

Professor Dr. Poul F. Kjaer
Department of Business Humanities and Law
Copenhagen Business School

Transformative Law as a Law of Sustainability

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21st Century Challenges

- More diverse societies – ethnically, socially, religiously – migration.
- Sustained divergences between cities and rural areas – ‘The Yellow Vests’, ‘London and the rest’.
- Social inequality and precariousness – generational gap
- Globalisation 2.0: Geopolitical conflicts and decoupling – The Ukraine War, dependency on China.
- Climate change!
- Economic, environmental and social sustainability – Indebtedness, climate change, social wellbeing.

The challenge, the question and the argument

- The challenge: How to achieve an economically, environmentally and socially sustainable society?
- The question: What is the role of law in arriving at a sustainable society?
- The task: Imagining a new type of social law for the 21st century – transcending old categories of e.g. economic, environmental and welfare law.
- The argument: As a response a new concept and practice of law is potentially emerging – transformative law!

Overview

- 1. The Strategic Function of Law in Society: What does law 'do'?**
- 2. The Strategic Function of Law in Previous Imaginaries of Law:**
 - A) 'Law as Purpose'
 - B) 'Law as a Tool'
 - C) 'Law as an Obstacle'
 - D) 'Law as Reflexivity Initiation'
- 3. The Promise, Potential and Dangers of Transformative Law - an exercise in 'legal imagination' (R. Unger)**

The Strategic Function of Law in Society

- Three functions of law in the western tradition:
 - The upholding of normative expectations (Niklas Luhmann).
 - But law ‘transforms’ as well. There is continued demand for norms aimed at expanding and stabilising social processes.
- Law as the basic grid of society – the infrastructure (Michael Mann) which makes society “hang together”.
- Law as form-giving: law provides social phenomena with forms and designations as ‘economic’, ‘political’, ‘scientific’ etc.

Four Imaginaries of law

The functions of law are central to four different imaginaries of law:

A) 'Law as a Purpose'

B) 'Law as a Tool'

C) 'Law as an Obstacle'

D) 'Law as Reflexivity Initiation'

Law as a Purpose –

German Historical School of Jurisprudence

- Law as a deductive, rational and coherent system – law front and centre in defining the world.

– ex ante law.

Objective: A coherent legal system and a perfectly legally regulated society.

Friedrich Carl von Savigny
(1779 – 1861)



Law as a tool: Interwar Corporatism and Post-1945 Neo-corporatism

- Law as an instrument for the realisation of political utopias
- A downgrading of the status of law – from communism to fascism and socialism and social democracy : Totalitarian and democratic versions.
- No independent impact of law on the world.

A post-WWII compromise in
Western Europe:

Universalised social law aimed at
establishing societal coherency

- Franz Leopold Neumann (1900 – 1954)
- Otto Kahn-Freund (1900 – 1979)
- Hugo Sinzheimer (1875 – 1945) etc...



Law as an obstacle: 'Law and Economics'

- Reaction to 'steering' and 'planning' crisis of the 1970s onwards - Law and Economics, New Public Management, New Public Governance
- Law as an impediment to the release of societal energies.
- Instead: 'The market' as driver: competition, de-regulation, outsourcing, privatisation.

- Richard Posner (1939 -)
- Law as a secondary element activated ex post – a deal is done or a decision taken and then the law is activated.
- 'Pseudo law' – e.g. 'soft law', 'contract management', 'CSR'..



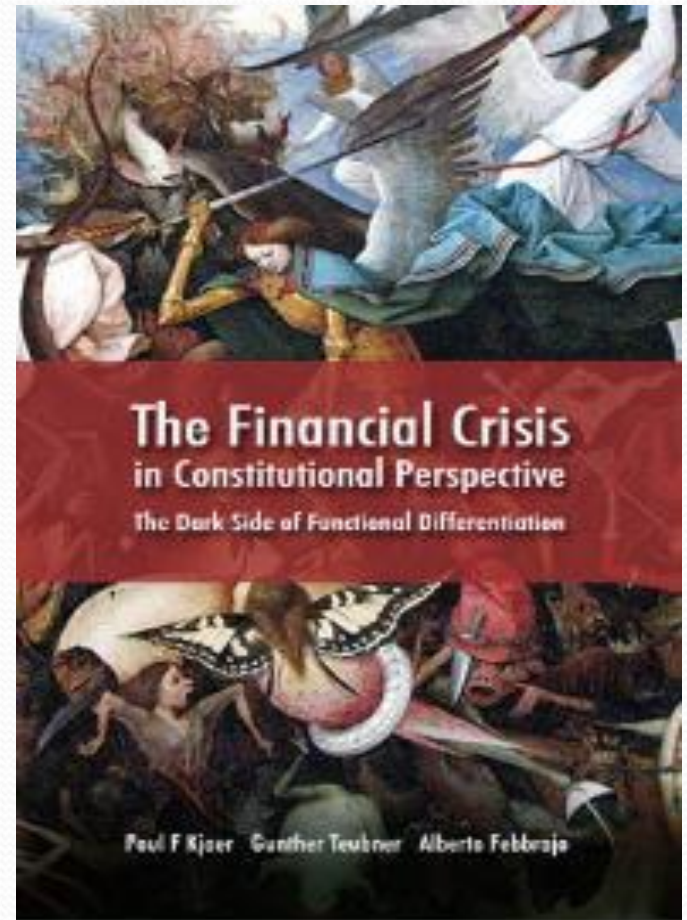
Law as Reflexivity Initiation

- Reflexive law as counter model to L&E.
 - The coordination or coordination.
 - The regulation of self-regulation.
 - Focus on externalities of systemic processes
 - Proceduralisation – a focus on time
- Gunther Teubner (1944 -)



The 2007 Financial Crisis

- The regulation of self-regulation died with the 2007 financial crisis.
- The twin paradigms of law: L & E and Human Rights Law have a "micro-bias" = no concept of society!
- The result: Geographical and socio-economic imbalances and a lack of focus on overall societal coherency.



Imagining Ten Features of Transformative Law

- 1. Societal Unit: ‘The world’ or ‘World Society’ – ‘Antropcenic Law’
 - LaP: Nations; LaT: Social classes, ethnic and religious groups, ‘races’; LaO: The market; LaRI: Function Systems
- 2. Form of Rights: ‘Any form of life’- ‘Vegan Law’- Animals, bacteria, electronic agents, fungi, plants and nature as such (B. Latour).
 - LaP: Individual; LaT: Collective; LaO; economic actors; LaRI: systemic agents.
- 3. Notion of Equality: Inter-generational
 - LaP: Formal individual ; LaT: Primacy of certain groups; LaO: Formal equality of economic actors ; LaRI: Systemic equality

Imagining the Core Features of Transformative Law

- 4. Legal Ideal: Epistemological Visualisation of worlds – “post-colonial law”.
 - LaP: A coherent legal regulation of society; LaT: supporting political action; LaO: Enabling market exchanges; LaRI: Systemic self-regulation.
- 5. Governance Idea: Inter-legality – Conflicts of Laws
 - LaP: Nation states; LaT: (Neo-)corporatism; LaO: Spontaneous ordering; LaRI; Regulation of self-regulation.
- 6. Normative Idea: Sustainability - merging the boxes of economic, environmental and social law
 - LaP: Rationality; LaT: Progress; LaO: Growth; LaRI: Functional differentiation.

The Potential Emergence of Transformative Law

- Transformative law is a potentiality not a reality!
- A multitude of fragments which might or might not merge into a new episteme of law.
- Decisive factors:
 - The structural conditions of 21st century world society – fragmentation or integration?
 - The location and division of resources among world regions.
 - the perception of problems and how they might change.
 - Its core source? **EU Law?**

The Dangers of Transformative Law

- Many versions are possible – like ‘law as a tool’ – multitude of ideological and institutional practices
- Activist, communitarian, fundamentalist, pluralist, totalitarian, new reactionary law or a democratic and rule of law based one!
- To be decided and unfolded in concrete societal settings and legal practise.

To conclude

Transformative Law is a potentially emerging type of law having sustainability at its core which might or might not turn out to be sustainable!

Thank you

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