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What is Transformative Law?

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1. Introduction: Beyond Ex Ante and Ex Post

Upholding normative expectations is a key function of law.[1] This insight indicates that law have a conservative dna as this function implies an orientation towards reaffirmation of already existing norms in the present with the purpose of transposing them into the future. However, law transforms too. A key characteristic of world society in its manifold local, national and transnational contexts is the sustained demand for legal norms in the attempt to stabilize but also expand and transform all sorts of social processes. The legal institutions of competition, contract, corporation and property are - among many others - key examples of this. On this backdrop, elements of a concept of transformative law is outlined relying on an epistemological understanding of law as form-giving. It is through form-giving that law constitutes a social phenomenon as a legal institution and it is form-giving which gives law a strategically central position in society. This argument is unfolded through a genealogy of imaginaries of law through a distinction between four historically dominant types of law: 'Law as purpose'; 'law as a tool'; 'law as an obstacle'; and 'law as reflexivity-initiation'. Finally, the extent to which

[1] Luhmann, Niklas (1993), *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp Verlag)

transformative law can act as an alternative to these four types of law is reflected upon emphasizing that the potentiality of transformative law can be boiled down to a question of time as it is in the tension between ex ante and ex post law the crux of transformative law lies.[2]

2. The Strategic Position of Law in Society

Modern law in the Western sense emerged with the legally defined and maintained differentiation between religion and politics in the wake of the Investiture Conflict between Emperor and Pope from 1076 to 1122.[3] The starting point of the dispute was the administrative law question concerning which of the two had the competence to appoint abbeys and bishops. More generally, it was about who was the sovereign, *i.e.* who stood above who. The emperor or the pope? The result was a compromise. The emperor was recognized as the sovereign of the worldly world and the pope as the sovereign of the spiritual world. The pope could thus appoint abbeys and bishops, but they had to swear allegiance to the emperor. The church thereby retained the monopoly on interpreting the religious text, but when the representatives of the church acted in worldly affairs in relation to everything from tax collection to military mobilization, it was the emperor who came into play. The consequence was the creation of two different universes – the religious and the political - that were reproduced in parallel while being closely linked. Using legal instruments, the two universes were differentiated and interconnected - quite literally - at the same time. Tax revenues, blessings and other components of meaning could be transferred by legal means from one legally defined parallel

[2] Ladeur, Karl-Heinz (2012), The Emergence of Global Administrative Law and Transnational Regulation, Transnational Legal Theory, 3:3, 243-267.

[3] Berman, Harold J. (1983): *Law and Revolution: The formation of the Western Legal Tradition* (Cambridge, MA.: Harvard University Press); Brunkhorst, Hauke (2014), *Critical Theory of Legal Revolutions: Evolutionary Perspectives*, (London: Bloomsbury, 2014).

universe to another.[4] The newly acquired function of the law as differentiator and interconnector necessitated the development of a refined conceptual apparatus and it was thus no coincidence that the Investiture Conflict coincided with the foundation of the first university 1088 in Bologna and that the university had canon law as its primary focus thereby initiating the creation of the modern legal profession.

From the 16th century onwards, the logic behind the differentiation and interconnection of religion and politics through legal means was, in the European context, extrapolated to the relationship between economy and politics. Prior to the introduction of the distinction between the 'economic' and 'political' dimensions of society the institution of the household was the central organizing form of social processes from the manor to the court providing an integrative approach to the exercise of power and socio-economic reproduction.[5] The 16th century emergence of the concept of 'political economy' indicated the moment where economy and politics started to become differentiated. 'Political economy', in other words, only became a relevant concept in the moment a distinction could be observed between the political and the economic dimensions of society as this created a functional and normative need to problematize the relationship between these two dimensions of society.[6] Law was the central conceptual and practical framework enabling this development. The expansion of property rights, and with it the conceptual distinction between private and public, was the crucial institutional formation allowing for this development. The crux of the emergence of political economy was a dual and simultaneous move towards differentiation and reconnection as expressed in the intertwined nexus of property rights and taxation with both of them unfolding within a specific legal form. It is first with the separation of the economy from the

[4] Brunkhorst, Hauke (2014), *Critical Theory of Legal Revolutions: Evolutionary Perspectives*, (London: Bloomsbury, 2014), 90ff Components of meaning

[5]

[6] Kjaer

political sphere through property rights that taxation, *i.e.* the transfer of resources from the economy to the political system became possible. In the same manner as modern statehood emerged out of Christian theological conceptuality[7], the political economy problematique and the law of political economy was a secondary appearance of a logic that originally emerged in the nexus between religion and politics.[8]

Since then the function of law as simultaneous differentiator and interconnector has extrapolated multiple times. This can, for example, be observed in the strive towards the expulsion of religious doctrines from the classroom, i.e. the separation of religion and education and the manifold legal questions and conflicts emerging from this.[9] The formation of modern science as an activity ideally based on the search for truth free from economic, political and religious interference as for example expressed through legal codification in university constitutions is another classical example.[10] The conundrums of modern sports law faced with questions of structuring the interface between sports on the one side and medicine (e.g. doping) and economic influence due to increased commercialization on the other hand is yet another example.[11] In all these case, and many more could be thought of, law is concerned with erecting boundaries between different dimensions of society while also allowing for interfaces within strict legal forms allowing for transplantations of components of meaning, i.e. religious texts, science funding or pharmaceutical products, from one dimension to another in a legally distilled and controlled form.[12]

The function of law as simultaneous differentiator and interconnector gives it a particular position in society. Not a position of outright supremacy but instead one as an

[7] Kantorowisch
[8]
[9] Harpester 1952
[10] FST and Habermas
[11]
[12] Kjaer 2011 398f.

infrastructural grid. Michael Mann unfolded the concept of state power as infrastructural power distinguishing it from despotic power.[13] Despotic power Mann understands as actions undertaken by state elites "without routine, institutionalised negotiation with civil society groups"[14] and infrastructural power as "the capacity of the state to actually penetrate civil society, and to implement logistically political decisions throughout the realm".[15] In a slightly different take he describes infrastructural power as "the power of the state to penetrate and centrally co-ordinate the activities of civil society through its own infrastructure".[16] This perspective might be considered 'methodological nationalist', discarding non-state-centric forms of local and transnational power, just as the, essentially Hegelian, distinction between state and civil society is rather simplistic and reductionist given the manifold of differentiations between economy, education, politics, religion, science and so forth characterising modern society. More central to this article is however that "there is virtually no technique [of infrastructural power] which belongs necessarily to the state, or conversely to civil society".[17] Hence, infrastructural power is societal power, with the concept of society denoting the category of all social communications and phenomena in world society.[18] The concept of society thereby transcends established distinctions such as private/public, state/civil society and the tripartite local/national/transnational distinction. An adequadte understanding of infrastructural power is therefore conditioned by a corresponding concept of society and indeed its incorporation and unfolding within the framework of a general theory of society.[19] Even more central, to this article is, however, that Mann mixes up the categories of power and law.

[13] Mann, Michael (1984-01-01). "The autonomous power of the state : its origins, mechanisms and results". *European Journal of Sociology / Archives Européennes de Sociologie / Europäisches Archiv für Soziologie*. **25** (2): 185–213.
[14] Mann p. 188
[15] Mann 189
[16] Mann 190
[17] Mann 194
[18] Luhman n
[19] Kjaer 2022

It is law and not power, understood as political power, which provides society with an institutional grid. This is expressed in the law's role as simultaneous differentiator and interconnector as outlined above. In practice this role plays out in two different ways: Through form-giving and synchronisation.

Political power…

might be considered the second key function of law besides the upholding of normative expectations. A function which however have been unfolded differently at different times as also expressed in the understanding of 'law as purpose'; 'law as a tool'; 'law as an obstacle' and 'law as reflexivity-initiation'.[20]

3. Law as Purpose

As is well known, a decisive transformation in the self-understanding of law took place in the 19th century. Especially in the German-speaking world, jurisprudence became increasingly conceived of as an objective science that observed law as a system that was coherent and rational. On the basis of a deductive method, a scientific framework could be created in which all legal norms fitted in and supported each other. The law and its unfolding thus became an objective in itself in two different ways. Internally, the ideal was that the law should be positivist, *i.e.* build on the laws own basis and not on external moral, political, religious or other factors. The law was – by itself - given the right to have right without, in principle or

[20] The distinction between these four types of law have some elements in common with Duncan Kennedy's distinction between 'classical legal thought', 'social legal thought' and recent US-American legal thought but the periodization differs just as this underlying question concerning the function of law and hence the knowledge interest is a fundamentally different one. See Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in *The New Law and Economic Development: A Critical Appraisal* (David M. Trubek & Alvaro Santos eds., 2006). For the alternative, Kjaer, Poul F. (2020), 'The Law of Political Economy: An Introduction', 1 - 30 in Poul F. Kjaer (ed.): *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press).

conceptually, having to take external factors into account. The law thus became an end in itself. Externally, the law should at the same time provide an optimal framework for the organization of society understood as an optimal degree of simultaneous differentiation and interconnection of different social processes in society. The perfectly legally regulated society thus also became an objective in itself. An objective that was captured and linked to progressive liberal ideas of a democratic state and a neutral public bureaucracy.[21]

4. Law as a Tool

After a long run that stretched back to the latter half of the 19th century, the tremors of World War I allowed for the emergence of a new conception of law as a tool. The law was increasingly considered to be an instrument that could be used as a lever for ideological projects and for the realization of political objectives. Common to otherwise very different ideological currents such as anarchism, fascism, communism, National Socialism and socialism, which experienced their breakthrough in the interwar period, was that they reinterpreted the status of law in society. Contrary to the idea of the law as an objective, the new ideological currents regarded law as an obstacle to the fulfillment of political utopias. Alternatively, and less radically, they regarded law as a tool that could be used to realize political objectives without the law was considered as an end in itself or as having an independent influence on the development of society. In practice, this meant an instrumentalization and downgrading of the status of law, albeit with a very large degree of difference in the broad span from anarchism to socialism. The struggle between the understanding of law as an objective or the law as a tool unfolded over decades and continues in many ways today. In many western national contexts, a de facto compromise was however reached in the post-WWII period with elements from both camps

[21] Weber…

present in daily practice and the organizational setup of core institutions political economy.[22] Especially, the development of the welfare state in the years before and particularly after 1968 implied strong tailwinds for the law as a tool approach, as welfare-related policy areas such as education, social security and elderly became increasingly central.

5. Law as an Obstacle

The tension between the two visions of law escalated in the 1970s. The explosive growth of the (welfare) state led to a governing and financial crisis during this period. The state's complexity in everything from budget size, number of employees and policy areas increased sharply throughout the western world, while the state's overall legal framework, e.g. basic constitutional structure, in most cases remained a leftover from the 19th century. The law therefore became increasingly perceived as a straitjacket associated with an old-fashioned *Obrigkeitsstaat*, i.e. authoritarian state, and as an obstacle to the realization of the social objectives associated with the evolving welfare state.

One of the many consequences, in particular in the US-American setting, was the development of the law and economics episteme, *i.e.* the analysis of the law as it is and should be, in a positivist and normative sense, using microeconomic methods. Law and economics was furthermore supplemented with a large number of non-legal management approaches up through the 1970s and 80s. Approaches which subsequently were collected under the management episteme New Public Management (NPM) and later followed up by the New Public Governance (NPG) episteme. The shared objective of these three epistemes was to increase dynamism and efficiency in the public sector and in private-public grey zones, *i.e.* the

[22] Kjaer, Poul F. (2020), 'The Law of Political Economy: An Introduction', 1 - 30 in Poul F. Kjaer (ed.): *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press).

networks and partnerships surrounding the core of the public sector, through the introduction of competition, privatization, outsourcing, financial incentives and removal of 'red tape'.

From the perspective of these epistemes the law was again perceived of as an obstacle blocking the release of adaptation and dynamism throughout society. At the same time, and quite paradoxically, they promoted a mimicking of law that did not imply actual lawmaking. This is for example the case through but the imitation of legal processes through performance management within organizations relying on 'contracts' without these being contracts in the narrow legal sense. These new forms of contract management were predominantly developed by political scientists and economists rather than lawyers, and have been used to supplant traditional, mainly administrative law, ways of organizing public and private-public relations. This development have, in many settings, contributed to a strategic marginalization of the law and the legal profession. In the traditional 'law as a purpose' setup the law was conceived of as an ex ante phenomenon. It was through law the world was defined and interpreted. In the 'law as an obstacle' episteme this is different. Political decisions are made and subsequently submitted to the legal unit of the organization in question for verification of their legality. A picture which also has merged within contracting and contract theory and thus within private law. Traditionally contracts were considered the central object of negotiations in business transactions. Today contracting is mainly considered an ex post exercise conducted after agreement has been reached, merely formalizing the details.[23]

The 'law as an obstacle' episteme thus had a lot in common with the 'law as an instrument' approach, while the normative objective was different. In the construction of the welfare state 'law as an instrument' served the purpose of creating social and material rights,

[23] E.g. Schepker, Donald J,, Won-Young Oh, Aleksey Martynov and Laura Poppo (2014), 'The Many Futures of Contracts: Moving beyond structure and safeguarding and adaptation', *Journal of Management*, 40, 1, 193 – 225.

while in the ‘law as an obstacle’ episteme it became an instrument used to dismantle ‘publicness’ and its replacement with ‘privateness’ on the basis of an ideal of the market as the optimal form for the organization of social exchanges. An objective, which however rested on the paradox that the desired de-politicizing exercise itself was a profoundly political project. De facto ‘law as an obstacle’ often metamorphosed into an instrumentalisation of law, *i.e.* the use of legal instruments to safeguard particular and vested interests through investor protection, dismissal of broader societal objectives of competition law, collective bargaining rights and so forth.

6. Law as Reflexivity-Initiation

The thinking behind the non-legal approach to ‘law as an obstacle’ resulted in a number of contradictions and paradoxes. A crucial consequence of the NPM and NPG epistemes, for example, was that public institutions were transformed into public organizations with independent operational economic and strategic responsibility.[24] Institutions have many - opposing - objectives and considerations that they need to balance. In most national settings, the postal service, for example, has traditionally been a business, an infrastructure and engaged in industrial and employment policy as well as regional and rural policy at the same time. However, from the narrow organizational perspective that came with NPM and especially the NPG paradigm, the postal service was in many settings increasingly reduced to its 'operational task' and ‘core business’. The same optimization and efficiency approach is behind the many structural reforms from the 1990s onwards, such as municipal mergers, closure or merger of courts, police districts, primary schools, local hospitals and so on, which swept through many – particular north-western European – jurisdictions. The intended and unintended externalities that public institutions such as colleges, schools, hospitals and so on produce for society

[24] Brunsson, Nils, and Johan P. Olsen. The reforming organization. (1993).

including the local contexts in which they are - or were - located were however poorly captured by the narrow approach to public management and organization which the 'law as an obstacle' stood for thereby greatly increasing the structural imbalances between cities and rural areas, centers of knowledge production and former industrial heartlands and so forth.

Internally in the legal discourse, there has been a weighty response to the 'right as an obstacle' approach since the early 1980s. The most important contribution is the idea of 'reflexive law', *i.e.* an idea of law as a mechanism of reflection. Rather than singular and hierarchical governance, as contained in the idea of law as an objective, complex societies, according to the reflexive law approach, are forced to develop a more indirect approach to governance and judicial intervention. Instead of substantial governance, the law should limit itself to setting the framework for self-regulation within the private sector, but also in relation to areas such as the mass media, research, health, education and so on. In that sense, reflexive law can also be understood as the regulation of self-regulation.[25] The various societal logics that drive this sphere must be allowed to unfold on their own terms, while the law installs procedures that will increase the reflexivity capacity and ultimately the adaptation capacity in relation to the externalities that different social activities produces.[26] The examples of such initiatives are numerous and range from requirements for Environmental Impact Assessment (EIA) studies, requirements for ongoing (self-) evaluations of public organizations to frameworks for reflection on Corporate Social Responsibility. Reflexive law can thus be

[25] Teubner (1983), 'Substantive and Reflexive Elements in Modern Law', *Law & Society Review* 17, 2 239-286.

[26] Wiethölter (1989), 'Proceduralization of the Category of Law', 501-510 in: Christian Joerges und David M. Trubek (Hrsg.), *Critical Legal Thought. An American-German Debate* (Baden-Baden: Nomos Verlag).

understood as a response to the lack of focus on the broader societal effects of social, including public activities, in the New Public Managements and New Public Governance approaches.

7. The Promise and Potential of Transformative Law

One of the areas where self-regulation within a reflective framework went the furthest was in relation to the financial sector. As known today, things it did not go so well when you take the 2007 financial crisis into account.[27] The focus on inequality and geographical imbalances currently dominating public discourse moreover indicates that the mechanisms of reflexive law, *i.e.* the law's ability to create a framework that manages to take into account the broader societal effects of both public and private activities is insufficient or at least that the expectations placed on the law are not met. The law - and society - thus faces a challenge. A return to a highly centralized *Obrigkeitsstaat* operating within a static legal framework is not practically possible in relation to many of society's complex governance challenges and probably also not normatively desirable in the eyes of most people. Furthermore, the massive expansion of the public sector since the 1960s, which in most settings have continued ever since including in the neoliberal era from the 1980s onwards, means that the 'state' today is an indefinable size without an actual center or opportunity to exercise a comprehensive form of control vertically and in all areas. By mobilizing all its resources and using considerable sums of its economic, organizational and political capital, a government might be able to establish itself as a singular center for a short time. This was in many instances, for example, the case, in connection with the management of the pandemic. But only in the face of a single problem and only for a relatively short period of time. A focus on a single problem that also makes many other single problems disappear out of sight as long as goes on. Despite the 19th century ideal of the rational essentially Hegelian state, as expressed by the idea of law as an objective, the

[27] Kjaer, Poul F., Gunther Teubner and Alberto Febbrajo (eds.): *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, 2011).

state has never possessed an ‘epistemological universal view’ that gave it the opportunity to observe and construct society as a whole in one particular moment. In other words, the state has never been able to capture, interpret and create society in a total sense on the basis of its own perspective.

This opens up for the need of a new approach to law. A possibility is what might be described as 'transformative law' and that both as a theoretical reflection and as a concrete practice.[28] Transformation is a compounded word. ‘Formation’ refers to a form and the ‘trans’ part to the act where the form goes beyond its existing form, *i.e.* transformation means to ‘change form’. The objective of transformative law is thus to change forms. Something has a shape and the intention is it must have a different shape. Here, three sub-elements can be differentiated in a substantial, social and temporal sense:

In a substantial sense, the focus on form means, firstly, a reflection on the law's core task as a simultaneous differentiation and interconnection mechanism. In addition to maintaining norms over time, it is in the simultaneous differentiation and interconnection of different social processes that the social function of law can be found. It is thus central that legislative initiatives systematically and strategically seek to incorporate this function in the way in which legislation, norms and other legal instruments are constructed. Secondly, the law has what might be called a 'soft constituent effect' vis-à-vis social processes including processes with political economy relevance. Mass media, health, science and economic activities are social processes in their own right that reproduce themselves on the basis of their own logics, but it is through concurrence with a legal form that they become institutionalized. An institutionalization, which also can be understood as an 'epistemological shaping effect' in the

[28] For a focus on transformative law in relation to global problems see; Kjaer, Poul F. (2021), ‘The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law’, *Global Perspectives*, 2, 1, 1 – 17.

sense that a social exchange of goods only becomes an economic transaction the moment it is categorized as a contract-based exchange just as a posting on social media first is categorized as a mass media phenomenon within a legally defined understanding of what a mass media is. The law in other words categorizes social phenomena and acts in that sense as constitutive by giving shape to social processes. Or in other words: The law gives loosely coupled social elements a tighter form. However, this process goes both ways. The law is constantly forced to respond to changes in the substantial processes it is oriented towards and typically lags behind in its shaping operations. This is the case, for example, when mass media legislation appears outdated in relation to the new reality created by the emergence and rapid evolution of social media or when new forms of treatment make existing health guidelines outdated. The consequence is a constant ‘crisis of regulation’ since many of the 'crises', 'problems' and 'lack of consensus' that modern societies are characterized by can be attributed to such time gaps where social processes have changed while the tighter form, which the law gives to them has not followed along and therefore no longer captures these processes in full. A time gap which the shift from an ex ante to an ex post perspective on the legal systems position in society, as driven forward by the NPM and NPG epistemes, reinforces by consistently seeing the relevance of the law as a secondary post-rationalization, rather than as the spearhead defining a given problem in the first place. However, a return to a purely ex ante approach to justice does not seem realistic and therefore opens up for the question of how a higher degree of societal stabilization can then be achieved. A middle ground could be a ‘co-constitutive approach’ where the simultaneity between legal and non-judicial processes is strengthened and the formative function of law becomes more dynamic. However, a 100 per cent temporal coincidence will not be achievable and will not be meaningful since the laws central task, in addition to the differentiation and reconnection function, is precisely to stabilize expectations over time through the maintenance of norms. A total coincidence in time will therefore also

mean a cessation of the distinction between the legal and the non-legal as they would become identical. The temporal friction is necessary to maintain the functional and normative integrity of the law and the challenge is therefore rather to make the temporal friction between the legal and the non-legal into a constructive and creative resource rather than a problem.

In the social sense, the law plays a crucial role in facilitating social exchanges, such as the purchases of goods and services, or conversely, preventing social exchanges such as the use of violence or the spread of defamatory statements on social media. The social dimension is also crucial for reflexive laws attempt to increase the ability of social processes to include the societal effects of their activities in their organizational forms, decision-making processes and values. However, this perspective can be broadened through an understanding of ‘law as infrastructure’, understood as the framework and the channels through which administrative, economic, mass media and other social processes are conducted, and that in two ways:

First, through a conceptual detachment of the concept of public law from the concept of the state. The ‘state’ or the ‘public sector’ is an indefinable quantity that has always been ‘fluid’. Both historically and today, private actors have played an active role in the production of, for example, welfare services and the construction and operation of infrastructure. That's the case from and private waterworks and railways over outsourced elderly care and private hospitals to Google's search engine. In addition, there are more sources of public law than just state law. EU law, for example, produces legal norms of a public law nature with direct legal effect. State law and public law are therefore not identical as public law goes beyond formal state institutions. A broader concept of 'public power' seems meaningful and thus also the application of norms and standards on 'public interest' and the areas that fall under administrative law and related areas of law to a wider spectrum of society. For example, private providers of public services or to privately owned ‘critical infrastructure’ and this

regardless of whether public law originates from a national capital or from Brussels and Strasbourg or elsewhere. The easiest and perhaps only way to define 'the public' will therefore be that the public 'is' where administrative law and related legal fields apply and expand their scope. The consequence of this optic is that Google, for example, should not simply be observed as an organization with a one-dimensional obligation to produce shareholder value. Rather Google - like the postal service in the old days - must be understood and regulated as a multi-faceted institution with a number of - potentially - conflicting societal obligations that can be identified and given form through regulation and which it will be Google's task to balance on the basis of a concept of stakeholder value. The task of the law is in other words to transform Google from an organization to an institution on the basis an understanding of public law as an infrastructure that spans the distinction between the public and the private.[29]

Second, through a spatial turn in law. The legal theoretical focus in the last four decades has with reflexive law been on the proceduralization of the law, *i.e.* on the time dimension of the law. Today, however, there is an increasing focus on 'the cohesiveness of society' as expressed in discourses on inequality and geographical imbalances. The spatial perspective implies that social spaces, symbolically defined through geographical markers, becomes a more central dimension in the projection surface on which law has its cognitive focus. Nationwide coverage obligation for telecommunications and electricity providers are classic examples but can in principle be unfolded in a manifold of cases. For example, in relation to welfare services as a legal obligation to ensure a maximum distance from residence to nearest hospital and general practitioner and a maximum distance to nearest educational institution in order to achieve a transformation of spatial relations in rural areas.

[29] Kjaer, Poul F. 'From the Private to the Public to the Private? Historicizing the Evolution of Public and Private Authority', *Indiana Journal of Global Legal Studies*, Vol. 25, 1, 13 - 36 (Spring), 2018.

In a temporal sense, the intention of proceduralization in reflexive law was, a way to deal with increasing societal complexity by focusing on the development of procedures for decision-making processes without entering into the substance against which the decision-making processes were oriented. The law should thereby become more agile, adaptive and dynamic and better at responding to societal change. While the proceduralization mindset has brought a lot, however, there is a basis for expanding the temporal horizon through the development of a legal concept of sustainability in both individualized and societal sense that can serve as a unifying optic for environmental, inclusive (spatial), social, health and economic issues. At the individual level, sustainability implies a focus on 'the whole life', i.e. on a person's total life expectancy. Labor market affiliation and conditions will thus have to be seen in a perspective that implies maintaining a certain minimum standard of living for life with the implications it has for pension schemes and similar things. Occupational health-related illnesses, such as stress, will have to be considered on their long-term implications throughout life and the value of education will have to be assessed on the basis of the long-term effects rather than on the immediate unemployment and income of recent graduates.

From a societal point of view, sustainability is closely linked to the generational perspective, the implications of current activities for future generations. The generational perspective is already central to both fiscal and environmental policy, where the long-term sustainability of contemporary dispositions has long been a theme. The transformative potential of law in this context lies in its ability to provide a framework for contemporary action on the basis of a future perspective, such as known from the EU Stability Pact for fiscal policy or for a statutory phasing out of internal combustion engines at some point in the future within climate law. The law can thus set goals for the future that serve as a guideline for present dispositions and thus initiate a transformative process. An objective function that the law is potentially better at fulfilling than the political system which works with a shorter time horizon governed

by ‘cases’, opinion polls and the next election campaign, while the law can relate relatively indifferently to the short-term political and economic costs of long-term dispositions.

8. Conclusion

Law has always been changing. Historically, law has been understood as an objective, as a tool, as an obstacle and as a mechanism of reflection. Especially after the New Public Managements and New Public Governance revolutions, the law has been strategically marginalized through a dilution of its norm-setting function in society. The consequence is that fertile ground has emerged for a wide range of societal problems to keep growing. This open ups for the possible development of a concept of transformative law focused on law as a form-giving exercise. A legal concept of transformative law that has both a substantial, a social and a time dimension, extending beyond the pure temporal focus which is the main element in reflective law.