Toward Transformative Private Law: Research Strategies

Marija Bartl*

Abstract

In this paper, I propose a way to study private law for change by showing a variety of legal alternatives to the neoliberal dogmas, through history, comparative research and the 'diverse economies' frameworks. Using these three scholarly approaches can help decentre the overwhelming necessity of neoliberal capitalism in private law thinking and renew private legal imagination. Such an opening will be crucial for our capacity to even begin imagining credible economic alternatives: realistic utopias that provide for a less insatiable prosperity.

I. Introduction

Private law has entered centre stage in both (legal) scholarship and policy. The primary reason is a growing realisation that private law, one of the central legal institutions underpinning the contemporary economy,[1] is clearly complicit in the poly-crisis we are facing. At a time when the climate emergency[2] meets growing inequality,[3] the erosion of democracy[4] and large technological transformations,[5]

* Marija Bartl is a Professor of Transnational Private Law at the University of Amsterdam. This paper is produced within the framework of the European Research Council Project *N-EXTLAW: Mainstreaming Law as a Vehicle of Social Change* [Grant agreement No 852990]. Many thanks to Candida Leone and Angus Fry for their insightful comments on the earlier drafts of this paper.

[1] The World Bank considers as the basic elements of its 'rule of law' framework mainly private law (property; contract; company; bankruptcy; and competition) as well as norm-making institutions including courts, legislative bodies, property registries, ombudsmen, law schools and judicial training centres, bar associations, and enforcement agencies. Cited in G. Barron, 'The World Bank and Rule of Law Reforms' *Development Studies Institute*, 19 (2005). Barron references as the World Bank source the following: https://tinyurl.com/yveur44c (last visited 10 February 2024).

[2] The UN Secretary General warns of 'collective suicide' over climate crisis. See *The Guardian*, available at http://tinyurl.com/mu4p6wt6 (last visited 10 February 2024). The main knowledge base on the issues of climate and biodiversity are the Intergovernmental Panel on Climate Change (IPCC) reports. See for instance IPCC Report of 2022, *Impacts, Adaptation, Vulnerability*, available at http://tinyurl.com/zscm7m6s (last visited 10 February 2024).

[3] B. Milanovic, *Global Inequality* (Cambridge: Harvard University Press, 2016); T. Piketty, *Capital and Ideology* (Cambridge: Harvard University Press, 2020); D. Markovits, *The Meritocracy Trap: How America's Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite* (London: Penguin Books, 2020); M.J. Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (London: Allen Lane, 2020).

[4] S. Haggard and R. Kaufman, 'The Anatomy of Democratic Backsliding' 32 *Journal of Democracy*, 27 (2021).

[5] S. Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power: Barack Obama's Books of 2019 (London: Profile books, 2019).

the confluence of all these challenges makes it extremely difficult to react to any one of them. Yet, it is intervention targeted at the deep infrastructure of the economy, at the level of private law, that may be exactly what is needed to reorient the economy and society toward a more sustainable future.

But first to the problems. Several important scholarly interventions have exposed to a wider audience the constitutive role of private law in the poly-crisis we are facing. Thus Katharina Pistor, in her ground-breaking contribution the Code of Capital, has shown how private law drives inequality. The top law firms use modules contract, corporate, property, insolvency and financial law to produce capital for those who can afford it — without much control of the public.[6] Furthermore, corporate law and finance scholars vehemently argue that we urgently need to transform the unsustainable and extractivist logic underpinning the corporation,[7] whilst contract law scholars challenge the regressive distribution of power, value and costs in (global) value chains.[8] At the same time, property law scholars contend that we need to change the institution of the property itself – if we truly aim to change our (extractive) relation to the Earth and its systems.[9] These critics not only argue that we need to move away from the particular neoliberal institutionalisation of private law, but also that we need to question the foundational myopias of private law, such as privity of contracts, property as dominion, or limited liability.

Multiplying crises, as well as ever-consolidating body of knowledge advocating for the change of private legal institutions, have led to policy action in the EU as well as its member states. The most visible interventions at the EU level have been to propose a set of legal measures to green the financial sector,[10] to ensure better sustainability reporting,[11] the imposition of a material obligation on large companies to engage in human rights and environmental due diligence,[12] or the expansion of ecodesign framework to include potentially all environmentally

[6] K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press 2019), 13.

[7] B. Sjåfjell, 'Redefining the Corporation for a Sustainable New Economy' 45 *Journal of Law and Society*, 29 (2018); J.P. Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol: Policy Press, 2020).

[8] D. Danielsen, 'Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law Is Needed to Address Global Inequality and Economic Development' in U. Mattei and J.D. Haskell eds, *Research Handbook on Political Economy and Law* (Cheltenham: Edwad Elgar, 2017), 195; F. Cafaggi and P. Iamiceli, 'Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive' 27 *European Review of Private Law*, 1075 (2019).

[9] F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler Publishers, 2015); U. Mattei and A. Quarta, *The Turning Point in Private Law* (Cheltenham: Edward Elgar, 2018).

[10] See EU's Sustainable Finance initiatives, available at http://tinyurl.com/36vpkwjh (last visited 10 February 2024).

[11] See EU, 'Sustainable Corporate Reporting Directive', available at https://tinyurl.com/ys47hc52 (last visited 10 February 2024).

[12] See EU, 'Corporate Sustainability Due Diligence Proposal', available at https://tinyurl.com/4kp8n3u7 (last visited 10 February 2024).

damaging product groups.[13]

Despite their laudable efforts, these legislative measures hardly respond to the degree of change currently called for. The EU's interventions still build on the conviction that markets are *mostly* rational and transparency *mostly* works, despite considerable evidence to the contrary.[14] Most importantly, however, these measures fall prey to what we can describe as neoliberal naturalism, the conviction that ultimately only one version of the economy, one version of 'high-profit' capitalism, can bring us to prosperity. In this economic imaginary, innovation is a matter of private enterprise and profit margins, rather than public good or collective effort. People then, as profit-seeking creatures, become only more creative the more money they can make. In turn, if ever we limit the possibility profit, the implication is economic and social regression. But nothing can be further from the truth.

At different points in history, across different regions, and even in today's economy, people have achieved many important things based on motivations and values distinct from those cherished by seeking extraordinary profits and rents. Such practices remain (even today) both fundamental, if not-recognised, pre-requisites of the neoliberal economy (consider the production of cared for humans for the 'labour market')[15] and have brought about large innovations and impulses for prosperity (consider scientists such as Einstein or the centrality of public institutions for innovation).[16]

In this paper then, I will explore a number of research strategies that can help uncover past and current alternatives to the neoliberal sociality and legality, through historical research, comparative research and the 'diverse economies' frameworks.[17] Using these three scholarly approaches can help decentre the overwhelming necessity of neoliberal capitalism in private law thinking, and thus renew private legal imagination. Such an opening will be crucial for our capacity to even begin imagining credible alternatives to the contemporary extractive economic system: realistic utopias that provide for less insatiable prosperity.

II. Three Ways of Challenging the Mainstream Narratives

1. Historical Variance

[13] See EU, 'Proposal for Ecodesign for Sustainable Products Regulation', available at https://tinyurl.com/muhc3f5m (last visited 10 February 2024).

[14] D. Ariely, 'The End of Rational Economics' 87 *Harvard Business Review*, 78 (2009).

[15] N. Folbre, 'Measuring Care: Gender, Empowerment, and the Care Economy' 7 *Journal of Human Development*, 183 (2006).

[16] M. Mazzucato, The Entrepreneurial State: Debunking Private vs. Public Sector Myths (London: Anthem Press, 2011).

[17] J.K. Gibson-Graham, 'Diverse Economies: Performative Practices for Other Worlds' 32 *Progress in Human Geography*, 613 (2008); Id and K. Dombroski eds, *The Handbook of Diverse Economies* (Cheltenham: Edward Elgar, 2020).

History has always been an important instrument of critical scholarship.[18] Showing the diversity in ways of being, legal-institutional arrangements or political projects, has been one of the major ways in which history helped to denaturalise the present.[19] The 'historical turn' in law means that history has arrived in other departments adjacent to legal history. Thus far, it has been most visible in the sphere of international law.[20] However, it has also been important in the study of private law.[21]

So, what is the central task of history when it comes to studying private law for change? It is showing that the 'privatisation' of power[22] is neither unavoidable nor definitionally good. Rather, the scope of 'private' as opposed to 'public' or 'collective' has been a matter of political boundary work, with significant distributive and societal implications. In turn, if we can show that neoliberal arrangements are not only avoidable, but also not necessarily drivers of broad prosperity, we open the space for legal and political imagination.[23]

There are several 'typical' ways of denaturalising neoliberal capitalism via historical analysis.

The first has been to historicise the *private* in 'private law'. How 'private' has private law been, *really*? If we look, for instance, to property law scholarship, scholars often highlight that it took publicly facilitated (and violent) interventions to transform the commons into private property.[24] Corporate law scholarship has shown that the corporation emerged as the instrument of public rather than private power, as states used them to expand the remit of their extractive economies (with the use of military power)[25] far beyond their own borders.[26]

Another way of historicising the private in private law has been to problematise

[18] Marx's 'historical materialism' has been foremost a challenge to the idealism of Kant and Hegel.

[19] K. Tuori, Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe (Cambridge: Cambridge University press, 2020); R. Lesaffer, European legal history: a cultural and political perspective (Cambridge: Cambridge University Press, 2009); F.A. Wieacker, History of Private Law in Europe, translated by T. Weir (Oxford: Clarendon Press Oxford, 1995).

[20] For reflections on the 'historical turn' in international law see: I. Venzke and K.J. Heller, *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford: Oxford University Press, 2021).

[21] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979); P. Ireland, 'Corporate Schizophrenia: The Corporation as a Separate Legal Person and an Object of Property' (2016), available at https://tinyurl.com/yc8hcasz (last visited 10 February 2024); L. Moncrieff, 'A Different Kind of 'End of History' for Corporate Law', in E. Christodoulidis et al eds, *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar, 2019); J.P. Robé, n 7 above.

[22] See also J.P. Robé, n 7 above, for an insightful analysis of the privatisation of power via private property.

[23] R. Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy (Cambridge: Cambridge University Press, 1987).

[24] K. Pistor, n 6 above.

[25] This is the case as it concerns both British or Dutch East Indian Corporations.

[26] G. Baars, The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy' (Leiden: Brill, 2019).

the boundaries of 'private autonomy'. Thus, in corporate law, scholars have shown that there is nothing natural in the right to 'incorporate' (by registration). For most of history, the corporation could emerge only if it had a public purpose and was granted a concession by the state.[27] In contract law, there is no natural scope for 'freedom of contract'. Rather, this has been the outcome of major struggles.[28]

The third way of historicising private law for change has been to discuss the transformations of particular legal institutions. In corporate law, it has been shown that what is today considered inherently 'normal', namely 'limited liability', was a development strongly fought against, insofar as it went against deeply held moral principles spanning the political spectrum.[29] In contract law, the shifting importance attributed to 'bargaining power' and 'just price' is the outcome of political struggle rather than the nature of the contract.[30]

Last but not least, one crucial way to historicise private law for change has been to historicise some of the discourses underpinning or neighbouring the field. In corporate law scholarship, scholars have shown how the confluence of social developments (most notably financialisation) has ushered in the ideologies of 'shareholder primacy' or 'shareholder value' that have changed how corporate law norms are read.[31] Equally, historicising neighbouring discourses, such as that of 'innovation' or 'value creation' are fundamental in questioning the deep norms of neoliberal capitalism, that place the private sector in the driver's seat of progress. Quite contrary to the story of private progress, scholars have shown that saw greater rates of growth, equality, and innovation in the period preceding neoliberalism,[32] with a more socially responsible corporation and the 'entrepreneurial state', which delivered the most fundamental innovations of our times.[33]

2. Comparative Research and the Varieties of Capitalisms

Historically, comparative research has been one of the most visible vehicles for denaturalising the 'normal' ways of doing things in private law scholarship,[34] adopted by those who were interested in expanding the legal imagination in some way.[35] The recognition that other countries and peoples organised their legal systems

[27] P. Ireland, n 21 above.

[28] H. Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (Durham: Duke University Press, 1993).

[29] S.P. Hamill, 'The Origins behind the Limited Liability Company' 59 *Ohio State Law Journal*, 1459 (1998).

[30] J. Gordley, 'Equality in Exchange' 69 *California Law Review*, 1587 (1981).

[31] B. Sjåfjell et al, 'Shareholder Primacy: The Main Barrier to Sustainable Companies', in B. Sjåfjell and B.J. Richardson eds, *Company Law and Sustainability* (Cambridge: Cambridge University Press, 2015), 79.

[32] T. Piketty, n 3 above.

[33] M. Mazzucato, The Value of Everything: Making and Taking in the Global Economy (London: Hachette UK, 2018).

[34] M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2022).

[35] G. Frankenberg, *Comparative Law as Critique* (Cheltenham: Edward Elgar, 2016).

and rules differently, connected to different institutions, cultures, or normative appreciations, brought home the very positivist point that the law is a political and social product of actual institutions – rather than a fully neutral and rational enterprise. Unsurprisingly, it was also in comparative law scholarship (which attempted to be more scientific in its knowledge production) that the question of method became an issue early on,[36] and more consistently than in the rest of legal scholarship, where such reflections and discussions are rare and periodic at best.[37]

Even if usually aspiring for a higher degree of 'scientific' credentials than doctrinal scholarship, more often than not comparative law scholarship came with a rather obvious political programme in mind.[38] Thus one of the most important legal projects in European private law is the (still ongoing) 'Common Core Project', which seeks to elucidate the similarities between European legal systems. While the project's founding fathers may have insisted that the project is descriptive only, those who have engaged in it have mostly been sympathetic to European legal approximation and eventually integration.[39] Comparative research has also served, more or less explicitly, as advocacy for the best (eg most efficient) ways of doing law.[40] Finally, comparative law research has provided a toolkit for creating all kinds of 'rankings' and 'indexes' that appear rather popular among international organisations, such as the World Bank's infamous 'doing business' index.[41]

An ever more important line of comparative law scholarship served to problematise simplistic universalism, eurocentrism and the dominance of Western legal thought, all of which have made us blind not only to the history of domination but also to the lessons that can be learned from different approaches to law.[42] Several recent critiques bring these questions to bear also on European and comparative private law, including for instance the theorisation of various types of hierarchies and injustices in European private law [43] or the proposal to take

[36] W. Hug, 'The History of Comparative Law' 45 *Harvard Law Review*, 1027 (1931); J.C. Reitz, 'How to Do Comparative Law' 46 *American Journal of Comparative Law*, 617 (1998); R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339; E.J. Eberle, 'The Method and Role of Comparative Law' 8 *Washington University Global Studies Law Review*, 451 (2009); G. Frankenberg, n 34 above.

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

[38] G. Frankenberg, n 34 above.

[39] For more information see the publications of the project, available at https://tinyurl.com/2kns5z32 (last visited 10 February 2024).

[40] R. Kraakman, The Anatomy of Corporate Law: A Comparative and Functional Approach (Oxford: Oxford University Press, 2017).

[41] See https://archive.doingbusiness.org/en/rankings.

[42] I.D. Edge, Comparative Law in Global Perspective (Leiden: Brill Nijhoff, 2001); W. Twining, Comparative Law and Legal Theory: The Country and Western Tradition (Leiden: Brill Nijhoff, 2001); W.F Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa (Cambridge: Cambridge University Press, 2006); S. Munshi, 'Comparative Law and Decolonizing Critique' 65 The American Journal of Comparative Law, 207 (2017).

[43] M.W. Hesselink, 'EU Private Law Injustices' 41 *Yearbook of European Law*, 83 (2022).

seriously the damages caused by racist and sexist hate speech online within tort law in Europe.[44]

Finally, important comparative insights in private law also came from reliance on non-legal scholarships, such as that of political economy. Thus, the broadly influential literature on 'varieties of capitalism'[45] showed that there are in fact different varieties of capitalism around the world, and hence (unavoidably) different legal regimes underpinning them. In private law, the 'varieties of capitalism' provide a solid ground to challenge arguments such as that we have reached the 'end of history' in corporate law, with the Anglo-American shareholder primacy model being the literal apex of development in this segment of human action.[46] Instead, there is a variety of capitalisms - even within the European Union - and thus also Europe (and any other region for that matter) that could take a different path to that of neoliberal capitalism.[47]

3. Diverse Economies and the Alternatives in the Heart of Existing Economy

The most powerful way of showing diversity in the study of private law for change is, I contend, showing that these alternative economies already exist in the very economy we inhabit.[48] Alternative economies – with different values, motivations, relations and practices – not only exist but even thrive in many contexts (although we simply may not be paying sufficient attention).[49] The task of legal scholarship is then to bring into view and facilitate, such alternatives by providing institutional forms that make it easier and more normal to engage in alternative practices, on the basis of non-profit-seeking motivations, with a view of multiplying such humanly and socially regenerative types of action.[50]

From the 70s, feminist scholarship has been particularly vocal in problematising the mainstream ideas of economy – what is value, what is productive as opposed to unproductive.[51] Under the (still) prevailing understanding, only commodified exchange (in a formal economy) counts as *productive*, as *economically valuable*. This leaves much of the feminised care labour outside of what is considered *economic production*. And yet, how can we even start thinking of 'economic growth' without a cared for, nourished, and educated 'labour force'? People are (for the

[44] See L.K.L. Soei Len and A. de Ruijter, 'Conceptualizing the Tortuous Harms of Sexist and Racist Hate Speech' 2 *European Law Open*, 8 (2023).

[45] S. Munshi, n 43 above.

[46] H. Hansmann and R. Kraakman, 'The End of History for Corporate Law' 89 *Georgetown Law Journal*, 439 (2001).

[47] L. Moncrieff, n 21 above.

[48] J.K. Gibson-Graham and K. Dombroski, n 17 above.

[49] See the project website available at https://www.nonextractivefuture.eu/ (last visited 10 February 2024).

[50] ibid

[51] N. Folbre, 'The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought' 16 *Signs: Journal of Women in Culture and Society*, 463 (1991).

most part) not produced by the market or for the market. Instead, the market depends on a large set of social institutions, and caring practices, which are made invisible, and undervalued, in current representations of the economy. What economics call the 'productive economy' is only the tip of the iceberg of all value produced.

Now, private law has been particularly powerful in normalising the mainstream understanding of not only of 'productive economy', but of a specific historical variation of it. For example, when we think, teach, and make policy in the field of company law, the centre place of imagination is the publicly owned company, alongside 'investors', 'shareholders', 'boards' and 'directors'. This is despite 50% of the EU's Gross Domestic Product (GDP) coming from Small and Medium-sized Enterprises (SMEs).[52] Not to mention that 'not-for-profit' undertakings such as social enterprises, cooperatives, care cooperatives, eco-villages, sustainability-driven businesses, fair trade initiatives are considered only marginally if considered at all.[53]

But this is clearly not only a problem of company law. When we think, teach, and make policy in the field of contract law, we adhere to unrealistic assumptions of formal equality and freedom of contract. Whenever there is a clear social demand to account for inequalities and exploitation, we exclude those issues and relegate them to abnormal, 'special' private law fields, such as labour law, consumer law, tenancy law etc. The same goes for property law, where we make sure that students learn about the exclusionary quality of property via law, scholarship, case law, and even human rights (the human right to property) – and pay only little service to commons, public ownership, most forms of shared property etc.[54]

This lack of visibility of not-so-capitalist economic practices, motivations, and values through the prism of private law has major ideological consequences. Such non-diverse private law elevates, or at least normalises, the practices, motivations, and values that stand behind mainstream neoliberal capitalism. At the same time, such private law does not recognise or support the economic activity that is built around different values and motivations – such as care, solidarity, sanctity, or generosity – and embedded in practices that are less extractive of the resources that underpin them (social, environmental, or financial). These are not seen as properly economic and legally relevant.

Paradoxically, however, this 'other' economy is by no means marginal in the European Union. In some countries (such as Italy) it counts for *circa* 10% GDP.[55] Moreover, as it has been demonstrated in the wake of the 2008 financial crisis, such activity created a level of economic resilience that helped countries weather

[52] See http://tinyurl.com/2zhkydb7 (last visited 10 February 2024).

[53] See M. Bartl, 'Teaching law in Times of overlapping Crises' *Verfassungsblog*, available at http://tinyurl.com/y5yazj9f (last visited 10 February 2024).

[54] ibid

[55] Communication from the European Commission, 'Building an economy that works for people: an action plan for the social economy', 2021, available at https://tinyurl.com/66h97zyz (last visited 10 February 2024).

the storm, especially in heavily impacted Southern Europe.[56] Even the European Commission recognised this effect, and took an increasing interest in the so-called 'social economy', putting forth several plans for social economy.[57]

Under the tagline of 'Social Economy', the European Commission bundles all kinds of not-so-capitalist economic practices that share the following main principles and features:

> 'the primacy of people as well as social and/or environmental purpose over profit, the reinvestment of most of the profits and surpluses to carry out activities in the interest of members/users ("collective interest") or society at large ("general interest") and democratic and/or participatory governance.'[58]

Clearly, the European Commission, as well as many member states for that matter, recognise that there are a range of alternative economic motivations, values, relations, and practices – even if most of the legislative activity in the EU is still directed toward a 'mainstream economy'.[59] Yet, there remains much value in what typifies this type of 'social' economic action. First, social economy enterprises place social responsibility at the heart of business. Enterprises, cooperatives, short value chains and other entities and practices of social economy are not here to advance the private interests of their members or 'investors', but to achieve (collective or general) common good. The profits thus made are not privatised to shareholders and managers but are instead (mostly) reinvested to further the common good pursued. Such social economy entities are organised in a more horizontal and non-hierarchical manner at the level of their fundamentals.[60] They are also the pioneers of social innovation, inasmuch they explore new ways of social organisation (production), innovating in the ways we practice economy and deliver the common good.[61]

Yet, while this economy is recognised as both valuable and real, why is it so little discussed in our research, law curricula, legislation, media, or public sphere? Why doesn't the EU go any further than promoting it via communications and action plans? Why is there no 'industrial policy for social economy', as we see today for clean technologies?[62] And why don't we teach about these 'legal devices' to our

[56] ibid

[57] The Commission launched 'The Social Business Initiative' in 2011 and a 'Start-up and Scale-up Initiative' in 2016. See the focus on Social enterprises available at https://tinyurl.com/ycxusftx (last visited 10 February 2024).

[58] European Commission, n 56 above, 5.

[59] At least judging on the basis of the fact that no legislative proposals have been put forth in the more than ten years by the European Commission.

[60] F. Laloux, Reinventing Organizations: A Guide to Creating Organizations Inspired by the next Stage in Human Consciousness (Brussels: Nelson Parker, 2014).

[61] See the EU's action on social innovation, available at http://tinyurl.com/mwabj753 (last visited 10 February 2024).

[62] See EU Commission Proposal for a Regulation on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry

students and colleagues? My sense is that our legal and economic imagination has been so deeply colonised by the ideas of neoliberal capitalism that we do not see, and value, what is directly 'under our nose'. It's high time to change that.

III. Conclusion

In this paper, I articulate three main research strategies that can denaturalise the still prevailing neoliberal dogmas about human nature (people as money-seekers) and the nature of the economy (extraction as efficiency).[63] I have suggested that if we had only tried to look a bit harder, we would have found that there were and are many existing alternatives to neoliberal extractivism, with people engaging productively in economic activity on the basis of different motivations and values, while building more respectful relations with others and with nature. The task of private law scholarship is then to make visible those alternatives, via the study of history, comparative perspectives as well as diverse economies.

Such approach to private law can not be challenged as naive. It does not draw on a promise of worlds not seen, or utopias not lived. Rather, it aims to show the *diversity of (once) existing economic arrangements* (motivations, values, relations, and practices) and thus offers an existing utopia in response to reified ideas behind neoliberal capitalism. Private legal scholarship, in turn, should orient itself toward the development of private law rules and institutions which foster such alternative economies, relations and motivations, while the legislative changes to private law should at least start with a commitment to support such diversity. Only by fostering non-extractive motivations, values, relations, and practices, do I see us arriving at a genuinely sustainable economy, society, and future.

For those pursuing a sustainability agenda in private law, such a decentring exercise is a fundamental requirement for creating the space necessary to unfold the legal imagination that socio-ecological transformation requires. To change how we produce, distribute, and consume, we need to change how we think about humans and the economy, what we are and how we live. This requires a private law that does more than just tinker at the edges. For instance, the introduction of the 'right to repair' means little if people (are led to) think that new is always better, the introduction of due diligence obligations will bring little change shall the remuneration of company directors remain bound to financial performance only, while the 'socialisation of costs' will continue if the financial markets reward foremost short-term financial profits. But all these compromises are currently made in the EU legislation because it remains difficult to rid ourselves of the

Act), 16 March 2023, COM(2023) 161 final.

[63] I use the term 'extraction' in a broader sense than just mining and extractive industries. I refer to it to the legal-institutional framework that incentivizes the privatization of the profits (to shareholders) and socialization of costs, via all types of 'cost-cutting' on labour, tax, the excessive use of natural resources, excessive pollution or the exploitation via the value chains.

naturalised images of both people and economy. Yet, as I have tried to show in this piece, that set of images and assumptions are not only reductionist and not borne by reality but also stand in the way of socio-ecological transformation.

Even for those who are less interested in sustainability, the approach to scholarship proposed here is not without merit. Understanding the contingency of private law institutions – by studying their historical, comparative, and practical alternatives – will enable the practice of private legal scholarship with increased awareness and ultimately additional rigour. This implies that scholarship not only presupposes contingency but also openly acknowledges it, and considers a broader range of alternatives to any legal solution, including a broader range of actors in every legal narrative, especially in relation to arguments based on private law ever-greens such as 'legal certainty', 'legitimate expectations' or 'public-private' divide. Certainty of what grounds? Whose expectations? And what remains naturalised, depoliticised, unseen and unacknowledged?