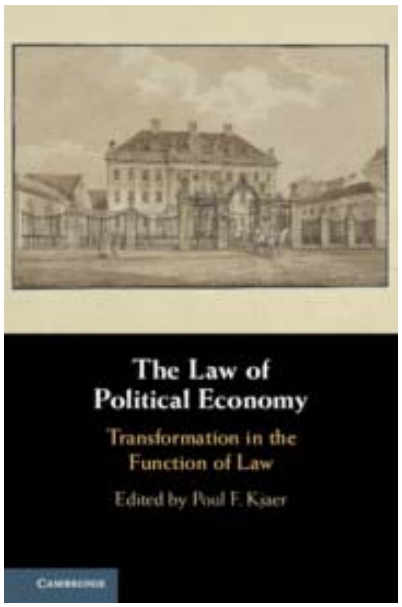

The Law of Political Economy: Transformation in the Function of Law

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Chapter 1

The Law of Political Economy: An Introduction

Poul F. Kjaer (Copenhagen Business School)

Abstract
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 capitalism. Going beyond this schism, two particular features appear as central to the law of political economy: the first one is the way 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. 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. The two distinctions can, however, be overcome through a third-way, emphasising the strategic role of law in mediating between holism and differentiation and hierarchy and spontaneity. This is demonstrated through a historical re-construction of the evolution of corporatist, neo-corporatist, and governance-based institutional set-ups of political economy.

Keywords: political economy, economic law, corporatism, neo-corporatism, governance, ordoliberalism, embeddedness, law and economics

Chapter 2

The Legal Proprium of the Economic Constitution

Christian Joerges & Michelle Everson (University of Bremen & Birkbeck College London)

Abstract
Our narrative is rooted in historical analysis but is of vital contemporary relevance. Ernst-Joachim Mestmäcker and Rudolf Wiethölter are celebrated protagonists of the post-war German academic generation and, as such, are each obsessed with the “proprium” of law. Conceptually-rooted in the ordoliberal tradition of Franz Böhm and Walter Eucken, on the one hand, and in the living constitutionalism of Hermann Heller, on the other, Mestmäcker and Wiethölter have consequently trod very different paths in their treatment of economy and society within the legal-constitutional perspective. We are clearly partisan in our allegiance, yet, in recalling the efforts of Mestmäcker to defend the legal co-ordination of the economy within a pre-political “order freedom” (Eucken), and the contrasting endeavour of Wiethölter

to picture the political administration of the economy, as well as the "law-(justification)-making" of its societal law, we are reminded of the naïvety of utopian notions of market constitution, but also of the corresponding difficulties (paradoxes) of political socialisation processes that are mediated by the law. In a contemporary context of European financial and sovereign debt crisis, we find that one of the primary victims of naïvety and complexity is the proprium of law itself, which seems to have run out in the subsuming of economic theory within European law, and which can surely only be re-established with great difficulty through the, as yet to be established, relationship between a societal European law and the emerging grassroots politics of progressive European peoples.

Keywords: economic constitution, ordoliberalism, social *Rechtsstaat*, political administration, competition as discovery procedure, conflicts-law constitutionalism, financial crisis, emergency, normalisation.

Chapter 3

The Myth of Democratic Governance

Emilios Christodoulidis (University of Glasgow)

Abstract
This chapter explores the democratic promise of "democratic governance" and finds it to be a lie. With a particular emphasis on how the *economic* system has cut itself adrift from *legal* regulation and, in the process, re-configured its relationship to the law under the sign of "governance", we explore the logic of a key substitution: the market principle that was understood as the principle subtending the transactional nature of private law as distinct from public law, gradually becomes the arbiter of the separation itself and guarantor of the circulation ("balancing" in the preferred idiom) of public goods. Governance is imported to lend a vocabulary to these significant shifts, celebrated by its exponents as signifier for plasticity and "experimentalism". The chapter explores the suggestion that governance might be thought of as an "empty signifier", in that it performs a function that is typically "hegemonic": it immunises itself by absorbing and re-defining (across its semantic range) any opposition to it. Through a series of substitutions, it performs a self-referential operation that has internalised all its criteria in order that governance be able to define for itself what is democratic about it.

Keywords: democratic governance, empty signifier, stake-holding, hegemony.

Chapter 4

A Political Economy of Contemporary Legality

Duncan Kennedy (Harvard Law School)

Abstract
The chapter starts with an observation: contemporary élite jurists pursue, *vis-à-vis* one another, a "hermeneutic of suspicion", meaning that they work to uncover hidden ideoogical motives behind the "wrong" legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology. The rise of the hermeneutic of suspicion is a striking manifestation of the contemporary transformation of the relationship between legal élites and political economic élites. This transformation accompanies and corresponds to the progressive juridification, judicialisation and finally constitutionalisation of the contemporary social order.

Keywords: sociology of law, legal history, critical legal studies, juridification, judicialisation, constitutionalisation, hermeneutic of suspicion.

Chapter 5

Law in Global Political Economy: Now you See it, Now you Don't

David Kennedy (Harvard Law School)

Abstract
Over the last century, North Atlantic legal intellectuals developed the philosophical, doctrinal and institutional tools which strategic actors use everyday around the world to press their interests, defeat their rivals, and consolidate their gains. At the same time, however, they promoted ideas about law in global affairs which make it difficult to see law's constitutive role in the global distribution of wealth. This chapter explores the interactive history of these two innovative strands before offering an alternative approach to law in global affairs which foregrounds law's role in political and economic struggle ather than its promise of order, its distributional impact rather than its peace-building or humanitarian potential.

Keywords: International law, international political economy, expertise, global governance, international legal history.

Chapter 6

Law of Natural Resource Extraction and Money as Key to Understanding Global Political Economy and Potential for its Transformation

Isabel Feichtner (University of Würzburg)

Abstract

This chapter examines the law of extractive resources and money to clarify law's constitutive role in political economy and, in particular, its implication in the expansion of exploitation. It also indicates how at various past junctures certain legal institutions have been chosen over possible alternatives. It, thus, draws attention to the "institutional toolbox" available for identifying ways in which law may re-configure and transform political economy. More specifically, the chapter explores the distributive effects that law generates - by allocating jurisdiction and exploitation rights, as well as by submitting distribution conflicts either to resolution through political procedures or market mechanisms. It explains how the principles of permanent sovereignty over natural resources and monetary sovereignty provide the basis not only for domestic, but also for international politics to be conducted in the legal framework of international organisations (international commodity agreements and the IMF). The chapter proceeds to trace how the assertion of government control over natural resources led to the expansion and proliferation of markets, not only because it prompted the emergence of a transnational economic law, but also as it contributed to the reverse integration of the industry and consequent changes in the structure of commodity trade. The chapter points to linkages between resource extraction and trade on the one hand and the demise of Bretton Woods and liberalisation of capital markets on the other hand with the effect of further reducing the scope for politics. Finally, it proposes to take a closer look at monetary design both as a driver of extraction and as a potential means to contain exploitation.

Keywords: political economy, extractive industries, permanent sovereignty over natural resources, monetary sovereignty, New International Economic Order, transnational economic law, Bretton Woods, money and finance, austerity, institutional design.

Chapter 7

“Social Nature”: Political Economy, Science, and Law in the Anthropocene

Jaye Ellis (McGill University Montreal)

Abstract
Data-driven approaches to environmental governance, such as those promoted by the planetary boundaries concept, permit the rapid circulation of actionable information on environmental performance through transnational networks operating within the political economy. Some of the most promising approaches emerge from structural cuopling between science and economics, largely bypassing law and politics, and operating in cognitive, rather than normative, terms. Yet a purely cognitive global ecological law, offering no possibility of stabilisation of expectations, would ultimately be ineffective. I argue that a role for law emerges if the normative dimensions of the condensation of complex scientific insights into metrics with a high degree of resonance in the political economy are taken seriously. Law must do more than transduce scientific data into metrics, as though scientists have unmediated knowledge of Earth systems. Rather, the normative dimensions of scientific knowledge-production, notably in processes of judging, arguing, and persuading, create opportunities for the development of norms governing the processes of condensing and translating scientific knowledge of ecological risk into signal of economic risk. As Bruno Latour argues, responses to ecological crisis ought not to be conceived of as a new form of *jus naturalis*, containing norms and standards dictated directly to humankind by the non-human world; instead, what is required is a *jus gentium* that accepts the unknowability of the non-human world, and the mediated – and therefore highly normative – channels through which knowledge of that world is derived.

Keywords: Anthropocene, ecological crisis, Earth systems science, governance metrics, incentive structures, social systems.

Chapter 8

The Transformative Politics of European Private Law

Hans-W. Micklitz (European University Institute, Florence)

Abstract
This chapter should be read as an ideological (self-) critique of the role and function of critical legal scholarship in the rise of the “social” after 1960, first, at national level, later, at EU level.

Critical legal scholars have all too often understood critical legal theory as practice of theory, in which law is there to help to protect the weaker parties in society and to compensate for the imbalance of power. The decline of the welfare state and the "neoliberal move" in the EU teaches us that law can be politicised not only to promote the "social" in the name of justice but also to de-construct the "social" in the name of economic efficiency. The revival of the political economy provides for an opportunity to re-think the role of law in the secular compromise between capitalism and democracy.

Keywords: *Ideologiekritik*, ideological critique, critical legal scholarship, theory as practice, practice of theory, expectation society.

Chapter 9

Socio-Economic Imaginaries and European Private Law

Marija Bartl (University of Amsterdam)

Abstract

The aim of this chapter is to explore how our ideas about the economy and the market shape the way in which we think about the law, as well as how ideas about the law condition our understanding of what the market "is" and what it "needs". I argue that legal and economic discourses share a set of fundamental pre-understandings as the relation between the subject of the legal-political order and the social whole. These shared pre-understandings ensure that the law and legal discourse tend to support, rather than subvert, the tenets (if not the particulars) of socio-economic organisation. However, by uncovering this entanglement, we unearth a potentially subversive role for the law. If law and legal discourse succeed in unsettling the shared pre-understandings, and offer alternative imaginaries as to the role of the law in society, they may become a trigger for a broader social transformation.

In the first part of the chapter, I develop a theoretical account, arguing that different economic, political and legal discourses converge around shared, and historically determined, pre-understandings (social imaginaries) as to *what* constitutes the socio-economic whole, *who* can act on it, and *how*. I further elaborate this argument by exploring the transformations of private law as a response to different imaginaries of the economy, politics and society in the last two centuries. In the second part, I turn to European private law to show how a new socio-economic imaginary enters and settles in European consumer law and policy – exposing both the conduits and the contingency of this transformation. I conclude by discussing some of the important impacts of the new socio-economic imaginary on European private law.

Keywords: European private law, social imaginaries, consumer policy, European integration, social change.

Chapter 10

The Transformative Socio-Economic Effects of EU Competition Law: From *Producerism* to *Consumerism*

Jotte Mulder (Utrecht University)

Abstract

The function of EU competition law is seemingly apparent: to prohibit cartels amongst firms and combat the abuse of positions of economic dominance in order to ensure effective competition and, eventually, to maximise consumer welfare. What is less apparent are the more covert socio-economic ordering effects of this externally imposed legal system on institutions within EU Member States that may historically/culturally have organised economic sectors upon the basis of social logics that do not necessarily accord with the centrality of competition and its accompanying logics as a principle of social organisation. This may apply in particular to economic sectors that have historically been organised to serve *producerist* objectives or interests (an orientation of the state on the supply side of a market). A (economic) consumerist orientation is, by contrast, focussed on purposive rights and interests on the demand side of the market-in particular, primarily as an interest in competitive prices and choice for consumers. This chapter discusses this potential clash of organisational logics by reviewing how the structure and application of EU competition law may tilt EU Member States from producerist towards consumerist socio-economic orientations. It shall do so upon the basis of a critical reflection of attempts by the European Commission to "liberate" the liberal professions and more recent examples in The Netherlands that demonstrate how EU competition law may install a logic of consumer welfare as a primary principle of social organisation whenever firms co-operate to achieve public interest objectives.

Keywords: EU competition law, legitimacy, producerism, corporatism, consumerism, consumer welfare, producer welfare, social order, markets, public interest.

Chapter 11

On the Vanishing Functional Autonomy of European Labour Law (and some Dangerous Counter-movements)

Stefano Giubboni (University of Perugia)

Abstract
In his chapter, Stefano Giubboni endeavours to show the reasons why, starting from the end of the 1980s, the "external" dimension of the functional autonomy of social law in Europe has gradually experienced a seemingly irreversible crisis due to a deep transformation of the political economy of the European integration process and, following the Treaty on European Union (TEU), of the economic constitution of the European Union. In the last decade, such crisis has worsened due to the transformation of the EU and its Member States into, respectively, a strong *Liberalisierungsmaschine* and *Konsolidierungsstaaten* – as Wolfgang Streeck evocatively described such process. In the final section of his chapter, Giubboni argues that, in as much as it is impossible to have a common set of fundamental social standards and a unitary welfare state at European level, an almost unavoidable response to the legitimacy crisis affecting the EU consists in giving back to Member States a higher degree of autonomy and "social sovereignty".

Keywords: European social law, EU economic constitution, neoliberalism, functional autonomy of labour law in Europe.

Chapter 12

The Future of Law – "Serial Law"?

Karl-Heinz Ladeur (University of Hamburg)

Abstract
The legal system undergoes again a deep process of transformation that may be attributed to the emergence of the "society of networks". The earlier transformations that took place in the "society of organisations" were centred around the organisation as a kind of "big individual" that was and still is able to aggregate and manage long chains of actions as opposed to the individual subject whose action was rule oriented and followed established patterns of experience. The "society of organisations" was characterised by the rise of all kinds of social norms (standards), organised generation of knowledge, and practices of "balancing" that the multiplication of long chains of action have made necessary. The "society of networks" leads to more complex processes of knowledge generation and tends to create new "quasi-subjects" that follow mobile project-like patterns of co-operation. They are focused on "high knowledge"

that is involved in permanent processes of self-transformation. The emergence of "data driven technologies" that do not follow stable trajectories is paradigmatic. It is a challenge for the legal system if what the new loosely aggregated quasi-subjects of the "society of networks" do is "surfing fluid reality" (Bahrami and Evans). This evolution finds its repercussion in new challenges for the regulatory state and also for contracting practices in private law. "Serial law" might be a new paradigm of law that "reads" processes of change in real time and experiments with forms of co-ordination that refer to learning processes.

Keywords: Society of network, serial law, big data, regulation, high technology.

Chapter 13

After Governance? The Idea of a Private Administrative Law

Rodrigo Vallejo (European University Institute, Florence)

Abstract
A panoptic overview of current governing practices evidences an expansive role of private regulation in a significant range of crucial public policy issues. Whether at the domestic, regional or global levels, such a phenomenon has increasingly become perceived as a conundrum, if not an overall crisis, for modern paradigms of legal and political authority. Building upon the array of case studies that the phenomenon has already elicited, this paper advances four interrelated arguments. First, descriptively, it contends that the administrative state has experienced a large-scale transformation due to the proliferation of a varied, multifaceted and fast evolving range of private regulatory practices. Second, methodologically, after mapping the way these private regulatory practices have been conceptualised in post-national legal theories, it conveys the importance of moving beyond the state of the art by adopting a phenomenological approach to contemporary legal orderings. Third, drawing upon comparative analysis of competition law, it distinguishes two broad models that have emerged to address the private regulation phenomenon: (i) the *private ordering* model, predominant in the US; and (ii) the *private police powers* model, predominant in the EU, which, I claim, could be productively understood from a doctrinal perspective as an emergent *private administrative law*. Finally, at a normative level, I conclude positioning such a private administrative law model as a distinctive conceptual framework to reflect upon the place, role and the very significance of law within a landscape of contemporary political economies characterised by an expanding topography of private regulators.

Keywords: Private Regulation, Competition Law, Administrative Law, Police Powers, Private Ordering, Economic Law, Neo-Classical Legal Thought, Legal Institutionalism.

Chapter 14

The Transnational Dimension of Constitutional Rights: Framing and Taming "Private" Governance Beyond the State

Lars Viellechner (University of Bremen)

Abstract
International law often fails to regulate cross-border affairs due to a lack of consent or pace among the states. As a consequence, transnational governance arrangements, which are established by contract mainly among non-state actors, step in to fill the gap. The arrangement that allocates domains on the Internet offers the most sophisticated example to date. This chapter argues that a new approach to the horizontal effect of constitutional rights may both account for the emergence of such arrangements and offer a solution to the problem of their legitimacy. According to this understanding, constitutional rights at the same time enable and restrict transnational regulation. In this way, they guarantee a comprehensive protection of freedom under conditions of globalisation. As long as transnational governance arrangements are not able to generate constitutional rights of their own, however, the national legal orders must complement them. Hence, the legitimacy of law in world society may only be ensured through a dialectical process of internal and external constitutionalisation, resulting from the interaction of its various constituents.

Keywords: transnational governance arrangements; Internet domain allocation; legitimacy; constitutional rights; horizontal effect; internal and external constitutionalisation.

Chapter 15

Counter-Rights: On the Trans-subjective Potential of Subjective Rights

Gunther Teubner (Goethe University Frankfurt)

Abstract
In contrast to current versions of critical theory which in their attack on liberal-capitalist societies develop a more or less vague vision of a socialist society, Christoph Menke, - Frankfurt School third generation - in his brilliant monograph, *Kritik der Rechte*, Suhrkamp 2015 (*A Critique of Rights*) fights on two-fronts. He directs his critique not only against liberal-capitalist formations with their conglomerates of societal power, but also against socialist-communist formations with their totalising aggregation tendencies. Against both, he attempts

to formulate a theory of the authentic political judgment, which is based upon “counter-rights” in a “new law”.
In the face of obvious deficiencies of both formations, this is a remarkable attempt to develop utopian ideas in politics and law. Building on these ideas, the author suggests is to go beyond individual counter-rights on which Menke focuses exclusively, and to articulate genuinely social counter-rights in three dimensions – in the communicative, the collective and the institutional dimension. What is more, they need to be developed in two directions. One direction is the attribution of counter-rights to collectives, organisations, social movements, networks, functional systems, not as substitutes for individual rights to resistance but as their supplements. The other direction is the pluralisation of counter-rights which Menke defines in a unitary manner. Counter-rights will need to be developed with a high degree of variation if they are supposed to overcome motivation constraints in various media of communication.

Keywords: Counter-rights, subjective rights, collective rights, institutional dimension of constitutional rights, sociology of affects, Christoph Menke.