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Economic Law: Anatomy and Crisis

Abstract: This article revisits the improbable concept of “economic law,” which originated in early- and mid-twentieth-century debates in search of a magical triad: a legal-political framework for a capitalist economy under democratic control. In analyzing its composite elements both in retrospect and in the current pandemic context, it becomes obvious how the elements generate complicated, potentially destructive dynamics with one another. The recently resurgent interest in the relationship between law and political economy provides a valuable opportunity to reimagine economic law at a time when many frameworks of the twentieth-century nation and post-welfare state have been exposed as vulnerable and fleeting—making the need for a critical legal methodology the more urgent. The analysis seeks to provide some starting points for such a methodology by taking a closer look inside the toolboxes that lawyers tend to open in times of crisis.

Keywords: Economic law; power; public-private divide; corporate governance; labor rights; economic constitution; neoliberalism; transnational law; methodology

I. Introduction: The State-Law Nexus

Now, in the second year of a global pandemic, the fragile constitution of existing political economies is plain to see. But it is the scale of the democratic, health, economic, and environmental crisis which renders the task of connecting anatomy and remedy potentially overwhelming. Which tools, maps, and concepts will ultimately prove effective in navigating through the ruins? How can we deepen the anatomy of neoliberalism’s rampage, how shall we subject the conflicting trends to a transformative critique? As a world, weakened by political choices over time, was finally undone by an invisible, infectious enemy, we search for a vantage point from which to launch a sustainable collective and inclusive political enterprise.

The resurging interest in (and relationship between) Law and Political Economy (LPE) provides a promising context in which to re-engage with both inherited and emerging lines of analysis and critique—particularly in historical perspective. This history does not speak for itself (Dore, Lazonick, and O’Sullivan 1999; Davies 2015; Streeck 2013; Brown 2019). Instead, it needs to be unpacked and disentangled with regard to its different materials, including its ideological and symbolic dimensions (McGuigan 2014; Korolczuk 2016; Isailovic 2018; Ghadery 2019). Depending on the lens applied, different aspects stand in the foreground of the constellation of different constituent forces that have shaped neoliberalism’s path of destruction and, particularly, its trajectory and dissemination of ideas and emerging networks (Mirowski and Plehwe 2009; Slobodian 2018). These have fueled the reciprocal dynamics between a financializing global economy and domestic policy choices (Schrecker 2009, 166-169; Hunter and Murray 2019; Sell 2019, 2-3) and over the past few decades helped design

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and effectively normalize decentralized, self-regulatory infrastructures in a wide range of legal fields (Ireland 1996; Pistor 2019; Parfitt 2018).

Meanwhile, law's position in critical, political projects continues to be an uncomfortable one (Gordon 1984, 66; Merry 1995, 12; Gupta 2015; Zumbansen 2019, 933-934): "The *limits of the law* as a means of effecting social change have been a key focus of legal thinkers over the past several decades" (Lobel 2007, 938, emphasis added). The promise of the LPE intervention recently launched by legal scholars to disrupt the present moment may lie in combining a critical chronology of state-centered power with an expansive, sociolegal analysis of the shifting relationships between public and private regulatory infrastructures that does not reduce their foundation and operation to "the state" as an exclusive, quasi-universal reference point.

This relativization is crucial in at least two ways. One is that lawyers' habitual association of law with the state seems to be almost inseparable from a deep-seated belief that the state itself can serve as bulwark and refuge, regardless of how privatized and diversified legal assemblages have become (Teubner 1986), or how problematic its underlying distinctions between a public and a private sphere are (Cooper 1995; Boyd 1997; Thériault 1992). This belief *in* and commitment *to* the state is itself part of a more encompassing normative appreciation of the state as an in itself deeply vulnerable and fragile achievement. In short, the state formula continues to provide a benchmark that no passing of time can simply render prosaic. Instead, it commands humility and respect, but more importantly, it suggests that the project of the state is ongoing and its work unfinished (Nullmeier 2016). It follows that when we lawyers tend to associate law so strongly with the state, we ought to keep in mind the multifacetedness of both "the state" and "the law." The recognition of law's ties to the state and the state's manifestation and representation, in part, through its laws cannot hide the fact that the relationship is multidirectional, volatile, and precarious (Duguit 1917, 3; Hart 1958; Fuller 1958; Frankenberg 2014, 120-126).

The second reason why we ought to take a more ironic stance towards the quasi-universalized nexus between law and the state emerges as we acknowledge the wide variety of experiences with the state (Brooke, Strauss, and Anderson 2018), the nation (Anderson 1983), and law itself (Neumann 1957, 41; Moore 1978; Ghai, Luckham, and Snyder 1987; Merry 2000, 35; Darian-Smith and Fitzpatrick 1999; Comaroff and Comaroff 2006). The growing recognition of alternative, divergent, interdependent, and related narratives of states, markets, and peoples, and of "progress" and "civilization," reinforces the pressing need to deconstruct and relativize the well-rehearsed accounts of the (Western) nation-state's trajectory from post-revolutionary legalization in the eighteenth and nineteenth centuries across its imperialistic global appropriations (Chakrabarty 2007; Prasad 2007; Osterhammel 2015), on to its post-World War II consolidation in a time of "embedded liberalism" (Ruggie 1982) and, eventually, its liquification through deregulation, contractualization, and financialization (Bernardot 2018, 3). Such an account or timeline can potentially prove helpful in reengaging the already mentioned trope of the state as a normative, contested, and unstable achievement, because it will serve as a starting point for a deeper anatomy of *how* the law emerges and evolves in correlation to particular socioeconomic conditions (Trubek 1972; Pistor 2019). But for such an analysis to be effective, it will be necessary to address the comparative scholar's own positionality and to actually listen to other voices outside of one's own echo chamber (Buchanan and Pahuja 2003; Pahuja 2014; Mahmud 2007).

These two caveats about the state raise the bar for a contemporary project on law and political economy considerably. While LPE's interest in unpacking law's role in invisibilizing, yet reinforcing power imbalances, domination, and violence is even more acute in light of the institutional and social infrastructure wastelands that the pandemic is so tragically exposing (Saad-Filho 2020), the challenge of how to address the transnational and postcolonial dimensions of the project remains daunting. Echoing some of the insights gained through a transnational investigation of the fast-emerging and consolidating "war on terror" after 9/11 (Baxi 2005), the comparative study of countries' responses to the pandemic in *Lex-Atlas: Covid-19* (LAC 19)¹ is an important entry point for a deep-reaching investigation into the contemporary *transnational* history of neoliberal state transformation.

LAC 19's transnational dimension illustrates the diversity of governance models and asks us to resist pressing the relationship of law and political economy into the particular framework of the Western nation-state. It is one thing to trace the evolutionary path of the rule of law, the social, and the welfare state up to the enabling and moderating state of the "risk society" (Luhmann [1981] 1990; Beck 1986; Ewald 2000); it is another to amplify alternative accounts, told from within the context of different periodizations and different political economies (Das 2020). As this paper will explore in more detail below, a transnational LPE approach will have to focus on the illumination of the reciprocal forces and entanglements between and across different political economies. Biden's first one hundred days, Navalny's hunger strike, and India's (and the US's) record numbers in COVID-19 infections are simultaneous events, but how we are to make sense of the cross-cutting forces that have over the recent decade created a seemingly globally shared sense of gloom and outright despair is the task now at hand (Mishra 2017; Weitzman 2020).

This article zeroes in on the role of law in governing situations of crisis and transformation. With that in mind, I will choose a particular concept—"economic law"—to interrogate some of the methodological challenges that LPE has been accentuating. By drawing on a concept that is, by design and scope, an almost impossible one, the ensuing analysis tries to situate the ambitions of the recent LPE emergence in a wider context and thus—hopefully—contribute to its normative, critical aspirations.

II. Pandemic Failures

The improbable concept of "economic law" originated in early and mid-twentieth-century debates in search of a magical triad: a legal-political framework for a capitalist economy under democratic control. In analyzing its composite elements, both in retrospect and in the current, pandemic context, it becomes obvious how each element generates complicated, potentially destructive dynamics with the other two. Surely, since Weber, we were trained to appreciate the relationship between law and the economy as a choice between the inevitable and the impossible. Economic law as idea, concept, and program could be seen to have marked an effort to critically engage the tension between law and the economy as part of a productive, political project. At its heart was the hope to unpack the inevitable intertwining of markets and what Weber called the "formal qualities of modern law," on the one hand (Weber 1978), and to help conceptualize the political economy of contemporary capitalism as a democratic constitution, on the other (Macpherson 1973). As such, its success always remained

¹ See *Lex-Atlas: Covid-19: A Global Academic Project Mapping Legal Responses to Covid-19*, a website produced by the Transnational Law Institute, King's College London, and University College London (<https://lexatlas-c19.org>).

extremely context-sensitive, idiosyncratic, and fragile, belying the sweeping normative assertions behind the Law and Economics school since the 1970s (Jensen and Meckling 1976).

I want to argue that the formulas of “economic law” and Law and Political Economy are intimately related. While neither claims to be a “field” or a coherently conceptualized theory, each ultimately seeks to conceptualize a methodology and laboratory for sociolegal analysis and policy design. In this vein, I suggest retracing the emergence of economic law against the background of a renewed interest in law and political economy at a time when the virus continues to lay bare the frailty and instability of the socioeconomic and political constellation. What the here-proposed deconstruction of economic law in the context of state transformation and globalization can teach us is to resist nostalgia, be that for the nation-state or the post-war “social contract” (Maier 1996) and the auspicious conditions for the once-blossoming welfare state (Esping-Andersen 1994).

But, where, exactly, *is* law in the present context? The law that should come to the rescue of those in the dark, in ICUs, in food banks, in single-parent family homes, and in abusive domestic settings and other prisons, hardly reaches the audible level of the nightly pot-banging in cities around the world through which some expressed their appreciation of “essential workers” at an early stage of the pandemic. The anger and frustration over the dysfunctionality of the state in getting essential workers protected and vaccinated, in improving access to public services, and, ultimately, in using the crisis to launch a deep, transformative, future-oriented policy agenda, has law on its list, in fact, everywhere. But how it operates specifically in the many different disaster zones, which role it plays, and to whose benefit—these are the questions that demand our critical attention (Gonsalves and Kapczynski 2020). It is obvious how law is caught up in increasingly violent struggles over the direction that public policy should take these days. Meanwhile, the stark tensions between inquiries into the possibilities, modes, and approaches of transformative change post-COVID-19 (Massy 2020), and the bizarre, yet not surprising, call for a “return to normal” (Ghosh 2020) illustrate old, deep political oppositions and ideological divides (Klein 2014). At the heart of these lie competing models of state-market relations: concepts of “economic governance” and “democratic market control,” and also a growing disillusionment with the Western narrative of a century of social and political “rights” victories (Glendon 1992; Henkin 1995). The result is a heightened political volatility that underscores the vulnerability of democratic political systems (Baer 2019; Karatasli 2019).

In light of the corrosive impact of neoliberalism’s acidic cleansing of public infrastructures over the past decades, a proper assessment of the transformation of political systems in this period must form an integral part of LPE research. Keywords such as *privatization*, *deregulation*, *outsourcing*, and *contractualization* point to intricate processes of structural change that have occurred under different conditions and at distinct times and speeds (Hollingsworth 1998). Meanwhile, law, along with the institutional infrastructure we have come to associate with it, has itself been transforming. The state-law nexus described earlier can hardly capture these fundamental transformations. As a replay and amplification of domestic state change (Mashaw 1983; Shaffer 2012), the transnational arena displays a myriad of co-existing and intertwined “hard” and “soft” laws, rules, standards, and recommendations that in themselves offer but a glimpse at the complex sovereignty constellations that have been emerging over time. The significant increase in UN regulatory work over the past ten years (Ochoa 2008; Ruggie 2013; Deva and Bilchitz 2017) is complemented by a recent resurgence of domestic regulation of transnational corporations (Palombo 2019; Schiller 2019). The emerging transnational regulatory space is populated by private and quasi-public actors who have come to assume key roles in the preparation of binding rules, draft legislation, codes of conduct, recommendations, expert reports, and “white papers.” These actors are comprised of legislators, regulators, citizens, companies,

NGOs, and standard-setters who are engaged in complex battles over authority (Paiement and Melchers 2020). Mirroring this proliferation of norm entrepreneurs in the transnational realm is a notable diversification and intensification of local advocacy, movement building, and law reform and rights activism on the ground. These efforts emerge through intensifying collaborations across different local and transnational civil society groups, activists, NGOs, and law firms, and are crucial factors in fighting for change on the local level (Perelman 2013; Carrasco 2015).

Lawyers have been struggling to properly denominate the type and model of state, and the type(s) of law, that would be compatible with these developments, with adjectives applied to the state ranging from *moderating* to *enabling*, and from *surveillance* to *dysfunctional* (Zuboff 2015; Saad-Filho 2020). All these terms show a great deal of discomfort with law and with the state, and they underscore the necessity of a better theory of contemporary legal governance in relation to what the state should do. But, how can these multifaceted constellations be adequately captured theoretically? Is the current crisis one of democratic governance, or one of failing public infrastructures? Is it a crisis of access to public services, which may be addressed through “emergency” and “disaster” politics?

The recent resurgence of interest in law’s connections with political economy under the rubric of LPE (Harris and Varellas 2020; Kampourakis 2021; Mutua 2021; Britton-Purdy et al. 2020; Grewal and Purdy 2014; Wilkinson and Lokdam 2018) creates audacious conditions for critique of the current crisis. Ambitious, perhaps overly so, in its explanatory and conceptualizing aspirations, LPE emerges at an opportune moment. By connecting the old and inescapably stodgy term “political economy” (Marx [1859] 1980; Smith [1776] 1977) with a progressive critique of the skewed institutionalization of power that characterizes our time, its proponents leave no doubt about the political stakes of their intervention. While focusing on law, their aim reaches further. LPE is interested in law as it is experienced and discursively employed, not only through myriad demonstrations of power by those in charge—whether from the bench, the White House, corporate board rooms, or right-wing media—but also in the many more indirect, hidden, and subtle forms of domination and manipulation. LPE’s critique of law is bound to expose it as both perpetrator and beacon of hope. The task at hand is how to formulate lines of inquiry and, eventually, policy design that both draw on and further build on work in critical legal theory, sociological analysis, and—indeed—political economy (Rahman 2018).

A pressing question is how to conceptualize an LPE analysis in face of the already alluded-to, far-reaching transnationalization of regulatory public and private infrastructures. Something that the timely parallels between the emergence of LPE and the global spread of the pandemic have made clear is the scope of global interconnectivity. But, while the virus knows no borders, it has also offered dramatic illustrations of similarities and differences across the geographical scale. As the insights from projects such as LAC 19 already show, there is an utmost need to interrogate the concrete local and regional responses to the crisis in order to learn from comparison. At the same time, the pandemic illustrates how its impact is deepened by structural changes that have occurred in political economies well before the virus embarked on its poisonous rampage. We need to focus on and bring closer together the analysis of local political and socioeconomic infrastructures of state transformation, on the one hand, and the assessment of the transnational parallels and connections between these different examples of state transformation, on the other. Such a *transnational* approach to LPE can partly build on longstanding work in commercial arbitration and international law (Jessup 1956; Goldman 1964; Calliess 2015) but must today incorporate sociological analysis of newly emerging constellations of actors, norms, and processes on the transnational scale. These constellations encompass private, public, hybrid, domestic, international, hard, and soft norm creations, and pose a

considerable challenge for state-based theories of legal and political legitimacy (Cutler 2016; Siems and Nelken 2021).

Arguably, Philip Jessup's famous intervention in the 1950s (Jessup 1956) can be read as a promise of a transnational understanding of law and as an opportunity to reflect on the constituent parts of law and legal regulation in an increasingly globally interconnected universe rather than trying to design another confined legal field *per se*.² In that vein, transnational law should more productively be understood as a methodology of law, norms, and power in a global context (Zumbansen 2021). "From this perspective, the transnational legal analyst might, for example, study not simply how developing states compete with MNCs for authority and power, but also how such states may seek to use commercial private regulation to strengthen their own capacity to distribute essential domestic goods and services" (Cohen 2018, 362). As methodology, transnational law can potentially offer a framework through which to scrutinize the alleged differences between law and non-law, between hard and soft law, and between law and legal pluralism. As both a sociolegal and an epistemological project, transnational law promises to incorporate and integrate existing legal fields and to mobilize them together with insights from legal sociology, legal anthropology, and legal pluralism in order to critically and effectively engage the complexity of today's transnational regulatory landscape.

III. Applications

The application of this approach rests on two main contentions. First, I argue that theorizing transnational law goes beyond a sociolegal analysis in that we begin interrogating also the *normative* justifications offered for key categories and distinctions, including that between public and private and the definition of markets as spheres of self-regulation (Zumbansen 2019). This branch of transnational law as *methodology* critically, furthermore, must engage the historical evolution from a postcolonial theory perspective (Merry 1994; Condit and Kavoori 1998; Quijano 2008). While postcolonialism can, at the outset, be understood as a historical, chronological marker and as a method of periodization, a "temporal approach to postcolonialism is explicitly political since it involves contested interpretations of what it does and does not represent" (Darian-Smith 1996, 292). Second, a sociolegal focus on the actors, norms, and processes as transnational law's DNA should help create a critical space in which to unpack the relationship between "old" (largely Western-determined) institutional markers (such as state, laws, legislation, rights, and constitutions) and, not only the newly emerging "global rulers" and norm-creators with their associated means of generating, disseminating, and administering bodies of normativity (Büthe and Mattli 2011), but also the still violently invisibilized and suppressed forms of alternative, traditional, or indigenous normativities (Santos 2020, 118; Mills 2016; 2021). Just as the pressing questions regarding legitimacy and power of transnational private regulatory governance formations cannot be resolved or discarded by comparing the "global" to the "domestic," postcolonial, subaltern, and indigenous legalities need to be addressed and engaged in their own right (Bhabha 1992, 47-48; Grosfoguel 2011, 4). This complementing of a sociolegal analysis with a critical, postcolonial one shows the degree to which transnational law today can be understood as a form of legal methodological analysis in the tradition of Law and Society and "law in context," and as contributing to critical, postcolonial theory work. Through both prongs, transnational law becomes a framework through which to analyze the discursive and institutional continuities between domestic state transformation, the emergence of transnational regulatory configurations, and postcolonial

² "Despite the appetite for viewing border-crossing law in expansive ways, the task of making visible the actualities of law and practice comprising transnational law involves slippery methodological questions that legal scholars seem particularly skilled at sidestepping" (Affolder 2020, 366).

continuities between the global North and global South. As a sociological and also as an epistemological and political project, the transnational legal methodology suggested here builds on the insights of sociolegal studies throughout the twentieth century and seeks to explicitly connect them with a political economy and postcolonial critique of the institutional, economic, and political conditions under which legal change has been taking place.

In order to render these continuities and parallels between domestic and transnational regulatory transformation visible, I suggest focusing on the concept of “economic law.” While emerging in the concrete context of early- and mid-twentieth century legal and political debates, its study can help reveal the similarities between the critique that was being launched at that time and the critical LPE intervention today. To begin, I revisit economic law as promulgated by a prominent political economist and legal theorist, Rudolf Wiethölter, at the University of Frankfurt in Germany during a phase of renewed battles of the democratic constitution of capitalist markets in the aftermath of World War II. For Wiethölter, as we will see, this term represented not merely a flashlight to identify the blind spots in contemporary doctrinal thought; it also represented a conceptual device to help advance the aspiration toward political and economic justice in the context of a budding welfare state. Echoing the conceptual aspirations we can find today across the LPE project, it will hopefully prove useful to engage with the way in which scholars at an earlier point in time mobilized the concept of economic law as critique. After a brief retrospective, I will try to elaborate on possible lessons for the current transnational context. As part of this inquiry, it will be important to keep in mind the local bias that LPE scholars are bound to bring towards their study. Their positionality, predominantly still as part of the global North, might help explain the prevailing focus on specifically Western experiences with the particular chronologies and experiences of the welfare state, labor, equality, and race politics and the specific, local consequences of neoliberal state transformation. A transnational LPE approach is eventually bound to have to learn to relativize, ironize, and decenter dominant Western narratives and too-often universalized experiences of state change and globalization (Santos 2018; Urueña 2021).

Asserting a project of Law and Political Economy today invokes all the conceptual frameworks and institutional reference markers which tended to inform law and political economy work in the twentieth century. These include not only historical trajectories and genealogies with regard to the transformation of states, societies, and markets (Ruggie 1982), but also the dualist categorizations that were central to those narratives, including state/society, state/market, political/natural, public/private, and so on (Streeck 2013, 2016). As we try to read these narratives in context, the assertion of the law/political economy link will hopefully make it possible to conceptualize frameworks anew at a time when institutional and geographical reference frameworks have become unstable and volatile and create overwhelming challenges for efforts to tie a renewed LPE agenda to thinkers like Polanyi or Habermas (Fraser 2013).

The starting point for our analysis shall be a rich body of legal and political economy work from the mid-to-late-1960s onwards, that is, from a time when the post-World War II constellations of a “mixed economy,” a growing corporatization of society, and a slowly decaying Keynesianism exposed the vulnerability of a once believed-in project of democratic capitalism. Central to the idea of a democratic society regulating itself through viable legal and social institutions was an understanding of law as a vehicle for meaningful market regulation and as a foundation for sustainable, equitable, and just self-governance. Mirroring the high expectations placed on law in that respect were ambitious concepts of legal fields of law, which were meant not only to encapsulate defined bodies of rules and principles, but also to serve as repositories of both substantive and procedural norms through which the law

could be used to advance goals of political intervention and social justice (Riesenfeld 1955; Jones 1958; Mashaw 1983). But the boundaries between public and private areas of law remained unavoidably fluid, and eventually called into question the neatness of distinctions between different legal fields and their quality as either public or private. Overarching and field-crossing legal concepts such as “economic” or “social” law emerged less as proposals for new legal fields than as critical interventions to prompt a revisiting of the justification of calling this or that area “private” or “public.” A key actor in this critical project was a private international lawyer at the University of Frankfurt in the 1960s.

A. Rudolf Wiethölter and the Search for a Political Anthropology

In his 1964 inaugural lecture “*Die Position des Wirtschaftsrechts im sozialen Rechtsstaat*” (“The Place of Economic Law in the Social Rule of Law”), Rudolf Wiethölter called for a “political anthropology.” Its necessity emerges, he argued, with the effort to create a “culturally as well as socially responsible, new society.” In his view, a political anthropology should make it possible to conceptualize a *homo oeconomicus* for a highly rationalized market society, along with a *homo politicus* and a *homo socialis* for a “modern democracy” (Wiethölter [1965] 2014, 43-44).³

Wiethölter made these observations in the context of an emerging welfare state tasked with nothing less than addressing, indeed resolving, the tension between political and economic power (Luhmann [1981] 1990). In his lecture, Wiethölter ties the precariousness of such an undertaking to a dualist understanding of a nonpolitical, “private” sphere of the market, on the one hand, and a political, allegedly committed-to-the-common-good, “public” sphere of the state, on the other. In Wiethölter’s words:

Economic processes today are of political relevance but capturing them with the help of categories such as *intervention* by the state into the economy, or through imageries of boundaries and *steering* of “per se” free economic exercise, they will be seen too narrowly, as already manifests itself in thinking about the political sphere in terms of boundaries and frontiers.⁴

Against this background, Wiethölter recognizes the emergence of “economic law” (*Wirtschaftsrecht*) during the First World War as a pivotal moment for the *legal* transition from night-watchman state to welfare state. Writing in the mid-1960s, looking back at the “historical urgencies of the Reich’s termination, the improvisations of the Weimar Republic, the NS Regime and the reconstruction after 1945,” Wiethölter observes that the opportunity never seems to have really presented itself to “lay the foundations of an economic law framework, whose institutional design and architecture would have been adequate for the conditions of the twentieth century as they became apparent” (Wiethölter [1965]

³ Meanwhile, he saw the current reality as marked by “business representatives who are sweeping political plans off the government’s desks, [and] union leaders who declare themselves as the determinative social class while employer representatives dismiss union demands as backward-oriented, Marxist class politics” Wiethölter [1965] 2014, 44 (author’s translation).

⁴ “Wirtschaftsabläufe sind heute von politischer Relevanz, in welcher sie mit Kategorien wie Intervention des Staates in die Wirtschaft, Schranken und Lenkung der ‘an sich’ freien Wirtschaftsbetätigung ebenso zu eng gesehen werden wie entsprechendes Schranken- und Grenzendendenken im politischen Bereich.” Wiethölter [1965] 2014, 47n2 (author’s translation, emphasis added).

2014, 50). In this constellation, “[e]conomic law served both as magic formula for a present it could not master and as a program of hope.”⁵

In the end, while economic law became a label for political decisions driven by the regulatory demands of the day, it could neither provide a concise conceptual framework to explain law’s relation to the economy, nor, indeed, help in satisfyingly distinguishing between law and the economy. Instead, the more the term “economic law” was employed in the context of ever faster expanding and deepening areas of regulatory governance, the less it offered clear guidelines—doctrinally *or* normatively. The urgency and, yet, the ambivalence of economic law became the elephant taking up ever more space in the modern state’s regulatory room. Even when addressed, it quickly became apparent that the real issue was that the term didn’t seem to clarify the relation between its two component elements—law and the economy.

B. “*Economic Law*” as a Critical Resource

We have yet to transcend this theoretical problem. The struggle over economic law repeatedly unfolds during periods of transition and crisis, which for lack of better categories get tagged as either “market failure” or “government failure” (Mestmäcker 1990, 423; Goodman n.d.). The distinction is remarkable for its deceptive simplicity as it pits competing sources of agency against one another by denying their co-dependency. The phrase “markets versus states” thus works as organizing framework and ideological device. What becomes visible is that terms to describe, explain, or change conditions regarding the state and the market are not simply given, but developed and mobilized—most importantly—with intent. In this juxtaposition of a *political* state and a *non-political, autonomous* market sphere, the state always ends up in defense. Instead of recasting the state as the sphere of democratic, political organization of societal relations, including those of the market, the state is pitted against the market as a looming threat.⁶ The use of the term economic law plays an important role here. While it could be used to help overcome the depoliticization of the, itself, politically constituted and regulated market (Hale 1923; Cohen 1933), it achieves the opposite. When used to qualify areas of law that are associated with the market, it ends up obscuring the political constitution of the market by implying that certain areas of law are themselves “economic” in nature. Wiethölter’s project is to keep the category of economic law in play but to change the imaginary, conceptual space it can help create. Instead of allowing it to continue as a label attached to allegedly “obvious” fields of legal regulation in the core or vicinity of private law, Wiethölter rightly asks whether the term ought not to be used as a question mark, prompting us to inquire how law—whether “public” or “private”—regulates societal relations altogether. This sets the bar very high, because the term itself resists a firm grasp. As a “magical paradox, economic law overwhelms both lawyers and law while it is simultaneously being dominated by them” (Wiethölter 1972, 531). This is particularly true where legal fields are situated at the intersection of the public and the private, such as competition law, public procurement law, financial regulation, or consumer law. What makes economic law so slippery is its ambivalent position between competing constitutional understandings of market governance, which themselves emerge

⁵ “Das Wirtschaftsrecht diene gleichsam als Zauberwort für eine nicht zu bewältigende Gegenwart und zugleich als Hoffungsprogramm.” Wiethölter [1965] 2014 47n2 (author’s translation, emphasis added).

⁶ “The state—the machinery and power of the state—is a potential resource or threat to every industry in the society. With its power to prohibit or compel, to take or give money, the state can and does selectively help or hurt a vast number of industries The central tasks of the theory of economic regulation are to explain who will receive the benefits or burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources” (Stigler 1971, 3).

against the background of competing political theories (Macpherson 1962; Polanyi [1944] 2001; Hayek [1944] 2009).⁷

And yet, economic law can have a critical potential when it is used to expose the role played by both the state and other powerful actors in governing, regulating, and indeed constituting market activities. This, however, doesn't solve the problem of how to avoid understanding the qualifier "economic" as tied to areas of law which partake in the larger universe of private law and are thus associated with the market. To the degree that the term is used in that sense, it tends to eventually remove an entire area of law and regulatory governance from the sphere of the political, something that the Legal Realists aptly illustrated with regard to property and contract law (Hale 1923; Cohen 1927; Cohen 1932). Used thus, the political quality of law and its grounding in (democratic) agency is rendered invisible, making the categories of private law available for instrumentalization and "mystification" (Harris 1994; Kennedy 1996). To disentangle the term as such from this web of references requires its use in a different manner. It requires a shift from application of a purportedly self-explanatory category to interrogating the meaning of the term in the first place, before asking in whose interest and with which intention we ought to apply it to a particular area of regulatory governance. This would ultimately open up a space of contestation in which the purpose and direction of a(ny) legal field could be scrutinized as part of a political deliberation of *how* society ought to be governed.

This recasting of the term "economic law" with the goal of facilitating a *political* critique of law's governing role has significant parallels to the project of Law and Political Economy. LPE, too, prompts us to question and to unpack the tension and relations *between* law and the economy by second-guessing the meanings and values habitually associated with each. The formula itself calls out the deceptive obviousness of the juxtaposition of state and market, public and private, which dominates the legal imagination from contract to corporate law (Bratton 1989). By centering the project on a critique of how law and the political economy are related, LPE takes as its baseline that the political economy cannot be understood without acknowledging and interrogating the role of law as such.

This is why it makes sense to reconnect with Wiethölter's engagement with economic law in our elaboration of LPE as a site of contention and laboratory for critical inquiry and political analysis. As a formula or descriptor, economic law draws our attention to the paradoxical nature of the boundaries between the *agents* (the political system, the state, and policy making, shared across a range of public and private actors) in a post-welfare state context (emergency relief programs, election "reform" legislation) and the *object* (the market, the economy, corporations, contracts, essential workers). The nature of these boundaries is paradoxical because, while creating the impression of two distinct spheres that exist autonomously on either side of the division, these spheres are, in fact, deeply intertwined and inseparably linked. As a result, the importance of either cannot be fully measured without considering the connections between the two—which pushes us to unpack what it is that we identify on either side, rather than taking "law" or "the economy" as a given.

The unpacking is necessary, for as we know, the task of conceptualizing the possibility of a democratic state and allegedly self-governing markets is fraught with problems (Macpherson 1973; Drache and Kroker 1987). For one, our reliance on distinctions between state and market or public and private leads us to ignore the actual role of power and agency in these constellations. The risk is even greater

⁷ While a still-common distinction in this regard is between "socialist" and "liberal" approaches (Mestmäcker 1990, 410-411), the term certainly reaches beyond these poles.

when we deny the normative construction of each sphere, thinking of the state as the repository of ideally rare “intervention” while the market is supposedly a sphere of autonomous, private self-regulation (Hale 1923). This design also shapes the modern understanding of the business corporation, especially where it is being represented as both separate legal entity and contractual business vehicle. This collapsing into each other of a public licensing act and a private contractual arrangement, in which the latter eventually eclipses the former (Bratton 1989), repeats the normative argument in which the state should “stay out of the economy” (Stigler 1963; Jensen and Meckling 1976). What this argument obscures is the actual regulatory organization of both the corporation as a legally reinforced separate legal entity, and the market as a sphere of rights-based (not natural law) contractual exchanges. This regulatory organization is the result of political choices, not a natural evolution. The recent LPE intervention is fortuitous as it further fuels and connects with the ongoing normative exposition and critique of such choices, whether in regard to the renewed discussion around the “purpose” of the corporation (Katelouzou and Zumbansen 2020), or in the context of calls for an inclusive and democratic, decolonialized, and non-racist society.⁸

We can see already in Wiethölter’s wide-ranging work—from corporate to labor law, from competition to free speech, conflict of laws, and legal theory (see Wiethölter [1965] 2014)—the varied battle- and testing-grounds for the elaboration of “economic law.” The term emerges, again and again, as a critical category *within*, but also as a lever of critique *of*, law. For Wiethölter, it has always been clear that for economic law to be an effective critical tool, the lawyer had to keep pace with a cohort of competing social theories. Among these theories, Wiethölter highlights sociological systems theory, the economic analysis of law (Law and Economics), and critical theory (for which he identifies Jürgen Habermas as a key thinker)—while never losing sight of the idiosyncratic, unique manner in which law engages the world (Wiethölter 1989). As we will see, this disposition gave rise to an immensely complex agenda. In Wiethölter’s numerous engagements and interventions, inside and outside of the classroom, with “what the courts do in fact” (Holmes 1897, 460-461; Frank 1931-1932), he lays bare the tensions that run through each judicial decision and which reveal themselves as the crystallizations of competing conceptions and “models” of society. Meanwhile, he insists that law itself should have little interest in models, for the law’s work is not about creating an edifice, nor issuing recipes. Instead, in Wiethölter’s view, law constantly reminds us of the need for benchmarks, fora, and processes (“*Maßstäbe, Foren und Verfahren*”) (Wiethölter 1988, 21). How better to describe “law in context”?

At this point, we must ask ourselves whether or not the term economic law is still too overburdened to be put to practical, ultimately critical use. After all, as a name, a label, and a category, it is merely a representation *of* and a pointer *to* complex relationships between different spheres of power. How, in other words, can economic law help us develop a critique of economic relations and of the role of law in them? This question does not seem altogether very different from those at the center of LPE: here we ask ourselves how a critique of legal governance structures ultimately relates to political activism (regardless of whether the goal is reform or revolution) and to the contestation between different theories of society. What both economic law and LPE prompt us to engage with is that legal governance structures, while always being tied to particular situations and sets of facts, which include

⁸ See Farjat 2002, 154: “Le système économique provoquerait des conflits systémiques en raison de sa position dominante, sa tendance hégémonique dans les sociétés contemporaines. Faut-il mettre fin à cette tendance hégémonique, si elle existe? Si c’était le cas, le droit économique devrait essentiellement avoir pour objet de poser des limites à l’économie” (“The economic system is bound to provoke systemic conflicts due to its dominant position, its hegemonic tendency in contemporary societies. Should an end be put to this hegemonic tendency, provided it exists? If that was the case, economic law would have its primary purpose in setting limits to the economy” (author’s translation)).

constellations of violence and power, simultaneously exist as normative, symbolic, self-referential universes. As such, it seems these legal “orders” cannot that easily be tied back to a neatly defined place of agency. Political agency in complex assemblages of power is not reducible to an address, the seat of “government,” or a court’s dictum. But neither can the term “market” ever conclusively depict or engage the power that structures it and the law by which it is governed. What both economic law and LPE render visible is the treacherous N&N classification of “normal” and “neutral” which dominates most depictions of laws relating to the economy. The access point of their critique is the rhetoric by which the market is effectively removed from the realm of the legal-political. On the basis of the (still) dominant dualisms of state/market, public/private, and political/economic (Hale 1923; Cutler 2016), the market becomes insulated from law by insisting that market-governance receives its cues and normative approval from the market itself. As we are led to believe that the market—now itself seen as the jurisgenerative subject—not only *is* itself able to provide the (self-)regulatory norm apparatus but also *must* be the ultimate arbiter in providing the justification for how it should be governed, market “law” becomes autonomous. Ultimately, it now is completely removed from how we otherwise (would like to) think of law in a democratic society. Polanyi’s anatomy and nightmare: at that point, there is no longer an outside to the market. The market and its logic have become the world.

Contrast that version of the market’s economic law with the economic law which we are mobilizing here from an LPE perspective. It appears as if the promise held out by both economic law and LPE was for a method of unpacking and exposing the market’s governance structure, in order to put its underlying principles and the allegedly self-regulatory character of its infrastructure along with its complementing allocations of rights and responsibilities back “on the table” and into the public forum of democratic deliberation. A key in this endeavor is the sociolegal counterattack against the rhetoric of autonomous economic agents at the heart of neoliberal political theory. This counterattack is necessary to rebut the claim that markets are facts rather than constituted realms of power. Economic law, now turned into a question and into a lever of critique—“*which* law for the economy?”—cuts across dividers between public and private law, and places law in the context of the actual political economy and its governance structures. In a similar way can other improbable terms (think of “war on terror,” “climate change law,” “surveillance law,” “supply chain law,” “modern anti-slavery law,” “law and artificial intelligence,” etc.) be applied as torch lights and tools of critical illumination of how particular socioeconomic facts are depicted and appropriated by law. This might be the first step in pushing back against the asserted factualness and self-explanatory nature of an in itself incompletely conceptualized regulatory response to complex societal conditions. As we begin to second-guess newly emerging legal fields, law shows itself to be an all-consuming parasite that continuously appropriates bits and pieces of the world around it by calling each piece “x-law” (or, “law and . . .”).

It becomes obvious that we must know who does the naming. As we will later see in the context of the case of “global administrative law,” the employment of a particular name or label to launch a strategy of conceptual design is part of the legal routine. Even fields of law with a very long pedigree offer daunting insights into the battles over meaning which shape their respective evolution and their respective legal histories (Atiyah 1979; Macneil 1974; Davies 2007). These underpinnings become even more striking in recent contexts of identifying and naming newly emerging or proposed fields of law, whether they are “security,” “big data,” “climate change,” or “AI and algorithmic governance” (Cohen 2019; Abbott 2020; Barfield and Pagallo 2020). This feeling of discomfort with a purportedly new field of law is tied to a concern over what this newness stands for and who or what is behind it. What, in the end, do we say about the *place and function of law* when we recognize its increasing “specialization”

and “technicization”? How much, in other words, does the fight over this name or that label reveal about the underlying value conflicts and the interests that are at stake (Staff 1987)? Writing in 2008, the Norwegian legal theorist Inger-Johanne Sand approached this question in the following way:

The range of what is recognized as political and thus also as possible objects of political and legal regulations has . . . gradually changed in the direction of a more comprehensive concept of the “social”. Economic, technological and other knowledge-based areas are seen as political in the meaning of having political effects and are thus increasingly objects of political and legal decision-making. Law is then increasingly exposed directly and intensively to a variety of social discourses. The understanding of the interaction between economic, technological, knowledge-based, political and legal forms of communication are then becoming increasingly significant and acute. (Sand 2008, 46)

This assessment appears still pertinent today, even more so as battles over the way in which society should be governed are carried out in the public sphere with frightening degrees of vehemence and force, placing an even greater burden on public policy makers, regulators, and scholars in the current “age of anger” (Mishra 2017). With the apparent erosion of public trust in the institutions of government and the collective democratic project in large societal sectors, the institutional foundations of contemporary democratic societies are aching under pressure (Hochschild 2016; Brooks 2020). This engulfs the state at a time when its democratic governance and management of the pandemic are scrutinized with greatest urgency in a legitimacy crisis and the personalization rhetoric of neoliberal attacks on state health care can no longer hide its ugly face (Cardona 2020, 2-3). That the continuing pandemic disaster could in 2020 prompt choices between “science” and “politics” seems tragically out of step with an understanding of law as part of a historically evolving political economy. Its adequate anatomy requires a nuanced and differentiated analysis of the relations, interactions, interdependencies, and operations of public and private actors over time, and must prevail against the noise of “either-or.”

Meanwhile, in all this, “the state” remains an important reference point for the political struggle over strategies, remedies, and emergency relief programs, even when its political legitimacy is under pressure from populist anger and alienation. This constellation is a particularly problematic one from the perspective of law, which remains tied to both the actual, historical experience of the state and to its symbolical aura. This state is not merely an assemblage of rules, institutions, and buildings, but a formula and an abbreviating circumscription, used to describe a particular, historically evolved form of political organization. This is why a project such as LPE must resist any reification of the state and, instead, engage with the sociological analyses of functional differentiation and state transformation that have emerged over the past couple of decades. As a critical project, LPE should maintain a skeptical stance towards a traditional, progressive belief in the state as power broker, as democratic agent, and as a platform of collective democratic empowerment without also acknowledging the actual and epistemological transformation of the state over time. The identification of neoliberalism’s destructive impact on society opens a first window on the ways in which the state has fared and journeyed through time—but it does not yet offer a complete view on how the state has operated since the rollback of the welfare state and its transformation into a moderator and enabler.

IV. Language: Economic Law's Anti-Formalist Inheritances

An important step of mobilizing the category of economic law as a critical tool must be taken in the context of legal language. The intricate connection between law and the state is, above all, tangible in legal discourse. Today, we are able to draw on a rich body of work spanning over more than a hundred years that scrutinizes the purportedly self-explanatory, technical nature of legal language (Jhering [1873] 1915; Pound 1910). The analysis notably exposed the role of law in invisibilizing and politically neutralizing structural inequalities (Marx [1843] 1978; Kennedy 1976; Harris 1990; Kennedy 2001). Scholars from Foucault to Luhmann and Teubner have shown that a political critique cannot simply rest on opposition to X, but must be compatible with and draw on an adequate study of societal conditions (Teubner 1992; Zamora and Behrent 2015). In short, it comes down to the crafting of a distinctly interdisciplinary lens through which we engage with the different infrastructures and assemblages which sustain neoliberal structures of inequality and exclusion (Wiethölter [1965] 2014; Lazzarato 2009; Sullivan 2020). Where Foucault scrutinized the discursive and non-discursive “dispositifs” of power that make up the economy and the context in which the individual becomes an “entrepreneur of oneself” (Foucault [1979] 2004, 232), Wendy Brown endorses Foucault’s analysis of neoliberalism as a “novel political rationality” where market principles become “saturating reality principles” that govern “every sphere of existence” (Brown 2019, 19-20). This analysis takes aim at the experience of life which is shaped and governed by neoliberal ideology and legal-regulatory infrastructures, and which impregnates every fiber of society today (Brown 2015). In her most recent work, Brown takes her Foucauldian analysis still further as she traces the development of neoliberal thought through the work of its key thinkers, foremost Carl Schmitt and Friedrich Hayek, to show how eventually the neoliberal move resulted in a far-reaching and immensely destabilizing depoliticization of democratic life. “Management, law, and technocracy in place of democratic deliberation, contestation, and power sharing: several decades of this multifaceted hostility to democratic political life has generated in neoliberal populations, at best, widespread disorientation about the value of democracy and at worst opprobrium against it” (Brown 2019, 57-8).

It is important, then, to keep the different lineages of anti-formalist critique of law’s *affirmative* effect (Singer 1988),⁹ however unsuccessful this intervention might have been in impacting the mainstream (Schlag 2009, 805n7),¹⁰ in mind when engaging a particular concept—such as economic law—as critical tool. Anti-formalism, Legal Realism, Critical Legal Studies, feminist legal theory, post-structuralism, and postcolonial legal theory are different building blocks that today contribute to a comprehensive, interdisciplinary critique of neoliberal political economy. Using a complex concept such as economic law can then allow us to consider its present use and how it has been shaped by these theoretical interventions. So, while, as a term, economic law—“*Wirtschaftsrecht*”—might carry with it the above-described risk of associating a legal field with “the market” rather than problematizing the normative assumptions at the heart of the legal field, it can also serve as an instrument of conceptual critique and as an entry point into the much larger interrogation of law’s relation *to* and its place *in* society.

The key here is not to replace one label for another in the hope that a new name might magically resolve the deeper problems connected to the demarcation between the normative universes of public and private in the background of particular legal fields. How an act of naming a (supposedly new) legal field can be turned into critique was impressively illustrated in the case of “global administrative law”

⁹ “We are all legal realists now. Or are we?” (Singer 1988, 467).

¹⁰ “It’s as if cls never happened. Hell, it’s as if Holmes and Llewellyn never happened” (Schlag 2009, 805n7).

(GAL) (Marks 2005). One of their central motivations, according to its proponents, was a continued frustration with the normative and doctrinal arguments that were being made in the context of global constitutionalism and global constitutional law. Bringing with it notable challenges of its own (Harlow 2006; Chimni 2005; Zumbansen 2013), the juxtaposition of administrative and constitutional law projects on a global scale was arguably driven by a more modest ambition on the part of the former when compared to the more holistic aspirations of the latter. “GAL is not a direct rival to constitutionalist visions; with its more limited ambition and different aims, it operates on a somewhat distinct plane . . . GAL . . . focuses on questions of accountability . . . and can therefore to some extent avoid the all-encompassing normative connotations of notions such as ‘legitimacy’” (Krisch 2009, 11-12). As administrative and human rights lawyers aptly highlighted, a project such as GAL, which seeks to carve out a viable accountability approach to the governance of powerful institutions without embedding the administrative rules in a constitutional framework, is bound to encounter fundamental legitimacy issues, not least because the creation of access and participation modes continue to depend on an ongoing assessment of who actually has capabilities to make use of them (Harlow 2006; Chimni 2005), something that the GOP’s infamous “election protection laws” of early 2021 illustrate only too well (Fausset, Corasaniti, and Leibovich 2021).

Meanwhile, sociolegal theorists have long been skeptical towards this sort of trading of process for substance, arguing that the distinction between formal and substantive could no longer, if ever, adequately capture the complex constellations of contemporary societies. What is required is a category or concept that challenges the distinction between these poles by problematizing the assumptions that underlie each. As such a concept, Wiethölter proposes the introduction of *procedural law*:

The transition from legal guarantees to political guarantees of social positions touches the category of law at its roots and entangles rule of law societies in systemic crises . . . This accounts for the change of legal programs—beyond formalization and materialization—to proceduralization: these programs are no longer aimed at the creation of social guarantees (in the form of law providing a particular “freedom”) or of provisions and subsidies (in the form of political administration). Instead, they seek to create the *conditions of possibility* of such guarantees and provisions by searching for the optimal selection of organizations, processes and personnel for their realization in the form of “reflexively” learning social systems. (Wiethölter [1982] 2014, 426-427) (author’s translation; emphasis added)

This kind of proceduralization carries great promise for a renewed use of the term and concept of economic law. For Wiethölter, procedural law is not to be confused with the law of civil or administrative procedure. Instead, it must be thought of as a means of opening up a space of critique and intervention. By going beyond the recognition of rights as barriers (for example, *against* the state), it second-guesses and scrutinizes rights as to their *actual* and *conceptual* capability to provide effective platforms for a political shaping of spaces of autonomy (Wiethölter [1986] 2011). Proceduralization of law is more than a reference to *process* as part of law’s jurisgenerative (law-creating) and executory (law-implementing) infrastructure. As an ambitious, institutional-normative concept, proceduralization connotes a particular *state* and *function* of law, where law is a framework, a platform, and effectively a laboratory for struggles over the structure of a democratic society. As such, the proceduralization of law designates a task rather than a fixed state of stability. As the term proceduralization calls into question the alleged reliability of law as foundation and refuge, it subjects law to critical examination.

In that vein, the example of economic law highlights problems that already mark long-existing fields of law. These, too, must be interrogated regarding their encapsulated regulatory purpose and hidden agencies. Whether or not we refer to law as public, private, domestic, international, contract, tort, labor, corporate, criminal, family, constitutional, administrative, cyber, information, anti-slavery, and anti-sweatshop, we must not store them in different compartments but, instead, ask what this particular area of law is *meant to do*, and in whose name. Proceduralization responds to the concern that law's categories, whether formal or substantive, fall short of capturing how law is regularly overwhelmed when being tasked with reconciling two dimensions: namely, on the one hand, being a set of regulatory rights, principles, and rules directed at managing the relationship, including the setting up of barriers, between the individual and the collective, and, on the other, being a transformative instrument for democratic societal change. Proceduralization emerges from the paradigm shifts between a formal rule of law and a substantive social or welfare state, but it can be mobilized as a critical tool well beyond the survival struggles of the welfare state. As it problematizes the legitimacy of a legal rule not only in a political sense, but also in a cognitive one (Campos 2019, 401), the concept of proceduralization exposes the fragility of law's capacity to handle, manage, and control causality in terms of input and output, by sensibilizing us to become aware of how law's ritualized employment invisibilizes the knowledge and power it perpetuates.

V. Towards a Sociology of Economic Law

It is important to understand that the idea of a category of procedural law and the return to a critique of economic law emerged at a moment in which the role of the democratic welfare state in providing for the common good had started to come under mounting pressure. It is in that moment that progressive legal theorists argued against the consolidation of a technical rationality of the modern bureaucratic state which, by redrawing the line between the state and the market and the public and the private, effectively neutralized political conflict through the invisibilization of structural inequalities (Forsthoft 1971; Staff 1987). The mobilization of economic law was driven by the desire to lay bare existing power dynamics in social and institutional arrangements which distinctions between public and private continued to obscure. This could not be achieved as long as the qualifier "economic" served to mark the degree of proximity of a legal field to the economic sphere, the market. Instead, the concept had its greatest potential in posing the question *how* a legal field related to the overall economic nature of society, and *where* political agency rested in driving the direction of regulatory outcomes.

The battleground par excellence for this intervention had to be the larger universe of "private law." We had already learned through the Legal Realist critique during the early twentieth century that in order to attack private law's alleged formality we needed to expose its ideological distance from the socioeconomic conditions of contracting parties with starkly unevenly distributed market power. The Legal Realist critique also illustrated how private law tends to both extend and hide the power-wielding, regulatory reach of the state into private relations (Hale 1923, 478). This sensitized us, throughout the experience of the mixed economy of post-authoritarian, capitalist market societies and their subsequent evolution from welfare statism to financial, neoliberal capitalism, to continue to view private law in context and thus to be able to engage its political implications (Assmann et al. 1980; Joerges 2005; Joerges 2016).

In the present moment, the major challenge for the mobilization of the ideas of procedural law and economic law arises from the fact that we find ourselves confronted with a starkly different,

transnationalized geography of law and regulatory governance. In trying to capture the challenge posed on the transnational level for law, we tend to exaggerate the differences between the sphere of the nation-state and of the global respectively (Walker 2014). By painting the contrast between the legal institutional infrastructure of the declining welfare state and post-industrial society and the heterarchical transnational regulatory landscape with its overlapping domestic, international, public and private actors, norms, and processes in stark colors, we imply that the respective institutional infrastructures are not only incompatible with one another but that they are fundamentally different. Much suggests, however, that the transnational arena should more adequately be seen as a continuing accentuation and, indeed, *amplification* of the transformative changes that modern states have been undergoing all along (Teubner 1986; Scott, Cafaggi, and Senden 2011; Shaffer 2012). Rather than effectively romanticizing the alleged coherence of the rule of law on the domestic level by comparing it to the onslaught of a wild-West globalization, we should investigate the actual continuities between neoliberal state transformation and the contemporary proliferation of complex transnational arrangements as, for example, in food security, climate change, corporate governance, or modern slavery law (Affolder 2020; Canfield 2021; LeBaron and Rühmkorf 2019).

This, then, opens up a space for a productive mobilization of the category of economic law and of the idea of procedural law, as they allow us to see that these regulatory arrangements and assemblages are never emerging in a vacuum. In this fluid regulatory geography, we still must ask where the political agency lies and how and why certain actors, norms, or processes are characterized as “private” (Cashore 2002; Scott, Cafaggi, and Senden 2011). In turn, the idea of procedural law unfolds significant potential when we begin interrogating the actual constellations of legitimacy and inclusion that govern processes such as the Bangladesh Accord in 2013, rather than juxtaposing “private” and “public” regulatory arrangements from an abstract normative vantage point (Backer 2016; Eller 2019).

VI. The Merits and Shortcomings of Legal Institutionalism

Like transnational law, with which it shares many traits, economic law does not constitute an attempt to call everything by the same name. Instead, economic law and transnational law are *methodological* keys with which to open up sites of inquiry into the ambivalent nature of law, the state, and the economy, and how these relate to one another. My suggestion is not to give up quite yet on law, even if there is no denying that its invocation in the transnational realm can hardly summon a functioning infrastructure of law creation and enforcement based on democratic endorsement. In the best sociolegal tradition, we are called on to pay close attention to the intriguing conflation of manifestations and arguments surrounding the myriad forms of “law” and “non-law” today. Law as argument unfolds through language, which makes it ever more important to scrutinize who controls the content being communicated (Merry 1990). With a view to law’s societal variety and the actual manifestations of legal pluralism, it will no longer be an option to confine matters of legal doctrine to the realm of abstract, principled reasoning without inviting the potentially unsettling and destabilizing “reality check.” Climbing down from the heavens of pure legal concepts, we find ourselves confronted with an immensely incoherent and messy world of legal and regulatory governance. This is the material we deal with, and when we come home from where the Wild Things are, neither Max nor we will find a warm dinner waiting for us.

The question that remains is how to further refine and consolidate the methodology with which to confront this material. A more recent intervention suggests a return to a critique of Legal Institutionalism. I have several concerns with that proposal, relating, on the one hand, to the theory’s

prioritization of conceptual and doctrinal critique over a more serious engagement with sociological facts and, on the other, what seems to me to be a too-narrow focus on socioeconomic forms and qualities of exclusion and inequality. While an important contribution to the LPE project, the Legal Institutionalism approach appears not to go far enough in investigating the actual patterns of *how* law in its societal operation continues to facilitate, implement, consolidate, and justify social outcomes and structures (Deakin et al. 2017; Pistor 2019). Approaching law, for the most part, as an instrument that “codes” (Pistor 2019) social relations in ways which sustain and reinforce social positions and, as a result, also perpetuates preexisting power asymmetries (“injustices”), often by justifying the coding as a response to *demands*, say, of the “market,” “security,” “efficiency,” “progress,” “civilization,” or something else, goes some way toward illuminating a relationship of cause and effect. But it falls short of even more concretely interrogating law’s forms and effects in their actual operation on the ground.

The main motivation for the Legal Institutionalism critique is a combination of unmasking and revelation (cause) on the one hand, and of accusing and transforming (creating a different effect), on the other. But, in that move the form of law itself ends up being treated in a too formal and reductionist manner. The Legal Institutionalism succeeds in calling out the structural adjustment that legal rules (the “code”) put in place, but doesn’t explore much further how legal language prefigures and then consolidates and reinforces social positions of unequal power as *everyday law*. While Legal Institutionalism casts a bright light on law’s role in a capitalist economy, it doesn’t reach deeper into the postcolonial, racial, and gender structures of this economy. This has potentially two consequences. One is that law risks being underestimated as to its linguistic ability to invisibilize social realities; the other is a tendency to overestimate law with regard to its purported availability to be instrumentalized and put to good use.

First, in failing to acknowledge that law is only ever able to process anything in the “real world” by pressing it into the distinction of lawful/unlawful, Legal Institutionalism only partly illuminates the materiality of legal instruments and choices and their respective political effects, and thus falls short of explaining how the legal code itself could be broken. The wealth of critique that has already been developed to unpack the power-consolidation and power-distribution dimensions of legal language remains largely unexplored. The second consequence of identifying law as a culprit while continuing to believe in it as a viable candidate to bring about change illustrates a continuing neglect of and engagement with the legal pluralist nature of law’s existing infrastructure. The heterarchical assemblages of legal norm production and norm contestation on both the domestic and global level (Santos 2018; Bartley 2018) require more sensitivity to the inchoate, fluid nature of transnational actors, norms, and processes than Legal Institutionalism seems willing to display in its continued attachment to the idea of law being predominantly a product of the state.

VII. Conclusion

Like Legal Institutionalism and LPE, economic law has so far been discussed as a critical tool seeking to unveil, resist, and, ultimately, transform existing power structures. As such, it immediately raises longstanding concerns regarding the difference between law and politics and between law and morals, as well as, effectively, law as a social science (Pound 1931; Cairns 1935). LPE cannot push these queries aside but, instead, must engage them in its search for a comprehensive critique of law’s exclusionary and redistributive social effects. Similarly, economic law must be understood as part of a social theory interested in the following question: Why, in our search for a legal response to all the different plights

humans face, can we not simply turn to law? Not contract law or tort law, not corporate law or labor law, just law.

We have already seen how the differentiation of law is in part reflected in the naming of different fields, areas, and specializations of law. Who does the naming? Just as we saw that drawing lines between different legal fields is not a given, but the result of choice, the management of legal fields involves political agency. In that vein, I argued that economic law should be understood as a method, a question, ultimately a political demand. In calling out and resisting purportedly obvious denominations and natural distinctions such as public/private, economic law might have the potential to facilitate a critical engagement with law's role in reimagining the categories of public and private anew. This is not a matter of legal philosophy. Projects such as Legal Institutionalism and LPE should embrace the challenge of seriously and comprehensively engaging with the diversity of violence and discontent that the public/private distinction obscures, whether with regard to questions of gender and the legal status of women and family (Boyd 1997), racism and racial violence (Harris 1990; Harris 1993; Leong 2013), the socioeconomic critique of the "employment" category (Klare 1982; Cherry 2019), or the societal role and function of the corporation (Berle 1954; Baars 2020; Katelouzou and Zumbansen 2020). In each instance, the task is to render visible the routines and inherited legal categories in the context of the socio-regulatory infrastructures in which law operates.

Just like law, economic law points us to questions of agency, responsibility, and legitimacy. It evokes the tensions between existing and imaginary spaces of collective, inclusive decision making, and requires us to ask hard questions. Economic law, imagined a long time ago at the intersection of a formalist rule of law whose aim it was to wield the principle of legality against arbitrary power, on the one hand, and an emerging welfare state ("*Sozialstaat*") that stretched the boundaries of new rights to their limits in the name of equality and justice, on the other, might still be a useful way to think about political choices and the circumstances in which they are made. At the same time, these ascriptions are likely very limited in their explanatory capacity with regard to other times and places of state building and state transformation. Any such inquiry, then, must learn to relativize, ironize, and decenter the dominant Western narrative of constitutionalization (Santos 2018; Urueña 2021) in the hope of coming closer to a non-Western, inclusive, and transnational critical legal dialogue.

The methodology of transnational Law and Political Economy envisioned here aims at remaining faithful to the idea that one must immerse oneself in the intricacies and idiosyncrasies of the local and historically contingent context—but this must be done with the ironic recognitions that "we" and our beliefs, preconceptions, and views of the world are not universal, that we are not alone, and that our particular histories of development, of state foundation, and state transformation are relative to potentially very different ones elsewhere (Bhabha 1992; Grosfoguel 2011). The project of a transnational LPE methodology, in other words, concerns the drawing of connections between different idiosyncratic experiences, not in the spirit of universalization, harmonization, or unification, but in grounding a new understanding of the nexus on the values of difference and contingency. This, arguably, has tremendous consequences for law/political economy approaches, which are so often still not only entangled in unreflective references to solely Western experiences and genealogies of state and society and public and private, but whose protagonists, too, appear to be either unwilling or unable to break out of those frames without either falling back on routinized modes of "comparative law" or seeking refuge in the ephemeral sphere of the "global."

As we have seen when tracing one such concept—"economic law" and its extrapolation in the form of "economic constitutional law" (*Wirtschaftsverfassungsrecht*)—from the Germany of the 1960s into

today's disembodied, transnational spaces of global value-chain capitalism (Knöpfel 2020), it becomes apparent how the concept not only originated in a particular historical, socioeconomic setting but also, arguably, how it seems to also crucially depend on these very settings. In other words, the question still on the table is whether and how it might be possible to think of an economic law from the perspective of transnational democratic politics.

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