

SOCIALIZATION AS A COUNTER-RIGHT TO DEMOCRATIZE AND RECLAIM THE COMMON

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Social-ecological transformation is the buzzword of the moment. As a lawyer I have long struggled to understand how law might foster a democratic social-ecological transformation; how lawyers might contribute to transformative law. In this endeavor, I find helpful an approach to law that has recently been promoted as “law in political economy.” This perspective has its roots in older traditions of legal realism and critical legal studies, and foregrounds law as co-constitutive of political economy and of value-production processes that are often extractive, exploitative, and destructive of life. It can make visible law’s implications and complicities and moreover can also draw attention to the potential for transformative experiments through the legal re-design of institutions at the heart of contemporary political economy (Feichtner and Gordon, 2023). It thus points to the potentially transformative role of law in a social-ecological transformation that is radical and not only reformist, that does not content itself with re-regulation or redistribution, but aims at changing and democratizing modes of production and provisioning.

Transformative law that aims at a reconfiguration of political economy so that society’s normative objectives, including relational freedom, equitable provisioning, and human as well as non-human flourishing, may

be better realized than they are today, should have some idea of the paths and agents of transformation. To enhance the likelihood of contributing to radical transformation, but also to be true to the normative ambitions just mentioned, transformative law should relate to and be informed by social practice and actual political projects by people striving for change (Kennedy, 2016). In this current moment, I consider two projects to be promising in that they point to pathways for radical and radically democratic social-ecological transformation and may provide impulses for a conceptualization of transformative law and a testing ground for transformative legal (and social) experiments. They are projects of commoning and projects of socialization. In the following, I seek to briefly present both projects, to connect commoning to the socialization movement, and to interpret socialization as the exercise of a collective and democratic counter-right directed at the generation of a new common.

Commons and practices of commoning are nothing new: Throughout history, humans all over the world have collectively self-organized in order to build resilient structures for the satisfaction of their material and immaterial needs. Through practices of commoning, commons emerge as social systems around shared, material, and immaterial resources (Hess and Ostrom, 2007; Bollier, 2015). Often commons are associated with precolonial social practices, law, and modes of association, production, and provisioning. Yet many new commons projects are also proliferating — often taking inspiration from and building on older traditions of commoning. Contemporary commons include, e.g., food cooperatives, urban gardening projects, complementary currencies, open-source seeds, and software initiatives. As commons researcher Silke Helfrich used to stress, commons are all around us. We just lack a general language and conceptual frameworks (including legal ones) to recognize and understand them as such.

Contemporary commoning projects and movements that aim for urban and rural, spiritual, cultural, digital, and material commons often respond to financial, economic, ecological, and humanitarian crises. They are driven by a critique of contemporary democratic capitalism and expressions of discontent with individuation; increasing social inequalities; and pervasive processes of economic value production that are extractive and

destructive of life. Commons emerge where people collectively self-organize to satisfy their needs and desires equitably, on the basis of relations of solidarity and care, and aimed at furthering aliveness and the “surplus value of lived experience” (Massumi, 2018). They can be considered modes of production, provisioning, and distribution that are complementary to state and market mechanisms. While commons are omnipresent, they can simultaneously be considered radical and revolutionary. They do not offer a blueprint for a different social order. Instead, practices of commoning seek to perform and institute epistemological and ontological shifts and thus reconstitute relations between humans and the non- or more-than-human world. They frequently draw on decolonial knowledges and epistemologies of the Global South to foster their projects of relation-building and world-(re)making. Commoning thus is not a revolution of the kind that overthrows the current system to build a new one on the ruins of the old. Instead, its revolution lies in the reconfiguration of infrastructures and relationality through practice, experimentation, and prefiguration of desired futures.

A question that arises, in particular with a view to the much-needed society-wide “large-scale” social-ecological transformation, is whether commoning — beyond dispersed projects and practices — can generate a new common that may integrate and hold society together. As Bini Adamczak has noted, in contemporary capitalist society it is value production on the basis of private property rights that is “the common” that integrates society in a particular and divisive way: “It is the relationality of value, that creates commonality through individuation, that connects by dividing. It realizes a common privacy and therewith a privatized common. The question that critics of bourgeois society would need to answer is then: What could [...] assume the role that private property plays in bourgeois society. That would be a question concerning relationality” (Adamczak, 2017, my own translation). Contemporary practices of commoning might have the potential to set into motion a relational revolution that replaces this divisive “common privacy” with modes of association and provisioning that connect without dividing and thus generate a new common. As Sabine Hark and her co-authors have noted, “[i]n light of the tendency that the common good merges into market dynamics, the practical experiments

of commoning might be seen as attempts to search for new solutions to the unfulfilled promise of a merely abstract claim to universality” (Hark et al., 2015). Commoning may thus be developed into a practice-theory of change — one that in various interconnected projects, in different sectors of society, and at different scales and levels of organization may generate relations, practices, and institutions that prefigure change and prepare a path towards social-ecological transformation.

One project that has particular potential for expanding the commons and fostering a new relational common is socialization, i.e., the transfer of private property to common ownership. Socialization as a project of revolutionary reform (Holm, 2021) gained renewed traction in Germany with the Berlin initiative *Deutsche Wohnen & Co enteignen*. This civil society initiative formed in response to rising rents, gentrification, and expulsions, all of which accelerated due to large-scale privatization of public housing in Berlin in the late 1990s and early 2000s. For the past seven years, the initiative has been successfully organizing around the demand that housing real estate in Berlin owned by large housing companies with portfolios of 3,000 or more apartments be transferred from private property to common ownership through legislation on the basis of Article 15 of the German constitution (the Basic Law). *Deutsche Wohnen & Co enteignen* successfully mobilized for a referendum in which a 57.6% majority voted in favor of such a socialization on September 26, 2021. The referendum mandated the Berlin state government (Senate) to work on legislation that effects such a transfer. In response, the Berlin Senate established an expert commission to examine *inter alia* the legal requirements, in particular of German constitutional law, that socialization would need to meet. I was a member of this commission, which delivered its report to the Berlin Senate on June 28, 2023. The report finds that the socialization of housing real estate in Berlin does not meet any unsurmountable legal obstacles. While the government of Berlin is still not willing to initiate work on a socialization law, public debate and civil society mobilization around socialization has — in the meantime — spread widely, geographically as well as thematically. Mobilization for socialization now extends beyond housing to such social infrastructures such as health, energy, education, and agriculture.

Article 15, the socialization clause of the Basic Law reads: “Land, natural resources and means of production may, for the purpose of socialization, be transferred to common ownership or other forms of a common economy by a law that determines the nature and extent of compensation.”¹ To date, however, it has never been put to use. In the current debate, lawyers are proposing two contrasting interpretations of this provision: one that aims for stabilization and another that aims for transformation. On the basis of these divergent interpretations, I wish to clarify my notion of counter-rights and transformative law that make space for the emergence of a new common.

The interpretation that aims at systemic stabilization regards socialization on the basis of Article 15 as an emergency measure to satisfy basic needs when the market economy fails to meet these needs. It understands socialization as a massive infringement of the individual right to private property and therefore demands that socialization meet strict requirements. One of these requirements is proportionality, a legal principle the Federal Constitutional Court of Germany developed in its case law as an unwritten constitutional limitation to state power. Proportionality requires that a measure that infringes on a constitutional right has to pursue a legitimate interest. The measure moreover must be necessary to further this interest, meaning that no less intrusive measure that could do the job is available. And finally, the measure’s harmful effects (to the rights-holders) must not outweigh its benefits to society.

Applied to socialization, proportionality strips it of its revolutionary potential. It paves the way for a balancing of interests (and values) within the given systemic framework of contemporary political economy — on the one hand, the interests of private enterprise that are compromised by socialization, on the other, the interest in affordable housing. It opens the door to questions of whether other measures are available to the state

- 1 The official translation uses the word nationalization instead of socialization. This is misleading, however, as socialization is not to be confused with a measure that merely transfers ownership of means of production or land to the state without also changing the mode of production and provisioning.

by which it may ensure an adequate supply of affordable housing, such as caps on rents, subsidies, new construction, etc. Proportionality also prompts an inquiry into whether and under what circumstances affordable housing is an objective that is important (or endangered) enough that it justifies the taking of private property on a large scale. In the last step of the proportionality test — the harm-benefit-balancing exercise — the value of housing is then placed on one side of the scale and weighed against the value of private property on the other. Given the high value accorded by proponents of this interpretation to private property, their assessment of its infringement as “massive,” and the endless arsenal of alternative policies and regulatory instruments at the state’s disposal that appear less intrusive, socialization becomes an emergency measure of last resort. A measure that the state only may resort to if other public welfare means can no longer ensure the level of affordable housing that the state must guarantee under its human rights obligations. I call this interpretation “stabilizing” as it regards the capitalist market economy and a state that extends welfare to those otherwise “left behind” as the desirable status quo and socialization as an instrument that may be used only in the direst of circumstances — ultimately to uphold and stabilize the current political economy.

The transformative interpretation, by contrast, regards Article 15 not as a limitation to the individual right to private property, but understands it as a right itself: not as an individual right that protects against state power, such as the right to private property, but as a democratic right to be exercised collectively, namely by the legislature that passes the socialization law. It is a democratic right, firstly, because it is exercised by the democratically elected state organs. Secondly, Article 15 is a democratic right since the purpose ascribed to it is not the satisfaction of predetermined needs and interests (e.g., affordable housing) or the realization of values enshrined in constitutions and international human rights covenants (e.g., the right to housing) — but rather the democratization of society. If this conception were endorsed, proponents of socialization would neither have to specify the interests and values pursued by socialization nor how these interests, e.g., the interest in affordable housing, are met by a transfer of

private property in real estate to common ownership. Socialization would only require a political decision and a legislative act that transfers private property to common ownership and provides just compensation for the previous owners.

This interpretation of Article 15 does not deny that socialization pursues a myriad of public interests. It certainly does — including, but not limited to, expanding the supply of affordable housing, preventing the extraction of rent and of gentrification, and allowing for more control over the administration of housing stock, including the implementation of climate change mitigation and adaptation measures. Yet, focusing merely on the satisfaction of basic needs and the promotion of public interests in a given political economy, i.e., an economy in which land and houses are commodified and assetized, detracts attention from the transformative potential of socialization initiatives. Thus, imagination is foreclosed in regard to what housing might mean if land were commonly owned and the city were reclaimed as a commons.

To emphasize the transformative potential of commoning, I suggest understanding socialization not only as a democratic right, but also as a counter-right. The conception of Article 15 as a counter-right can build on various works in German legal scholarship (Ridder, 1975; Menke, 2015; Teubner, 2020). Accordingly, Article 15 could be understood as a counter-right against the right to private property (as the basis of the divisive common identified by Bini Adamczak) and as a counter-right against the requirement — often imposed in public discourse on those demanding change — to frame affects, emotions, passions, and desires in the terms of interests. According to Gunther Teubner, the “institutional imagination” (Unger, 1996) of collective counter-rights not only serves the development of political programs, but also, and more importantly, collective counter-rights are needed so that “pre-conceptual affection can be articulated within social movements, organizations, associations, labor unions and NGOs, so they can produce collective political judgments in mediation with conceptual determinations” (Teubner, 2020, p. 388). Counter-rights could enlarge “the social spaces for collective will-formation” (ibid.). In the realm of urban real estate, socialization as the exercise of a counter-right

would quite literally make space — space for people to meet in new and unpredictable constellations, space in which social movements can form, convene, and cultivate democratic practice.

Such an interpretation of Article 15 of the Basic Law finds support in constitutional history and alternative interpretations of the social state — alternative to the concept of the interventionist and stabilizing welfare state outlined above. Thus, constitutional lawyer Helmut Ridder interpreted the social state objective in the German constitution as demanding a democratization of all spheres of society (not only state institutions). Democratization here means the dismantling of societal relations of power so that the social state is not reduced to a welfare state that is external to society and extends charity to people “left behind,” but is rather a state that promotes relational freedom through collective self-organization (Ridder, 1975).

Democratization of society is a demanding concept. Socialization, in the transformative sense of making space for a new common to replace the divisive common of private property, can be the necessary first step but it will not be sufficient on its own. Legal and institutional arrangements will be needed to fill the space and facilitate, promote, and protect collective self-organization for the realization of relational freedom. In this respect, the practice-theory of commons and commoning can provide guidance on which rules, principles, procedures, and patterns (Bollier and Helfrich, 2019) may enable and foster a relationality that is not characterized by domination, but rather by equality, and one that allows for equitable sharing and provisioning that responds to peoples’ (changing) needs and desires. Inspiration, e.g., for the question of how common ownership in housing should be (self-)administered, may be drawn from past instances and models of participation — *inter alia* workers’ participation (Deutsche Wohnen & Co enteignen, 2023). In order to concretize what future housing commons might look like and what role the state might play after socialization, it seems particularly promising to further develop the concept of Commons-Public Partnerships (Helfrich and Bollier, 2015) as a counter-model to Public-Private Partnerships, and to promote local self-government and the right to the city (Gruber, 2021; Schubel, 2024). It would be one piece in the larger puzzle of a transformative law for the common(s).

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