

Economic Law, Inequality and Hidden Hierarchies on the European Union Internal Market

How do lawyers address global inequality through trade law, antitrust law or through any other legal field? Why do the “haves” keep coming out ahead? Where do we start when thinking about law and social transformation, and how do we articulate and address resistance to the reproduction of the concentration of power, wealth, authority, and prestige in the world?

A quest for social transformation through law requires an understanding of law which is different from existing accounts of law, such as law as integrity, as primary and secondary rules or as background rules and enforcement institutions that condition social struggle. I argue that these understandings of law suffer from analytical error and do not adequately account for daily power relationships.

Law in action is the way each of us is hierarchically constituted in every moment in time. Law and governance should be understood as a constant and ineradicable (hierarchical) struggle that not only tears society apart, but forms it and connects people in a global web of hierarchies. Hierarchy and claim of injury form the lowest common denominator of the legal system. The question of reproduction of hierarchies is identical to the question of the reproduction of the legal system. Law is the way each of us is hierarchically constituted in every moment in time and the goal of legal inquiry is to resist the hierarchical reality. Understanding the legal structure this way has important consequences for thinking about social transformation. Lawyers should articulate new tools to address the global hierarchical structure. I use this framework of analysis in this article in antitrust and trade law.

The concentration of global wealth, power, knowledge, authority and prestige continues unabated. Antitrust enforcement has been at the heart of debates on combating increasing inequality. Yet, the transformation possibilities have been overstated, while its impact has been paralyzed by widespread assumptions about both antitrust and international trade analysis. Challenging "market power" or "capital accumulation", as per Thomas Piketty's analysis, may contribute to the reproduction of concentration of power. This article cautions about the viability of the current antitrust and international trade assumptions and doctrines to tackle the challenges of growth and injustice of today's globalized society.

It argues that the hierarchical structure of production in goods, services, knowledge, and prestige in global society should be the starting point of legal and economic analysis. Lawyers should articulate targeted resistance to particular hierarchies using antitrust and trade law as updated tools. As an example of this analysis, this article describes a privilege to harm, enjoyed by companies from the structural center of Europe against firms on the periphery. This privilege is termed: dumping by the center. This analysis provides one explanation for the increasing wealth and power in the center of the European Union, despite the Union's promise of development for all. While developing this doctrine, several assumptions of antitrust and trade law are challenged, including the coherence of the consumer welfare standard, the benefits of low prices and the assumption that non-predatory dumping on the internal market is not possible. This article thus addresses the constantly changing, yet reproducing hierarchical structure of society and the transformative possibilities of antitrust and trade law.