can observe is in fact *not* a reduction in the centrality of normativity and associated norms in society but rather a reconfiguration of the function of norms from first order to second order appearances. Traditionally law works with a distinction between primary and secondary norms, as expressed between the difference between law and morality, or between primary and secondary rules allowing for an understanding of constitutions as the embodiment of a

hierarchy of norms. In the increasingly cognitivised and rationalised world, the meaning of constitutionalism however changes as the very purpose of constitutionalism becomes the normative second order restabilisation of increasingly cognitivised first order social processes. Hence, the third premise of transformative law is the need to reformulate societal constitutional theory as a forward-looking transformative phenomenon. That is especially the case as the (western) world currently experiences a revolt against fifty years of destabilising moves unleashed by increased cognitivisation and rationalisation with a lapse into irrationality and mythology as a result. This new theory however cannot go back to the hierarchy of norms of classical modernity. Instead, such a theory needs to reflect the structural conditions of the 21st century and the inherent fluidity of society and its norms, thereby countering static conceptions of the constitution of society It needs to provide an apparatus for apprehending the dynamic and hence transformative character of constant normative selection and the role it plays in the evolution of society.

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