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DIALOGUE AND DEBATE: COMMENT

Legal theory in search of social transformation

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Abstract

Inspired by the contributions of Poul Kjaer and Kerry Rittich to this Special Issue, this article extends the reflection on the role and potential of law for social transformation. More specifically, I attempt to build on a revised framing of the constitutive role of law to draw the contours of a transformative instrumentalism, where law functions as an instrument for the articulation of political and social objectives. My account shifts the attention from transformative law's form to its content, based on the premise that engagement with 'political' economy necessarily entails an engagement with the substantive standards that shape social relations of production and define the nature and extent of exploitation. Yet, I argue that the endorsement of law's constitutive function and the turn to law's content need not lead to the kind of instrumentalism that exhausts itself in particular policy reforms or prescriptions to assume control over processes of legal coding. Relying on a tentatively redrawn conception of the constitutive role of law that draws from both legal institutionalism and Marxist perspectives, I suggest that instrumentalism may instead be transformative by prioritising material ends, leaving open the question of the concrete legal and institutional forms that will materialise them. The directions of such transformative instrumentalism involve an element of 'mobilisational democracy' against the insulation of the economy from democratic control; reforms generative of collective subjects and centres of democratic power ('non-reformist reforms'); and a focus on the planning and coordinating function of law among diverse – but united in their objective – legal rationales and institutional forms.

Keywords: legal theory; social transformation; political economy; constitutive role of law

1. Introduction

This contribution is inspired by and is, in a way, a comment on the articles by Poul Kjaer[1] and Kerry Rittich.[2] Grappling with what may seem like a history of the present, both contributions share the intuition that a potential emergence of a 'new moment in legal consciousness' would be inextricably linked with the ways in which law may trigger, facilitate, or hinder social change. This not only speaks to the theme of the conference being 'transformation' and 'institutional imagination', but it also corresponds to a historical juncture where accelerating societal crises raise the question of law's complicity and agency in redressing them. A tension that animates these contributions, but also the broader debates in which they are embedded, is that between the tendency to accentuate the primacy of the political and legal systems in ordering society versus the acknowledgement of the innate, horizontal logics of the various social systems of a functionally differentiated society. While, as I will show, this tension is better visualised as a spectrum, rather than a dipole, treading a path for 'transformative law' is conditioned by the position one assumes in that

[1]P Kaer, 'What is transformative law?' 1 (4) (2022) European Law Open 760.

[2]K Rittich, 'In the middle of things: the political economy of labour beyond the market' 1 (4) (2022) European Law Open 781.

spectrum. The greater the importance attributed to law's constitutive effect for social relations and economic processes, the greater its supposed agency in altering these very relations and processes.

In this article, I attempt to build on a revised framing of the constitutive role of law to draw the contours of a transformative instrumentalism, where law functions as an instrument for the articulation of political and social objectives. On the one hand, this builds on Kjaer's careful distancing from reflexive law as the normative horizon for contemporary legal theory and institutionalist praxis. Indeed, reflexive law's ultimate reliance on system-specific logics of self-limitation and self-change appears inadequate in conditions of consolidated private power. On the other hand, the account presented here differentiates itself from Kjaer's emphasis on the form-giving function of law, suggesting that engagement with 'political' economy necessarily entails engagement with questions of *content*, that is, with the substantive standards that shape social relations of production and define 'the nature and extent'[3] of exploitation. The acknowledgement that law, as a product of deliberate design, is imbricated within social relations of production, defining entitlements and granting coercive powers, means that there are no value-neutral iterations of legal critique. As to the direction of normativity, I suggest that it may be approached through a recourse to standards internal to the practices criticised – that is, through an *immanent critique* to the dominant socio-political arrangement and its legitimising logic.

An argument I put forward in this article is that endorsing law's constitutive function need not lead to an instrumentalism that exhausts itself in the prescription to assume control over processes of legal coding, as some versions of legal institutionalism might imply. Relying on a tentatively redrawn conception of the constitutive role of law that draws from both legal institutionalism and Marxist perspectives, I suggest that instrumentalism may instead prioritise material ends, leaving open the question of the concrete legal forms or policies that will materialise such ends. This echoes Rittich's critical point that the breadth of governing legal orders extends beyond a set legal field, making the success of targeted, ad hoc reforms doubtful. As I will show, adopting a macro-perspective on the direction of legal change, transformative instrumentalism involves an element of '*mobilisational democracy*' against the insulation of the economy from democratic control; reforms not limited to concrete outputs but instead generative of collective subjects and centres of democratic power ('*non-reformist reforms*'); and a focus on the *planning and coordinating function of law* among diverse – but united in their objective – legal rationales and institutional forms.

In Part II, I trace the roots of reflexive law and the limitations that make it the point of departure for Kjaer's project of transformative law. In Part III, I argue that subscribing to constitutive theories of law that highlight the deliberate design of the economy also entails assuming a position about the content of the relevant legal arrangements. I, then, turn to immanent critique in an effort to unpack the underpinnings of normative positions of current critical projects. In Part IV, I attempt to draw the contours of a transformative instrumentalism, relying on a nuanced understanding of law's constitutive function. In Part V, I highlight that the turn to the state – and, thus, to aspirations of direct control over legal coding – does not, *in itself*, upend market dominance. Instead, I point to mobilisation, non-reformist reforms, and planning as the directions of a transformative instrumentalism. The conclusion stresses the importance of a mobile and context-sensitive critical practice, highlighting both the limits of the directions discussed above, as well as the overall limits of law for agendas of social transformation.

2. Beyond reflexivity, beyond embeddedness

Poul Kjaer's agenda-setting piece frames 'transformative law' as a next step in the historical evolution of the function of law in society, following 'law as purpose', 'law as tool', 'law as obstacle', and, finally, 'law as reflexivity-initiation'. Kjaer recognises that reflexive law, albeit the last progressive theorisation of the function of law in Europe, has been insufficient in addressing

[3]EM Wood, *Democracy Against Capitalism* (Verso 2016) 27.

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contemporary societal challenges, especially those associated with financialisation and rampant social inequalities. Reflexive law was conceptualised by Gunther Teubner as 'a system of coordination of action within and between semi-autonomous social subsystems'.[4] Emerging as a response to the crisis ensued by the 'rematerialisation' of law that accompanied the establishment of the welfare state and the solidification of systems of vertical state control,[5] reflexive law was envisioned as a shift to regulated forms of self-governance and to procedural forms of legitimacy. Reflexive law was thus a break from legal centralism and the top-down regulation of the welfare state. Instead, its programmatic aspiration was to enhance the self-reflecting and self-limiting capacities of social systems. As Kjaer highlights, reflexive law prompted a turn to 'regulated self-regulation' and the creation of discursive structures within social systems that ideally would support learning and adaptation.[6] As such, the normative vision behind reflexive law has been that of decentralised self-governance and, eventually, of a democratisation of the multiple social systems that comprise society.[7]

As Kjaer's periodisation already hints, the turn to reflexivity and proceduralism was defining for projects of legal critique, shaping the ways in which 'transformation' or 'institutional imagination' were envisioned. Yet, iterations of reflexivity expanded beyond the critical realm of progressive legal theory. A diluted, and often distorted, version of reflexivity that may have drawn from the decentralising impetus but which, ultimately, set aside reflexive law's aspirations of democratisation penetrated institutional practice. Reflexivity gradually acquired a dimension of cooperative relationships between the public and the private, of 'responsive regulation', and regulatory synergies.[8] As Kjaer points out, the limits of this approach have been most evident in the case of financial regulation, where 'reflexive' new governance techniques have been prevalent and criticised for their contribution to the financial crisis of 2007.[9] In their most ambitious form, elements of reflexivity are discernible in current attempts to 'publicise the private' and thicken the normative web of market dynamics by steering – not forcing – private corporate activity towards goals of social and environmental sustainability. At the international level, the most characteristic example in this direction is the framework of the UN Guiding Principles on Business and Human Rights (UNGP). Rather than instituting legal obligations for corporations to respect human rights, the UNGP opt for a model where obligations are monitored and enforced by the 'courts of public opinion', comprising of 'employees, communities, consumers, civil society, as well as investors'.[10] In other words, the UNGP create a framework that facilitates the generation of learning pressures

[4]G Teubner, 'Substantive and Reflexive Elements in Modern Law' 17 (2) (1983) Law & Society Review 239, 242. This also followed the concept of 'responsive law', developed by P Nonet and P Selznick, *Law and Society in Transition: Toward Responsive Law* (Taylor and Francis 2017).

[5]Reflexive law comes partly in response to Jürgen Habermas' diagnosis of a dual crisis of the substantive law of the welfare state: A rationality crisis – related to the increased complexity of societal operations – and a legitimation crisis – related to the burden of political responsibility when the state substitutes the market for the allocation of resources, see J Habermas, *Legitimation Crisis* (Beacon Press 1975) 61–74. See also, L Boltanski and E Chiapello, *The New Spirit of Capitalism* (New updated edition, Verso 2018) discussing the emergent 'artistic critique' to capitalism, focusing on regimes of oppression, technocracy, state paternalism, and hierarchical power.

[6]Teubner, 'Substantive and reflexive elements in modern law' (n 4) at 273.

[7]Reflexive law was followed and complemented by the agenda of societal constitutionalism, see G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012). For Teubner, each social system must find its own way of 'democratisation' rather than mimicking the political system, see G Teubner, 'Societal-Constitutionalism and the Politics of the Common' 21 (2010) Finnish Yearbook of International Law 111.

[8]O Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' 89 (2004) Minnesota Law Review 342, 364.

[9]Examples include the turn to principles-based regulation – which calls for broad, general, and purposive rules to guide market participants towards regulatory objectives – or *meta-regulation* – where corporations develop their own systems of compliance and the government monitors their self-monitoring, see J Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' 75 (6) (2012) Modern Law Review 1037.

[10]OHCHR, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the

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on corporate actors, ideally leading to self-limitation and self-change. Non-binding norms serve as starting points for the generation of intracorporate norms, which then constitute actual standards for review and monitoring.[11] Similarly, at the European level, new forms of supply chain regulation aimed at social and environmental sustainability largely follow on the tracks of the UNGP and the reflexive logic of regulated self-regulation, albeit with a slightly more prominent role for states in the delineation of concrete obligations for transnational corporate actors.[12] More broadly, embedding public and social values in the operations of private actors – as a new iteration of the agenda of embeddedness and 'embedded liberalism'[13] – came to structure the normative horizon of what constitutes 'progressive' regulatory policy.

As Kjaer highlights, reflexive law and its ideals of decentralised deliberation and self-governance had a progressive vector at a time when the welfare state appeared to be stagnating. And yet, as Kjaer also acknowledges, a contemporary project of transformative law must look beyond it. Contemporary accelerating societal crises, including growing inequalities and impending environmental catastrophe, are taking place in a historical setting very different from that of a stagnating welfare state. In an institutional setting permeated by the prioritisation of market rationalities, the focus shifts to unfettered private power, which reflexivity seems ill-equipped to redress. This is, at first, because, in its current instantiations, reflexivity's aspiration to transform the organisational culture of private actors to achieve lasting change is coupled with an expansion of private corporate actors' regulatory authority and scope of self-governance. More profoundly still, the reliance on societal expectations and 'learning pressures' as the motor of social transformation empowers the private actors able to exert forces of 'self-limitation' and 'self-change'.[14] At the same time, the conceptual premise of a functionally differentiated society that knows no apex or a position of omniscience overlaps with the Hayekian epistemology of 'unknowability' of the economy, according to which central authorities cannot collect and act upon the dispersed and localised knowledge that is necessary for the allocation of productive resources.[15] This epistemological substratum reduces the possibility for collective action and political voluntarism, elevating social complexity to an insurmountable obstacle for aspirations of legal and social engineering. The remaining leeway for projects of social transformation, namely the system-specific logics of self-limitation and self-change, appears too confining for a future-oriented agenda of transformative law, such as the one laid out by Kjaer.

Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: A/HRC/8/5' (7 April 2008) at 54.

[11]This corresponds to what Teubner has theorised as a *reversal* of the qualities of law, whereby the private ordering of corporations adopts characteristics of hard law, while state or international norms maintain a soft character, see G Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' 18 (2011) Indiana Journal of Global Legal Studies 617.

[12]Recent examples include the proposals for a Corporate Sustainability Due Diligence Directive and a Corporate Sustainability Reporting Directive at the level of the EU, the German Supply Chain Act of 2021, the French Duty of Vigilance Law of 2017.

[13]Agendas of embeddedness of the economy typically draw from K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001). For embedded liberalism, see J Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the PostwarEconomic Order' 36 (2) (1982) International Organization 379.

[14]See, I Kampourakis, 'The Postmodern Legal Ordering of the Economy' 28 (1) (2021) Indiana Journal of Global Legal Studies 101, 142–6. For a similar critique, see also E Christodoulidis, *The Redress of Law* (Cambridge University Press 2021) 12, for whom re-entries of the political within the economic system cannot be fundamentally transformative because the economic system structurally removes processes of organisation of production and democracy from its field of reference.

[15]Indicatively, FA Hayek, 'The Use of Knowledge in Society' 35 (1945) Americal Economic Review 519. On the relative epistemological kinship between the systems theory thinking animating the reflexivity response and Hayekian neoliberalism, see also Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 224.

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3. In search of normativity: between form and content

Attempting to capture what Rittich calls a 'new moment in legal consciousness', Kjaer launches the idea of 'transformative law' as both a theoretical reflection and concrete practice. Bridging systems theory insights with the legal institutionalism that is currently regaining influence – not least through the Law and Political Economy (LPE) scholarship – Kjaer outlines law's 'soft constituent effect' as the starting point for transformative thinking. On the one hand, from this perspective, law must remain a differentiation and interconnection mechanism, enabling structural couplings between social systems that otherwise reproduce on the basis of their own logic rather than directly responding to political imperatives.[16] On the other hand, Kjaer nuances this position with legal institutionalist insight: While social processes – including those related to the economy – reproduce on the basis of their own logic, it is through the legal form that they become institutionalised. This form-giving function of law is key to its transformative potential.[17] Building on the earlier objective of reflexive law to see the societal effects of different logics of action internalised within their organisational forms, Kjaer suggests that public law needs to be detached from the state. Taken to the field of the economy, this would mean that what neoclassical economics has traditionally framed as 'externalities' must be reincorporated as part of the organisational logics of 'private' systems, essentially diffusing the notion of the 'public' – public power and public interest – within the private, possibly expanding administrative law's ambit. Yet, this agenda differentiates itself from reflexive law by suggesting that the expansion of public rationalities may come through a self-conscious expansion of public law that 'publicises' the private, rather than through societal pressures and the facilitation of self-regulation. In this way, and despite an overarching scepticism towards the role of the state in projects of social transformation, Kjaer's 'detached public law' reserves a more central role for political power than its reflexive law counterpart.[18] As Kjaer emphasises elsewhere, emancipative social theory tends to ignore the fact that modern society is, above all, an 'organisational society'[19] – making an institutional mediation the condicio sine qua non of large-scale social transformation.

In this account, then, transformative law is fundamentally about *form*. What about transformative law's *content*? As with reflexive law, a possible inference is that any attempt to sketch substantive elements is futile as it takes place in the shifting ground of political contingencies. In addition, outlining a vision about the content of law would risk destabilising established liberal commitments against oversized political power[20] and for 'rigorous state neutrality' regarding diverse conceptions of the good.[21] Yet, in that way, Kjaer's account does not land far from reflexive law's proceduralism as the epicentre of transformative discourses in conditions of increasing societal complexity. The procedural response extends to the social processes with political economy relevance. However, this appears to only circumvent that engagement with 'political economy' entails by definition an engagement with 'the political' of the economy – that is, with questions about the ordering and the morality of our economy. Procedural accounts are themselves not

[16]See, N Luhmann, *Law as a Social System* (Oxford University Press 2008).

[17]See, also, PF Kjaer, 'The Law of Political Economy: An Introduction' in PF Kjaer (ed), *The Law of Political Economy: Transformations in the Function of Law* (Cambridge University Press 2020) 11–4.

[18]This could be seen as redressing what Kjaer has identified as a weakness of the left-Lumannian project: ' . . . making it explicit that the realisation of political claims in modern society is impossible without the reliance on complex forms of formal organisation automatically highlights the limited reach of the left-Luhmannian agenda', PF Kjaer, 'Law and Order Within and Beyond National Configurations' in PF Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011) 405.

[19]Ibid. at 406.

[20]See, G Teubner, 'A Constitutional Moment? The Logics of "Hitting the Bottom"' in PF Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011) 36–7, according to whom 'the political constitution cannot fulfil the role of defining the fundamental principles of other subsystems without causing a problematic de-differentiation – as occurred in practice in the totalitarian regimes of the twentieth century . . . No social sub-system, not even politics, can represent the whole society.'

[21]See, R Dworkin, 'What Is Equality: Part Two: Equality of Resources' 10 (1981) Philosophy & Public Affairs 283, 332.

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substantively neutral. Rather, they tend to favour particular sets of substantive outcomes, depending on the procedural norms they advance – this echoes critiques about the risk that reflexive law amplifies the role of the market as a site of veridiction.[22]

Subscribing to the notion that law is – at least partially – constitutive of the economy, as Kjaer does, means that questions about the shaping of social relations of production and exchange are inescapably legal questions as well. This is because the form and extent of legal entitlements, including most prominently property rights, as well as the eventual nexus of background rules of prohibition and permission and the coercive power these confer to different actors, is a product of deliberate institutional design.[23] As Ellen Meiskins Wood has recognised, juridical and political relations determine 'the nature and extent' of exploitation, with relations of production being historically constituted by the configuration of power that is contingently reflected, among others, in legal rules.[24] Furthermore, recent LPE scholarship has recognised that the political has the capacity to resolve certain of the contradictions inherent in the processes of capitalist accumulation. For example, while the abundance of capital and the increase of the capital/output ratio would in theory lead to a fall of the rate of profit, institutional arrangements may reverse this expected tendency.[25] Indeed, one way of reading Thomas Piketty's empirical finding that the rate of profit has not fallen over the centuries despite capital's abundance[26] is to suggest that this has been made possible through institutional arrangements – through the sphere of the political.

The extent to which the economy is a product of legal design becomes manifest through Rittich's account of how legal rules are internal in the very definition of what constitutes 'the economy'. By constituting markets, legal rules also shape the boundaries of markets, separating the family, informal markets, or community organisations from the domain of contract and commerce. This definition of the boundaries – the legally constitutive act of institutionalisation – is not only an act of form-giving but rather also an act of content determination, as legal institutions become internal to the processes of valuing and devaluing *certain kinds* of labour. At the same time, as Rittich highlights, the definition of boundaries invites continuous challenge of their own artificiality, based on an assessment of the distribution of burdens and benefits they entail. This challenge and assessment unfold similarly on normative terms: What kind of labour is valued and what devalued by the current delineation of market boundaries? Who is set to gain and who to lose from this delineation, and with what justification? Rittich's return to the Hohfeldian correlativity of legal entitlements is instructive in that regard:[27] as legal entitlements empower certain

[22]E Christodoulidis, 'On the Politics of Societal Constitutionalism' 20 (2) (2013) Indiana Journal of Global Legal Studies 629. See, also the feminist critique to Jürgen Habermas' largely procedural account of deliberative democracy, according to which grounding the legitimacy of norms on informal deliberations in the public sphere only brackets the substantive inequalities that make up the public sphere, perpetuating existing exclusions and the lack of participatory parity, N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' in CJ Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992) 109–142.

[23]This has been a key insight of American Legal Realism with broad reverberations in Critical Legal Studies and now Law and Political Economy. Only indicatively, see RL Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' 38 (3) (1923) Political Science Quarterly 470; MJ Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford University Press 1992); D Kennedy, 'The Stakes of Law, or Hale and Foucault!' XV (4) (1991) Legal Studies Forum 327; J Britton-Purdy and Others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' 129 (2020) The Yale Law Journal 1784.

[24]Wood (n 1) 27. Similarly, in EP Thompson's historical analysis, law was not simply 'superstructural' but rather 'deeply imbricated within the very basis of production relations, which would have been inoperable without this law', EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1975) 261.

[25]DS Grewal, 'The Legal Constitution of Capitalism' in H Boushey, JB de Long and M Steinbaum (eds), *After Piketty: The Agenda for Economics and Inequality* (Harvard University Press 2017) 471–490.

[26]T Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014).

[27]See, WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' 26 (8) (1917) The Yale Law Journal 710.

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actors with coercive power, they simultaneously disempower others, forcing them to tolerate the relevant forms of coercion.

The recognition that social relations of production, as well as what is even defined as 'production', are, at least partly, generated by legal rules suggests that legal critique that seeks to be transformative cannot shy away from a normative brief. Along these lines, Robin West underlines that the Critical Legal Studies movement followed a normative vision: One that opposed the liberal legal settlements revolving around isolated right holders and that challenged the gap between formal and substantive equality, prompting utopian writing and moral critique.[28] Recent LPE scholarship has also assumed a standpoint of commitment to egalitarian and democratic ideals as integral to the construction of a 'democratic political economy' that 'creates a world which satisfies the needs and powers of human beings'.[29] Even more pointedly, Britton-Purdy et al underline that 'a democratic political economy is a *moral project*, aimed at taking with full seriousness the equality of persons and our capacity to set for ourselves the terms of our collective lives, to decide how to deal out power and vulnerability, to figure out how to live together – and to defend these decisions to one another'.[30]

This critical standpoint should not be assumed as a moral abstraction but rather in conjunction with the current political hegemony. Speaking from within the emerging field of LPE, Corinne Blalock warns against assertions of substantive morality devolving into a futile and misleading opposition of morality versus economic efficiency. Drawing from the work of Martha McCluskey, Blalock emphasises that the current neoliberal hegemony is nothing but amoral; not only does it promote individual freedom and value-free economics at the expense of social responsibility and community morality; instead, it redefines those very notions.[31] An alternative normativity requires, as a first step, the demystification of the supposedly value-free character of current socio-political arrangements.

Still, this leaves unanswered the fundamental question of grounding the normative vision – of the subject, in other words, of the 'moral project' Britton-Purdy et al referred to. Whose morality are we talking about? One possibility would be to simply transpose moral debates to political contestation over competing notions of the common good. Yet, a more robust alternative to self-standing, context-independent, and eventually transcendental moralities can be found through a recourse to standards internal to the practices criticised – that is, through an *immanent critique* to the dominant socio-political arrangement and its legitimising logic.[32] Legal critique, then, finds its normative propulsion in the assertion that the current, legally institutionalised, structure of the economy does not fulfill its own promises. *Freedom*, a core constitutional value and organisational principle of liberal democracies, remains primarily confined in the frame of absence of state coercion (ie, civil and political rights) and facilitation of economic entrepreneurship (eg, four freedoms of the EU). This reductive understanding of freedom can underpin the accumulation of private power and the fuelling of socio-economic inequalities, while cultivating individualism and alienation. Yet, the ideal of freedom lends itself to multiple forms of institutional imagination, from 'freedom from want' expressed through socio-economic rights and redistributive policies, to the

[28]R West, *Normative Jurisprudence: An Introduction* (Cambridge Introductions to Philosophy and Law, Cambridge University Press 2011) 118. See, also P Gabel, 'Critical Legal Studies as Spiritual Practice' 36 (2008) Pepperdine Law Review 515, 528.

[29]A Harris and JJ Varelas, 'Law and Political Economy in a Time of Accelerating Crises' 1 (1) (2020) Journal of Law and Political Economy 1, 10.

[30]Britton-Purdy and Others (n 23) at 1832.

[31]C Blalock, 'Neoliberalism and the Crisis of Legal Theory' 4 (2014) Law and Contemporary Problems 71, 99–100; MT McCluskey, 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State' 78 (2003) Indiana Law Journal 783.

[32]See, R Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (Cambridge University Press 1981); A Honneth, 'Reconstructive Social Critique with a Genealogical Reservation: On the Idea of Critique in the Frankfurt School' 22 (2) (2001) Graduate Faculty Philosophy Journal 3.

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utopia of *freedom from necessity*.[33] Similarly, *equality* is associated with equality before the law (ie, juridical equality), the full membership in a community (ie, citizenship) and the guarantees to equality of opportunity (eg, anti-discrimination). This brings up the recurrent critique that formal equality in conditions of material inequality only legitimises substantive inequality.[34] Nevertheless, equality has also inspired notions such as those of social citizenship and affirmative action, and it opens a door for economic policies and legal rationalities that expand on principles of substantive equality. It is beyond the purposes of this contribution to discuss in greater length the possibility of an inherent fault of categories such as 'freedom', or 'equality'. While their semantic reach is limited by the fact that they carry within them the deficit they are meant to address,[35] legal critique may draw from the unrealised normative potential that may be reconstructed from existing legal ideals and social practices.[36]

4. Towards a transformative instrumentalism

The implication behind the constitutive role plays for the economy is that the economy is a human artefact amenable to many forms (contrary to 'there is no alternative' discourse). In its most radical form, this highlights the 'false necessity' of current dominant social organisational forms.[37] A possible conclusion of an institutionalist analysis that highlights the primacy of the political and the legal systems for the constitution of social relations of production is that legal rules and institutional formations can function as vehicles for the fulfilment of social objectives, including possibly broader social rearrangements. This hints to a version of 'transformation' that is closer to the current of thought Kjaer identifies as 'law as a tool'.[38]

Yet, the turn to legal instrumentalism and the theorisation of the relation between law and the realisation of political objectives is not unequivocal, nor does it correspond to one unambiguous theory of social change. One version of the turn to instrumentalism is captured by legal institutionalist analyses that overemphasise the performative role of law for the constitution of social relations, leading to a normativity that stays at the level of legal coding. Assuming control over law is, then, presented as *the* avenue for social transformation. Along these lines, Katharina Pistor's *The Code of Capital* offers an illuminative exploration of how legal coding may turn assets into capital and shield private wealth through the creative employment of private law instruments. Yet, what results from an otherwise analytically enlightening emphasis on the processes of legal coding for capital formation is the seemingly straightforward call to regain control over the law, to adopt legal fixes that impede the privileges and mobility of capital, and to rethink legal education

[33]See, K Marx, *Capital* (III, International Publishers 1977) 820, 'the realm of freedom actually begins only where labour which is in fact determined by necessity and mundane considerations ceases'. As to how freedom lends itself as the motor of institutional imagination, see Polanyi (n 13) at 265, 'juridical and actual freedom can be made wider and more general than ever before; regulation and control can achieve freedom not only for the few, but for all. Freedom not as an appurtenance of privilege, tainted at the source, but as a prescriptive right extending far beyond the narrow confines of the political sphere into the intimate organization of society itself'.

[34]See, K Marx, 'On the Jewish Question' in J Waldron (ed), *'Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man* (Routledge Revivals, New ed. Routledge 2015); TH Marshall, *Citizenship and Social Class* (Cambridge University Press 1950).

[35]Christodoulidis, *The Redress of Law* (n 14) 538. For an only partially overlapping critique, see K Marx, *Capital* (I, Penguin Classics 1976) 178, who critiques Proudhon for deriving ideals of 'justice' from current juridical relations, eventually perpetuating an understanding of these relations as 'natural' and, therefore, insurmountable.

[36]See, T Stahl, *Immanente Kritik: Elemente einer Theorie sozialer Praktiken* (Campus 2013).

[37]See, RM Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (v. 1, Verso 2004).

[38]For a similar periodisation, see D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850 – 2000' in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19–73 and the second globalisation of 'the social'; or, M Bartl, 'Socio-economic Imaginaries and European Private Law' in PF Kjaer (ed), *The Law of Political Economy: Transformations in the Function of Law* (Cambridge University Press 2020) 228–253 and her discussion of 'the market as a political project'.

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and its funding, considering the cardinal role of ordinary lawyers in coding capital.[39] The risk is that a legal institutionalist perspective that sees law as an all-encompassing social relation ends up reifying juridical relations at the expense of social relations,[40] reducing its normative spearhead to reforms within law's self-description[41] – and, thus, eventually abandoning hope for broader social transformation. The lack of engagement with the structural dynamics that make the current legal coding a historic product of specific social relations and constellations of power may engender an ahistorical normativity, which does not provide the analytical tools to comprehend how a genuine regaining of control over the law could occur within a socio-economic system that is constituted by this very law. This is also reflected in the methodological individualism of the emphasis on lawyers and their craftsmanship. Furthermore, straightforward calls for legal change and legal reform also face the obstacle Rittich rightly highlights in her piece: The breadth of governing legal orders extending beyond a set legal field. For instance, 'work and labour markets are regulated not only by property, contract law, as well as labour standards, [but] also regulated by family law and a wide range of other laws too'. This means that targeted, ad hoc legal reforms may be ineffective in transforming even the social fields in which they purport to act. This is a danger Kjaer is acutely aware of, and which his turn to law's form-giving function is meant to avoid.[42]

However, the turn to instrumentalism need not exhaust itself in partial legal reforms or prescriptions about contingent policy tools. Rather, I argue, the turn to instrumentalism could prioritise the legal articulation of political and social objectives. This shifts the focus on the broadly conceived capacity of law to contribute to the constitution of social relations, modes of exchange and interaction, or conceptual categories.

Such a shift rests on two premises that re-evaluate the primacy of the political, nuancing legal institutionalism and the constitutive premise itself. The first premise follows a moderate concession to the epistemologies highlighting societal complexity and 'unknowability' of the economy, acknowledging that commitments to guiding normative visions of equality and democracy will not always yield precise answers to distributive conflicts.[43] The inevitable indeterminacy of social engineering means that theories of law cannot generate fully fleshed-out predictive analytics of resource allocation. This also warrants a critical attitude towards technocratic regimes of 'best practices' and indicators.[44] However, this concession cannot be absolute, as if knowledge only preceded social action. Instead, tapping on dispersed knowledge and mobilising centripetal transformative energy can exist in a dialectical relationship, where the former informs the latter after the latter has already been launched – in other words, political voluntarism may possibly unleash new ways of utilising decentralised societal knowledge in the design of economic policies.[45]

[39]K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019) 224–9.

[40]As Marco Goldoni insightfully points out in his critique of Pistor, 'the legal norms that declare gig economy employees as self-employed might not be enough to make those "workers" really autonomous; rather they seem to hide their de facto condition as wage workers', M Goldoni, 'On the Constitutive Performativity of the Law of Capital' 30 (2) (2021) Social & Legal Studies 291, 294.

[41]According to Goldoni, Ibid. at 294, 'the failure to couple the analysis of the relevant legal norms with social relations runs the risk of producing a disembedded type of legal analysis that misses out on the dynamics of the relevant social practices'. Similarly, A Chadwick, 'Capital Without Capitalism? Or Capitalism Without Determinism?' 30 (2) (2021) Social & Legal Studies 302, 307 'her book is also a testament to the fact that Marxists have tended to drastically underweight the role of law in the process of wealth creation (p 116). Nonetheless, it is possible that the balance of the argumentation perhaps tilts too far in another direction. At times, the impression is created that it is possible to have capital without capitalism'.

[42]The limited reach of targeted, top-down reforms is also consistent with the system theoretical thinking according to which effective limitations on the destructive expansion of social systems, like the economy, can only be the result of system-specific logic, see Teubner, 'A Constitutional Moment? The Logics of 'Hitting the Bottom'' (n 20).

[43]RM Unger, *What Should Legal Analysis Become?* (Verso 1996) 124.

[44]Indicatively, SE Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' 52 (3) (2011) Current Anthropology 83.

[45]On the potential and shortcomings of actually implemented experimentalism in China, see S Heilmann, 'Policy Experimentation in China's Economic Rise' 43 (1) (2008) Studies in Comparative International Development 1.

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The second premise follows the imbrication of law within the basis of social relations of production. Reducing the historicity of social relations of production to the contingent legal infrastructure implies that the whole – the overarching mode of production – can be reduced to an inner essence of 'the Political' and everything that emanates from it is just an epiphenomenon.[46] In a sense, this maintains the crude Marxist metaphor of 'base -superstructure', only replacing 'the economic' with 'the political' as the 'base'. Refusing, instead, the analytic distinction between the social (legal, ideological, etc.) and the material (economic) of social relations of production redraws constitutive theories of law to their rightful scale. While legal entitlements may be crucial in conferring coercive power to their holders, the shaping of such entitlements and the ideology that underpins them is a product of the very social relations of production they are meant to uphold.[47]

Recognising the finitude of legal and social planning on the one hand, and the limitations of at-will, top-down rearrangement of the economy on the other hand, does not rule out having a guiding vision of how the 'political' economy should be ordered. Rather, I argue, it invites a *normatively guided pragmatism* that prioritises objectives, leaving open the question of the concrete legal forms or policies that may materialise such objectives.[48] As I will show in the next section, such pragmatism requires overarching planning capable of coordinating and interlinking the various ad hoc reforms and the employment of different tools in different social contexts under shared normative auspices.[49] For example, this could include the decentralised vision of 'detached public law' as articulated by Kjaer *but also* top-down indicative planning; it could involve the programmatic advancement of rights and remedies in certain fields, *as well as* the solidification of welfare mechanisms revolving around taxation and redistribution; the expansion of decommodification and commons *but also* the strategic deployment of re-designed market mechanisms for the achievement of relevant social objectives, etc. This emphasis on ends builds alliances between different transformative agendas by eclectically highlighting their shared ambitions, while it may enable even seemingly antagonistic projects to operate as inclusive building blocks of a normatively guided legal engineering. In the next Section, I turn to how such legal engineering may flesh out public power.

5. In search of public power: mobilisation, non-reformist reforms, and planning

Instrumentalism is not only making a comeback in (critical) legal theory but also in practice. As Rittich observes, the numerous recent crises have destabilised the dominant neoliberal consensus, creating cracks in the consistency of hegemonic policies of market prioritisation. Rittich focuses on the erosion of the distinction between monetary and fiscal policies, reflected in the EU in the suspension of the Stability and Growth Pact, the adoption of an extraordinary ECB asset purchase programme that allowed the Central Bank a wide margin of discretion and flexibility, and the economic recovery package 'Next Generation EU', which involved the joint issuance of common debt bonds. Other instances of 'cracks' and attempts to use the law as a tool involve a hesitant shift

[46]For the notion of 'expressive causality', see F Jameson, *The Political Unconscious* (Routledge 1983) 7–43.

[47]See, L Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (Verso 2014).

[48]Following the pragmatist viewpoint that 'there is no fixed set of moral laws or a predetermined collection of ends or human goods', these objectives must be seen as fundamentally dependent on the political process, see S Taekema, *The Concept of Ideals in Legal Theory* (Kluwer Law International 2003) 102. On how pragmatism may blur distinctions between means and ends, with law being both, see S Taekema, 'Beyond Common Sense: Philosophical Pragmatism's Relevance to Law' 29 (2006) Retfærd: Nordisk Juridisk Tidsskrift 22.

[49]This bears similarity to what Robert Knox has outlined as 'principled opportunism', partly in response to the limited faith in political voluntarism's capacity to transform social relations of production, see R Knox, 'Marxism, International Law, and Political Strategy' 22 (2009) Leiden Journal of International Law 413.

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to industrial policies, especially in the context of greening the economy and ensuring supply chain resilience;[50] the rise of unilateralism in international economic relations[51]; and the re-emergence of the state as an economic actor.[52] In all these instances, the prioritisation of the political and the turn to the state as a response to crises crystallises what has been termed as a shift from a neoliberal global economic order to an emerging 'geoeconomic order', where the 'logic of the state' gains centrality at the detriment of the 'logic of the market'.[53]

However, the turn to the state does not, *by itself*, challenge or upend market dominance. More expansive fiscal policies, EU-wide industrial policies for sustainability transitions in the transportation sector, strategic autonomy in the procurement of critical raw materials; all these policies are, by themselves, compatible with continuing ecological degradation and the perpetuation and intensification of socio-economic inequalities – perhaps in particular in their global dimension, casting doubts on projects of international cooperation for global justice.[54] This is not a surprise at a time when, as Rittich highlights elsewhere, functionalism has long been appropriated by the political right, with legal and administrative institutions measured by the extent to which they secure and advance private economic activity.[55] This could be taken as a justification of Kjaer's skepticism towards the state as a problem-solver. However, and more narrowly, I argue that faith in the 'logic of the state' is another instance of ideational faith placed in particular legal and institutional forms – only here it is placed in centralised, rather than decentralised, 'publicisation'.

Instead, the question of social transformation hinges on *the material ends* that are being pursued in different forms, registers, or frames. This also warrants against an unqualified defense of 'the public interest'. While the public interest may be used as a vessel to flesh out the 'egalitarian aspirations' that define democratic citizenship,[56] its enunciation may also serve to efface class antagonism and construct a misleading image of supposedly shared, objective citizen interests. For example, during the Greek sovereign debt crisis, austerity politics that deepened socio-economic inequalities were legitimated and justified as advancing 'the public interest'.[57] Starting the analysis not from the agent of transformation (eg, the state) but rather from the material ends driving transformative instrumentalism means that agency should not be sought in overly formalistic terms. Rather, the concept of 'public power' introduced by Kjaer becomes particularly helpful, because it denotes forms of power that may entail elements of collective self-legislation, pursue transformative ends, and yet operate beyond the state (eg, in the workplace, the transnational realm, etc.).

In regard to the material ends of transformative projects, I argued already that contingent legal reforms or policy blueprints cannot define the boundaries of a legal theory in search of social

[50]See, indicatively, the EU Action Plan on Raw Materials; The White House, 'Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews under Executive Order 14017' (2021); elements of industrial policies in the Inflation Reduction Act and the Infrastructure Law in the USA, or in the European Green Deal.

[51]See, A Hervé, 'European Unilateralism as a Tool for Regulating International Trade: A Necessary Evil in a Collapsing Multilateral System' (29 March 2022).

[52]China's state capitalism being the prime example.

[53]See, A Roberts, HC Moraes and V Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' 22 (4) (2019) Journal of International Economic Law 655; HG Cohen, 'Nations and Markets' 23 (4) (2020) Journal of International Economic Law 793.

[54]T Riofrancos, 'Shifting Mining From the Global South Misses the Point of Climate Justice' *Foreign Policy* (7 February 2022), <https://foreignpolicy.com/2022/02/07/renewable-energy-transition-critical-minerals-mining-onshoring-lithium-evs-climate-justice/>.

[55]K Rittich, 'Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates' 55 (3) (2005) University of Toronto Law Journal 853, 854, 862.

[56]A Vauchez and P France, *The Neoliberal Republic* (Cornell University Press 2021) 132.

[57]P Roufos, 'Ordoliberalism Out of Order? The Fragile Constitutionality of Greek Austerity (Part Two)' (2020) <https://legalform.blog/2020/06/03/ordoliberalism-out-of-order-the-fragile-constitutionality-of-greek-austerity-part-two-pavlos-roufos/>.

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transformation. If, instead, law is to function as an instrument for the articulation of political and social objectives, then it must secure the conditions for doing so.

The first condition is challenging the insulation of the economy from democratic control. Critical analyses posit this insulation – the 'encasement' of legal protections for capital and private power from political contestation and possible revision – as a structural feature of the legal constitution of capitalism.[58] Confronting the inoculation of the economy requires the reshaping of institutional and regulatory foundations so that they remain subject to review and revision, taking into consideration developing societal majorities. This involves, for example, an outright opposition to special legal regimes that cede domains of regulatory policy for the future, as is ordinarily the case in investment treaties[59]; or, a contextually-embedded skepticism towards the expansion of the realm of constitutional meaning[60] and possibly towards judicial review[61]; or, finally, the privileging of political initiatives that expand participatory structures, enabling the expression of public autonomy consisting in the notion of self-authorship of the laws governing oneself.[62] Following Kjaer's detached public law, as well as Teubner's 'societal constitutionalism', these participatory structures may *also* be part of social subsystems – the workplace, the corporation, etc. This vision of radicalisation of the democratic project can build on what Roberto Unger – an inspiration for this conference and Special Issue – has termed as 'mobilisational democracy', elevating the struggle against depoliticisation to a challenge of the very categories of thought and order that law casts as necessary.[63]

A second condition is that reforms create collective subjects and build centers of democratic, public power. A shortcoming of the normative ramifications of certain iterations of legal institutionalism is that they may devolve into the kind of policy advocacy that is easily absorbed by the broader socio-economic settlement, impeding ambitions of genuine social transformation. Contrary to this, a more radical legal instrumentalism would focus on the kind of reforms that, as they happen, generate new collective subjects through the evocation of the unity of needs. When, for example, a city imposes a horizontal rental cap,[64] the reform goes beyond redressing the housing crisis in that it functions as a centripetal force and an identifier for the beneficiaries, coalescing those renting under conditions of precarity and exploitation as a political subject.[65] Even more ambitiously, reforms must remain anchored to an overarching normative agenda, functioning as intermediate steps to increasingly ambitious goals – that would mean an overarching vision on housing, in the example used here. Along these lines, as Amna Akbar brings to

[58]See Grewal (n 25), Britton-Purdy and Others (n 23). On the notion of 'encasement', see Slobodian (n 15). On how ordoliberalism has performed a function of depoliticisation in the EU, see I Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' 1 (2) (2021) Journal of Law and Political Economy 301. For a historical discussion see, FL Neumann, 'The Change in the Function of Law in Modern Society' in WE Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press 1996) 101–141.

[59]A Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in L Sachs, L Johnson and J Coleman (eds), *Yearbook on International Investment Law and Policy 2018* (Oxford University Press 2019) 394–413.

[60]See, for example, Amy Kapczynski, 'The Law of Informational Capitalism' 129 (2020) The Yale Law Journal 1460, on the implications of the US Supreme Court treating trade secrets as property subject to the Fifth Amendment. For a critique of the overconstitutionalisation of the EU, see Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21(4) European Law Journal 460.

[61]For a recent take reflecting the increasing scepticism among progressives towards juristocracy, see Samuel Moyn, 'The Constitution Is Broken and Should Not Be Reclaimed' (*New York Times*, 19 August 2022) <https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html>. See, also, J Waldron, 'The Core of the Case against Judicial Review' 115 (2006) The Yale Law Journal 1346.

[62]SK Rahman, *Democracy Against Domination* (Oxford University Press 2017).

[63]RW Gordon, 'Critical Legal Histories' 36 (1984) Stanford Law Review 57, 109.

[64]As, for example, was the case in Berlin in 2020–2021.

[65]In EP Thompson's terms, feeling and articulating a commonality of interests is a condition of class formation, see EP Thompson, *The Making of the English Working Class* (Victor Gollancz Ltd 1964) 12.

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attention, the heuristic of 'non-reformist reforms' is increasingly employed by activists to 'conjure up the possibility of advancing reforms that aim not to ameliorate the status quo but call it into question and facilitate transformational change'.[66] 'Non-reformist reforms' are therefore not static but immersed in a process of mobilisation, they do not deliver only demarcated outputs but modify relations of power. While this invokes an element of grass-roots democracy,[67] I argue that the 'non-reformist' element depends less on the kind of campaign that initiates the reforms and rather on the kind of energies a particular reform unleashes. This provides a mediation between bottom-up driven reforms and top-down regulatory interventions.

This mediation is important because delivering such reforms depends on some form of *planning*. This coordinating, planning function constitutes another element of how the law may be used as an instrument of social change. I suggested above that, fundamentally, legal instrumentalism is an exercise in normatively guided pragmatism, relying on envisioning how different institutional forms and legal rationales may be employed to materialise an articulated political and social agenda. Acknowledging the fragmentation and breadth of governing legal orders discussed by Rittich, coordinating the different reforms is perforce a patchwork exercise. To return to the example of housing, bringing about 'social transformation' might involve direct policies, such as rental caps, but it could also involve the expansion of public ownership and changes in public law to accommodate it, the revision of tenant-landlord contractual relations, new urban planning regulations, etc. Or, sustainability transitions in the transportation sector might require measures ranging from a progressive carbon tax to public investment in public transport infrastructure and new technologies, to the decommodification of certain forms of mobility or market subsidies for others, etc. In terms of agency, planning brings to the foreground the need for forms of public power with centralising, coordinating capacities. While the state is the obvious candidate, planning could take place both above the state (internationally or supranationally) or below the state, at a local or sectoral level. Essentially, planning is the string that links these different reforms together, making them operate as parts of an overarching agenda. It enables a coordinated channeling of resources and an interplay of diverse capacities in ways that would be impossible for reforms pivoting only on one legal and institutional form (eg, 'more rights', 'more state', 'more commons', etc.) To some extent, this resonates with what Kjaer refers to as the temporal dimension of transformative law. Kjaer's account of the need to develop a legal concept of sustainability could, then, constitute an example of the kind of overarching, material agenda that may subsume the various legal rationales and institutional forms that might make it purposeful and effective.

6. Conclusion: the context and limits of law

The contestation around the role and potential of law in triggering social transformation largely reflects the theoretical and normative premises and divides of different currents of thought and scholarship. Yet, critical practice axiomatically structured around form may lead to rigidity, the unrealised potential of alternatives, or co-optation by the currently socio-economic hegemonic forces. Instead, identifying the space for law in projects of social transformation may pass through a mobile, flexible, context-sensitive critical practice centred on the legal articulation of political and social objectives. This means that despite my earlier call for an instrumental approach to legal reasoning or institution-building, there might be particular contexts when a principled defence of the legal form or the rule of law could be better suited to the tenets of an immanent critique, such as the ones sketched above. Similarly, a context-sensitive approach might mean, for example, that in certain settings it is progressive constitutionalism and not constitutional scepticism that better

[66]A Akbar, 'Demands for a Democratic Political Economy' 134 (2020) Harvard Law Review 90, 97. Akbar draws from A Gorz, *Strategy for Labor: A Radical Proposal* (Beacon Press 1967) who coined the term 'non-reformist reforms'.

[67]Akbar (n 66) and S Burns, *The Politics of Movement and the Cooperative Commonwealth: The Politics of Non-Reformist Reform* (University of California, Santa Cruz 1984).

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articulates immanent critique. Importantly, context is not only defining for what may be 'pragmatic', but it also conditions the positionality of the articulator of any normative agenda.

Eventually, however, the success of a context-sensitive turn to instrumentalism is dependent upon the magnitude of the social forces that enable it in the first place.[68] The political underpinning of transformative visions that build on law's constitutive function partially illustrate the limits of law at initiating processes of social transformation. Seeing juridical relations as imbricated within but not as completely absorbing social relations of production means that struggles for social transformation do not play out only on the level of legal inscriptions. If that is the case, then social transformation passes, by definition, *also* through 'extra-institutional spaces'[69] and 'parallel struggles'[70] outside institutions. Still, law remains a variable even in this extra-institutional dimension of the bifurcate path to social transformation. This is not only because legal priors (eg, right to assembly and association) may affect the ways in which such struggles are carried out. It is also because even if the direct goal of such struggles is not institutional change, cultivating structures of participation and challenging the social power embedded in relations of production may generate the kind of dynamics that eventually trigger legal and institutional imagination.

Competing interests. The author has no conflicts of interest to declare.

[68]Rittich (n 55) 868.
[69]B Rajagopal, *International Law from Below* (Cambridge University Press 2003) 235.
[70]N Poulantzas and J Martin, *The Poulantzas Reader: Marxism, Law, and the State* (Verso 2008) 338.

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