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A New Approach to the Concept and Function of Law

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Document Version
Accepted author manuscript

Published in:
Global Perspectives

DOI:
10.1525/gp.2021.23669

Publication date:
2021

License
Unspecified

Citation for published version (APA):
Kjær, P. F. (2021). The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law. *Global Perspectives*, *2*(1), [23669]. https://doi.org/10.1525/gp.2021.23669

The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law[1] Poul F. Kjaer

Published as 'Kjær, P. F. (2021). The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law. Global Perspectives, 2(1), [23669]. https://doi.org/10.1525/gp.2021.23669.

Abstract

This article outlines a new approach to the law of political economy as a form of transformative law, a new approach that combines a focus on the function of law with a concept of law encapsulating the triangular dialectics between the form-giving prestation of law, the material substance the law is oriented against, and the transcendence of legal forms—that is, the rendering of compatibility between forms. Transformative law thereby serves as an alternative to both law and economics and recently emerging culturalist and neo-Marxist approaches. The timing of this publication is not coincidental. The era of neoliberalism—that is, of structural liberalism, which started in the 1970s and experienced its breakthrough in the 1980s and 1990s after the collapse of structural Marxism—is ending. This makes the question of what will succeed the neoliberal episteme pertinent.

[1] This article presents the Law of Political Economy approach initially developed between 2014 and 2017 within the European Research Council project 'Institutional Transformation in European Political Economy – A Socio-Legal Approach' (ITEPE-312331). As such, the article draws upon and expands insights presented in Kjaer 2020a, Kjaer 2020b, and Kjaer 2020c as well as a range of other publications related to the Law of Political Economy approach. The article thus synthesizes a number of findings and focuses on the overall picture.

1. Introduction

In legal scholarship, the question of the degree of autonomy law enjoys vis-à-vis the rest of society, such as the economy, morality, and politics, is a classical topic. Clear examples of this are the debates between Hans Kelsen and Carl Schmitt, between Lon Fuller and H. L. A. Hart, and between Jürgen Habermas and Niklas Luhmann. This is rather different within political economy scholarship as well as within the part of legal scholarship most directly interested in law's relation to political economy, such as law and economics and various (post-)Marxist approaches as they tend to consider law an epiphenomenon.[2] Within this sort of scholarship, law and legal instruments tend to be regarded as merely reflecting economic interests and power relations and therefore enjoying a low level of autonomy and having a limited impact on the course of societal evolution. In that vein, criticism of the role of law vis-à-vis the economy and politics is hardly a new thing (e.g., Pashukanis 2001). Without being blind to the limitations and contradictions of law, the prospect developed here, building on insights presented in *The Law of Political Economy: Transformation in the Function of Law* (Kjaer 2020a), questions this understanding of the role of law. It assigns law a prominent role as the central infrastructure of society and hence as constitutive for both politics and economy as well as other parts of society.[3] This insight is not new but rather has a two-hundred-year history—a point we will come back to. The post–World War II liberal constitutional settlement of the Western world—that is, the US-centric world, and the legal infrastructure enabling the United States to exercise its relative dominance over world society—is

[2] There are, of course, important exceptions to this rule, as we will come back to in section 3, discussing ordoliberalism and social democratic positions of the immediate post–World War II era.

[3] The perspective presented here is therefore specifically limited to the law of political economy—that is, the role of legally structured institutions located in between political and economic processes. It focuses, therefore, only to a limited extent on the types of law specifically dealing with political processes, such as constitutional and administrative law, or economic processes, such as contract and property law.

being challenged and is possibly breaking down before our eyes. Singular events, such as the outcome of a presidential election, might slow this development or mitigate the effects to a certain extent but are unlikely to change the overall direction, as what can be observed is a far more profound structural transformation.

Structural transformations typically become observable through the emergence of crisis semantics.[4] Indeed, the list of social phenomena characterized as crisis ridden in contemporary society is long: the financial crisis, including its long-term effects (Kjaer et al. 2011); the migrant crises along the borders of rich nations and regions as well as throughout the poorer parts of the world; the erosion of institutions and the rule of law in countries as different as Brazil, Hungary, Poland and Turkey; the effects of climate change; the still ongoing COVID-19 health crisis and its socioeconomic fallout; sustained social inequality; and many more. These phenomena do not constitute a singular crisis that can be traced back to a unitary logic—for example, the capitalist logic—but rather constitute a range of different but mutually reinforcing crises unfolding in different modi and temporal logics (Kjaer and Olsen 2016). Some of them are therefore global in reach, while others are specific to the Western world or to specific countries. Indeed, the feeling of crisis is, for the time being, not an experience that is shared by many in (for example) East Asia, who see rising living standards and increased global centrality for their region. It is therefore not surprising that the apocalyptic eschatology, widespread in Western popular culture and popular sentiment these days, is Western and not global (Cowan 2011). This apocalyptic eschatology might be seen as tied to the end of Western hegemony in general and the end of the hegemony of white males in particular, rather than reflecting crises with a global reach. Only Westerners systematically overestimating their importance in the world could characterize the 2008 financial

[4] For different definitions of societal crises, see Kjaer 2011.

crisis as a "global financial crisis" (Wikipedia 2021) when it was, in fact, largely a domestic US and UK crisis, albeit it produced severe spillovers in other jurisdictions, triggering different kinds of economic crises in countries such as Greece and Spain.

If there is one overarching element binding the multiple crises together, it might be that they can be understood as a crisis of modernization. This crisis, which became visible in 1914 and unfolded until 1945, was a reflection of the structural transformation leading to the end of the Eurocentric world after the rise of Japan, the Soviet Union, and the United States. The current crisis reflects the end of the Western-centric—that is, US-centric—world after the rapid modernization of China and other parts of the world. Or, to put it in sociological terms, the crisis we see unfolding reflects another step in the expansion of world society—that is, modernization—through the expansion of the primacy of functional differentiation throughout the world (Kjaer 2014, 103ff.). The crisis of the first half of the twentieth century had catastrophic effects and also this time, large parts of the world, in the West and elsewhere, seem to be moving into Weimar territory. Institutions and norms once assumed certain are increasingly challenged or outright collapsing, and overall societal coherency is waning (Kjaer and Olsen 2016). The major difference seems to be that while the enactment of "the decline of the West" (Spengler 2017)[5] played out as tragedy in its first staging, the reenactment we are currently seeing has so far played out as farce. This farcical aspect has been expressed in a multitude of ways, from the Churchillian fantasies of the UK prime minister to the Ottoman dreams of the Turkish president and the infantile rhetoric and strange haircuts shared by many of today's strongmen.[6] In spite of its phoniness, the ongoing erosion of the

[5] The German 1918/22 original speaks of "Abendland," meaning the Occident understood as Western Europe, not the Western world in the contemporary sense.
[6] Silvio Berlusconi's Italy might be considered the first expression of this development. For an early understanding of the problem, see Crouch 2004.

institutional infrastructure of world society calls for a reflection on the concept of law and the function of legal instruments. The constitutive, enabling, and limiting functions of law are in need of recalibration in order to stay relevant under the changed structural conditions of the twenty-first century (Kjaer 2020c). A coherent concept of law capable of unifying these functions in a way that is relevant for the twenty-first century might be termed *transformative law*, a point we will return to. Transformative law constitutes social phenomena by giving form to them in a manner implying that they—through the legal form—are made capable of transcending that very form.

2. At the End of an Episteme: The World beyond Neoliberalism

More than a decade has gone by since the outbreak of the financial crisis—a phony decade in which the rules pinned down in the economics textbooks were systematically broken and any sense of a coherent economic policy approach based on sound theoretical foundations melted away. Nonetheless, surprisingly little changed in the first years after the financial crisis, leading to claims of the "strange non-death of neoliberalism" (Crouch 2011). Neoliberalism is in many ways an empty signifier into which one can read many different positions. Believers in "pure capitalism" will even deny its very existence. When used in its broadest possible sense, the term might be considered an umbrella concept of the dominant—that is, hegemonic—economic and political theories and praxes from the 1970s until today (Biebricher 2019). Concretely, neoliberalism might thus be understood as an episteme (Foucault 1966), integrating a paradigm and a praxis of knowledge in relation to a whole string of areas and phenomena such as "governance," "new public

management," and "monetarism" as well as, somewhat controversially, "global human rights" and "global justice" (Moyn 2018).[7]

Within law, the most dominant version of neoliberalism is law and economics—that is, the attempt to conceptualize and solve legal problems with microeconomic tools. While mainly deployed in private law settings and especially in business law, the law and economics assumptions of methodological individualism, strategic rationality aimed at utility maximization, and notions of markets that self-correct through striving toward equilibrium have permeated many aspects of modern society. These assumptions has led to epistemological capture and hegemony reflected in the difficulty to articulate and deploy alternative approaches (Deakin 2020). While law and economics is mainly a US-American phenomenon, even areas of law such as EU competition law, where distinct differences to the US-American approach are routinely celebrated, are de facto relying on the approaches developed in Chicago (Bartalevich 2017).

In spite of such global influences, the United States remains the place where the societal impact of law and economics has been most profound and systematic. The consequence has been an erosion of the functional and normative integrity of public power, as expressed through rampant social inequality, eroded public institutions, and contested legitimacy of public decision-making. In spite of enjoying more than $65,000 per capita GNI (World Bank 2021), the United States has increasingly revealed features normally associated with what the World Bank characterizes as upper middle-income countries, defined as countries with a per capita GNI between $4,046 and

[7] While most scholarship using the term *neoliberalism* does so in a negatively loaded sense, the term is used here and throughout as a sociological term aimed at describing a sociological phenomenon and not as an ideological concept.

$12,535 (World Bank 2020). In the post–World War II era, developed countries, in either the Soviet or the Western version, were the dominant countries and the ideal types that other countries tended to orient themselves toward. In contrast, the defining feature of the early twenty-first century is that the categories of "developed" and "developing" countries have increasingly melted together. The dominant category of world society today is that of "gray-in-gray states": that is, states that are "developed" and "underdeveloped" at the same time; states that typically are not outright dictatorships but also are not well-functioning democracies; states that are not poor but also not rich, and characterized by massive and sustained inequality of the distribution of capital in all its forms; states that have strong capabilities to randomly deploy organized violence but that also have dysfunctional and compromised institutions of public power and hence limited capacity to pursue across-the-board polices and to ensure the sustained implementation and institutionalization of such policies.[8]

When observed from a Western angle, this development can be described as a "Brazilianization of the West," as predicted by Ulrich Beck (Beck 1999). Although this development is a structural feature visible throughout the Western world, the United States and the United Kingdom are the Western countries where it has advanced the most. These are also the countries where neoliberalism, including law and economics, happens to have advanced the most. Indeed, neoliberalism in general, and law and economics in particular, can be understood as directly oriented toward a breakdown of public power, understood as abstract, generalized, and hence

[8] Countries such as Argentina, Brazil, India, Mexico, Russia, South Africa, Turkey, and increasingly the United States have some, though not necessarily all, of the characteristics mentioned above. China, on the other hand, might, to the extent its political economy model proves to be sustainable, provide an alternative model of authoritarian state capitalism. When the universal political economy model of continental northwestern Europe is added as another outlier, the contours appear of a new global typology of political economies, with three different worlds of political economies centered respectively around dysfunctional populism, authoritarian state capitalism, and egalitarian universalism.

depersonalized power (Kjaer 2017; Neumann 1996). The entire thrust of the microeconomic approach is to split up the singularity and comprehensiveness of the state, the main though not the only repository of public power, through the introduction of competition, outsourcing, and privatization as well as redistribution in favor of the higher end of the income spectrum. Doing so systematically challenges the already porous public/private divide, allowing for private interests to enter the realm of public power in an increasingly unfiltered manner, while public power can enter the private realm in a fragmented form—a fragmentation that implies that albeit formally public power, it no longer acts as such. Instead, fragmented public power becomes increasingly instrumentalized and arbitrary, acting as a vehicle for the advancement of private interests (Kjaer 2016).

The still ongoing erosion of the functional and normative integrity of public power is in itself a crisis among the many crises of contemporary society—a crisis that, to a large extent, has been caused by the neoliberal episteme in combination with more profound structural developments. Just as theories seldom are proven wrong in the Popperian sense but rather fade away when they lose their allure and capacity to provide a convincing narrative, the neoliberal episteme is fizzling out, with the vacuity currently filled by authoritarianism and populism. This begs the question: is there an alternative to authoritarianism and populism as the successor episteme to neoliberalism? As Thomas Kuhn noted on the basis of insights harvested from Ludwik Fleck (1980) and Arthur Koestler (2014), "a scientific theory is declared invalid only if an alternate candidate is available to take its place" (Kuhn 1996, 77). Extrapolated to epistemes, this insight might explain the "strange non-death of neoliberalism" as the neoliberal episteme continued as the world's caretaker government for another decade after the implosion of its functional and normative integrity during the financial crisis because of the lack of an obvious replacement. Instead of an actual replacement,

the phony version of authoritarianism and populism, resembling a Baudrillardian reality show more than "real politics," has so far filled the void (Kjaer 2020c).

Within economics, the combined forces of Esther Duflo, Thomas Piketty, Emmanuel Saez, Gabriel Zucman, and others provide the contours of a new (French) paradigm of economics—a paradigm that seeks to fill the void after the monetarist paradigm, although such a paradigm also would have to become an episteme combining theory and praxis in order to replace the phony version of authoritarianism and populism. However, within law in general, and within economic law specifically, the contours of a new paradigm—not to speak of a new episteme—are not yet in sight (Kjaer 2020c). The sustainability of political decisions in the longer term is conditioned by the sort of infrastructural power that legal and economic epistemes offer, as the contentlessness of phony authoritarianism and populism is unlikely to be sustainable in the longer term. It is with this background in mind that a new concept of law capable of recalibrating the functions of law in a manner suitable for the twenty-first century is needed.

3. History: The Road to Renewal

The first place to look for renewal is in history. What sorts of paradigms, epistemes, insights, and approaches are out there, maybe forgotten or slumbering, which in modified form can be reactivated? What historical experiences might serve as warnings concerning which road not to take, thus enabling historical learning processes (Eder 1991) on the basis of institutionalized memory (Luhmann 1997, 576ff.)?

Modern legal epistemes came in three different versions: interwar corporatism, post–World War II neocorporatism, and the type of governance law, including law and economics, which emerged from the 1970s onward and which has been dominant in the last four decades. As outlined in *The*

Law of Political Economy and elsewhere, the concept of law unfolded in interwar corporatism and late twentieth-century governance share a number of features: firstly, a holistic notion of society; secondly, a sectorial outlook, in praxis representing an in-built contradiction to the holistic outlook; and, thirdly, a rejection of the rule of law and legal formalism and their substitution with informality. At the same time, they are each other's exact opposites or mirror images, as corporatist law advanced notions of hierarchy and planning on the basis of an ideal of unbound political energy, while governance law is linked to an ideal of spontaneous exchanges on the market as the ultimate form of social exchange. Hence, governance law is corporatist law turned upside down (Kjaer 2020b).

That corporatist and governance law are mirror images of each other is also expressed through their shared tendency to instrumentalize law for narrowly defined objectives. In corporatist law, this is expressed in the concept of the dual state, which allowed for two legal universes: a universe of positivist law oriented toward the economy on the basis of norms (*Normenstaat*) and a universe of unrestrained political action safeguarded through law (*Maßnahmenstaat*) (Frankel 2017). Governance law inverts this figure through the delineation with legal means of an economic universe free from political intervention. The economy is sought constitutionalized on the basis of very specific economic principles, as apparent, for example, in relation to central banking and trade and investment law, with the purpose of lending them an entrenching authority aimed at excluding alternative epistemes. As the foundation for safeguarding the economy is derived from economic theory, relying on formalistic analytical modeling, this type of social organizing is also being characterized as an expression of neoformalism (Nourse and Shaffer 2009; Frerichs 2020). Similar insights can be found in the work of Duncan Kennedy, one of the contributors to *The Law of Political Economy*. Kennedy argued back in 2006 that the world of modern globalized law

consisted of three paradigmatic epochs: German classical legal thought (1850–1914), French social law (1914–68), and what might be called a US-centric globalizing legal paradigm (1968–2000s) (Kennedy 2006). Epochs are never named before they come to their end, and the last of these epochs is still in the process of obtaining its defining name. It therefore goes by several names, including neoliberal, neoformalist, and governance law. Irrespective of its name and the preferred division of epochs, this episteme probably imploded somewhere between the 2008 financial crisis and today; this fact means that we are witnessing the end of an epoch and looking into an unknown future.

This also raises the question: can the neocorporatist law of the immediate post–World War II era serve as a template for renewal? A widespread degree of nostalgia can be observed among scholars, especially those with left-wing inclinations, for what they consider the golden age Keynesian nation-state of the *trente glorieuses* and the *Wirtschaftswunder* (e.g., Streeck 2009). This is a problematic stance functionally and normatively (Kjaer 2019c). While the post–World War II period indeed implied a move toward unprecedented affluence (Galbraith 1998) and also provided a very high level of political and social stability in comparison to the interwar period, these changes first of all happened under very specific structural conditions demographically, economically, educationally, politically, and technologically. Secondly, the normative setup was centered on a male-breadwinner model that broke down decades ago in the Western world, just as the general normative setup was hardly attractive for those who were not Christian, heterosexual, male, and white. Thirdly, the *trente glorieuses* and the *Wirtschaftswunder* were associated with a very small albeit strategically important part of the world, essentially situated around the North Atlantic—a part of the world that today not only hosts a far smaller part of the world's population but also bundles far less of the world's resources than it did in the mid-twentieth century. Fourthly and

finally, the nostalgists tend to ignore the fact that the golden age Keynesian nation-states were in fact transnationally constituted (Kjaer 2019c). For the nostalgists, the nation-state is an ontologically given and hence stable frame within which socialism can unfold. As such, the position of the nostalgists represents an unfortunate marriage between nationalism and socialism, and it is therefore not surprising that they tend to consider transnational ordering as a threat (Streeck 2016). Apart from being false, such a narrative is also counterproductive and—if one wants to take a political stand—dangerous, as under current conditions it plays directly into the narrative of political movements such as *Alternative für Deutschland*, *Rassemblement national*, and the currently dominating segments of the Conservative Party in the United Kingdom and the Republican Party in the United States.

Neocorporatist law, however, provides a template for renewal in a deeper, infrastructural sense. As a reaction to the interwar period and starting with the publication of the Beveridge Report in 1942 (Beveridge 1942), substantial changes were introduced in the infrastructural setup of public power and its relation to private power in Western Europe as well as elsewhere throughout the Western world.[9] These setups were characterized by a reliance on legal formalization and were aimed at *simultaneously* separating and reconnecting politics and economy as well as various other systemic formations such as education, science, and religion within the legal form. As such, law provided a framework for the synchronization—that is, the integration—of society (Kjaer 2014b). In praxis, formalized and legally constituted negotiation systems emerged where translations and exchanges between capital, labor, and political power could occur just as legally regulated autonomous professions became central stabilizers in society. Such institutional formations had,

[9] In the United States, the developments from the New Deal to the Great Society programs of the mid-1960s implied a similar development, although in a very different context than in Western Europe.

of course, existed in previous times too. The central novelty was that for the first time, they became across-the-board nationwide frameworks. Around 1900 only two countries in Europe, Denmark and Switzerland, had what resembled singular and nationwide institutional formations in relation to labor market issues (Crouch 1993, 67ff.). After 1945 such formations became a far more widespread phenomenon throughout Western Europe. For the first time, public power, defined as generalized and abstract and hence impersonal power, became structurally dominant (Brunkhorst 2014, 421ff.). This form of power was located in the institutional repository of the state but also in formally private formations such as unions, trade associations, and professional bodies that implemented across-the-board policies and universal inclusion on the basis of legal procedures (Schmitter 1974). Hence, the category and boundaries of the state were transcended, as it no longer was possible to force public power back into the straitjacket of the state. Indeed, an important reason for the interwar catastrophe was the ever more desperate attempts—conceptually and practically—to force a society with a degree of complexity exceeding what the category of the state could possibly absorb into that very category.[10]

Neocorporatist post–World War II law rested on a compromise, as expressed in the term *social market economy* (*Soziale Marktwirtschaft*), as developed in the context of the German Federal Republic by Alfred Müller-Armack (1960). This compromise allowed both center-right social conservatives, such as the ordoliberals, and center-left social democrats and various in-between positions to claim victory. The former was—broadly speaking—associated with scholars such as Franz Böhm, Walter Eucken, Wilhelm Röpke, and Alexander Rüstow, and the latter—in various degrees—with scholars such as Herman Heller, Otto Kahn-Freund, Franz Neumann, and Hugo

[10] An exercise that was repeated in the 1970s and 1980s by Marxist state theorists who added layer after layer to the category of the state in the increasingly futile attempt to capture societal developments.

Sinzheimer. The institutional compromise erected was possible because the two movements, in spite of antagonistic debates (Joerges 2010), respectively represented right- and left-Hegelian positions. Consequently, they shared fundamental Hegelian assumptions and insights in relation to the functional differentiation of society and the fundamental function of law in society, seeing law as the constitutive framework and central infrastructure of society. Accordingly, they could both identify the central societal function of law in the way law simultaneously separated and reconnected systemic societal spheres, such as economy and politics and others spheres.[11]

4. The Return of Polarization

While the scholarly and political positions dominating the immediate post–World War II era were located in the center, it is the outliers on the continuum that dominate in today's world. The increased attention to outliers is probably a reflection of the challenge to the liberal order and Western dominance as well as the collapse of the neoliberal episteme. The popularity of outliers is most clearly expressed in the continued attractiveness of the works of Friedrich August von Hayek (1994) and Karl Polányi (2001). Both Hayek and Polányi developed theories aimed at explaining why totalitarianism had emerged and how to avoid its resurgence. The answers they gave were, however, exact opposites: Hayek identified political interventionism in the economy as the core problem, whereas Polányi argued that the problem was the absence of political interventionism (Kjaer 2020b). This divide is reiterated today in the standoff between neoliberal proponents of law and economics and public choice, on the one hand, and left-wing movements such as the Cologne School of political economy, on the other hand. In both cases, moreover, a

[11] The Hegelian heritage here was largely confined to what might be described as Hegel's historical-sociological writings, most notably in *Elements of the Philosophy of Right*, providing an empirically based description of emergent tendencies of modern society and statehood. This made it possible to draw on Hegel's theory of society without necessarily buying into the full Hegelian system.

particular radical interpretation implying a downgrading of the role of law in society has gained ground since the 1970s. For the former, that is especially expressed through Milton Friedman's radicalized version of neoliberalism, which, in contrast to Hayek, considered law merely an instrument to be deployed on the basis of economic calculus and with an economic objective. For the latter, this is expressed through a reactionary, communitarian, and methodological culturalist right-Polányian approach—an approach that assumes the existence of chessboard-style fixed national universes within which capitalist institutions operate and move, or the existence of unbridgeable cultural divides between national cultures (Kjaer 2020b).

Polányi's *The Great Transformation* provides, in spite of its many fine qualities, a critique of modern society on the basis of a highly idealized fiction of premodern society, seeing a communitarian utopia as the alternative to modern capitalism. Polányi's historical reconstruction of the stages in the autonomization of the economy and its reproductive logic and the consequences hereof is, moreover, deeply skewed by the failure to recognize that striving for value surplus and tendencies of autonomization and acceleration can be found throughout society and not just in the economy (Kjaer 2020b, 9f.). Left-Polányians have sought to transform these insights into a question of democracy and hence into a progressive agenda on the basis of a notion of society that conceives of it as equal to a singular polity—that is, by making politics rather than the economy the supreme and all-encompassing system (e.g., Klein 2020). While this softens the stance compared to the right-Polányians, both seek to substitute the implicit holism of market thinking based on equilibrium models with another kind of holism. Latter-day Polányists end up merely substituting market holism with cultural or political holism (Kjaer 2020c).

While the post–World War II settlement was made possible through a move to the center in both scholarly and political terms, the current Hayekian versus Polányian standoff is a semantic

reflection of the increased polarization of the Western part of world society. Another example of increased polarization is the attempt to counter the dominance of law and economics by the New Haven law and political economy (LPE) movement. The core claim of the New Haven LPE movement is not that law is an epiphenomenon of political economy but rather that law is the critical infrastructure of political economies (Britton-Purdy et al. 2017). This insight is both correct and crucial, but it is hardly new. Rather, it was one of the basic arguments of Hegel's *Elements of the Philosophy of Right*, which turns two hundred years old this year (Hegel 1970). As already pointed out, both right- and left-Hegelians have furthermore maintained this view throughout—that is, both the ordoliberals and the social democratically inclined scholars such as Herman Heller, Otto Kahn-Freund, Franz Neumann, and Hugo Sinzheimer had this insight as their basic premise. As reconstructed by Christian Joerges and Michelle Everson in chapter 2 of *The Law of Political Economy*, the German term *Wirtschaftsrecht* (economic law) covers and includes this insight as well. In fact, the dispute in the 1960s and 1970s between Ernst-Joachim Mestmäcker and Rudolf Wiethölter, as reconstructed by Joerges and Everson, in many ways encapsulates the birth of modern European LPE, as the dispute largely was concerned with the right meaning of the term *Wirtschaftsrecht* understood as the law of political economy (Joerges and Everson 2020).

Although it was sold as a revelation, it is, from a strictly scholarly perspective, difficult to see exactly where the novelty of the New Haven version of LPE should be found. A reason for this might be that it is primarily a political and only secondarily a scholarly movement. This is also reflected in the New Haven manifesto published in November 2017, as it, in its aesthetic style and substantial direction, has far more to do with a political declaration than with a research program (Britton-Purdy et al. 2017). The "primacy of the political" is also attested by the fact that "theories of the right" also acknowledging the crucial role of law on political economy are systematically

rooted out and ignored. The first criteria of selection is political conviction; scholarly quality is the second. In this sense, one might argue that the New Haven version of LPE is closer to Lenin than Marx. Although his work deeply influenced political movements on the full spectrum from social democracy to Stalinism, Marx was primarily a scholar and only secondarily a political activist. Lenin, on the other hand, was primarily a professional revolutionary and only secondarily a scholar, systematically instrumentalizing scholarly insights for a political project.

The fundamentally political nature of the Yale LPE initiative is also reflected in the slogan-style advocacy for a move "from efficiency to power," "from neutrality to equality," and from "anti-politics to democracy" (Britton-Purdy et al. 2020). The initiative, however, suffers from missing scholarly foundations. No concept of society seems to be available. Rather, it provides a deeply idiosyncratic approach, as 99 percent of the issues, conflicts, and problems addressed are related to the US-American context, just as the history of the coming into being of the "Twentieth-Century Synthesis" and its subsequent unraveling is reconstructed as an exclusively US-American story (Britton-Purdy et al. 2020). In short, it is simply assumed that the society we are talking about is the US-American society and hence a nation-state society. This is hardly an adequate foundation for the development of a concept of law suitable for the twenty-first century (a point we will return to). When taking a global perspective, the idiosyncratic US focus furthermore speaks directly against the self-declared objective of "equality." Unreflectively and most likely unwillingly, it reinforces a narrative of a US-centric world and hence underpins one of the most blatant examples of inequality in world society.

But the issue of equality goes further than that. When the French *noblesse de robe* (nobles of the gown) launched a coup d'état against the *noblesse d'épée* (nobles of the sword) in 1789, they claimed to speak for the entire population, although the broader population largely were bystanders

(Elias 1997). Indeed, one of the classic situations of history is that well-intended revolutionaries with self-proclaimed emancipatory projects are faced with the paradox that they are part of the establishment they wish to overturn. The New Haven version of LPE falls exactly into this category. Traditionally, Latin American universities are the world leaders when it comes to the production of (unnoticed) scholarly manifestos. Scholarly manifestos are a particular genre characterized by the rejection of the distinction between politics and scholarship. Somewhat ironically, the traction of the New Haven manifesto might in this sense be considered a reflection of the increased "Brazilianization" of the US-American context. The New Haven LPE manifesto represents a specific energy-loaded moment in which "Brazilianization" has already occurred while the credentials of supremacy remaining from the previous world are still showing their effect. The world systems of higher education and research might be highly standardized (Thomas et al. 1987, 133ff.) and functionally delineated (Stichweh 2000) vis-à-vis other segments of world society, but internally they are also highly stratified. In this context, the institutions at the top serve as verifiers of knowledge. Information published on blogs or elsewhere is not considered valid or of high value before an institution at the top of the hierarchy has corroborated it. These top institutions furthermore tend to have consecration and elite reproduction as their primary function, while scholarly advancement or excellence remains secondary (Bourdieu 1989). Hence, statements made countless of times, such as those included in the New Haven LPE manifesto, gained the necessary status only when adopted by Yale. If the New Haven LPE manifesto had been published on a blog originating in Botswana, Mexico, or Nebraska, no one would have noticed or cared. In this sense, the manifesto represents a performative contradiction, as the effects produced by the manifesto are highly undesirable according to its own standards. In other words, if one were to take the manifesto seriously as a political document, the first thing to torch, literally or

metaphorically, would have to be the New Haven campus, before proceeding to the rest of the Ivy League.

When viewed as a scholarly document, the previously mentioned absence of a concept of society is not the only thing that is striking. There also does not seem to be an elaborated concept of law guiding the endeavor. Law seems to be considered primarily a political instrument and legal discourse and institutions a political battlefield. The objective to produce a shift "from efficiency to power," "from neutrality to equality," and from "anti-politics to democracy" (Britton-Purdy et al. 2020, 1818ff.) is characterized by the absence of any deeper sociological understanding of the condition of possibility of law, its form and effects, its potentials and limitations. As an example, the notion of power advanced is a classical Weberian one, which enables one to concentrate on simplified questions such as "who has" or "who should" hold power on the basis of a methodological individualist worldview and a conception of power as bargaining power—that is, the capability of exerting influence over others (Britton-Purdy et al. 2020, 1820; Weber 1980, 122ff.). The numerous alternative and in most cases far more refined concepts of power transcending crude subjectivist assumptions available since at least the mid-twentieth century (e.g., Arendt 1970; Foucault 2001; Kjaer 2010, 85ff.; Luhmann [1975] 2012; Lukes 1986; Sciulli 1992) are not taken into account, just as no new concept is developed. As such, the foundations remain ultimately the same as the ones found within neoclassical economics in general and law and economics specifically. In both cases, the concept of power is not only reductionist in itself but also derived from a reductionist concept of rationality, as Jürgen Habermas went to great lengths to illustrate forty years ago through his critique of Weberian strategic rationality and his subsequent broadening of the concept through the inclusion of social and dramaturgical rationality (Habermas 1995, 489ff.). As such, the New Haven LPE project seems devoid of a deeper

knowledge interest (*Erkenntnisinteresse*) constituting an advancement of knowledge in a scholarly sense. If a primarily political endeavor can be classified as scholarship at all, pragmatism might therefore be the most suitable term to describe the endeavor—a form of pragmatism that, rather than propelling an advancement of knowledge, contributes to the lock-in of predictable, ideologically infused positions where the two sides act as mirror images of each other.

5. A New Concept of Transformative Law

As stated in the first paragraph of *The Law of Political Economy*, developing a sound theoretical approach capable of overcoming the unfruitful ideologization of legal and political economy scholarship might be a productive alternative to the currently dominating approaches (Kjaer 2020b, 1). Indeed, a core objective of the European Research Council project on "Institutional Transformation in European Political Economy—A Socio-Legal Approach (ITEPE)," launched in 2014, was to develop a theory and an approach capable of describing and assessing the role of law in structuring political and economic processes and the relation between them. A theory striving to avoid prestructured and hence predictable ideological positions that are either affirmative or critical of specific modes of economic reproduction while still acknowledging that social and legal theory can have profound political effects. While this aim also was central to the seventh ITEPE conference, in July 2017, leading to publication of *The Law of Political Economy*, the project goes far deeper than that.

The Law of Political Economy has the subtitle *Transformation in the Function of Law*, indicating an intrinsic relationship between function, time, and change. This perspective has two dimensions: First, internal formal and substantive transformations of the law and the legal system. This is very much the perspective developed in *The Law of Political Economy*, as it largely remains confined to an internalist perspective on how law conceives of and reconstructs political and economic

processes and their interrelation. Second, an external perspective on how law acts as a medium for the transformation of society and nonlegal societal processes. This perspective is at the forefront of the cutting-edge work undertaken at the Amsterdam Center for Transformative Private Law (Bartl 2020; Eller 2020). An exhaustive concept will, however, need to combine and integrate the two into a dual endogenous and exogenous framework.[12] This might be done on the basis of a concept of transformative law encapsulating the triangular dialectics between form giving (i.e., constituting social phenomena, the material substance the law is oriented against) and the transcendence of that form (i.e., the rendering of compatibility between forms).

In order to arrive at such a comprehensive concept, a minimum of three preliminary steps briefly outlined beneath are, however, needed: the development of an adequate concept of society, a mapping of the conflict lines unfolding within that society, and an assessment of the strategic location and impact of different systemically organized processes in society. Building on top of these largely sociological insights and the understanding of the function of law emerging from them, it becomes possible to distill elements of a transformative concept of law.

5.1. From the Individualistic Premise to World Society

Margaret Thatcher famously twisted Karl Popper's variant of methodological individualism beyond recognition by stating that "there's no such thing as society" (Thatcher 1987). This proposition is at the very center of the neoliberal episteme, and the problems facing the Western part of world society can be traced back largely to this ontological starting point. The dominant worldview of the last four decades was derived from a methodologically individualist premise

[12] For preliminary work pointing in this direction, combining an intra- and intersystemic approach, see Kjaer 2006.

leading to the assumption that the sum of actions of individuals equals society. This unreflective jump from micro to macro pops up in political, economic, and legal discourses concerning everything from campaign financing in the United States (Supreme Court of the United States 2010) to EU competition law and policy (Bartalevich 2017). However, the methodologically individualist premise is central not only to law and economics but also to human rights law, the core focus point and instrument of self-proclaimed progressive movements in the last four decades (Moyn 2018). While human rights are a pivotal element of modern legal orders and play a crucial role in world society, they are an insufficient focus point and instrument for the creation of across-the-board institutional frameworks aimed at establishing societal coherency.

Both law and economics and the progressive human rights agenda of the last four decades share the poverty of methodological individualism. The central problem of the neoliberal episteme and of its self-proclaimed human rights–oriented progressive mirror image is their failure to recognize networks, organizations, and institutions as social phenomena in their own right—that is, as objects of study and agents of change, producing autonomous effects on society. As forcefully and convincingly argued by David Sciulli, the consequence is that both law and policy lose sight of systemic effects, asymmetric power, and issues of societal integration (Sciulli 1992; Sciulli 2001). For epistemes departing from an individualistic premise, societal coherency and synchronization are not an issue because there is no concept of society available to enable an articulation of society as a social phenomenon in its own right. The starting point for a new law of political economy might therefore be found in the development of a concept of society that is compatible with legal reasoning and dispute resolution. Conceptually, this means that theories that entail a specific and, in principle, all-encompassing concept of society, such as both left- and right-Hegelian and left-

and right-Luhmannian theories, could stand in front of a renaissance. In practical terms, it would moreover mean that overall societal impact (i.e., levels of socioeconomic equality, territorial cohesion, and the broader societal impact of business activities beyond the creation of share value) should and could obtain a more definitive and decisive role in legal regulation—a form of societal impact that is not equal to the sum of individual preferences or actions (Kjaer 2020c).

Another core insight is that an adequate concept of society would have to be a concept of world society and not a concept of nation-state society. The idea that states are weaker today than in previous historical periods is, although widespread, empirically unfounded. In spite of the damage inflicted by neoliberalism, we have not only more states today than in previous historical times but also more states that are institutionally stable and capable of exercising micromanagement—that is, to regulate social processes in a very high degree of detail—than ever before (Kjaer 2014a, 31ff.). Nonetheless, states are not containers of society. On the contrary, it is society that frames states. Throughout their existence, states have been islands in a far bigger societal ocean characterized by highly interconnected social processes in relation to economy, education, mass media, religion, science, and so forth. As persuasively reconstructed by Hauke Brunkhorst, such processes have literally transcended the centripetal forces of localistic politics since before the axial age and hence for thousands of years (Brunkhorst 2014, 59ff.). The image of states as islands rather than as containers is also reflected in the functional limitation of the form of generalized public power of which states are the most important but not the only central repository. Public power is—as we will discuss again later—legally constituted and merely has an infrastructural and not a substantial capability. Public power cannot appreciate the depth of a religious sentiment, determine the validity of a scientific argument, capture the rationale of a business transaction, or

assess the quality of a piece of art. So while an absence of generalized public power makes societal coherency impossible, this absence does not imply that generalized public power is supreme to the rest of society or that society can be considered as captured or framed by public power in a substantial or a holistic sense (Kjaer 2017). As also argued in *The Law of Political Economy*, mainstream conceptions of politics, just like mainstream conceptions of economy, suffer from ontological deficiencies derived from the holistic thinking of seventeenth-century body politics. Modern public power–based politics is, however, not body politics in the seventeenth-century sense (Kjaer 2020b; Neumann 1996).

A very clear example of the inadequacies of individualistic and state-centric approaches is that of global value chains (GVCs), ranging from their early colonial version to present-day digitalized and spatially synchronized versions (Baars et al. 2016; Eller 2017; Kjaer 2018; Salminen and Rajavuori 2019). GVCs serve as the central infrastructure of the global economy and consist of chains of contracts at times involving thousands of firms, millions of employees, and billions in investments. They have a profound impact on the institutional setup of corporations, labor markets, financial bodies, and many other crucial institutional formations throughout the globe, just as their synchronization of operations on a global scale provides one of the most ample contributions to the reality of world society (Kjaer 2018). The attempts to capture GVCs through both national law and due diligence–based human rights terms are therefore inadequate. GVCs not only transgress national jurisdictions but also create a functional and normative need for enabling and limiting legal forms that provide societal coherency through a reliance on elaborated institutional frameworks. These forms cannot merely be derived from individualistic human rights–based approaches incapable of addressing issues such as the need for institutional solutions through

across-the-board labor market and welfare measures and generalized environmental protection schemes.

5.2. From Hegemony to Interlegality

One of the many implications emerging from taking world society and globalized social processes, including political and economic processes, as the starting point is that law cannot be reduced to the dual categories of national and international law. Apart from national and international law, transnational and community-based living law also fulfill central functions in world society.[13] As we will return to later in this article, these four types of law might potentially also act as sources of interlegal global law to the extent that they are deployed in an intercontextual manner (Kjaer 2019a). Interlegal global law exists in two versions: The first is universal imperial law, the dominant form of global law until the implosion of the Austro-Hungarian, Chinese, German, Ottoman, and Russian Empires between 1911 and 1922. The second is the assemblages of legal and managerial techniques deployable in an unspecified number of geographic locations, which was characteristic of colonial law, as it emerged from the late fifteenth century onward, as well as contemporary GVC law (Kjaer 2019a).

In this context, a central dimension of the history of world society from 1492 onward is the history of consecutive Western states (Spain, the Netherlands, the United Kingdom, and the United States) acting as institutional anchors of the world economy. While never leading to the eradication of other legal orders, the role as the anchor nation ensured them a hegemonic role and an exorbitant

[13] For definitions of these types of law, see Kjaer 2019a.

privilege. These states served as guarantors of the institutional formations enabling global economic exchanges—that is, providing a global reserve currency, a willingness and a capability to use force to maintain "global order," and legal constructions justifying the existing order. The current anchor, the United States, is, however, under pressure as its relative weight in world society is diminishing (Kjaer 2019b). The expansion and deepening of world society, expressed as modernization processes leading to functional differentiation becoming the dominant organizing principle in ever larger parts of the world (Luhmann 1997, 145ff.), means that the tragedy of the United States is that it is too small to dominate the world and too big not to try. At the same time, neither China nor the European Union are likely to be able to fill the gap. In legal terms, the consequence is that distinct worlds of law are on the rise. From trade and investment law to internet law, no single global framework à la WTO law or UN law will take hold. Rather, distinct EU-, Chinese-, and US-centric legal universes are likely to be the norm (Kjaer 2020c).

This development is currently reinforcing ancient trends, as global law, including global economic law, is not singular and hierarchical. Instead, the core feature of global law is interlegality (Kjaer 2019a). Global law is a decentered form of law located in-between-worlds, aimed at handling societal processes that are intercontextual and interlegal in nature. The law of global value chains is also illustrative in this case. Like colonial law before it, GVC law structures and enables global economic exchanges through connectivity norms. Connectivity norms are oriented toward the facilitation of transplantation—that is, the extraction, transmission, and incorporation of components of meaning from one legally structured context to another. This is, for example, the case within international trade and investment law and internal market law (Kjaer 2018). This

makes GVC law a third space, part of neither the outbound nor the inbound destination of transplanted components of meaning. GVC law is, in other words, liminal law.[14]

A reconstruction of both universal imperial and colonial and GVC versions of global (economic) law as intercontextual law implies that conflicts of laws methodology becomes the most obvious legal lens through which to observe both past and present global society (Kjaer 2020c). Based on a mapping of the manifold global conflict lines between community-based living law, national, international, transnational, and global legal orders, a central challenge for legal scholarship is to develop a multidimensional conflict of laws approach complex enough to address the structural realities of world society (Fisher-Lescano and Teubner 2006; Joerges et al. 2011; Michaels and Pauwelyn 2012). A many-valued logic going beyond the binary national/international and bilateral inter-state lock-ins and a theory of polycontexturality is needed in order to capture the complex matrix of law in world society.[15] Such an approach, in its substantial normative content, might have the safeguarding of the autonomy and integrity of multiple legal orders as its focus point—that is, addressing asymmetries, transfers, and collisions between such orders.

5.3.From Economism to Pluralism

[14] Liminality was also central to colonial law. While it shares many characteristics with contemporary GVC law, a central difference is that colonial law was explicitly asymmetrical, skewed in favor of the colonizers through distinctions such as Christian/non-Christian and civilized/uncivilized and through unequal treaties. GVC law is, on the other hand, formally symmetric and bound up in a semantic of partnership. The degree to which this difference makes a difference in the real world is an empirical question, which, if adequately clarified, might highlight both the potentials and the limitations of law in global settings. See Kjaer 2018.
[15] In the sense of Gotthard Günther. See Günther 1978.

Gunther Teubner recently made a case for a nonreductionist concept of surplus value, arguing that equivalents to profit maximization can be found in all areas of society and not just in the economy—that is, in education, politics, religion, science, and so forth (Teubner 2020). Hauke Brunkhorst, coming from a left-Hegelian position, effectively made the same argument in 2014, arguing that the inbuilt contradictions and conflicts Marxists identify in the economy are present throughout society, just as different functional systems like religion, the economy, and education have been structurally dominant in different historical epochs (Brunkhorst 2014; Kjaer 2020c).

This insight has several implications for the law of political economy. One is that structural Marxism and structural liberalism (i.e., neoliberalism) are each other's mirror images, as they share a reductionist foundation. In the 1980s, structural liberalism succeeded structural Marxism as the fashionable ideology of the day. This, however, merely implied a switch from one side to the other of the same coin, insofar as both assume that society can be understood as being predominantly structured by economic interests and motivations, and that "society" can be considered the equivalent of the economy, or at least that society can be captured through an economic lens. Both ideologies saw and see the economy and private power, not law and legally constituted public power or any other part of society, as the driving force of societal evolution. For both, state action ultimately remains guided by economic interests, leaving little autonomy for law and legally constituted public power, or indeed for any other part of society (Kjaer 2020b, 2ff.; Kjaer 2020c).

After being the underdog for a couple of decades, the Marxist version has been revived in recent years (e.g., Baars 2020; Tzouvala 2020). In the new version, links are frequently made to ethnic, gender, and racial justice issues. The theoretical rationale allowing for this link is, however, not

entirely clear, as the present-day attempt to give a privileged ontological status to identity-related concepts and the tendency to focus on individualistic rather than class-based perceptions and experiences is diametric to classical Marxist thinking. The only link seems to be a diffuse feeling of kinship based on the idea of a common enemy and a common taste for ideology-driven conflictuality.[16] The failure to develop a nonreductionist theory of surplus value and the, at best, feeble link to classical Marxism might be considered a main reason for the move of self-declared critical and left-leaning scholars into the dead end of methodological culturalism. As already indicated, Polányi's *The Great Transformation* has attained cult status in recent decades. In spite of its beauty, Polányi's historical reconstruction of the stages in the autonomization of the economy and its reproductive logic and the consequences thereof remain—like the Marxist approach—deeply skewed and reductionist by the failure to recognize that striving for value surplus and tendencies of autonomization and acceleration can be found throughout society and not just in the economy (Kjaer 2020c). The differentiation, autonomization, and acceleration of functionally delineated processes are observable in relation to a whole string of areas, such as art, health, education, intimacy, law, mass media, politics, religion, science, sports, and tourism, and not just in relation to the economy. These processes share their reliance on specific logics related to modern forms of organizing as expressed through concepts such as the Weberian iron cage and Lenin's concept of the organizational society. In the most advanced parts of the world, the untapped emancipative potential of modern society is therefore primarily organizational rather than economic or political (Sciulli 2001).

[16] For critical as well as embracing views, see Kumar et al. 2018.

When one departs from a multi-evolutionary perspective and multivalued logic rather than a one-dimensional economism approach, the focus moves away from the singular endogenous logic of the economy to the multiple endogenous logics of a whole range of functional systems. This move, due to the plurality of systems, inevitably puts the coevolutionary logics and the relational dynamics between different systemic processes at the center. This enables a very different and far more sophisticated diagnosis of society than the ones provided by one-dimensional approaches such as those advanced by Hayek, Friedman, Marx, and Polányi, who all locate the driving force of society in the economic system. An alternative and sociologically sounder approach would be to acknowledge that humankind has tasted the apple of modernity, with the consequence that paradise has been lost and a return to a communitarian *Gemeinschaft*, as advocated by the latter-day Polányists, or, more generally, the reduction of society to a single system is structurally impossible. This insight was already at the center of Hegel's *Elements of the Philosophy of Right* and its ultimately failed attempt to reestablish unity on modern premises through the state. It was also central to the work of mid-nineteenth-century sociologists such as Émile Durkheim, Georg Simmel, Ferdinand Tönnies, and many others. Contemporary ideology-driven scholarship seems, in other words, to be struck by a remarkable degree of amnesia.

An acceptance of the pluralistic structural condition of modernity implies a recognition of the need for a far more complex conceptual framework for describing society and its evolution than the ones provided by mainstream affirmative or critical approaches to market-based economies. Such a societal diagnosis would, as a minimum, have to differentiate between three questions that traditionally have been lumped together: How does society transform over time—that is, what are the drivers of change in society? How does socialization of subjects take place—that is, how do

subjects internalize norms, beliefs, and knowledge? How is societal coherency—that is, integration—established and maintained? To answer the first question, scientific and technological changes are probably the dominant driver. To answer the second, family and religion were traditionally dominant, and today education increasingly takes the prize as the most central dimension of society. To answer the third, the question of why some parts of world society look like Somalia and others like Switzerland, the question of institutions and, behind that, law and politics—that is, legally constituted public power—looms large. In short, while of course crucial, the economy has never been the central dimension of society. All systemic processes circulate around three dimensions: first, their reflexive self-maintenance (i.e., what they produce to maintain themselves); second, the prestation they produce vis-à-vis other systems (e.g., skills provided in the educational system enabling believers, citizens, or consumers to engage in their respective social roles within the systemic processes of religion, politics, or the economy); and finally, the function they produce vis-à-vis society as a whole (i.e., their contribution to the coherency of society). In this setup, different systemically organized processes are characterized by a different relative weighting. Some, though far from all, strands of religion and intimate relations barely exceed reflexive self-maintenance. The economy and education tend to focus on providing prestations crucial to most other systemic processes. The legal and political systems, on the other hand, remain centrally focused on societal coherency. Hence, the systematic overestimation of the role of economic processes in society as equally assumed in affirmative and critical approaches to a market-based economy reflects a profound lack of conceptual differentiation. One might argue that the use of the money medium as an integrated part of almost all social exchanges means that we live in a capitalist society. But the same argument could be made for educational skills or scientific and technological knowledge. Few societal exchanges would take place without basic

math skills or wheels turning. On the other hand, law and economics scholars and other structural liberalists conflate the prestations provided by economic reproduction with reflexive self-maintenance or societal coherency. The core problem of the parts of world society most strongly subjected to structural liberalism, including law and economics, in the last four decades is the idea that reducing society to the issue of increasing economic prestation capacities somehow is good for reflexive self-maintenance and societal coherency. This problematic view, shared by self-declared left-wingers as well as both right- and left-wing economism, tends to equate reflexive self-maintenance and societal coherency with economic prestation.

The above pluralist perspective on society has implications for the function of law. While systems theory in the Luhmannian variant goes a long way in terms of its capacity to describe society through its reduction of society to endogenous processes, it fails to give an adequate account of intersystemic dynamics and the in-between worlds of the gray in gray (Luhmann 1997). A doubling of the theory, enabling it to *equally* capture the endogenous and the exogenous dimensions of systemic social processes, is needed. This is illustrated very well through the strategic role, as originally pointed out by Hegel and Durkheim, of intermediary institutions in society and the sort of enabling and stabilizing effect they have on systemic processes (Kjaer 2015). In this context, the classical understanding of the function of law as focused upon the upholding of normative expectations (Luhmann 1993, 195ff) can be complemented by a focus on the dual functions of simultaneously differentiating and reconnecting systemic processes.

The dual function linked to the *simultaneous* separation and reconnection of different systemically organized spheres of society originally emerged in the process leading to a differentiation of

religion and politics through law. Concretely, this differentiation occurred from the investiture controversy onward, and the controversy thereby became the mother of modern separation and reconnection processes, providing the template for modern law-based political economy (Brunkhorst 2014, 90ff.). This double separating and reconnecting function gives law and legal instruments a strategic, though not superior, position in society as the grid aimed at enabling and restraining societal exchanges while respecting and nurturing the inner *Eigenlogik* and rationality of systemic processes throughout society. Hence, the *simultaneous* separation and reconnection of different systemically organized spheres of society through law are observable not just in relation to politics and the economy. Political economy, both as an epistemological approach and as an institutional reality, is, however, a very clear example. While both advocates and critics of a market-based economy tend to emphasize the fusion of economic and political processes, considering this fusion either problematic or desirable, the third way outlined here instead emphasizes the dual and literally simultaneous function of separating and reconnecting political and economic processes through legal means. Indeed, the law-based neocorporatism of the post–World War II era was the embodiment of this approach. Strongly formalized and across-the-board frameworks of organizing capital, labor, and government and formalized frameworks of continued negotiations between them served as filters aimed at distilling meaning through the restructuring of specific social communications and exchanges into generalized and hence depersonalized components of public power. This prestation of law, in other words, served to organize convergence and synchronization between other partial segments of society—a prestation that implied guaranteeing the *Eigenlogik* and autonomy of the systemic processes in question through institutions such as private property rights, competition law, and the neutrality of

administrative law as well as obtaining functional validity though synchronization for society as a whole.[17]

5.4. From Analytical Formalism to Sociological Formalism

Formalism is traditionally associated with nineteenth-century classical legal thought, advancing a "scientific," "objective," and internalist view on law aimed at establishing systemic coherency—an approach that relied on notions of formal equality derived from transcendental philosophy and that, especially in the US context, was heavily criticized by legal realist scholars for its speculative character. As mentioned, in this context, Victoria Nourse and Gregory Shaffer consider law and economics as a neoformalist approach detaching legal reasoning from social reality, instead relying on formalist analytical modeling derived from economic theory (Nourse and Shaffer 2009; Frerichs 2020)—a form of speculative theorizing acting as a deductive form of casuistry relying on prestructured utilitarian values and crude methodological individualist assumptions.

Sociological formalism—that is, the empirical study of social forms such as institutions, organizations, networks, and social roles—represents a far more advanced approach. Social communication flows come in looser or tighter versions. Loosely coupled communications have social reality but are characterized by blurred boundaries, short life spans, and sparsely condensed meaning. Tightly coupled communications, on the other hand, imply clear boundaries, reiterated processes, and condensed forms of meaning. As studied since Pythagoras, many different forms

[17] In addition, neocorporatism was aimed at substituting public power with the help of law for clientelism, paternalism, and private interests. This made neocorporatist institutions specifically modern, as abstraction advanced through depersonalization, besides functional differentiation and a reconstruction of time as linear, is the central feature of modernity.

of form building are observable within many different mediums of a physical, biological, and social nature (Åkerstrøm 2019). In the social world, the conversion of loosely coupled communications into tightly coupled communications is the built-in purpose of social formations such as institutions, organizations, networks, and social roles, enabling increased complexity, structuring of expectations, and dynamic stability (Karafillidis 2010). Many of these social forms exist without relying on or only sparsely relying on law. In many instances, however, law provides a particular prestation for many nonlegal social processes by rendering form to them. For a social exchange to be considered an economic exchange, it needs to take place with the framework of a contract of similar legal form. For something to be considered a legitimate expression of political preferences, it needs to unfold within a voting procedure or other legally structured framework. In both cases, it is the legal framing that transforms a generic social communication into something that we can call specifically an economic, a political, or, for that matter, a religious or a scientific phenomenon. As such, law can be considered as enabling social processes through the prestation of form giving. The rather old idea of the New Haven LPE movement concerning the law's constitutive function vis-à-vis the economy is, in other words, not particular to the economy but rather a general feature of many institutionalized social processes. Hence, form giving might be considered a central prestation of law, with a prevalence similar to the use of money, educational skills, or technology in social communications. It is, however, a kind of form giving that remains "hidden" in most cases, as the full force of the law is activated only in conflictual settings remaining largely invisible in day-to-day operations. In spite of, or maybe exactly because of, its inconspicuous impact on day-to-day operations, the form-giving prestation of law comes with a decisive epistemological twist: form giving is a condition for observation, thereby making it constitutive in a more fundamental sense. While the political system might instruct the law through

legislation, and while economic and other concerns might force the hand of the law in concrete cases, form giving through law ascribes something a specific political or economic quality. Political power, for example, does not exist outside the law; only violence does (Arendt 1970; Brunkhorst 2014, 127). In this particular sense, we might say that it is not the political or the economic that constitutes the law; it is the law that constitutes the political and the economic because they become observable only as particularly political or economic through the legal form. The prestation of law is, in other words, of a far more fundamental character than economic prestations, which tend to merely grease the wheels of noneconomic social processes.

The prestation of law in the transformation of loosely coupled communications into tightly coupled communications—that is, the "formative" part of transformative law—is where the immediate transformative potential lies. However, the potential of law goes further as the legal system, in spite of its own blind spots, has a strategic location in society, making it the central infrastructural grid giving structure to world society—a grid that represents the "trans" part of transformative law. Apart from form giving—that is, constituting social phenomena in their enabling and limiting dimensions—and the material substance the law is oriented against, the third dimension of triangular dialectics concerns the transcendence of forms—that is, the rendering of compatibility between forms. As the social world is a processual world—that is, existing in the medium of time and constantly in the making through form giving—this is very much a question of synchronization. While a news cycle, the covering of a story by mass media from first to last instance, often is extremely short, business cycles are considered to run for up to sixty years (Kondratieff and Stolper 1935). A political cycle tends to follow the four- or five-year election period or, alternatively, five-year plans, as in communist political systems. Science and technology

life cycles are often of a thirty-year duration, and religious cycles are intended to be eternal. In this context, the function of law becomes a question of achieving compatibility through the synchronization of different time logics. In the context of political economy, several examples can be mentioned: the legal structuring of institutional formats such as neocorporatist frameworks for continued tripartite negotiations between employers, employees, and the state; the structuring of independent central banks located in between the economic and the political system; corporate social responsibility frameworks as well as supply chain liability doctrines. These are all examples of legally framed attempts to establish compatibility between different modes of operating originating within different systemic processes in society—examples that represent prestations involving partial segments of society but that provide the basis for generalized legal principles and approaches that have profound effects for society in its entirety.

Over the last decades, world society has, however, undergone immense increases in complexity, massive accelerations, and spatial expansions. The amount of information published and stored, the pace of technological developments, and the convolution of the challenges facing society go far beyond what law in its current form can absorb. The core characteristic of world society in recent decades is that the material substance of social processes has exceded the legal-institutional frames and forms that emerged in the immediate World War II period. Mass media has morphed into social media, economic products into experiences, multinational companies into global value chains, and scientific contributions into blog posts. In short, the crisis of the West is essentially about the absence of tight framings of social processes. Form giving through law is not just about enabling social processes but just as much about limiting such processes, and the crisis of the West might be considered linked to the increased failure of the limiting function of law. Constitutionally,

as well as in every legal field from company law to family law and internet law, the challenge is thus to increase the internal complexity, speed, and reach of law in a manner that enables it to capture loose social processes and give them a tight form. Informal governance and "managerial" soft law arrangements, for example, which emerged as a result of the inadequacies of existing institutional forms, are in demand of a new, tight legal form. The challenge posed both by neoliberalism and by its demise is thus mainly a surface problem, as the law is faced with a far bigger challenge: namely, to reinvent itself to stay relevant under the structural conditions of twenty-first century world society (Kjaer 2020c).

6. Conclusion

The Western world faces a crisis that might end up being terminal in the sense that the term *Western world* will no longer be meaningful. The crisis is essentially about the loss of Western privilege and structural dominance in an increasingly globalized world society. One symptom of this, observable across society, is a retreat to ontological concepts of identity. Both the defenders and those critical of the so far dominant forms of societal privileges resort to obscure identity-based worldviews. On both sides, an incoherent cocktail of theoretical humbug provides the shaky but nonetheless fertile foundation for antagonistic, conflictual, and exclusionary approaches threatening to rip society apart. This return of polarization is, however, largely a surface problem, as far more profound structural issues are at play. The integrative grid of society provided by law has been challenged and faced with erosion in many different settings as the legal-institutional frames of the post–World War II world have faltered and without new ones emerging or with the new ones insufficiently grounded and coherent. This is not only observable in relation to the legally structured relationship between economy and politics. The triangular relationship between law, economy and politics have to be considered a central aspect of a larger societal-wide constellation.

thereby providing the incentive for a rethinking of the law of political economy under the structural conditions of the twenty-first century. A rethinking that might be done under the heading of transformative law and with the aim of developing a new understanding of the function and concept of law. This endeavor implies, at a minimum, four moves: firstly, forsaking methodological individualism and a move toward a substantial concept of world society; secondly, abandoning the concept of hegemony, substituting for it a concept of interlegality; thirdly, rejecting the reductionism of economism at the center of both affirmative and critical approaches to market-based economic organization, moving instead toward a pluralist perspective providing a far more nuanced and sophisticated analysis of the role of different societal logics on society as a whole; fourthly and finally, moving beyond the sort of analytical formalism currently dominating economics, philosophy, and political science, replacing it with empirical (i.e., historical), grounded sociological formalism.

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