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CORE ANALYSIS

European private law & intersectionality: three strategies

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Abstract
In this paper we identify and discuss three different strategies for taking up intersectionality in the space of European private law, ie, liberal ideal theories of social and private law justice, liberal nonideal theories of reparation, and private law abolition. While we caution for how intersectionality is taken up in the European space of private law, these strategies yield insights about how intersectionality may recast (European) private law's role as a potential site to advance, or thwart, pursuits of justice. The three strategies imply (potentially radical) shifts in how legal scholars may understand private law justice. We suggest that (European) private law abolition might be the most promising starting point to think intersectionality's significance for recasting dominant understandings of private law's relation to (in) justice in the EU context.

Keywords: intersectionality; abolition; Black feminist thought; nonideal theory; abolition democracy

1. Introduction

In recent decades, intersectionality has been taken up across a wide variety of geographical, disciplinary, and political contexts. One key role of intersectionality, as an analytic, is to expose the ways in which instances of multiple marginalisation across various intersecting vectors of social oppression (such as race, gender, class, and religion) are made invisible through law and legal concepts that purport to contribute towards a more just society. Private law theorising tends to be celebratory of private law's relation to justice,[1] but most of these efforts do not engage with intersectionality and marginalise or disregard private law's role in creating and maintaining injustices along intersecting vectors of oppression. While intersectionality's relevance has been noted in the context of European private law (EPL) scholarship,[2] this space is particularly slow to recognise its significance. The possibility of taking up intersectionality in this context arises alongside a slow shift in European self-perceptions that are firmly rooted in

[1]Cf A Bagchi, 'Public Justice and Private Consent' in H Dagan and BC Zipursky (eds), *Research Handbook on Private Law Theory*, ch 4 (Elgar 2020) 58.

[2]LK Tjon Soei Len, 'Progress Towards What? On the Need for an Intersectional Paradigm Shift in European Private Law' 1 (2022) European Law Open 363–73; LK Tjon Soei Len, 'Justifying Racial and Gendered Contract in Europe' 51 (2022) Netherlands Journal of Legal Philosophy 25–32; MW Hesselink, 'EU Private Law Injustices' 41 (2022) Yearbook of European Law 83–116; MW Hesselink, 'The Power of Reasons in European Private Law' 51 (2022) Netherlands Journal of Legal Philosophy 58–74.

assertions of Europe's colour blind reality.[3] This shift is particularly delayed within the sphere of private law and its theory, given prevailing assumptions about private law's political neutrality.[4] In the relative absence of a political discourse on intersectionality in this predominantly white space, initial questions arise as to intersectionality's implications for European private law and the theorising of its relationship to (in)justice.

In this article we position intersectionality as pivotal to questions of private law's relation to justice. We identify three different strategies for taking up intersectionality in the space of European private law, which offer three distinct ways in which intersectionality's encounter with European private law could produce valuable knowledge and insights. We also caution for how intersectionality is taken up in the European space of private law theorising and the risks of changed meaning. The article explores what intersectionality may do in the space of European private law and how it may recast (European) private law's role as a potential site to advance, or thwart, pursuits of justice. How might intersectionality be taken up in the European private law sphere and what sort of work is entailed in intersectionality's encounter with European private law? Centring this question, we offer insight into intersectionality's significance to recasting dominant understandings of private law's relation to (in)justice in the EU context, and into the various ways in which intersectionality can – and ought to – be made more central to European private law discourse.

After introducing intersectionality (Section 2) and the context of European private law (Section 3), we discuss three possible strategies. First, we offer an immanent critique of influential liberal social justice and private law justice accounts of (European) private law. This critique shows that intersectionality ought to be central rather than marginal within contemporary dominant justice theories, even on their own terms (Section 4). Then, shifting from ideal theory towards nonideal theory, we proceed by showing how liberal justice could be occupied so as to contribute towards the reparation of historical and ongoing structural wrongs in the concrete contexts of interpersonal relationships governed by private law. In this context, we give concrete examples of what this might entail (Section 5). Subsequently, we consider the possibility that private law is so structurally flawed that it is beyond repair and must be abolished and suggest that the premise of private law abolition may be the most promising strategy for rethinking European private law in terms of intersectionality (Section 6). Finally, we offer some concluding observations (Section 7). Throughout the paper, our focus will be mainly on the core field of contract law.

2. Intersectionality

A. An intersectional lens

Intersectionality is a lens that renders visible how different vectors of social hierarchy intersect and mutually reinforce each other, thus shaping people's varying experiences of oppression and marginalisation. As Audre Lorde put it, 'there is no such thing as a single-issue struggle because we do not live single-issue lives.'[5] Kimberlé Crenshaw coined the term 'intersectionality' three decades ago as an intervention to and critique of the dominant paradigm of American antidiscrimination law.[6] In this context, intersectionality aimed to make legible experiences of Black women in a society characterised by structural racism and sexism, which were made

[3]F El-Tayeb, *European Others* (University of Minnesota Press 2011); G Wekker, *White Innocence* (Duke University Press 2016); LK Tjon Soei Len, 'On Politics and Feminist Legal Method in Legal Academia' in M Bartl and J Lawrence (eds), *The Politics of European Legal Research* (Edward Elgar 2022) 31–44.

[4]In other areas of law, intersectionality and critical legal analyses that centre race, have had a longer and deeper engagement even though continental Europe remains a difficult space to work on the linkage between law and racial power, see for instance M Möschel, *Law, Lawyers and Race* (Routledge 2014).

[5]A Lorde, *Sister Outsider* (Penguin Books 1984) 133.

[6]K Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 139 (1989) University of Chicago Legal Forum 139–67.

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invisible under legal analysis of discrimination. The naming of the concept of intersectionality occurred as a necessary response to the invisibility of multiple marginalisation within civil rights struggles for racial justice, and within feminist struggles for gender justice. Intersectionality thus serves to bring experiences of multiple marginalisation from the margins to the centre of political attention where it belongs. While coined as a term three decades ago, intersectionality is rooted in a much longer history of collaborative and socially transformative Black feminist thought and movements that centres lived experience of multiple marginalisation and oppression.[7]

B. Intersectionality travels

Since its coinage, the concept has travelled to a wide range of contexts,[8] and has settled in the heart of feminist studies to call attention to the struggles of multiply marginalised persons who find themselves at the intersection of several kinds of discrimination and marginalisation such as race, ethnicity, gender, class, and ability. It has also travelled geographically, because these forms of power and domination, and thus multiple marginalisation and oppression, are not specifically American phenomena.[9] To the contrary, they are also structural features of the European Union (EU) and its Member States. Therefore, as a lens intersectionality is pertinent to all contemporary social contexts within the EU including contexts governed by European private law.

C. Extraction, appropriation, and commodification

As a preliminary note of caution, we want to highlight that with intersectionality's arrival in new spaces, like any concept, it is bound to be modified as it is picked up and contextualised.[10] Such modifications may be beneficial from the political and epistemic points of view of becoming an effective idea and creating knowledge, respectively. However, there are also real ethical, political, and epistemic risks when intersectionality enters predominantly white spaces. Intersectionality's rootedness in Black feminism is significant when addressing potential (unintentional) adaptations of the concept and ways of engagement within white spaces that are undermining and counterproductive. Real ethical and political risks include extraction, appropriation, and commodification, which disconnect intersectionality from Black feminist social and political struggles and position it as an abstract intellectual analytic that functions – counterproductively – to benefit and sustain established hierarchies rather than to challenge and dismantle them.[11]

[7]GTA Hull et al, *All the Women Are White, All the Blacks Are Men, But Some of us Are Brave* (Feminist Press 1981); b hooks, *Feminist Theory from Margin to Center* (South End Press 1984); The Combahee River Collective, *The Combahee River Collective Statement* (Zilla Eisenstein (self-published) 1977); PH Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Unwin Hyman 1990).

[8]For reflections on the various contexts of intersectionality, see K Crenshaw, 'Postscript' in Linda, Ms Supik, et al, *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Routledge 2012); E Grabham, et al, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge 2009).

[9]Contrast French President Emmanuel Macron in his speech 'Fight against separatism – the Republic in action' <www.elysee.fr/emmanuel-macron/2020/10/02/fight-against-separatism-the-republic-in-action-speech-by-emmanuel-macron-president-of-the-republic-on-the-fight-against-separatism.en>: 'Anglo-Saxon traditions based on a different history, which is not ours' and 'certain social science theories entirely imported from the United States, with their problems'.

[10]The moral and ethical significance of modifications to intersectionality are reviewed, for instance, by JC Nash, 'A Love Letter from a Critic, or notes on the Intersectionality Wars' in idem, *Black Feminism Reimagined: After Intersectionality* (Duke University Press 2019), see ch 1 for a critical reflection; see also Crenshaw, 'Postscript' (n 8).

[11]See S Bilge, 'Intersectionality Undone: Saving Intersectionality from Intersectionality Studies' 10 (2013) Du Bois Review 405–24; Nash (n 10). For similar risks concerning positionality statements made by white scholars (extraction, self-affirmation and self-legitimation, reinforcing hierarchies, re-centring whiteness), see JK Gani and RM Khan, 'Positionality Statements as a Function of Coloniality: Interrogating Reflexive Methodologies' 68 (2024) International Studies Quarterly sqae038.

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Epistemic risks include denaturation of the concept.[12] These risks require specific attentiveness and critical reflection in the context of intersectionality's travel into the space of European private law.[13] In our attempt to identify strategies for taking up intersectionality in the space of European private law, we thus also raise caution. Intersectionality's encounter with European private law must be accompanied by questions such as: who gets to take up intersectionality, and when and why? Who and what is allowed to travel where? Who are and can be at home in the European legal academy?[14] And, most importantly, what meaning and political purchase remains for intersectionality in the course of European private law theorising? The question of who and what is at stake in intersectional analyses must remain central when it travels in European private law discourse.

3. European Private law

A. Private law subjects

The lens of intersectionality can do important analytical work in European private law because relationships governed by private law have significant justice implications. Private law determines rights, obligations, and remedies between private persons. In doing so, it shapes and reshapes, produces, and reproduces, interpersonal relationships. Persons subject to private law – private law subjects – include both natural and legal persons. As a baseline, formal equality shapes private law's understanding of the person: in principle, every natural or legal person can be the holder of any private right, obligation, or remedy. However, contemporary private law's conception of persons also has certain substantive (or 'materialised') aspects. In other words, it considers certain differences between the ways in which persons are situated within the relationships it governs as relevant. Yet, private law has been highly selective as to the material features of persons and relationships it chooses to consider. EU private law, in particular, differentiates only in terms of certain specifically defined categories of persons, such as 'consumer' and 'trader', which are legally constructed capacities in which persons are understood to have certain private rights, obligations, and remedies.[15]

B. Colour blind materialisation

This type of 20th century European private law 'materialisation' is still structurally blind towards the specific ways in which multiply marginalised persons come to private law relationships. Conversely, this also means that private law comes in a very specific way to persons. It presents itself as neutral but corresponds, amongst others, to gender and racially dominant and privileged experiences. Apart from very few exceptions, private law is structurally blind towards forms of oppression and marginalisation that are structurally present in our society. Insofar as private law is neutral towards such forms of oppression and marginalisation, it reproduces and reinforces them. And to that same extent, the present-day private law person is still shaped through white, patriarchal, heteronormative, cisgender, and ableist perspectives, assumptions, values, and beliefs.

[12]These risks should be given serious consideration, as concepts that raise concerns about racism can and do become 'non-performatives', as shown by Sara Ahmed in the case of 'diversity' within academic institutions. See S Ahmed, *On Being Included: Racism and Diversity in Institutional Life* (Duke University Press 2012).

[13]As authors and outsiders to Black feminist struggles, we are drawn to these concerns and their pertinence to this paper in light of our own varying positions of power within and outside the European legal academy and our various engagements in scholarship at the intersection of European private law and social injustice. We believe that extraction, appropriation, commodification, and denaturation constitute epistemic injustices that require our own critical reflection, as a matter of reparative scholarship, in light of our positionalities and varying investments in this predominantly white space.

[14]Tjon Soei Len (n 3).

[15]See, eg, Consumer Rights Directive 2011, Art 2, and Digital Services Act 2022, Art 3.

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The contemporary private law understanding of the person is thus no longer formal, that is, no longer categorically blind towards substantive inequalities. Yet, it is materialised in a specific way, where selective accounts of power imbalances (unequal bargaining power) and other 'weaknesses' are considered.[16] The specific materialisation of European private law, codes, organises, naturalises, and reproduces power to the advantage of those in more privileged positions. By taking the experiences of those who are privileged (eg, racially, gendered, etc) as general and universal, and therefore as the norm and standard for neutrality, some experiences of multiply marginalised persons are treated as somehow more specific, exceptional, and therefore less appropriate for informing the interpretation of generally applicable rules. As a result, the experiences of multiply marginalised persons can become illegible through general private law because important organising dimensions of private law relations are kept out of materialisation.

Take the example of Article II.-7:207 DCFR (Unfair Exploitation).[17] Pursuant to this provision, 'a party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.' This general European private law articulation says nothing more about 'the person.' All we know is that they were dependent on or had a relationship of trust with the other party, were in economic distress or had urgent needs, were improvident, ignorant, inexperienced, or lacking in bargaining skill. But how did they end up being dependent, in economic distress, or with urgent needs? Through what process are parties labelled improvident, ignorant, inexperienced, or lacking in bargaining skill? Whom does private law consider 'ignorant' and 'lacking in skill'? Why do they have to prove their own 'weakness' in order to be relieved from the exploitative contract?[18] And what and whose purpose do these private law dichotomies serve? Are members of privileged and dominant groups as likely to end up in predicaments that render them some version of 'less competent' than multiply marginalised contracting parties? Are structural oppression and marginalisation in society not likely to be reproduced also in contractual relationships? If so, then why does private law turn a blind eye on the structural dimensions of (pre) contractual exploitation? Under conditions of structural inequality across multiple axes of power, susceptibility to exploitation is a 'normal' feature of contractual relations of exchange for multiply marginalised people. And yet, purportedly protective private law places the burden of proof of exploitation (and the practical and financial obstacles of a pursuit of avoidance) on them as 'weaker' parties.

What is more, the provision does not convey or reveal anything more about 'the other party' than that they knew or could reasonably be expected to have known about the predicament of the first party and that they exploited the first party's situation by taking an excessive benefit or grossly unfair advantage. But are Black women as likely as white men to be in a position to exploit their

[16]Paradigmatic: Case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675, para 36, with reference to Art 6 Unfair Terms Directive 1993: 'This is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.'

[17]The Draft Common Frame of Reference is meant as an academic restatement of European private law; it is not itself law in any formal sense. For positive law examples from some Western/hegemonic European jurisdictions, see eg Art 1143 French Civil Code ('where one contracting party exploits the other's state of dependence'), Art 138 German Civil Code ('a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another'), Art 3:44 Dutch Civil Code ('he is under the influence of particular circumstances, like a state of emergency, dependency, thoughtlessness, an addiction, an abnormal mental condition or inexperience').

[18]See C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), full edition, Vol I (Sellier 2009) 507–8.

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contracting party's situation by taking an excessive benefit or grossly unfair advantage? Does the capacity of contractual exploitation correlate with cisheteronormativity, with white supremacy, with ability? (How) does private law code and naturalise racial and ethnic power? European private law 'materialisation' does not provide any insight that would assist answering these questions, and what is more, such answers would not be salient to private law's relation to justice.

In sum, contemporary private law doctrines, even when asserted as 'materialised', are race, ethnicity, and gender blind – amongst others – and therefore necessarily and inherently incapable of allowing visibility and legibility of the ways in which oppression shapes multiply marginalised experiences in private legal relationships. As a result, the existing (European) private law is profoundly alienating. It ignores the fact, central to the lives of all private law subjects, that they come to relationships governed by private law, not with certain individual 'weaknesses' or 'strengths' that are commensurable and can be meaningfully expressed in the single currency of bargaining power, but with lived experiences with structural features of society that are profoundly unjust. What is more, this assertion of private law's neutrality may actually play a constructive, justificatory role in maintaining and reproducing injustice, naturalising racial, gender, imperial and ethnic majority power through private law relationships.

C. The EU's structural blindness to intersectional discrimination

EU discrimination law applies to a wide (but limited) set of relationships covered (potentially) by private law, including (self)employment, education, and supply of goods and services. In other words, the pertinent EU directives have horizontal effect (indirect, via transposition into Member State law), and insofar are properly understood as (core) parts of EU private law even though they are often treated as a different subject.

However, EU antidiscrimination law contains structural obstacles to incorporating an intersectional approach.[19] The EU's patchwork of legislative instruments poses significant structural difficulties, as legislative instruments vary in grounds, scope, legal bases, defences, and exceptions.[20] For instance, while the Race Equality Directive (2000) and the Employment Equality Framework Directive (2000) are both meant to implement the principle of equal treatment,[21] they each do so on different grounds (eg, the latter does not include race and ethnicity) and only have a partial overlap in scope. The EU's legislative collage reflects clear, discrete distinctions between various one-dimensional grounds of discrimination and thus structurally resists intersectional analyses of discrimination that can capture multiple marginalisation. What is more, the same dominant legal paradigm of antidiscrimination critiqued by Crenshaw also drives EU legal analysis: parties must argue through the paradigm of sameness/difference to show they are treated less favourably than a similarly positioned comparator.[22] It is exactly this paradigm that produces a selective legal legibility of discrimination. It both forces multiply marginalised people to explicate their experiences only to the extent that they are comparable and similar to experiences of

[19]We do not mean to imply that such structural obstacles are the sole reason why European approaches to antidiscrimination have not been attentive to multiple marginalization. Notably, the European Court of Human Rights jurisprudence is similarly unresponsive to intersectional harms, see the project 'Intersectional Rewrites: European Court of Human Rights Judgments Reimagined', <https://intersectionalrewrites.org/> and Nani Jansen Reventlow et al, (eds), *Intersectionality and Human Rights: Reimagining European Court of Human Rights Judgments* (Edward Elgar Publishing forthcoming).

[20]S Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law' (European Commission Report 2016), Chapter 5.

[21]See Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art 1; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art 1.

[22]See Crenshaw (n 6); Fredman (n 20) 65.

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discrimination of more privileged others, and it marks multiply marginalised people as exceptions because they are deemed too different from norm setting privileged subjects.

As a result, EU antidiscrimination law is structurally blind in two distinct ways.[23] First, the law is blind to discriminations at the intersection of different discrimination types addressed within one single directive (for example, religion and age, or disability and sexual orientation, in the case of the Framework Directive). Second – and most relevant here – the law is blind towards discrimination that occurs at the intersection of these two directives, such as the intersection between sex and race, which renders discrimination of women of colour invisible. This has become obvious in the infamous line of headscarf cases where the Court of Justice privileges 'the right to conduct a business' over the right of Muslim women to wear a headscarf at work.[24] As it has been pointed out by Nozizwe Dube, 'by concealing itself behind the single-axis framework that characterises EU non-discrimination law, the Court does not acknowledge the entirety and complexity of the disadvantage that victims of intersectional discrimination face.'[25] This in spite of attempts by some of its Advocates-General to point the Court in the right direction.[26] Moreover, as a general matter, in its interpretations of non-discrimination law, the Court seems to be particularly colour blind in that it privileges ethnicity discourse over race.[27]

Both directives are currently under review. And intersectionality has been tabled by the European Commission as a possible concern.[28] However, in the Commission's reading, like in much of the relevant European literature, intersectionality is understood as – and reduced to – the problem of multiple discrimination.[29] Yet, as Iyiola Solanke points out, 'in the absence of synergy, the idea of intersectional discrimination loses its systemic critique.'[30] In this respect, the European Parliament has made a better attempt to acknowledge intersectionality in a recent resolution, which underlines that 'intersectional discrimination differs from multiple discrimination.'[31] In the resolution, the European Parliament acknowledges that 'in the case of intersectional discrimination, the grounds of discrimination are intertwined, which creates a unique type of discrimination', that 'applying an intersectional analysis allows us to address and understand social inequalities, exclusion and discrimination from a comprehensive, systemic and structural perspective, while overcoming a single-axis approach to discrimination', and that 'intersectional

[23]On 'intersectional discrimination' and 'intersectional needs' in the context of combating violence against women, in particular support for victims, see the recent EU Directive 2024/1385 of 14 May 2024 on combating violence against women and domestic violence, respectively Arts 16 Para 4 and 33.

[24]See, eg, CJEU, 15 July 2021, C-804/18 *WABE* ECLI:EU:C:2021:594.

[25]N Dube, 'Not Just Another Islamic Headscarf Case: LF v SCRL and the CJEU's Missed Opportunity to Inch Closer to Acknowledging Intersectionality' (*ELB Blog* 2023) <https://www.europeanlawblog.eu/pub/not-just-another-islamic-headscarf-case-lf-v-scrl-and-the-cjeus-missed-opportunity-to-inch-closer-to-acknowledging-intersectionality/release/1> accessed 26 February 2025.19 January 2023.

[26]See Opinion of Advocate General Kokott in Case C-443/15 *Parris* ECLI:EU:C:2016:493 (with specific reference to Crenshaw). See also Opinion of Advocate General Medina In Case C-344/20 *LF v SCRL* ECLI:EU:C:2022:328.

[27]To be more precise, the Court follows the language of the directive of 'racial origin', as if somehow racialised persons arrived – and hence are newcomers. The Race Equality Directive, moreover, refers to racial *or* ethnic origin, structurally negating the reality that race and ethnicity can intersect to shape experiences of discrimination.

[28]European Commission, 'Possible Gaps in the Legal Protection Against Discrimination on Grounds of Ethnic or Racial Origin: Factual Summary Report Open Public Consultation' (2022) Ares 4818137 – 01/07/2022, 7. See also Commission Communication 'A Union of Equality: EU Anti-Racism Action Plan 2020–2025' (Brussels), 18.9.2020 COM (2020) 565 final 2 and 13.

[29]This refers to the idea that discrimination grounds can be additive, such that discrimination is viewed and proven on separate but multiple grounds. This view still resists the idea of intersectionality, which identifies a qualitative shift in the experience of discrimination vis-à-vis a one-dimensional perspective.

[30]I Solanke, 'The EU Approach to Intersectional Discrimination in Law' in G Abels et al, (eds), *The Routledge Handbook of Gender and EU Politics* (Routledge 2021) 93–104 (contrasting the additive or cumulative approach of multiple discrimination with the synergistic approach of intersectional discrimination).

[31]European Parliament resolution of 6 July 2022 on intersectional discrimination in the European Union: the socio-economic situation of women of African, Middle-Eastern, Latin-American and Asian descent (2021/2243(INI)), B-D.

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policies cannot be implemented without centring racialised people at the intersections of discrimination.'[32]

4. Intersectionality and liberal justice

A. Liberal social justice

As an abstract matter, the injustice of structural social inequalities is widely accepted. And it is not difficult to see how intersectionality ought to be central to dominant accounts of social justice, such as John Rawls's justice as fairness.[33] In Rawlsian terms, when a society is characterised by structural racism and other types of structural oppression, then that society lacks a just basic structure. And if the second principle of justice as fairness (in its first part) holds that social inequalities are acceptable only if they work to the benefit of the least well-off groups in society, then this principle naturally needs to account for the multiple marginalisation of members of society. In other words, what it means to be the least well-off must be considered in light of people's positionings at the intersections of multiple social oppressions. And Black feminists have long pointed out that women of colour are 'at the bottom.'[34] Similarly, the demand made by the second part of that same principle – that socio-economically relevant positions be open to all under conditions of fair equality of opportunity – makes sense only through a thoroughly intersectional reading. Finally, concerning the first principle, which requires equal basic liberties for all, Rawls was very clear that this demand should not be understood formally but in a substantive sense of the equal fair benefit of these liberties. In sum, mainstream understandings of social justice such as Rawlsian political liberalism are easily read as prohibiting the social injustices that are made visible and legible through an intersectional lens. As a result, these theories ought to be read as demanding special attention for social injustices experienced by multiply marginalised persons, even if in fact this is yet to happen in most cases.[35]

B. Division of labour

However, while the institutional responsibility of the basic structure of society for ensuring social justice necessarily seems to demand an intersectional approach even in mainstream liberal political thought, it is much more controversial among liberals that private law shares any of that responsibility. In this regard, dominant liberal accounts of social justice invoke the idea of a division of labour between private law and other institutions. On this view, which is widespread among liberal philosophers (eg, Dworkin, Rawls, Ripstein),[36] private law is not responsible for ensuring social justice at all: while the basic structure of society has the task, in the words of Rawls,

[32]Ibid.

[33]J Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001). The focus here will be on Rawls as the pre-eminent mainstream account of social justice. However, much of what we have to say also applies to other social justice theories, in particular other liberal-egalitarian ones, such as the capabilities approach developed by A Sen, *The Idea of Justice* (Belknap Press 2009) and MC Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press 2011).

[34]See, eg, 'The Combahee River Collective Statement' (1977) by the Combahee River Collective: 'at the very bottom of the American capitalistic economy', 'being on the bottom' 'our position at the bottom'; Crenshaw (n 6) 169: 'most disadvantaged' and (with reference to the basement metaphor, 151: 'These people are stacked – feet standing on shoulders – with those on the bottom being disadvantaged by the full array of factors, up to the very top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling'; b Hooks, 'Black Women: Shaping Feminist Theory' in idem, *Feminist Theory from Margin to Center* [1984] (Routledge 2015) 16: 'at the bottom of the occupational ladder'.

[35]Our claim that Rawlsian social justice should centre intersectional oppression and marginalisation does not imply that all understandings of intersectionality could embrace Rawlsian justice. In particular, more identitarian strands are fundamentally at odds with liberal understandings social justice.

[36]J Rawls, *Political Liberalism* [1993] (expanded ed, Columbia University Press 2005) 266–9; A Ripstein, 'Private Order and Public Justice: Kant and Rawls' 92 (2006) Virginia Law Review 1391–438; R Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 287.

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to ensure 'background justice' for transactions between private parties, private law has no part in that institutional responsibility. In other words, on this division of responsibility view, private law is not part of the basic structure of society, that is the main socio-economic–political institutions responsible for social justice. And so, to the extent that the oppression of multiply marginalised persons is primarily, or even exclusively, a matter of social injustice as opposed to interpersonal justice (on which further below), private law bears no responsibility. For these liberals, the point is not that structural injustices and their intersections are not important. Rather, in their view, their importance is best addressed elsewhere. The reason may be either expediency, ie, that it is impossible to properly assess the social inequality ramifications of private transactions, as Rawls thought,[37] or moral, ie, that it is unjust to make individual private parties bear the responsibility for structural injustices in society, as Weinrib and Ripstein argue.[38] Both positions result in a liberal permissiveness that sets aside structural injustices as a concern for private law.[39]

There exist alternative responses immanent to liberalism to these liberal claims to private law exceptionalism. First, the expediency argument is contingent, and there are many cases in which we can be quite confident that the formal application of a private law rule will reproduce and exacerbate structural – and structurally intersecting – social injustices.[40] Secondly, the moral division of labour view relies on a natural law understanding of pre-political moral private rights, which private law must simply implement, while in a post-institutional view (as in Rawlsian justice), morally relevant rights are established through just institutions, such that private law would be complicit in the creation of oppressive, and therefore unjust, private rights under the division of labour view.[41] Finally, and most directly, private law is in fact part of the basic structure of society as understood by Rawls, because of its key role, at least in a capitalist societies (and most certainly after the waves of massive privatisations) in distributing wealth, capabilities, and primary goods.[42]

C. Liberal interpersonal justice

Implicit (Dworkin, Rawls) or explicit (Weinrib, Ripstein) in the division of labour view is a formal understanding of private law. In other words, division of labour views vindicate, rather than criticise, the pre-materialisation understanding of private law. On this view, the specific

[37]Rawls (n 36), lecture VII ('The basic structure as subject').

[38]EJ Weinrib, *The Idea of Private Law* (Harvard University Press 1995); Ripstein (n 36) 1391–438; A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009). See also Dworkin (n 36) 43, where he uses the metaphor of 'swimming in your own lane' to illustrate the idea of a division of public and private responsibilities.

[39]For a critical discussion, see MW Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 300–6.

[40]See eg SV Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' 29 (2000) Philosophy & Public Affairs 205–50, and A Bagchi, 'Distributive Justice and Contract' in G Klass et al, (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 193–212.

[41]A third response would be purely nominal. Private law could be kept 'pure' by calling instances of private law social justice 'public law', as often happens, for example, in the case of horizontal non-discrimination law. On EU non-discrimination law, see above Section 3. Contrast DCFR, Book II, Chapter 2 (Non-discrimination), where the right not to be discriminated against is included in general contract law. See, in particular, Art II.–2:101 (Right not to be discriminated against): 'A person has a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods, other assets or services which are available to the public.' However, the provision does not address intersectional discrimination.

[42]See, eg, AT Kronman, 'Contract Law and Distributive Justice' 89 (1980) Yale Law Journal 472–511; KA Kordana and DH Tabachnick, 'Rawls and Contract Law' 73 (2005) George Washington Law Review 598–632; S Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 Oxford Journal of Legal Studies 213–35; J Klijnsma, 'Contract Law as Fairness' 28 (2015) Ratio Juris 68–88; MW Hesselink, 'Unjust Conduct in the Internal Market: On the Role of European Private Law in the Division of Moral Responsibility Between the EU, Its Member States and Their Citizens' 35 (2016) Yearbook of European Law 410–52; LKL Tjon Soei Len, *Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer Contracts* (Hart Publishing 2017).

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characteristics of the parties, such as their vulnerabilities, their relationships, including their power dynamics, and their context, including how they are socially (dis)embedded in patterns of prejudice, denigration, and exclusion, should be ignored when determining the private rights, obligations, and remedies of the parties to a given relationship governed by private law.

Again, on this view, parties' social, economic, political positionings are ignored not on the libertarian ground that social justice is a mirage (Hayek),[43] but because such inequities should be addressed through different institutions than private law.

However, what about private law theories that vindicate and defend the materialisation of interpersonal justice? Until recently, interpersonal justice theories were as colour blind as the mainstream liberal theories of social justice. However, this is changing. Indeed, the relational theory of private law justice by Dagan and Dorfman, which is committed to substantive autonomy and equality, explicitly understands private law's responsibility for justice as directly horizontal, not merely indirectly and derivatively from society's (vertical) social justice responsibilities.[44] Yet, so far, they have not taken up an intersectional reading of private rights and wrongs.

D. A liberal feminist variation

Liberal feminists may see in intersectionality's encounter with European private law an opportunity for liberation.[45] For instance, the potential of contract – the normative force of interpersonal promise or agreement – promises a democratised way to shape distribution of social and economic goods between persons. With a broad space for contractual thinking (and contractual freedom) to roam, so the liberal promise goes, parties hold the power to give shape to their own ideas of desirable interpersonal relationships, whether they be intimate or at arms-length. In the context of feminist struggles for social justice, contract then holds – at least in theory – a radical potential to place formative power, for instance, of family structures, or of the scope of the 'economic', into the hands of multiply marginalised persons (eg, countering heterosexist ideals of the family, expanding the gendered notions of economic activity).[46] In this sense, contract law can align more easily with the plurality of ways in which people engage in interpersonal relationships beyond, for instance, heteronormative patriarchal white supremacist restrictions. On this view, the radical potential of contractual thinking may allow the contract to be an aid in struggles towards social justice and dreams of liberation. With the extension of contractual freedom to persons beyond formal exclusions of racialised and gendered difference, the liberal feminist view sees in private law, and in contract more specifically, a potential for liberation and response to persisting and historical racial and gender injustice. Thus, on this account, intersectionality might – and ought to – be taken up in private law to further examine its liberatory potential for multiply marginalised people. However, this too has yet to happen in European legal scholarship.

[43]FA Hayek, *Law, Legislation and Liberty; A New Statement of the Liberal Principles of Justice and Political Economy* [1973] (Routledge 2003), Vol 2 ('The mirage of social justice').

[44]See H Dagan and A Dorfman, 'Just Relationships' 116 (2016) Columbia Law Review 1395–460; H Dagan and A Dorfman, *Relational Justice: A Theory of Private Law* (Cambridge University Press 2024).

[45]See M Ertman, 'Contract's Influence on Feminism and Vice Versa' in D Brake, et al (eds), *The Oxford Handbook of Feminism and Law in the U.S.* (Oxford University Press 2022) 532–51.

[46]In this liberal, individual choice centred framework, contract represents the availability of expanded opportunities for plural family formation and recognition. Yet, other feminists critique this celebratory reading of contract as choice and show how contract works to the detriment of multiply marginalised persons. See for instance, in the context of surrogacy contracts: D Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (Vintage Books 1999); idem, 'Why Baby Markets Aren't Free' 7 (2017) UC Irvine Law Review 611.

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5. Intersectionality and reparative private law justice

A. Nonideal theory

It is important to realise that most liberal social justice theories are ideal theories, and that the same applies for most private law theories. These are theories setting out what an ideal society and an ideal private law, respectively, would look like. In particular, the division of labour claim does not go further than stating what the ideal role of private law in a just society would be. And the idea is that private law would have no responsibility for social justice in a 'well-ordered society', to use the Rawlsian phrase, because social justice would be assured by a sufficiently just basic structure, which would provide a background for fair transactions among equals. As such, private law would have no responsibility for any injustice arising from multiple marginalisation, and its encounter with intersectionality would have limited implications for general private law. Many people would consider these ideal theories utopian fantasies detached from the bitter realities of intersectional oppression and marginalisation.

However, there exists a second way in which intersectionality may be taken up in European private law. This strategy remains internal to the liberal frame and addresses the failure of leading ideal liberal accounts of social justice to foreground actual historical and persisting structural injustices. European private law governs in a social context where background justice patently has never been assured because in reality the basic structure is profoundly unjust. In particular, the basic structure is characterised by deep historical persisting and exacerbating structural inequalities across gender, sexuality, race, ethnicity, ability, and class which impact multiply marginalised persons in various ways. This raises the urgent question of what private law's role should be under nonideal, unjust circumstances, that is, our real circumstances here and now. This brings us to nonideal theory. There exists a rich scholarship from critical feminist and critical race theorists who argue against ideal liberal accounts of justice, because their accounts de facto legitimate patriarchal and white supremacist social orders.[47] One response is to turn away from (or never to engage with) liberal justice (see below, Section 6), while others have responded by proposing a process of more or less radical rethinking of liberal justice in a profoundly nonideal world.

B. A private law right against intersectional exploitation

Aditi Bagchi has argued that when background social justice is not assured by other institutions, then private law as a societal institution has a responsibility for social justice that it might not have under ideal circumstances. As she puts it, 'whatever the relationship between distributive justice and private law in ideal theory, a failure to meet our obligations of distributive justice destabilises our other rights and obligations toward one another.'[48] In particular, she argues for 'a negative right against conduct that exploits and exacerbates distributive injustice.'[49] She explicitly grounds this right not only in social justice but also in interpersonal justice. The idea is that our moral responsibilities for justice are not exhausted by the moral duty, affirmed by Rawls, to support just institutions where they exist. When just socio-political institutions are not in place, we retain what she calls 'imperfect social duties and rights' towards each other. These interpersonal or horizontal social duties obtain under circumstances of distributive (or, wider, social) injustice, ie, where society has not achieved social/distributive justice.

Taking up an intersectional understanding of injustice (a subject that Bagchi does not address), this means, it would seem, that any materialisation of private law should prioritise the spill-over effects of the main structural social injustices in a given society onto private law relationships.

[47]Notably, C Pateman, *The Sexual Contract* (Stanford University Press 1988); CW Mills, *The Racial Contract* (Cornell University Press 1999).

[48]A Bagchi, 'Distributive Injustice and Private Law' 60 (2008) Hastings Law Journal 105–48, 107–08.

[49]Ibid., 134.

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Very concretely, for European private law this could mean that a new EU-wide doctrine of intersectional exploitation should be centre stage rather than, say, consumer protection in the digital single market. Thus, instead of ensuring the wellbeing of 'average consumers', European private law would be concerned chiefly with what happens to people at the bottom of social hierarchies. As a very concrete example of what this might mean, the text of Article II.-7:207 DCFR (Unfair Exploitation) could be adapted to highlight and centre the moral significance of multiple marginalisation to contract exploitation.[50] It could run something like this:

> Article # (Intersectional exploitation):
>
> A party may avoid a contract if, at the time of the conclusion of the contract: (a) that party was oppressed by the combined effects of intersecting types of subordination, either individual or structural, such as sexism, racism, ableism, homo- and transphobia, ageism, and classism; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.

Following the example of Article II.-7:207 DCFR, a second paragraph could be added allowing for judicial adaptation of the contract at the request of the disadvantaged party, which could run as follows: 'Upon the request of the party entitled to avoidance, a court may, if it is appropriate, adapt the contract in order to bring it into accordance with what might have been agreed in the absence of the intersectional exploitation.' This second paragraph may be of important practical relevance as disadvantaged parties would probably prefer, in most cases, contractual adaptation (substituting the exploitative price with a fair one) as a remedy over contractual avoidance/annulment (which would make them lose access to the good or the service).

It might be argued, against the introduction of such a provision, that this would lead to great legal uncertainty. For how can the combined oppressive effects of intersecting types of subordination possibly be proven? Our answer is that any such probatory difficulties do not seem to differ categorically from those arising in the context of the original Article II.-7:207 DCFR (Unfair Exploitation) (establishing, eg, 'economic distress', 'urgent needs', or 'ignorance') or Art 3, Unfair Terms Directive 1993 (determining 'unfairness, contrary to the requirement of good faith').

Importantly, legal certainty could be improved significantly by interpreting the provision in such a way that it centres the experiences of intersectional harms suffered by multiply marginalised people. If private law strategies to take up intersectionality are to be effective, interpretation must come from the perspective of multiple marginalisation. Concretely, this means that 'combined effects of intersecting subordination' should be interpreted as ones that are central to the experiences of multiply marginalised parties, whether those effects are unique to their experience (centring the entanglement of multiple systems of oppression), or representative of the type of exploitation most parties can encounter (centring multiply marginalised parties as representative of the meaning of exploitation generally). As Iyiola Solanke underlines, the intersectional focus on synergy between race and gender 'facilitates the shift of perspective centralising marginalised voices and without it these voices are re-marginalised.'[51]

[50]The idea is not that the new article should replace the current Art II.-7:207 DCFR, but rather that it should be added to the current DCFR in order to highlight and centre the moral significance of multiple marginalisation to contract exploitation. Similarly, the proposed new provision should not be read *e contrario* as implying that the mere effect of a single type of subordination, as opposed to the combined effects of several intersecting types of subordination, should not give ground for contract annulment. Single vector oppression and marginalisation are simply outside the scope of the present article. Moreover, coordination issues may arise if intersectionality is going to be taken up in (EU or national) non-discrimination law.

[51]Solanke (n 29).

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C. Occupying liberalism

A notable critic of Rawls, Charles Mills, criticised dominant liberal theories of justice and specifically Rawls's theory based in social contract theory.[52] To fixate on the minutiae of ideal theories of justice for a well-ordered society, Mills argued, means to ignore the structural injustices of existing ill-ordered – namely, racist anti-Black – societies that have impacted actual people over time. His critique exposed the racist nature of the social contract. However, rather than rejecting liberal justice altogether he argued for occupying it.[53] He proposed the retention of the liberal promise of liberty and equality through an exploration of a radically different account of justice (racial justice), ie, one that seeks to correct and redress how liberal theorising of justice historically and currently excludes and structurally justifies racial domination.

Mills's critique is notably non-intersectional in the sense that it centres on racial justice alone, but the implications of his critique are patently relevant in the encounter of intersectionality and European private law. Mills's critique elevates the question of how liberal private law's promises of freedom and equality must be radically reconsidered to account for its actual historical and current role in constructing, maintaining, and naturalising the oppression of multiply marginalised persons. This question demands a radical recentring and correction of private law's role in systemic exclusion and subordination of multiply marginalised persons: how can the theorising of European private law acknowledge, account, and correct for its complicity in injustice? Rather than leading to small or easy adjustments and reforms to European private law doctrines and interpretations, it points towards a radical restructuring of its very foundations. In particular, Mills's work ensconces a radical approach to contract – one that uses contractual thinking to correct racial injustice. His account opens a different path for the radical restructuring of new (and likely unrecognisable) liberal private law that centres on the interests of multiple marginalisation persons – as opposed to the interests of consumers – and the correction of the injustices that have structurally shaped their exploitation and subordination.

Concretely, a radical liberal rethinking of private law could include additional, punitive damages for racial, gendered, ableist, etc private harms in tort, as well as unjust enrichment/disgorgement claims. Such structural changes could make a difference, for example, in the recent Sanda Dia case in Belgium and similar ones marred by the combined effects of institutional racism and classism, potentially allowing for more effective civil law remedies (punitive damages) where the criminal law fails.[54] As another example, they could support protection against eviction of multiply marginalised tenants in cases where landlords own more houses than they would under a more just basic structure.

Moreover, as another very concrete example, the possible new DCFR provision discussed above could be made more radical by structurally excluding ignorance based on privilege as an excuse. The passage 'the other party knew or could be expected to have known this' could then be deleted on the ground that today, ignorance based on privilege (whether white, male, ableist, etc) should not yield a private law legal advantage. As a baseline, private law could hold that all parties should be aware that our society is characterised by structural racism, sexism, ablism, homo- and transphobia, ageism and classism, and their intersecting and compounding effects. The more radical first paragraph of a new Article # DCFR (Intersectional exploitation) could then run as follows[55]:

[52]CW Mills, *The Racial Contract* (Cornell University Press 1999).

[53]CW Mills, *Black Rights/White Wrongs: The Critique of Racial Liberalism* (Oxford University Press 2017) Ch 2 ('Occupy Liberalism!').

[54]Cf 'Ex-Fraternity Members in Belgium Found Guilty Over Death of Student' *The Guardian* (25 May 2023) <www.theguardian.com/world/2023/may/26/ex-fraternity-members-in-belgium-found-guilty-over-death-of-student>; 'Students in Belgium hazing death are sentenced to fines and service' <www.nytimes.com/2023/05/26/world/europe/belgium-students-hazing-sentencing.html>.

[55]The second paragraph on contractual adaptation could remain the same.

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Article # (Intersectional exploitation)

A party may avoid a contract if, at the time of the conclusion of the contract: (a) that party was oppressed by the combined effects of intersecting types of subordination, either individual or structural, such as sexism, racism, ableism, homo- and transphobia, ageism, and classism; and (b) the other party exploited the first party's situation by taking an excessive benefit or unfair advantage.

D. Decolonising EU private law

This provision could become part of an EU directive on combating multiple marginalisation and oppression. Such a directive could find a solid basis in Article 114 TFEU, because an internal market where intersectional exploitation is allowed is clearly not functioning properly. Indeed, an EU directive that explicitly invites an intersectional lens to market functioning would have a much more secure basis than much of the EU consumer acquis, which is also based, often rather artificially, on the same legal basis for internal market integration (Article 114 TFEU).

It is important to note, however, that attempts to decolonise European private law must be attentive to the specific and multiple variations in which Member States have been complicit in historical and ongoing wrongs of marginalisation and oppression. Private law is situated in these specific national contexts and plays a role in maintaining and constructing gender and race within specific and varying European contexts. Yet, while Member States are responsible for private law complicity in injustice, that fact alone does not relieve the EU from responsibility. As Gurminder Bhambra has argued, 'the decolonization of Europe will only happen once the colonial histories of Europe are explicitly reckoned with and Europe itself is understood to have been constituted by those histories – in all their variety.'[56] As a matter of symbolism, this requires a change in the preamble to the Treaty on European Union (TEU), where the current self-glorifying normative-historical account, expressing appropriating 'inspiration' and selective 'recalling',[57] is supplemented and partly replaced by a reckoning with and taking responsibility for Europe's colonial past and present. And as a matter of concrete steps, this should indeed include reparations, as Bhambra rightly argues.[58] Further, decolonising the EU, as a long overdue response to structural injustices and of taking responsibility, must be structural too. Therefore, it must include all sectors of EU law, including EU private law. And just like 'good governance' and 'digital Europe' can be horizontal EU programmes, stretching across various sectors and competences, so too could (and should) be the 'decolonising EU' project.

E. Occupying private law

But truly occupying or liberalizing illiberal private law, to state it in Millsian words, entails more than rewriting preambles, or shifting private law rules, even if comprehensively across EU law. Deep engagement with radical rethinking must start with reconsideration of private law's role in the oppressive, imperial, colonial histories, and present-day reality of Europe. It must start with structural revision – not of judgements and rules but of the history of private law, of private law theory, of private legal scholarship. To occupy liberal private law means to identify sanitizing egalitarian accounts of Europe and its various private laws; to discard ideas of exceptionalism in the sexist, racist, colonial, imperial, oppressive nature of European private laws; to recognise

[56]GK Bhambra, 'A Decolonial Project for Europe' 60 (2022) Journal of Common Market Studies 1–16.

[57]See the Preamble: 'DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe'.

[58]Ibid.

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Eurocentric, 'civilising' tendencies that impoverish intellectual life and appropriate and extract ideas – like intersectionality, like decolonisation – into existing private law discourse.[59] If intersectionality's encounter with European private law moves through the strategy of radical rethinking, there must be an intersectional paradigm shift that impacts not merely European patterns of private law freedoms, rights and obligations, but also shifts in who engages in European law knowledge production, its ground rules, its evaluations.[60]

F. Democratic (dis)empowerment

What would an intersectional paradigm shift entail for EU private law making under profoundly non-ideal circumstances? Let's start from who gets to decide today on how to acknowledge intersectionality in European private law. Currently, EPL making in the European Commission, Parliament, Court of Justice, and legal academia is predominantly a white affair. To put it in terms of deliberative democracy, the white (male) perspective, voice, concerns, and reasons are massively overrepresented, while the voices of multiply marginalised people are near absent, and their concerns made almost invisible.

Even recent initiatives to make EU law and policy more legitimate are blind towards the problem of the whiteness of EU law and policy making. Notably, the Conference on the Future of Europe failed to address racism as a core concern for Europe's and Europeans' future.[61] Similarly, the Commission recently proudly announced that 'building on the success of the Conference on the Future of Europe, citizens' panels are now part of the Commission's policymaking in certain key areas.'[62] These 'new generation of citizens' panels' will deliberate on initiatives on food waste, learning mobility and virtual worlds,[63] but absent attention for intersectional injustice (for instance, within chosen key areas) the experiences of multiple marginalisation are likely to be overlooked. This raises the question of what would have happened if the random selection of citizens for the deliberative panels had been stratified, not merely on the basis of five criteria to be 'representative of the EU's diversity, ie, gender, age, geographic origin, socio-economic background, and education level,[64] but also of race and ethnicity.[65] However, even such more legitimate deliberative panels would remain toothless unless they were also given important agenda setting powers. Only the combination of statistical over-representation of currently marginalised groups with genuine powers to set the deliberative agenda might be deserving of the label 'new generation of citizens' panels.' And only such panels might bring a switch from European private law's current fixation with consumer protection towards intersectional justice.

Yet, it is submitted, the problem of the democratic illegitimacy of the EU private law *acquis* runs much deeper. Statistical representation is not the same as democratic empowerment. The problem with the privileged access to EU private law-making is not merely the epistemic one that

[59]In the European private law context, taking up intersectionality can easily become an intellectual project and extraction of ideas, while excluding those whose labour and lived reality of multiple marginalisation produced and produce the knowledges that undergo European private law disciplining. See Section 2.

[60]See Tjon Soei Len (n 2 and 3) and Hesselink (n 2).

[61]The 338 pages *Report on the Final Outcome* of the Conference on the Future of Europe (May 2022) 15, mentions racism only once (under proposal 46 on 'Education', measure 2, item 8: 'Combating bullying and racism' see p 89) and ethnicity also once (in the Annex, p 102).

[62]Commission work programme 2023 'A Union standing firm and united' (Strasbourg, 18.10.2022 COM (2022) 548 final).

[63]Ibid.

[64]Conference on the Future of Europe, *Report on the Final Outcome* (May 2022) 15.

[65]Arguably, those who have been overrepresented and structurally enjoyed unjustified power ought to be kept out of the democratic deliberation altogether, at least as a temporary measure until their excessive power is overcome. Note that as a matter of nonideal democratic theory the statistical *under*representation (or even exclusion) of those at the intersection of several privileges (ie, white heteronormative men) in democratic deliberation under current conditions of structural social injustices would *increase*, not reduce, the legitimacy of EU (private) law making.

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the preferences of multiply marginalised persons are not properly tracked.[66] It is also the social justice problem of the violation of the right not to be dominated by laws made by others.[67] Democratic agency is key here. Therefore, under nonideal theory radical reform should aim at increasing democratic control for people belonging to multiply marginalised groups, while at the same dismantling the current structures of privileged access to European private law making which have ensured domination through European private law. In democracy, nothing can replace actual political agency and democratic participation; there are no shortcuts.[68]

In sum, just like Rawlsian liberal justice, so too Habermasian deliberative democracy is liable to the radical immanent critique of not living up to its own emancipatory promises and, as a consequence, ending up being apologetic, rather than critical, of existing structures of intersectional oppression. Therefore, in our current profoundly nonideal circumstances, occupying deliberative democracy – after the example of Mills' idea of occupying liberalism – is not only legitimate but necessary. This can take different shapes. But what they will have in common is that they will be discomforting, unsettling, and indeed disempowering for those whose unjustified structurally privileged access to EU private law making currently undermines its democratic legitimacy. Yet will the master's tools ever dismantle the master's house?[69]

6. Intersectionality and Private Law Abolition

A. Thinking beyond private law reform

The various shapes of occupying and radically rethinking private law under non-ideal conditions connect to intersectionality's deep engagement with attempts to critically rethink and reshape law. But if, through intersectional readings, European private law must be recast as a structurally oppressive institution (ie, if private law is an oppressive tool that colludes with structural injustices) then radically rethinking private law may have to move from occupying private law towards the possibility of abolition.

Contract's legitimacy as an institution, for instance, is on shaky ground if private law itself is responsible for constructing gendered racial bargaining power. It is on shaky grounds if private law functions to shape structural injustices it purports to take for granted, ie, if contract constructs the 'flourishing' market-based economy in which gendered racialised 'others' are structurally exploited. If this *is* contract – the notion of agreement whose normative force and legally binding nature is abstracted and detached from the actual conditions of human lives that shape its conditions – perhaps contract needs to be so radically restructured that it amounts to its effective abolition. Attending critically to naturalising and justificatory manoeuvres in European private law discourses that turn a blind eye to private law complicity in injustice is one way to make space for abolition as a starting point. While intersectionality creates no normative necessity for abolition, intersectional analyses of contract may spark, attach to, and invite questions and practices of abolition. Abolition in this sense is not an end state (ie, private law dismantled), but a commitment to processes that centre multiply marginalised people and dismantle private law and private law theory that is oppressive.

[66]Contrast H Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2013); H Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton University Press 2020).

[67]MW Hesselink, 'Private Law Subjects in European Mini-Publics' 22–4 (2024) International Journal of Constitutional Law 1–26.

[68]C Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press 2020).

[69]A Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in *idem*, *Sister Outsider* (Penguin Books 1984) 103–6.

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B. Abolition

Abolitionist critique is a powerful body of thought and activism that challenges oppressive structures.[70] Abolitionist critiques have focused on systems with expressed aims of ensuring safety, justice and equality, but which in practice create and maintain structural unsafety, injustice, and oppression. Notably, abolitionists have positioned themselves against reforms to legal systems and structures and instead argue that they are beyond repair and should therefore be abolished.[71] Abolitionism has a long history but is commonly tied to US-based movements and Black feminist struggles to abolish slavery. In its contemporary US context, it is chiefly pointed against carceral systems notably the criminal justice system under which Black people are subjected to mass incarceration as a continuant of racial oppression.[72] Abolitionist critique has also become vibrant in relation to European systems of incarceration (for instance those that respond to migrants, people with disabilities, etc), as they are archetypes of oppressive systems.[73] A deep and critical engagement with abolitionism in European private law discourse is important for epistemic reasons, since abolitionist critique and movements have been from the onset a powerful Black feminist response to the lived realities of misogynoir.[74]

C. Private law abolition

While policing, incarceration, imprisonment, and detention are at the core of abolitionist critique, all structures of oppression ought to be dismantled under an abolitionist framework. In this regard, it is noteworthy that there has been comparably less attention for private law in the abolitionist movements. The overt violence and dehumanisation of carceral state responses reasonably draw more attention over the covert violence of private law enforcement by means of state power. But indeed, if all structures of oppression ought to be dismantled under an abolitionist framework this raises the question: is (European) private law beyond repair? If property and contract are intrinsically exploitative and oppressive along gendered, racialised, and ethnicised lines, then they may not be worthy of a defence for reform, including radical reform. If so, what would private law abolition entail? And if abolition is warranted, what – if anything – should replace it?

Abolitionist scholarship and activism challenges the assumption that punishment and incarceration (through policing and imprisonment) make society safer. Similarly, the claim that a private law system and a system of civil procedure ensures interpersonal justice and protects interpersonal rights can be challenged. Thinking private law abolition,[75] and discussing it as a serious alternative, is a radical way of taking intersectionality seriously. Conversely, abolition, be it of criminal justice or of civil justice, must be thought intersectionally.[76]

[70]See, for instance, A Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003); M Kaba, *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (Haymarket Books 2021); RW Gilmore, *Abolition Geography: Essays Towards Liberation* (Verso 2022).

[71]See, for instance, L Ben-Moshe, 'The Tension Between Abolition and Reform' in ME Nagel and AJ Nocella (eds), *The End of Prisons: Reflections from the Decarceration Movement* (Value Inquiry Book Series 2013) 83–92.

[72]See, for instance, M Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2010).

[73]For an examination of political and social organizing across Europe see A Emejulu and L Bassel, *Women of Colour Resist: Exploring Women of Colour's Activism in Europe* (University of Warwick, Project Report 2021).

[74]M Bailey, *Misogynoir Transformed: Black Women's Digital Resistance* (New York University Press 2021). Here it is relevant to consider earlier questions about how and when European private law scholarship engages Black women's labour and knowledge. Critical reflection is required to assess how ideas, such as intersectionality, are taken up in sanitised, disciplined, forms, ie, in accordance with white European comfort and sensibilities that render race almost unspeakable. See Wekker (n 3).

[75]For a similar exploration for another field, ie, international relations, see OU Rutazibwa, 'After Inclusion. Thinking with Julian Go's "Thinking Against Empire: Anticolonial Thought as Social Theory"' 74 (2023) British Journal of Sociology 324–35.

[76]AY Davis, G Dent, E Meiners and B Richie, *Abolition. Feminism. Now* (Penguin 2022).

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Note that the private law abolitionism considered here is not a form of nihilism.[77] To the contrary, it is strongly idealist in its deep commitment to justice. In particular, it is best understood as a way – perhaps the only viable one – to overcome the profound private law injustices resulting from existing forms of marginalisation and oppression through private law.

D. Abolishing contract

What does it mean to take up the idea of private law abolition? Taking up the possibility of private law abolition requires a radical way of thinking about our social order and the role that private law plays in human lives and relations. Abolition first and foremost asks us to consider the idea that a more just future is possible without private law.[78] What then are we asked to let go of, if we consider private law abolition in the name of justice?

For starters, abolition could challenge firmly held ideas in contract law.[79] Abolition of the idea that contract is essential to the fulfilment of human needs and for human flourishing. Abolition of the bilateral structure of agreement, which shields private parties from considering other people's – and collective – interests. Abolition of the core ideas of contract that animate attempts to legitimise and justify state violence as a contractual consequence. Abolition of the idea that contract serves well-being by enabling self-interested private pursuits. Abolition of the idea that a person's acquiescence (theorised as 'will', 'consent', etc) to a counter party's bargaining power should count as morally transformative, such as to justify state violence. Abolition of the idea that a flourishing economy and social provisioning necessarily depend on contract. Abolition of the idea that the only way a person can create trust that they will keep their word is through contract's access to violent enforcement. Abolition of the idea that the world can only turn with the legal certainty of contract at the foundation of social and economic relations. Abolition of the legal certainty of exploitation that contract secures. Abolition of the idea that struggles for justice of multiply marginalised people *must* engage with, build on, put their energies into, private law as it is produced in entanglements of capitalism, whiteness, patriarchy, and heteronormativity in order for them to be considered 'reasonable', 'feasible', and worthy of consideration as opposed to too radical. What it means to take up the idea of private law abolition is to allow creative legal discourse to engage alternatives to these core private law ideas, and encourage legal scholarship to question these private law assumptions, that are usually taken for granted, in favour of exploring alternative ways to fulfil human needs and support human flourishing.

E. Human relations beyond private law abolition

Just like in the case of normative theory, here too we could distinguish analytically between private law abolition, while everything else remains the same, and private law abolition in concert with the abolition of all other institutions so actively engaged in – or deeply intertwined with – structural oppression that they must also be considered beyond repair. However, clearly from the point of view of abolitionist critique only the latter strategy makes sense, as private law would be but one of the structures of oppression that would undergo dismantling. In particular, private law abolition

[77]This paper was submitted for publication to the *European Review of Private Law* (ERPL) and rejected there for its 'unworkable nihilism that is divorced from political and legal reality'.

[78]A post-revolutionary society without property law has been central to communist and anarchist thought. However, until recently those accounts tended to be non-intersectional (and structurally sexist and racist) focussing singularly on the oppression of the working class de facto understood as white men. This is rapidly changing today. See, eg, C Bottici, *Anarchafeminism* (Bloomsbury 2021).

[79]As to tort law, a key question relates to the current private/public divide: if a post-abolition approach of interpersonal harm means a disarticulation of crime and punishment (see Davis et al (n 69)) and a shift from punishment towards repair, then in current categories this might seem to imply a shift from a public law (vertical justice) towards a private law (horizontal justice approach), while in reality it would mean an approach that transcends the private/public divide.

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would go hand in hand with thinking through the abolition of global capitalism as the structure in which social provisioning takes place.[80]

Thinking private law abolition requires us to make assumptions about human interaction in a world without private law. These assumptions may have to draw on conceptions of the human person as situated in a post-abolition world. That may seem speculative. But remember that the same applies for ideal theories of social justice and of private law in a 'well-ordered society.' These are equally counter-factual and not necessarily more plausible or even acceptable. In particular, social justice theories grounded in social contract theory have contrasted the civic state following the conclusion of social contract favourably with the 'state of nature' (Hobbes, Kant), with doubtful colonialist connotations.

The central function of private law is commonly described in terms of its role in supporting social and economic relations. Contract, for instance, is commonly seen as the legal institution at the foundation of private exchange in market-based societies. In this context, private law thus serves its function in fulfilling basic human needs and allowing people to engage in exchange to obtain goods and services. Private law supports the mechanism, ie, private exchange, through which the distribution of goods takes place under capitalism. Private law enables trust, confidence, and security so that persons can give up something in return for something else in a context of living among strangers. Its role can be restated as ensuring reciprocity. Thinking about private law abolition requires thinking about alternatives to social provisioning, the distributions of resources, the fulfilment of needs of the living world et cetera.

F. Abolition and community

Thinking private law abolition also requires being self-reflexive about possible critiques. One such possible critique is the risk of reproducing community oppression and marginalisation. Current abolitionist thinking explores community-based responses when it comes to imagining society after abolition. For example, when it comes to the core intersectional question of abolition feminism, ie, how to build a world both without prisons and police and without gender and sexual violence – most concretely, what tools are available to hold someone accountable if we don't call the police? – then the answer tends to be found in community-based responses (addressing conflict and harm within organising communities; healing, accountability, and repair within communities; investing in communities).[81] Indeed, the core focus seems to be on making communities safer, not, eg, society in general (which may include many different communities) or interpersonal relations (between specific individuals).

This raises the question of whether this focus on communities within abolitionist thought and activism is susceptible to similar critiques as raised in response to communitarianism, and if so, whether that is problematic. What counts as a community? What happens to persons who do not fit into any community, either in their own view or of the existing communities? Who gets to decide about membership and boundaries of the community? If the procedure is majority voting, then what does this mean for minorities within the community? What about violence from non-community-members or across different communities? And more specifically, for questions currently dealt with by private law: Will everything be held in common, or will some things continue to be owned individually? What about conflicting legitimate needs in relation, eg, to alternative uses of commons? Will priority rules develop over time, either on a case-to-case basis

[80]On the constitutive role of law, in particular general private law, for a capitalist economy, see S Deakin, D Gindis, GM Hodgson, K Huang and K Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' 45 (2017) Journal of Comparative Economics 188–200; K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

[81]Davis et al (n 69) 13, and *passim*.

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or through community deliberation, that are similar or even indistinguishable from those currently found in the common law or civil codes, respectively?

It will be clear that some of these questions are familiar from the liberal-egalitarian critique of communitarianism, and that others remind of the questions raised by Marx's sketchy peeks into a communist society after the successfully completed revolution. Perhaps there exist very good answers, which could strengthen the paradigm of private law abolition. But it is clear that, both as a matter of theory and as a very practical question, the relationship between abolition and community should be central in (European) private law abolitionist thought and activism.

Crucially, however, in these debates, in light of its own structural unwillingness or incapacity to centre various types of structural oppression and their intersections, liberal thought is not in a position to claim the default. Thinking an intersectional (European) private law requires a paradigm shift. There is no turning back to liberal ideal theory, either because it is too complicit in – and compromised by – turning a blind eye to the fact of multiple structural oppression or because it is too detached from a profoundly nonideal reality, or both. Indeed, we suggest that the most promising strategy towards further thinking intersectionality in (European) private law might be to start from the radical premise of (European) private law abolition. Arguably, this reversal of the burden of proof could even be defended on Rawlsian grounds: Pursuant to the difference principle in its procedural aspect, it must be proven to those at the bottom that society's current basic structure, including its system of private law, also works for their benefit. Until then, the normative case – in terms of social justice – for its abolition stands.

G. The abolition of rights

Finally, another possible challenge to private law abolitionism comes from one of the founders of Critical Race Theory (CRT), Patricia Williams.[82] In a powerful rebuttal of the Critical Legal Studies (CLS) critique of rights,[83] Williams argues that, unlike the white male leaders of the CLS movement, most Black people and in particular Black women, do not have the privilege of being able to rely on informal trust-based solutions; they need formally binding contracts, which provide them with legally enforceable rights.[84] Williams offers the illuminating story where she and Peter Gabel, a co-founder of the CLS movement, both newly arrived in California from New York, are hunting for apartments. Gabel pays a sizeable cash deposit without any formal contract or even a receipt. Williams observes that this avenue of informal trust would never be open to her as a Black woman: she needs the formal lease. As she writes, 'unlike Peter, I am still engaged in a struggle to set up transactions at arm's length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce.'[85] More generally, she points out, the discourse of rights (first and foremost civil rights) has been central to Black political strategy of emancipation. 'Therefore', she remarks, 'one of the most troubling positions advanced by CLS is that of rights' *disutility* in political advancement.'[86] As she points out, to Black people in the United States the prospect of attaining full rights under law has been 'a fiercely motivational, almost religious, source of hope.'[87] Historically, she explains, recounting her personal story of discovering the contract of sale for her great-great-grandmother Sophie, for the Black community the fundamental stake in rights is to be recognised as a *subject* with contractual rights rather than a mere *object* of a legally contract between two others.[88]

[82]Cf R Delgado, J Stefancic and A Harris, *Critical Race Theory: An Introduction* (4th ed, New York University Press 2023) 5.

[83]For the CLS critique of rights, see D Kennedy, *A Critique of Adjudication{fin de siècle}* (Harvard University Press 1997) ch 13, esp 332 ('Rights then function as no more than interests (perhaps with an exclamation point)').

[84]PJ Williams, *The Alchemy of Race and Rights* (Harvard University Press 1991) ch 8 ('The Pain of Word Bondage') 146–65.

[85]Ibid., 148 (emphasis in original).

[86]Ibid., 150 (emphasis in original).

[87]Ibid., 154.

[88]Ibid., 17–9.

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At first sight, Williams's convincing refutation of the CLS critique of rights and her defence of formal contractual rights seem a formidable challenge also to the idea of private law abolition, that is the abolition of the current system of legally enforceable private rights and obligations. Indeed, when she writes that the 'failure of rights discourse, much noted in CLS scholarship, does not logically mean that informal systems will lead to better outcomes',[89] this seems to go directly against the idea of private law abolition and community solutions. However, upon further reflection Williams's powerful critique of CLS' rights scepticism, applies most forcefully to a world *where other people have rights*, that is our profoundly non-ideal world where the basic structure of society, established by the social contract, ensures rights for some (white people, in particular white men) but not or much less so to others (Black people, especially Black women). In other words, Williams's CRT critique of the CLS critique of rights is immanent to the current oppressive and marginalising system of private law rights. Put in normative terms, it offers a non-ideal theory of the kind discussed in Section 5. Yet, this leaves open the real possibility that a society where no one has any legally enforceable private law rights, because a system of private law no longer exists, would be a better society for Black women and others currently at the intersection of various forms of oppression and marginalisation (but not – and here comes the redistributive bite – for those who currently benefit most from such rights). Put differently, in a society where private law protects the interests of some as legally enforceable rights,[90] and where abolition of that private law system is not in the cards, the best strategy may well be still to try to obtain formal contract and property rights wherever possible. However, a society where no one has any legally enforceable private law rights may still be a more just one overall, because it no longer offers a key tool for intersectional oppression and marginalisation.

H. Abolition democracy

As Angela Davis underlined, 'it is not only, or not even primarily, about abolition as a negative process of tearing down, but it is also about building up, about creating new institutions.'[91] With her, we would like to draw on the DuBoisian notion of abolition democracy. Du Bois introduced this term to express a vision of American society after the abolition of slavery, that is a vision about what it meant to effectively abolish slavery. As he argued, slavery would not be fully abolished until Black people had the same social, economic, and political standing, and equal control over the future of the country, as white people.[92] Similarly, for the abolition of prisons Davis proposes 'the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete.'[93] In the same vein, we propose to think through the abolition of contract through the creation of new institutions that better serve everyone. Doing so, engages radical democracy and starts with centring multiply oppressed and marginalised persons. As Gayatri Chakravorty Spivak recently pointed out, Du Bois's account of the oppression of Black people was not yet intersectional.[94] But what we are arguing for here is, of course, intersectional private law abolition democracy. From this point of view, contract abolition doesn't mean the mere tearing down of the institution of contract but the democratic construction of a post contract society. Key here is the self-empowerment of the currently intersectionally oppressed and marginalised. This is not a matter of merely 'including' the currently excluded within existing frameworks of white (European) private law making but first and foremost the radical transformation of these frameworks themselves. This is also an

[89]Ibid., 158.

[90]On the key role of private law in creating and entrenching wealth and economic and political inequality, see Pistor (n 80).

[91]AY Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (Seven Stories 2005).

[92]WEB Du Bois, *Black Reconstruction in America* [1935] (Free Press 1998) 182ff.

[93]Davis (n 91) 92.

[94]GC Spivak, 'W.E.B. Du Bois and Angela Davis on Abolition Democracy' 2 (13) (2020) 13/13 Seminar Series, <https://blogs.law.columbia.edu/abolition1313/gayatri-chakravorty-spivak-w-e-b-du-bois-and-angela-davis-on-abolition-democracy/>.

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important reason why in this section on abolition we have raised more questions that we have answered. What is needed is not a top-down reform of contract but a bottom-up process of self-empowerment of the currently oppressed and marginalised to build a society beyond private law as we currently know it.

7. Concluding remarks

As shown in this paper, a range of questions arise from intersectionality's travel within the sphere of European private law. Several strategies through which intersectionality can be taken on in European private law, give their own shape to potential answers. We discussed three quite different such strategies, ie, liberal ideal theories of social and private law justice, liberal nonideal theories of reparation, and private law abolition. Through our critical discussion we showed how intersectionality's encounter with European private law yields insights about European, legal, and private law sensibilities, more so than about intersectionality as a concept.

Intersectionality comes to European private law without the European, legal, and private law sensibilities and assumptions that render it a race and gender-neutral space. Instead, intersectionality allows European private law to become visible as a site where gendered, racial – and other forms of – power, are coded, organised, and expressed. As a lens, intersectionality can help to examine how private law constitutes gendered, racial forms of legal privileging, showing how it naturalises and justifies persisting gendered racial and ethnic inequities.

Centring the predicament of multiply marginalised persons is what private law's encounter with intersectionality ought to do. And it matters how that work is done. From our analysis it is obvious that it cannot merely consist of an intellectual exercise of redefining abstract private law subjects, because the stakes of intersectional work are not imagined; they are real. Taking up intersectionality as a lens in the space of European private law elevates root problems, inviting a self-conscious reckoning of private law's complicity in historic and ongoing oppression. At the same time, it helps expose how mutually constitutive forms of oppression are formative – historically and presently – to private law and its theory.

This paper has yielded insights and caution about the various ways in which intersectionality can be taken up, drawing on our familiarity with existing European private law discourse. For obvious reasons of legitimacy – both political (agency) and epistemic (positionality) – our analysis could not engender anything like a blueprint for an intersectional European private law. Indeed, we submit that thinking a genuine encounter between intersectionality and European private law cannot start from the premise that targeted reform will suffice, leaving European private law's current basic structure in place. We see more potential in addressing the social and political struggles of multiply marginalised people, which intersectionality brings forward, through a much more radical rethinking – one where the dominant liberal paradigm of social and interpersonal justice also cannot claim the default. Indeed, (European) private law abolition may be the best starting point for reimagining a more just future that centres resistance to intersectional marginalisation and oppression in (European) private law.

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