THE LAW OF POLITICAL ECONOMY: AN INTRODUCTION

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INTRODUCTION

The law of political economy is a contentious ideological field characterised by antagonistic relations between scholarly positions which tend to be either affirmative or critical of capitalist modes of economic reproduction. Going beyond this schism, two particular features appear as central to the law of political economy: the first one is the way in which it epistemologically seeks to handle the distinction between holism and differentiation, *i.e.*, the extent to which it sees society as a singular whole which is larger than its parts, or, rather, as a mere collection of parts. Different types of legal and political economy scholarship have given different types of answers to this question. A third way has, moreover, emerged through an understanding of the law of political economy as being aimed at simultaneously separating and re-connecting political and economic processes in a manner which goes beyond the holism *versus* differentiation schism. The second feature of the law of political economy is the way in which it conceives of the relation between hierarchical and spontaneous dimensions of society, *i.e.*, between firms and the market, or between public institutions and public opinion. Also in this regard, competing approaches exist, just as the relation has been handled in radically differently ways within corporatist, neo-corporatist and governance-based institutional set-ups of political economy.[1]

[1] This double function is also at the heart of the following contribution to this volume by Christian Joerges and Michelle Everson.

I. THE MULTIPLE DISCOURSES ON LAW AND POLITICAL ECONOMY

Political economy themes have - directly and indirectly - been a central concern of law and legal scholarship ever since political economy emerged as a concept in the early seventeenth century,[2] a development which was re-inforced by the emergence of political economy as an independent area of scholarly enquiry in the eighteenth century, as developed by the French physiocrats. This is not surprising in so far as the core institutions of the economy and economic exchanges, such as property and contract, are legal institutions.[3] In spite of this intrinsic link, political economy discourses and legal discourses dealing with political economy themes unfold in a largely separate manner. Indeed, this book is also a reflection of this, in so far as its core concern is how the law and legal scholarship conceive of and approach political economy issues. The focus is, in other words, on how law and legal scholarship internally re-construct issues of political economy, and not on the political economy as such.

One reason for the relative estrangement between law and political economy might be found in the basic assumptions and focus of the dominant schools of political economy. As an ideologically contentious scholarly field, political economy tends, as mentioned, to be divided into approaches which are either affirmative or critical of capitalist modes of economic reproduction.

On the affirmative side, public and social choice stand out as umbrella terms for approaches which seek to transpose economic tools and perspectives, such as those derived from utility maximisation and game theory, into issue areas that are traditionally dealt with by public law and political science, *i.e.*, how individual decisions aggregate into collective decisions, and issues of individual, as well as social, optimisation of welfare.[4] New Public Management might be seen here as a related approach which seeks to develop "business-like" forms of organisation and management in the public sector, for example, through the

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2 Antoine de Montchrestien, *Traicté de l'oeconomie politique*, edited by François Billacois, (Geneva: Librairie Droz, [1615] 1999).

3 For illustrations of this, see, for example, Simon Deakin, David Gindis, Geoffrey M. Hodgson, Kainan Huang and Katharina Pistor, "Legal Institutionalism: Capitalism and the Constitutive Role of Law", (2017) 45 *Journal of Comparative Economics*, 188-200; David Kennedy, *A World of Struggle. How Power, Law and Expertise Shape Global Political Economy*, (Princeton NJ: Princeton University Press, 2016).

4 See, for example, James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, (Ann Arbor MI: University of Michigan Press, 1962); James D. Gwartney and Richard E. Wagner (eds), *Public Choice and Constitutional Economics*, (Greenwich: JAI Press, 1988).

introduction of *quasi* markets.[5] These approaches tend - implicitly or explicitly - to be combined with normative undertakings aimed at expanding an economistic way of observing and evaluating social phenomena in areas of society not previously dominated by economic logics, thereby producing performative effects.

Critical political economy and associated left-Hegelian and Marxist-inspired approaches, on the other hand, have served as alternative ways of observing economic processes, essentially advocating the task of critical political economy as exposing the perceived inadequacies and simplifications of the basic concepts of mainstream economics, and engaging in the development of a conceptual framework capable of taking better account of the wider societal effects of economic reproduction.[6]

This divide between affirmative and critical approaches is furthermore based upon different methodological points of departure. Public and social choice and positive political economy in general depart from a methodological individualist perspective, maintaining individuals as their focal point. Critical political economy and Marxist-inspired approaches, on the other hand, tend to emphasise methodological collectivism, focusing on groups and structures, rather than on individual preferences. In this divide, rational institutionalism and Varieties of Capitalism might be seen as seeking to bridge the gap between left and right, thereby departing from a "centre-left position" while the section of positive economics which acknowledges the self-interest of the state and other collective formations, might be seen as engaged in the same exercise departing from a "centre-right" position.[7]

In spite of the different points of departure, the various positions tend implicitly to share a number of assumptions. Firstly, the primacy of the economy in so far as both the affirmative and critical approaches tend to see the economy as the central driver of societal evolution, with the in-built logics of profit generation, welfare maximisation, and creative destruction embedded in economic processes as the fuel. This is also the case for those which explicitly seek to highlight the role of the state or the structural demand for a societal embeddedness of economic production processes, in so far as they tend to invoke the notion of capitalism, understood as an overarching process which integrates economic and political

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5 Gernod Gruening, "Origin and Theoretical Basis of New Public Management", (2001) 4 *International Public Management Journal*, 1-25.

6 For an overview, see Gary Browning and Andrew Kilmister, *Critical and Post-Critical Political Economy*, (Basingstoke: Palgrave, 2006).

7 For positive economics, see Steven G. Medema, *The Hesitant Hand: Taming Self-interest in the History of Economic Ideas*, (Princeton NJ: Princeton University Press, 2009), p. 197 et seq.

logics, thereby making it difficult to separate the political and economic dimensions of capitalist reproduction.[8]

Within legal discourse, a similar divide can be observed between the largely German ordoliberal school and the largely American law and economics approach. Both of them are primarily legal approaches, while being intrinsically linked to political economy and economics. At the same time, they reproduce the divide found within political economy, as the former provide a macro-approach, and the latter a micro-approach, derived respectively from methodological collectivism and methodological individualism. The two approaches therefore deal with different problem constellations. Ordoliberalism is a legal theory of societal ordering, which departs from an understanding of the economy and politics as different systemic processes in need of mutual stabilisation through law.[9] Law and economics, on the other hand, remain a toolbox for concrete problem-solving within market-based economic processes which does not derive an explicit macro perspective on society from it micro insights. The objectives guiding the two approaches therefore remain fundamentally different, as the latter, in essence, are concerned with questions of allocative efficiency, and the former with issues of power and stability in society. Thus, the two approaches do not serve as functional equivalents. This is also apparent in the area where the two have intersected the most, namely, in EU competition law and policy. The switch from a predominantly ordoliberal and legal approach to an economic approach, encapsulated as law and economics within the legal dimension of EU competition law and policy, have considerably altered the objectives and effects produced by this policy regime.[10] In a simplified form, one might therefore argue that the ordoliberals are interested in the connection between political economy and law, while law and economics is interested in the connection between economics and law.

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[8] See, for example, Wolfgang Streeck, "How to Study Contemporary Capitalism?", (2012) 53 *European Journal of Sociology*, 1-28.

[9] Franz Böhm, "*Privatrechtsgesellschaft und Marktwirtschaft*", (1966) 17 *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* (hereinafter *ORDO*), 75-151; Walter Eucken, "Die Wettbewerbsordnung und ihre Verwirklichung", (1949) 2 *ORDO*, 1-99; Walter Eucken, "Technik, Konzentration und Ordnung der Wirtschaft", (1950) 3 *ORDO*, 3-17. For a historical and conceptual re-construction of ordoliberalism within the broader framework of neo-liberalism see; Thomas Biebricher, *The Political Theory of Neoliberalism*, (Stanford CA: Stanford University Press, 2019). For the further development of ordoliberalism by Ernst-Joachim Mestmäcker and the long-term implications for Europe, see, also, the contribution of Christian Joerges and Michelle Everson to this volume.

[10] For more on this, see Dzmitry Bartalevich, "Do Economic Theories Inform Policy? Analysis of the Influence of the Chicago School on European Union Competition Policy", Ph.D. Dissertation, Copenhagen Business School, 2017.

II. THE LAW OF POLITICAL ECONOMY – A SUB-CASE OF A GRAND DEBATE

The highly divergent assumptions and objectives guiding the various schools of political economy and of legal approaches to political economy means that exercises aimed at "overcoming the differences" or developing a "unified approach" within the scheme of a singular grand theory are likely to be futile. One might, however, fruitfully contextualise the existing approaches to law and political economy within the broader social scientific and epistemological realm, and position them according to a number of core dimensions.

II.1. Holism *versus* Differentiation

The grand theories of modern society from Hobbes and Hegel to Leibnitz and Luhmann all circulate around a trade-off between holism and differentiation. The diagnosis of society provided by such theories is, to a high extent, determined by the theoretical architecture put forward, and this architecture is pre-structured by the initial choice made between a holistic- or a differentiation-based world view, *i.e.*, between an understanding of society as a whole, which is larger than the sum of its parts, or an understanding of society as a mere collection of differentiated parts.

As also observable in the self-descriptions of society, the progressive advancement of modernity can be understood as a gradual move away from a holistic notion of society, and towards an increased reliance on a differentiation-based notion of society.[11] Hobbes' theory of the Commonwealth is, at least in the Anglo-American world, often considered the first theory of society based upon modern premises. But, although a differentiation between state and society is implicit to the theory, its starting-point is, as also illustrated by the famous frontispiece of Leviathan, a holistic, *i.e.*, organic, notion of body politics.[12] In the Hobbesian world, there are many bodies in society, but they are all encompassed by the "meta-body" of the state in the monarchical form. As such, Hobbes' theory introduces a modern element but never really escape the pre-modern understanding of society as a holistic whole. In a "two steps ahead" and "one step back" manner, the history of modern western thought from Locke and Montesquieu to Rousseau, Kant and Hegel are the history of the gradual shift - sometimes bemoaned and sometimes celebrated - from holism to differentiation. A

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[11] Reinhart Koselleck, *Begriffsgeschichten*, (Frankfurt aM: Suhrkamp Verlag, 2006); Niklas Luhmann, "Gesellchaftliche Struktur und semantische Tradition", in: idem, *Gesellschaftsstruktur und Semantik, Band 1*, (Frankfurt aM: Suhrkamp Verlag, 1980), pp. 9-71.

[12] Thomas Hobbes, *Leviathan: Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civil*., edited by Ian Shapiro, (New Haven CT: Yale University Press, 2010).

movement which culminated in the theory of classical modernity, defined as the *époque* between 1789 and 1989, *par excellence*, in Hegel's *Philosophy of Rights*.[13]

A substantial degree of uncomfortableness with the modern condition can be detected in Rousseau's communitarian praise of the simple life prior to Hegel. A similar scepticism can be found in Kierkegaard's and Marx's subsequent critiques of Hegel through their explorations of the dark side of modernity by respectively looking at the individualised human condition and the implications of economic reproduction. Nonetheless, Hegel's theory was the first which made the structural conditions of modernity, a differentiated and temporalised society based upon a linear conception of time, rather than a holistic and static society reproduced through a circular notion of time, the explicit foundations for his theory, while, at the same time, systematically seeking to address the dark side of modern society by introducing a systematic notion of critique.[14]

The classical modernist narrative, as embodied in the advancements of the Atlantic Revolutionary movements, in Europe, North and South America, from the 1770s to the 1820s,[15] implied a focus on progress, emancipation and freedom, while the "dark side", from Hegel onwards, has been consistently problematised through terms such as *alienation* (Marx), *anomie* (Durkheim), *colonialisation* (Habermas), *de-differentiation* (Luhmann), *disciplination* (Elias and Foucault), *existential fear* (Kierkegaard), *rationalisation* (Weber), *reification* (Adorno and Horkheimer), and *technification* (Heidegger), upon the basis of what ultimately points in the direction of either a longing for, or at least serving as reflections on, the consequences of a lost world understood and observed in holistic terms.[16]

II.2. Holism and Differentiation in Economics and Political Economy

Within economics and political economy, a sub-variant of this debate has unfolded. With initial skirmishes unfolding from Smith and Ricardo to Hegel and Marx, the defining battle emerged with the constitution of economics as a largely self-contained academic discipline in

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[13] Georg W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse, Werke Band 7*, (Frankfurt aM: Suhrkamp Verlag, [1821] 1970).

[14] Jürgen Habermas, "Hegels Begriff der Moderne", in: idem, *Der philosophische Diskurs der Moderne*, (Frankfurt aM: Suhrkamp Verlag, 1985), pp. 34-58.

[15] Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*, (London: Bloomsbury Academic, 2014); Susan Buck-Morss, *Hegel, Haiti and Universal History*, (Pittsburg PA: University of Pittsburg Press, 2009).

[16] Poul F. Kjaer, "The Structural Transformation of Embeddedness", in: Josef Falke and Christian Joerges (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford: Hart Publishing, 2011), pp. 85-104, at 89 et seq. See, also, Niklas Luhmann, *Paradigm Lost: Über die ethische Reflexion der Moral*, (Frankfurt aM: Suhrkamp Verlag, 1990).

the switch from the dominance of the German historical school, associated in various ways with von Schmoller, Weber, Schumpeter and others, to the analytical, model based, largely US-based economic discipline of today. The switch from the "real world", *i.e.*, history, to analytical models is normally considered a switch from holism to differentiation because the German historical school ultimately subscribed to a particular holistic inspired philosophy of history.[17] This view, however, is highly questionable. Rather than representing an advancement of modernity, analytical economics remain stuck in the past, in so far as the axis around which modern economic theories circulates is a notion of "equilibrium" and the idea that markets tend towards it. Any notion of equilibrium, or balance, however, pre-supposes a whole which can be "in balance". Contemporary economics is yin and yang science, where the whole, *i.e.*, "the market", is a body which is greater than its parts, *i.e.*, supply and demand. This is also expressed by the common day stylisation of the market as a *persona* with autonomous agency, as expressed in statements such as "the market expands", "the market rebounds" or "the market expects".[18]

Whereas advanced social theories have shed any notion of equilibrium or balance a long time ago, and substituted them with notions of process and evolution, mainstream economics remains entrenched in holistic thinking of a seventeenth century origin. This is also apparent from its built in bias, which tends to see "society", rather than the state or any other repository of public power, as the central driving force of social development, while, at the same time, "society" is factually equalled to the market. Hence, "private" is preferred to "public", and public intervention is only deemed desirable in the unfortunate case of "market imperfections".

The above, somewhat crude, characterisation of the dominant traits of contemporary economics has, of course, been heavily criticised by the political economy discipline, which went its own way in the wake of the differentiation of economics from its neighbouring disciplines. But, even in contemporary political economy, the critique of "market fundamentalism" and the crude world view concerning the nature of economic relations which dominates the economic discipline has, however, not implied an abandoning of the holistic premise, but merely a substitution of market holism with cultural holism. *The Three*

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[17] Yuichi Shionoya, *The Soul of the German Historical School: Methodological Essays on Schmoller, Weber and Schumpeter*, (New York: Springer Verlag, 2005).

[18] For a de-construction of the notion of the market, see Geoffrey M. Hodgson, "How Mythical Markets Mislead Analysis: An Institutionalist Critique of Market Universalism", *Socio-Economic Review*, published ahead of print 9 January 2019, available at: https://doi.org/10.1093/ser/mwy049.

Worlds of Welfare Capitalism approach, associated with Gøsta Esping-Andersen, advances, as is also apparent from the title, an image of distinct universes of welfare capitalism.[19] In a similar manner, *The Varieties of Capitalism* literature tends simply to speak of "France", "Germany" or the "United States", assuming that they are unified and singular entities. From this perspective, the state/society distinction does not exist or is at least disregarded in so far as the objects of study are ontological pre-supposed and assumed to be "culturally given" holistic national units, made up of all social communications unfolding within their respective borders and seen as tending to move towards some sort of institutional equilibrium.[20] In the German context, Fritz Scharpf and Wolfgang Streeck have, moreover, advanced an implicit culturalistic version of political economy, in which, for example, the German political economy, *i.e.*, the German capitalist state, is seen as a unitary and holistic system which includes all activities unfolding within the borders of Germany,[21] or through an understanding of the Eurozone as characterised by not only unbridgeable cultural divides, but also by static cultures which are essentially resistant to change.[22]

Due to the deficient conceptual tool boxes at their disposition both market-based economics and culturalist political economy are - for theory-constructing reasons - forced ontologically to assume the prior existence of some sort of given holistic unity which tends towards equilibrium upon the basis of mysterious forces. The essential nature of their respective constructions, therefore, only differs to a limited extent, because both types of theories lack the conceptual framework which would enable them to go beyond a holistic world view. As such, both strands can be understood as based upon foundationalism of an essential metaphysical character. Or differently expressed: Mainstream economics and political economy share the trait that they have not yet moved into the post-metaphysical era.[23]

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[19] Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism*, (Cambridge: Polity Press, 1990).

[20] Peter A. Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, (Oxford: Oxford University Press, 2001).

[21] Wolfgang Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy*, 2nd edition, (Oxford: Oxford University Press, 2010).

[22] Fritz W. Scharpf, "The Costs of Non-disintegration: The Case of the European Monetary Union", in: Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity*, (Cambridge: Cambridge University Press, 2016), pp. 29-49.

[23] Jürgen Habermas, *Nachmetaphysisches Denken*, (Frankfurt aM: Suhrkamp Verlag, 1988). An important exception can, however, be found by Ngai-Ling Sum and Bob Jessop. In their version of cultural political economy, analyses of sense- and meaning-making are linked to instituted economic and political relations, thereby combining semiotic and structural features without falling into the trap of foundationalism. See

The divide between market holism and cultural holism was particularly highlighted in the stand-off between Friedrich August von Hayek and Karl Paul Polanyi (*Polányi Károly* in Hungarian) which, to a large extent, continues to dominate contemporary debates on political economy.[24] In 1944, Hayek and Polanyi published *The Road to Serfdom* and *The Great Transformation* respectively and, in doing so, asked the same question: Why had totalitarianism emerged and succeeded?[25] The answers that they gave were, however, diametrically opposed to one another. Hayek's answer was that the economy had not been differentiated enough from the rest of society, *i.e.*, that society had become characterised by de-differentiation and a capture of the economy by politics. For Polanyi, the main problem was, on the other hand, a society in which the economy had become "too detached" and dis-embedded from the rest of society. In short, the answers that they gave were yet another variation of the holism *versus* differentiation debate.

But even though Hayek seemingly opted for differentiation, his theoretical construction remained bound up on the ontological idea of the market, simultaneously understood as the sum of individual preferences and as a holistic universe in its own right, making it into more than the sum of individual preferences. In addition, both of them end up with lopsided theoretical constructions characterised by incongruous methodologies aimed at comparing "apples and pears". This is the case because they base their respective conclusions upon selective comparisons between empirical realities and highly idealised fictions. By Hayek, this is expressed in the comparison that he makes between the spontaneous order of the market as a fictional ideal, and the empirical reality of politics as selectively embodied in Stalinism and National Socialism. By Polanyi, on the other hand, the focus is on the empirical reality of market society, which is conceived of as essentially brutal and which is contrasted with the fictional ideal of a holistic and communitarian pre-modern world characterised by integrated and harmonic social exchanges.[26]

Ngai-Ling Sum and Bob Jessop, *Towards a Cultural Political Economy: Putting Culture in its Place in Political Economy*, (Cheltenham: Edward Elgar Publishing, 2013).

[24] See, for example, the contributions in (2018) 15 *Globalizations*, issue 7, special edition, entitled "Questioning the Utopian Springs of Market Economy", guest edited by Damien Cahill, Martijn Konings and Adam David Morton, 887-1057.

[25] Friedrich A. Hayek, *The Road to Serfdom*, (Chicago IL: University of *Chicago* Press, [1944] 1994); Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, 2nd ed., (Boston MA: Beacon Press [1944] 2001).

[26] An equally skewed reactionary-communitarian version of the Polanyian approach can be found in Wolfgang Streeck in his comparison between the real existing capitalist market economy and an ideal vision of democracy which, for Streeck, is equal to nationally constituted and embedded left-wing social democracy.

Yet another variant of the holism *versus* differentiation tension can be observed in the gradual substitution of the 1970s variant of structural Marxism with structural Liberalism, *i.e.*, neoliberalism, as the fashionable ideology of the day, a substitution which, in theoretical terms, merely implied a switch from one side to the other of the same coin, in so far as both assumed that society could be understood as being predominantly structured by economic interests and motivations, and that "society" could be equalled to the economy. Both ideologies saw and see the economy and private power, and not the state and public power, as the true driving-force of societal evolution, and, for both, state action ultimately remains guided by economic interests, leaving little autonomy for public power and law. If one digs deep enough behind both world views, one will find a holistic notion of society which is seen as the central source of meaning and evolution.[27]

II.3. Beyond Holism and Differentiation through Law

Within law, the holism *versus* differentiation debate has crystallised in another sub-debate on democracy *versus* rights and republican *versus* liberal approaches, often historically described as a relentless hollowing out of republican values and the rise of rights-based liberalism,[28] and continued attempts to square the circle between the two approaches.[29] The move towards a hollowing out of republican values can be understood as reflecting a progressive "self-emptying of power"[30] through a substitution of politics with law.[31] Within political philosophy, the liberals *versus* communitarian's debate of the 1990s might, furthermore, be seen as an offspring of the holism *versus* differentiation perspective on the world.

But, more fundamentally, law can also be seen as the social formation which - at least potentially - overcomes the trade-off between holism and differentiation. A central contribution of law to the rest of society is form giving, in which a social exchange becomes

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For this capitalism *versus* democracy dichotomy within a nationalist frame, see, for example, Wolfgang Streeck, "How will Capitalism End?", *New Left Review*, 87, May/June 2014, 35-64.

27 Poul F. Kjaer, "Context Construction through Competition: The Prerogative of Public Power, Intermediary Institutions and the Expansion of Statehood through Competition", (2015) 16 *Distinktion*, 146-66.

28 For example, Martin Loughlin, *What is Constitutionalisation?*, in: Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?*, (Oxford: Oxford University Press, 2010), pp. 47-69.

29 Most notably pursued by Habermas. See Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt aM: Suhrkamp Verlag, 1992).

30 Jean Clam, "What is Modern Power?", in: Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics* (Oxford, Hart Publishing, 2006), pp. 145-62.

31 Franz L. Neumann, "The Change in the Function of Law in Modern Society", in: William E. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, (Berkeley CA: University of California Press, [1933] 1996), pp. 101-141.

an economic exchange when given legal form and status through instruments such as contracts and property rights, and a social exchange becomes a political act when unfolded as formal legally-framed decision-making or when relying on legally-constructed citizen rights, such as the right to vote, and other constitutional principles. Bridges between different spheres of society, such as the economy and politics, are also built through law, as, for example, expressed through the legal structuring and constitutional linking of taxation and representation.

In sociological terms, this means that it is through law that the functional differentiation of society is given form, in so far as law *simultaneously* separates and re-connects the different functional spheres of society. Law, in other words, has the *potential* to ensure the integration of society in a manner which goes beyond the zero-sum holism-*versus*-differentiation perspective. It is through law that a self-reflexive loop is established between a functional sphere (Hegel/Durkheim), social system (Luhmann) or field (Bourdieu) and the rest of society. Or to express it differently, it is through the coupling with law that a social system becomes a social system. Methodologically, this has profound consequences, as the very object of study becomes law, or, more correctly, the legal form. Following Hans Kelsen's identity thesis, the study of the state, for example, becomes the study of law, in so far as the state is the law and *vice versa*.[32] *If* one functional system takes up an overarching position in society, in the sense that it has a strategic position which enables it to serve as the central framework for the integration of society, it is therefore the legal system, and *not* the political or the economic system, because the legal system is what gives form to modern society. Again using the example of statehood, a modern state distinguishes itself from other types of ordering through the particular way in which it establishes a coupling with autonomous law through constitutional self-binding. The essential point concerning the nature of the state and other institutional repositories of political power, (or, in fact, any other institutionalised social phenomena) is that states do not and cannot exist outside the law, and it is the law which constitutes the state and not the other way around. This is the case because there can be "no sovereignty beyond legality",[33] or to paraphrase Hannah Arendt, outside the

[32] See Hans Kelsen, *Pure Theory of Law*, (Berkeley CA: University of California Press, [1934] 1960), p. 279 et seq.

[33] Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*, (London: Bloomsbury Academic, 2014), p. 127. For more on this, see, also, the review by Poul F. Kjaer, "Hauke Brunkhorst: Critical Theory of Legal Revolutions: Evolutionary Perspectives", (2015) 42 *Journal of Law and Society*, 312-18.

law, there is no power only violence.[34] As argued by Franz Neumann, political freedom, both positively and negatively conceived, is therefore constituted through law, as it is rights, political, economic and social, which provide such freedom with its form, hereby, once again, underlining the constitutive function of law.[35]

The Marxist critique of law as an inseparable and constitutive element of capitalism is therefore both right and wrong. There is, indeed, no economy without law, and law is, indeed, intrinsic to economic reproduction.[36] But law is also intrinsic to all other institutionalised social formations. Modern political power, for example, is, as already indicated, legally-constituted power.[37] But even more important, the modern version of this form-giving function of law established through simultaneous separation and re-connection of the functional spheres of society did not emerge from the dialectical stand-off between the economy and political power, but instead from the tension between religion and political power. The modern world emerged as an outcome of the tenth and eleventh century Investiture Controversy between the Pope and the Holy Roman Emperor. Modernity started with the central outcome of this Controversy, namely, the *simultaneous* differentiation and coupling of religion and law, giving religion, within the framework of the Church, a specific legal form. In short, the basic legal infrastructure of modern society was developed in the stand-off between politics and religion, and not in the stand-off between politics and the economy.[38] Later differentiations and couplings, such as the also legally-mediated distinction between the economy and politics, as expressed in the law of political economy, are just variations of this first modern distinction. In the same manner as the emerging sovereign state

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[34] Hannah Arendt, *On Violence*, (New York: Harvest Books, 1970).

[35] Franz L. Neumann, "The Concept of Political Freedom", in: William E. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, (Berkeley CA: University of California Press, [1933] 1996), pp. 195-223.

[36] See, for example, the work of Grietje Baars. Especially, Grietje Baars, *The Corporation, Law and Capitalism. A Radical Perspective on the Role of Law in the Global Political Economy*, (Leiden: Brill, 2019).

[37] Franz L. Neumann, "The Change in the Function of Law in Modern Society", in: William E. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, (Berkeley CA: University of California Press, [1933] 1996), pp. 101-141.

[38] Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*, note 33 above; Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, volume I, (Cambridge MA: Harvard University Press, 1983); Harold J. Berman, *Law and Revolution*, volume 2: *The Impact of the Protestant Reformation in the Western Legal Tradition*, (Cambridge MA: Harvard University Press, 2006), new edition.

à la Bodin and Hobbes was an imitation of the Kingdom of God,[39] the law of political economy is based upon re-cycled material emerging from the law of religion.

The breakthrough of modernity, at the time of the Atlantic Revolutions, implied a gradual shift of focus from religion to the economy, a development which, however, advanced slower than is often assumed, with the real shift only taking place in the first half of the twentieth century, a shift which, especially in the European context, has so far played out in three different institutional formations: those associated with the "turn to corporatism" in the interwar period, the "turn to neo-corporatism" in immediate the post-WWII era, and the "turn to governance" since the late 1970s. All these shifts implied a re-calibration of the function and status of law in general, and the law of political economy in particular. These shifts, as will become apparent below, might also be seen as different ways of approaching the relation between hierarchy and spontaneity in society through law, thereby providing an historical-empirical counterpart to the conceptual-theoretical distinction between holism and differentiation.

III. THE "TURN TO CORPORATISM" AND THE SUSPENSION OF LAW[40]

Contrary to popular perception, the factual realisation of the idea of legally-constituted modern public power resting on legally-constituted public sovereignty, which was advanced in the context of the Atlantic Revolutions, was a rather protracted affair.[41] Conglomerate *quasi*-feudal empires with strong privatistic and multi-level features, rather than nation states, to which the characteristics of modern legally-constituted public power were attached, remained the dominant form of statehood on the European continent right up to the implosion of the multi-national Austro-Hungarian, German, Ottoman and Russian empires in the wake of WWI. It was not until this point in time that modern nation statehood became the

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[39] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, (Princeton NJ: Princeton University Press, [1957] 1997).

[40] The following illustrative historical-empirical re-construction is largely limited to European developments though the insights might, in adjusted form, also be relevant for non-European settings. The re-construction is based upon and expands, Poul F. Kjaer, "European Crises of Legally-Constituted Public Power: From the 'Law of Corporatism' to the 'Law of Governance'", (2017) 23 *European Law Journal*, 417-430; Poul F. Kjaer, "From the Crisis of Corporatism to the Crisis of Governance", in: Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro*, (London: Rowman & Littlefield, 2016), pp. 125-39; and Poul F. Kjaer, "Context Construction through Competition: The Prerogative of Public Power, Intermediary Institutions and the Expansion of Statehood through Competition", (2015) 16 *Distinktion*, 146-66.

[41] For two distinct approaches to the delayed modernity thesis, see Arno J. Mayer, *The Persistence of the Old Regime: Europe to the Great War*, (New York: Pantheon Books, 1981), and Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870-1914*, (Stanford CA: Stanford University Press, 1976).

paradigmatic form of legal organisation in (continental) Europe.[42] With Czechoslovakia an important exception, the Central and Eastern states succeeding the continental empires all succumbed to different degrees of authoritarianism within a decade of their formation,[43] just as the democratic state of law inherent to modern statehood eroded or came under severe pressure throughout the rest of Europe as well.[44] This breakdown of legally-constituted public power was intrinsically linked to the "turn to corporatism" which unfolded throughout interwar Europe and which became the manifestation of the law of political economy. Drawing on earlier institutional formations, mostly related to the guilds and corresponding ideological articulations,[45] a diverse and multi-faceted string of corporatist institutional formations and corresponding ideological movements gained momentum in the years following WWI, manifesting themselves in reactionary, totalitarian and progressive formats. The term "corporatism" became the word of the day, gaining a level of popularity comparable with the popularity of the term "governance" today, while also maintaining a similar illusive and catch-all character.[46] Factually, corporatism gained different institutional expressions in different national settings, from Austria, Germany, Hungary, and Italy to Spain, which all subsequently turned to authoritarianism or totalitarianism, at the same time that corporatism also gained considerable influence in democratic settings from France to The Netherlands and from Scandinavia to the United Kingdom.[47]

In spite of its multi-faceted character, a number of core and shared features of corporatism, which were shared across ideological and national boundaries, can be distilled:

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[42] For Germany, see, for example, Franz L. Neumann, "The Decay of German Democracy", in: William E. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, (Berkeley CA: University of California Press, [1933] 1996), pp. 29-43. A similar case can be made in relation to the United States. See, also, Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*, note 33 above.

[43] Balázs Trencsényi, "The Crisis of Modernity – Modernity as Crisis: Toward a Typology of Crisis Discourses in Interwar East and Central Europe and Beyond", in: Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro*, (London: Rowman & Littlefield, 2016), pp. 37-52.

[44] Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*, (Cambridge: Cambridge University Press, 2011), p. 275 et seq.

[45] Émile Durkheim, *De la Division du Travail Social*, (Paris: CreateSpace, [1893] 2015), p. 10 et seq; Heinz-Gerhard Haupt, *Das Ende der Zünfte. Ein europäischer Vergleich*, (Göttingen: Vandenhoeck & Ruprecht, 2004).

[46] Bob Jessop, "Corporatism and Beyond? On Governance and its Limits", in: Eva Hartmann and Poul F. Kjaer (eds), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance*, (Basingstoke: Palgrave Macmillan, 2015), pp. 29-46.

[47] Poul F. Kjaer, "From the Crisis of Corporatism to the Crisis of Governance", in: Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro*, (London: Rowman & Littlefield, 2016), pp. 125-39.

1) A holistic focus on "society" in its entirety derived from an understanding of society as an organic body, rather than a focus on the state or other institutional repositories of public power. Overcoming the distinction between the public and private dimensions of society was, therefore, at the forefront of corporatist development;

2) A sectorial outlook, in *praxis* representing an in-built contradiction to the holistic outlook, emphasising the organisation of society along functional lines upon the basis of interest representation;

3) A rejection of the rule of law and legal formalism, since law and legal instruments came to be seen as a hindrance to efficient and goal-orientated planning and political action.

In general theoretical terms, corporatism can also be understood as reflecting a rejection of the spontaneous dimension of social processes and their substitution with planned and organised processes. Most functionally-differentiated areas of society are characterised by a duality between hierarchically organised and spontaneously co-ordinated areas, as, for example, expressed in the distinction between firms and the market, the political system and public opinion, and between institutionalised religious congregations and their believers.[48] It was precisely this duality which came under attack through the corporatist intention to substitute spontaneous processes, including, but not only, market-based processes, with hierarchical structures which relied on organisation and planning. Not surprisingly, price control, rather than free price formation and competition on the market, thus became a key aspect of the economic dimension of corporatism.[49] In its economic dimension, cartelisation thus became, at both national and transnational level, the dominant concrete organisational and legal form of corporatism.[50] This move to cartelisation factually implied the emergence of hybrid structures which cut across the public/private divide, allowing both the intrusion of states into the economy and an inclusion of private actors into public policy. Corporatism thus reflected, as, for example, was apparent in Weimar Germany, both an opening of the private realm to a high level of arbitrary state intervention, as well as a factual (re-)

[48] Gunther Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization*, (Oxford: Oxford University Press, 2012), p. 88 et seq.

[49] Wolfram Kaiser and Johan Schot, *Writing the Rules for Europe: Experts, Cartels, International Organizations*, (Basingstoke: Palgrave Macmillan, 2014), p. 107 et seq.

[50] Andrea Colli, *Dynamics of International Business: Comparative Perspectives of Firms, Markets and Countries*, (Abingdon: Routledge, 2016), p. 134 et seq.

privatisation of public power as informal networks, most notably from industry, which, *de facto*, became an institutional actor of the state.[51]

Moreover, this factual suspension of the public/private distinction was, as indicated, connected to a more fundamental rejection of the rule of law. This rejection of law, which was taken to an extreme in Fascist Italy and National Socialist Germany, implied a dismissal of the modern form of statehood and legally-constituted public power. As argued by Neumann, focusing on developments in the German context, the consequence was not only a strongly cartelised economy and a more general eradication of the separation between the state and the rest of society, but also the disappearance of the state, and, with it, the realm of public power. A state is constituted through the legal distinction between the state and the rest of society, and the dissolution of the distinction therefore also implies the dissolution of the state. In the German case, this process had already begun during the WWI through the introduction of a corporatist *war economy*, and gradually became more entrenched during the Weimar years, reaching its climax during the National Socialist regime. Rather than a "strong state", National Socialism became characterised by a particular form of "totalitarian pluralism" in which the notion of statehood had lost its meaning, as both the formal and factual distinction between the state and the rest of society had disappeared altogether.[52] Alternatively, one can, as argued by Ernst Fraenkel, speak of a "dual state", since the legal system, continued partly as a "normative state" (*Normenstaat*) and partly as a "prerogative state" (*Maßnahmenstaat*), with the latter allowing for a continuation of social exchanges within the economy and other segments of society, for example, through the enforcement of contracts, while the latter *instrumentalised* the law, deploying legal instruments as a tool both in and for the advancement of arbitrary political objectives and for the suppression of resistance to the regime.[53]

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[51] Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law*, (Oxford: Oxford University Press, 2014); Chris Thornhill, "The Constitutionalisation of Labour Law and the Crisis of National Democracy", in: Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro*, (London: Rowman & Littlefield, 2016), pp. 89-106.

[52] Jürgen Bast, *Totalitärer Pluralismus. Zu Franz L. Neumanns Analysen der politischen und rechtlichen Struktur der NS-Herrschaft*, (Tübingen: Mohr Siebeck, 1999), p. 279 et seq; Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-1944*, (Chicago IL: Ivan R. Dee ([1944] 2011), p. 467 et seq. For a somewhat similar view, see, also, Michel Foucault, *La naissance de la biopolitique. Cours au collège de France 1978-1979*, (Paris: Seuil, 2004), p. 105 et seq.

[53] Ernest Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, (New York: Oxford University Press, 1941).

IV. THE "TURN TO NEO-CORPORTISM – SEPARATION AND RE-CONNECTION THROUGH LAW

Against the background of the interwar experience, de-cartelisation and a competition-based market economy gained a central strategic status in the post-war European order, becoming central pillars of a new paradigm of the law of political economy. As already mentioned, Hayek and Polanyi simultaneously developed theories concerned with why totalitarian regimes had emerged but arrived at diametrically-opposed conclusions in so far as the former argued that the problem was "too little", and the latter "too much", market and competition. In sociological terms, their respective positions can also be seen as focused upon whether the existence or the absence of a functionally-differentiated society was the underlying reason for the emergence of totalitarianism. For Neumann, competition furthermore emerged as one of the "four Ds" which subsequently became the pillar of the US-American occupation strategy in Germany: de-nazification, democratisation, de-militarisation, and finally de-cartelisation.[54] While not sharing Hayek's general stance on society and its central driving forces, as well as avoiding market holism, Neumann decisively opted for a functional differentiation approach, in so far as his central point was that de-differentiation between economic and political processes due to a suspension of generalised formal law was a central reason for the breakdown of the Weimar Republic. As such, he admitted a central strategic role to law as the framework which is aimed at simultaneously separating and re-connecting economic and political processes. Inspired by US anti-trust policy, he came to see competition law and policy as a central instrument not only aimed at framing economic processes, but also aimed at preventing concentrations of resources and private power to a degree which enabled economic actors to exercise influence over or to undermine the autonomy of the political system. Neumann, in other words, granted competition law constitutional status, seeing it as a core pillar of the constitutional order.

Neumann's stance was unfolded within a wider ideological debate on the compatibility between the rule of law and the emerging welfare state.[55] The evolutionary answer was a double movement oriented at establishing institutional structures which served the dual function of internally stabilising functional, de-limitated spheres such as the economy, health, education, science, and religion, and providing frameworks for the compatibility between these spheres. This cluster of arrangements has traditionally been

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[54] Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-1944*, note 52 above.

[55] Christian Joerges, "*Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process", (2010) 9 *Comparative Sociology*, 65-85.

denoted as "neo-corporatist", although it has, in fact, essentially nothing in common with earlier forms of corporatism. Although considerable variation can be observed,[56] the welfare-state conglomerates which emerged in Western Europe in the post-war period shared the feature that they had formal organisation and formalised positivist law as their key organisational components, and, as such, they were directly opposed to the core organisational ideal which had driven inter-war corporatism. Neo-corporatist structures are characterised by hierarchically-organised "peak-associations" serving as negotiation systems (*Verhandlungssysteme*)[57] which mediate between the different spheres of society, most notably, but not exclusively, between the economy and the political system in the state form, with the objective of establishing mutual stabilisation of exchanges between the spheres in question.[58] What we, in mainstream language, have come to understand as nation states, rather take the form of configurational webs, which are mainly established at the level of organisations and regimes, in so far as the "higher order" of nation states emerged through a mutual stabilisation of expectations and exchanges between multiple social spheres. Formal organisation became the form through which internal order was established within functionally-delineated areas, just as they came to serve as the "contact points" for inter-systemic exchange between, for example, national organised science, education, religion, health, mass media, economy, and politics. The consequence is that a particular form of second order politics emerged. The internal form of stabilisation within functional spheres became a question which was channelled into formalised, often profession-based, organisational arrangements, which produced collectively-binding decisions or the functional equivalents to collective decisions within their respective functional areas. It follows that a successful national configuration neither operates upon the basis of a total subordination of society to the modern form of political power in the state form, nor in a form in which the political only resides in the state. Rather, a certain gradualisation of the political can be observed, in the sense that some linkages between the state-based form of the political- and non-state-based forms remained tighter than others, just as the internal degree of hierarchy within the non-state forms differed from societal area to societal area.[59]

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[56] Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism*, (Cambridge: Polity Press, 1990).

[57] Helmut Wilke: *Ironie des Staates: Grundlinien einer Staatstheorie polyzentrischer Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1992).

[58] David Sciulli, *Theory of Societal Constitutionalism: Foundations of a non-Marxist Critical Theory*, (Cambridge: Cambridge University Press, 1992), p. 73 et seq.

[59] Poul F. Kjaer, "Law and Order Within and Beyond National Configurations", in: Poul F. Kjaer, Gunther

In this context, competition, especially within its ordoliberal variant, gained a specific function as the internal form of ordering within the economy. As pointed out by Foucault, this, however, had little to do with *laissez-faire* liberalism, in so far as competition became institutionalised and formalised as an objective, and its realisation became the task of an "active policy" and "governmental art".[60] Consequently, the market and the state are not just in need of separation, but also in need of re-connection, in so far as "pure competition" can only be produced through "governmentality". Especially in the German context, the form of this relationship was, however, essentially a legal one. The intervention of the state in the structuring of economic exchanges was based upon ordoliberal ideas, at least ideally, and based upon a double movement aimed at *simultaneously* separating and re-connecting of the economy and politics through law. Thus, the objective was to maintain functional differentiation while re-integrating the economy and politics within a specific form. This gives, much neglected by Foucault, law a strategic position as the form through which expectations are stabilised, and exchanges and transfers take place between the economy and the political system in the state form. Foucault furthermore indicates that the structuring of the market becomes the overriding purpose of the state. While structuring the market indeed is a central function of the political system in the state form, this view probably under-estimates the orientation of the state towards its own reproduction and the expansion of state power as well as the general function reproduced by states *vis-à-vis* society in its entirety.[61]

The constitutional coupling of law and politics is aimed at establishing the general convergence of the time structures of society and this is the central integrative contribution of states to society.[62] The convergence between the market and rest of society is just one dimension of this as the "state-complex" of law and politics constitutes a common context through the structuring of relations and the convergence of time between a whole string of social spheres and regimes. This is also reflected in the societal reality of most post-war European settings, in so far as areas such as science, health, and education remained largely excluded from the market and were, instead, structured upon the basis of an ideal of professional autonomy. Like the market, this sort of autonomy was characterised by a dual

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Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, (Oxford: Hart Publishing, 2011), pp. 395-430.

60 Foucault, *La naissance de la biopolitique. Cours au collège de France 1978-1979*, note 52 above, p. 121 et seq.

61 Poul F. Kjaer, "Context Construction through Competition: The Prerogative of Public Power, Intermediary Institutions and the Expansion of Statehood through Competition", (2015) 16 *Distinktion*, 146-66.

62 Niklas Luhmann, *Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993), p. 427 et seq.

set-up, simultaneously emphasising their self-regulatory nature and their reliance on an external legal basis provided by the state. Thus, in North Western Europe, the post-war period was marked by a massive strengthening of competition as an institutionalised form in relation to economic production processes and a simultaneous, legally structured, limitation of competition to the economic sphere, which enabled the establishment of the political system in the state form to stabilise itself as the "first among equals" within the larger conglomerate of the laterally-related institutional regimes which make up the nation state. Thus, also the so-called golden-age nation-state was not reflecting an outright state-centred society. What, in layman's language, is understood as the nation state should therefore rather be understood as considerably more complex configuration, in which the horizontal nature of relations between the state and other spheres of society remained a central feature, at the same time as the political-legal complex took up a strategically central position, enabling it to engage with other societal dimensions in an asymmetric manner.[63]

V. THE "TURN TO GOVERNANCE" – BEYOND THE FORM OF LAW

As a response to the "turn to corporatism" and totalitarianism, Western Europe underwent a profound dual (trans-) national re-constitution process in the immediate post-WWII period, which implied a re-invigoration of public power within a neo-corporatist framework.[64] Together with *Les Trente Glorieuses* and the *Wirtschaftswunder*, this development provided for the expectation that Western Europe had finally arrived in modernity. However, since the 1970s, this has gradually changed due to a "return of crisis",[65] as embodied in the stagnation crisis of the 1970s and the possibly interconnected financial crisis which became visible in 2007.[66]

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[63] Poul F. Kjaer, "From Corporatism to Governance: Dimensions of a Theory of Intermediary Institutions", in: Eva Hartmann and Poul F. Kjaer (eds), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance*, (Basingstoke: Palgrave Macmillan, 2015), pp. 11-28.

[64] Kjaer, "From the Crisis of Corporatism to the Crisis of Governance", note 40 above; Poul F. Kjaer, "Towards a Sociology of Intermediary Institutions: The Role of Law in Corporatism, Neo-Corporatism and Governance", in: Mikael Rask Madsen and Chris Thornhill (eds), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law*, (Cambridge: Cambridge University Press, 2014), pp. 117-141. More generally on the post-WWII re-constitution process, see Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*, note 33 above, p. 436 et seq., and John Erik Fossum and Agustín José Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*, (Lanham MD: Rowman & Littlefield, 2011), p. 78 et seq.

[65] Hauke Brunkhorst, "The Return of Crisis", in: Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, (Oxford: Hart Publishing, 2011), pp. 133-71.

[66] Wolfgang Streeck, *Gekaufte Zeit: Die vertagte Krise des demokratischen Kapitalismus*, (Berlin: Suhrkamp Verlag, 2013).

It was in the context of this prolonged crisis trajectory that the "turn to governance" gradually unfolded from the 1970s onwards. As was the case with the "turn to corporatism", the emergence of the governance phenomenon has a dual character which is reflected in concrete institutional transformations, as well as in discursive articulations of particular intentions. The concept furthermore remains as multi-faceted and elusive as the concept of corporatism, thereby depriving it of the status of a legal concept in the strict sense.[67] In terms of origin, two different strands can be detected. One mainly has nation-state origins and was closely associated with the introduction of New Public Management and concordant policies associated with the de-centralisation, privatisation and de-regulatory and re-regulatory reform programmes which took shape from the 1970s onwards. In terms of scholarly origin, this strand can furthermore be considered a further development of the theories of steering developed in the 1970s.[68] Another strand refers to transnational regimes centred on public international organisations such as the World Bank, the original creator of the concept, and public international organisations, such as the IMF and the OECD, and, of course, the EU.[69]

A common core of the various strands, however, shows certain affinities with the characteristics previously highlighted in relation to the "turn to corporatism":

1. A holistic focus on "society", rather than the state or other institutional repositories of public power. This implies an explicit intention to cut across the public/private divide, thereby undermining the distinction between state and society or equivalent distinctions between institutional repositories of public power and the rest of society. "Society as such", rather than institutional realms of public power, thereby gains the front seat, being seen as both the object and the subject of policy-making, while, at the same time, "society" *de facto* is equalled to the "economy";
2. A sectorial outlook at policy-making and legal regimes along functional lines, thereby making it closely aligned with the tendency towards the increased

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[67] Christoph Möllers, "European Governance: Meaning and Value of a Concept", (2006) 43 *Common Market Law Review*, pp. 313-336. For an extensive analysis in the EU context, see Poul F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation*, (Oxford: Hart Publishing, 2010).

[68] Renate Mayntz, "Governance Theory als fortentwickelte Steuerungstheorie?", in: Gunnar Folke Schuppert (ed), *Governance-Forschung. Vergewisserung über Stand und Entwickungslinien*, (Baden-Baden: Nomos Verlag, 2006), pp. 11-20.

[69] As expressed in the famous White Paper, *European Governance: A White Paper* (COM(2001) 428 final), 25 July 2001.

fragmentation of legal ordering. As such, the governance phenomenon is also characterised by a fundamental in-built contradiction as it simultaneously refers to society in its entirety and furthers the fragmentation of that society.

3. Instead of a focus on the decision-making processes themselves, the focus is externalised through an emphasis on output and efficiency, giving it a strong economistic touch.[70] The consequence is a pragmatic emphasis on decision-making and the impact of decision-making, paying less attention to the formal legal structuring of decision-making and associated issues of accountability. Governance, therefore, implies a turn to informality which goes against the ethos of legal formalism.[71]

The fundamental difference between interwar corporatism and contemporary governance, therefore, seems to be the difference in normative intention, as corporatism, in essence, was about the constitution of a society-based political community unrestrained by formality and law, while governance is about the amelioration of economic efficiency through a loosening of the perceived grip of law and the "red tape" of government regulation on the market or on market-mimicking social processes. Or, to put it in more abstract terms, whereas corporatism implied a dismissal of the spontaneous dimension of social processes and a re-enforcement of the hierarchical dimension, governance is aimed at ameliorating the spontaneous dimension and a downgrading of the hierarchical dimension. Governance, in other words, turns the intentions of corporatism upside down. But, at the same time, the two discourses share the focus on "society", rather than the realm of public power, as their core object, just as they share the turn to informality and the downgrading of law, essentially dismissing the view that law provides the core infrastructure for the structuration of social exchanges and the integration of society. Or expressed differently: governance is corporatism turned upside down.

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[70] Christoph Möllers, "European Governance: Meaning and Value of a Concept", (2006) 43 *Common Market Law Review*, pp. 313-336, at 314 et seq. For the switch from normativity to efficiency as the guiding thrust of "governance law", see Sabine Frerichs, "Taking Governance to Court: Politics, Economics and a New Legal Realism", in: Eva Hartmann and Poul F. Kjaer (eds), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance*, (Basingstoke: Palgrave Macmillan, 2015), pp. 157-73.

[71] For an instructive over the implications and use of the term legal formalism, see Duncan Kennedy, "Legal Formalism", in: Neil J. Smelser and Paul B. Baltes (eds), *Encyclopedia of the Social & Behavioral Sciences*, vol. 13, (Amsterdam: Elsevier, 2011), pp. 8634-38.

VI. THE STRUCTURE OF THE VOLUME

The holism *versus* differentiation and hierarchy *versus* spontaneity dimensions of the law of political economy highlighted above in relation to various historical phases do not and are not intended to provide a complete picture which gives justice to the many facets of law's dealings with political economy. It does, however, set some overall parameters which the other contributions to this volume relate to in various ways. The book is divided into four sections with the first one, in combination with this introductory chapter, setting the scene in a theoretical and conceptual sense. This is followed by a global outlook and then a zooming in on European developments before, in the final session, the dimensions of a new law of political economy are outlined.

The three contributions in the first section challenge the concept of governance and the concept of constitutionalisation, two of the most central prominent concepts of the last decades, arguing that both are "totalising" concepts which do not recognise the existence of an outside world.

In the first section, Christian Joerges and Michelle Everson re-construct the largely Germany-centred debate on economic constitutionalism. This is done through a contrasting of the ordoliberal vision of Ernst-Joachim Mestmäcker, which greatly influenced the early decades of the European integration process, with the "alternative economic law" (*Alternatives Wirtschaftsrecht*) of Rudolf Wiethölter which was explicitly developed as a critique of ordoliberalism upon the basis of the idea an international *ordre public*. Joerges and Everson link up with this vision and engage in the development of a revised conflict-law perspective in the current European constellation, seeing it as a possible route out of the crisis of the last decade through an attempt to safeguard the *proprium* of law within that constellation.

In the following chapter, Emilios Christodoulidis exposes what he calls the myth of democratic governance, the idea that the move to flexible, decentralised, informal soft law modes of co-ordination provides an alternative to classical representative democracy. Rather, the turn to governance has facilitated a cutting adrift of the economy from political processes and the installation of the market principle as the central guarantor of both public interests and individual freedom, and has done so in a way which factually underlined the public/private divide and the concurrent distinction between public and private law. As such, the turn to governance implies the installation of the hegemony of market thinking which has no outside and thereby extends to all aspects of society.

Duncan Kennedy follows suit by arguing that law has become instrumentalised, used as a weapon aimed at striking down ideological adversaries. The progressive moves towards juridification, judicialisation and constitutionalisation of the contemporary legal order are seen in this light, as they reflect attempts to install a singular perspective as the higher and hegemonic order. The political economy of law is thus reflected in the continued attempts of collectivities that share material and ideological interests to constitutionalise their particular version of the common good. According to Kennedy, drawing mainly on US-American developments, the consequence of this development is a politicisation of the judiciary, a hollowing out of its claim to impartiality and the destruction of the faith in the methodology of law.

After the sobering contributions of the first section, the attention in the next session is turned to developments in the global political economy and the role of law in this context.

David Kennedy take issue with the hereto dominant perspectives on law and global political economy which have seen law as an ordering device aimed at introducing stability into the global political and economic systems while promoting peace, justice and prosperity. Instead, he suggests turning the focus to the law's constitutive role in the continued reproduction of injustice and inequality. Much like Duncan Kennedy, in the domestic US American setting, David Kennedy foregrounds the role of law in political and economic struggles in the global setting, recognising law as an instrument and weapon deployed in distributive struggles.

A clear example of this role of law is revealed in the following chapter in which Isabel Feichtner explores the law's role in the distribution and exploitation of natural resources, and the link between natural resource extraction and the financialisation of the global economy. She explores which bodies of norms shape the political economy of resource extraction, including norms of jurisdiction, ownership and use rights, and the justifications that accompany these norms of allocation, arguing that law has an in-built exploitation bias with respect to natural resource extraction, and that this bias has profound distributive effects. Through a historical re-construction, she furthermore shows how this bias and related booms and busts in natural resource extraction are intrinsically linked to expansions in the financialisation of the economy.

Jaye Ellis adds another dimension by reminding us that a global perspective on the law of political economy necessitates an explicit anthropocenic view which takes the

ecological impact of the law of political economy into account. Observing the current state of global law, she argues that political economy in the anthropocene remains dominated by cognitive instruments and practices, such as standards and indicators which are conditioned on scientific input and mainly operate though managerial governance, rather than law. However, she argues that legal norms have the potential to play a central role in the translation and condensation of scientific insights into components which are actionable in the political economy, thereby highlighting the form-giving function of law.

As becomes apparent in the following section, the global context of law and political economy provides a frame for observing European developments as well. Due to the particular intensity of transnational legal developments in the European context and the long standing European attempts to theorise the different aspects of the relationship between law and political economy, Europe might be seen as a particularly well-suited location for observing both factual as well as scholarly developments pertaining to the law of political economy.

Hans Micklitz sets the scene by establishing a link between the present "Copenhagen book" and the 1989 "Bremen book" entitled *Critical Legal Thought: An American-German Debate*.[72] A substantial, though far from total, overlap exists among the contributors to the two volumes, allowing for a highlighting of the continuities and discontinuities of the past thirty years. Departing from a critical legal studies (CLS) perspective on the transformation of private law in the European context, he highlights how CLS scholars themselves became central actors in the attempt to construct a European internal market with a social face. This endeavour has, however, been challenged through the consecutive changes in the function and status of law within the European integration process, as it has metamorphosed from "integration through law" to "integration through governance" and to "integration beyond law".

Marija Bartl follows suit with a re-construction of the ideational imaginaries about economy and market which unfolds within European private law. By zooming in on European consumer law in particular, she re-constructs how different concepts and imaginaries of market and economy have shaped the integration project over the last thirty

[72] Christian Joerges and David M. Trubek (eds), *Critical Legal Thought: An American-German Debate*, (Baden-Baden: Nomos Verlagsgesellschaft, 1989), and Christian Joerges, David M. Trubek and Peer Zumbansen, "Critical Legal Thought: An American-German Debate-Republication [with a New Introduction] Twenty-Five Years Later", (2011) 12 *German Law Journal*, 1-595: available at: http://www.germanlawjournal.com/volume-12-no-01.

years. The transformation observed is essentially one which goes from the attempt to balance market- and non-market-based social formations to an attempt to optimise markets though deepened competition and marketisation. A transformation which is based upon a re-naturalisation of the idea of the market and the idea of the market as the preferred and most efficient form of resource allocation.

Within EU competition law, Jotte Mulder detects a similar transformation as the one observed by Bartl in consumer law. The cartel prohibition, in particular, has undergone a transformation which implies a structural shift which increasingly favours the demand side (consumers) over the supply side (producers). This development has been greatly accelerated since the modernisation and economisation of competition law at the turn of the millennium, which has curtailed the ability of Member States to take non-economic concerns into account. Mulder illustrates this in relation to the Commission's approach to liberal professions and provides two cases on ecological and environmental sustainability in The Netherlands.

Stefano Giubboni shifts the focus to labour law, highlighting the deeply ambivalent relation between labour law and capitalism, a relationship partly characterised by antagonism and partly by labour laws central role in enabling capitalist reproduction. This ambivalence, he argues, has been re-inforced in the European context over the past three decades due to a fundamental transformation in the way in which European integration impacts upon national labour law systems. Through the "internal market"-linked turn to governance, and subsequently through the economic and financial governance regime of the Euro, the EU have moved away from safeguarding national autonomy in relation to labour law, thereby factually undermining such autonomy. This is particularly the case after the outbreak and expansion of the European debt crisis from 2009 onwards. The result has been the surge of "populist" and "'sovereignist" counter-movements throughout Europe.

The current state of both the global and the European political economy is marred by uncertainty and an erosion, possibly even an outright breakdown, of the institutional set-up put in place to stabilise economic and political exchanges. The massive transformations that have unfolded over the last four decades - as outlined in the previous chapters - seem to have led to a dead-end or *cul-de-sac* in the form of an ideational and institutional exhaustion. Against this background, the final section takes up the creative task of reflecting on the possibility of a new law of political economy, its features, its purpose and its form.

Karl-Heinz Ladeur starts out with a radical proposal to go beyond hierarchical "top-down law" based upon a doctrine of delegation and replacing it with "serial law", which consists of temporalised experimental search processes characterised by *ex post*, rather than *ex ante*, control, a type of law-making which, he argues, can furthermore emerge from private and hybrid public/private sources, and rely on complex constellations of networked contracts, rather than pure public sources. Such a law, he argues, will correspond far more to the reality in which we now live, *i.e.*, a networked and fluid society characterised by data flows, social media, and rapid expansions in advanced technology.

Rodrigo Vallejo follows suit by unfolding a proposal for an understanding of current developments in relation to private regulation as amounting to the emergence of a private administrative law. Contrasting American and European approaches to private regulation, he argues that European rules of recognition concerning private regulation amount to a doctrinal construction containing institutional, formal and substantial dimensions. Thus, a new model of the law of political economy aimed a containing political economy struggles within the structural reality in which they unfold is emerging.

Lars Viellechner goes a step further by exploring the metamorphosis of constitutionalism, and in particular, the emergence of institutions of fundamental rights both within the transnational sphere and within "private law"-based formations. Viellechner observes a double transformation of law: first an expansion of traditional international law into areas which traditionally have not or have only very slightly been touched upon by international law, such as environmental law, and certain aspects of criminal law and human rights law. Second, the emergence of contract-based transnational governance arrangements, such as the one guiding the Internet Corporation for Assigned Names and Numbers (ICANN), arrangements which, he argues, are based upon a new approach to the horizontal effect of constitutional rights which is capable of addressing the legitimacy demands of such transnational private arrangements.

Gunther Teubner generalises the above reflections by advancing a vision of rights as not only individual rights but also as trans-subjective rights of communicative, collective, and institutional formations in the both the public and the private sphere. As such, Teubner argues for a radical expansion of law, allowing it to capture societal processes which are currently beyond its reach. In addition, the focus of rights needs to be expanded not only to focus on protection from the logics of politics in the form of state activity, but also from the logics of the economy and other societal dynamics. The expansion and transformation of the forms of

economic reproduction as well as the intensification of other societal processes needs, in other words, to be addressed through a corresponding expansion and transformation of law.

In sum, the volume can be seen as providing a conceptual framework for the study of the law of political economy, a diagnosis of the current state of affairs within world society and specifically in Europe as well as outlining a vision for new law capable of encapsulating the future.