
The Law of Political Economy

An Introduction

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Introduction

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

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

I The Multiple Discourses on Law and Political Economy

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

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

On the affirmative side, public and social choice stand out as umbrella terms for approaches which seek to transpose economic tools and perspectives, such as those derived from utility maximisation and game theory, into issue areas that are traditionally dealt with by public law and political science, that is, how individual decisions aggregate into collective decisions, and issues of individual, as well as social, optimisation of welfare.⁴ New Public Management might be seen here as a related

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

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

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

approach which seeks to develop 'business-like' forms of organisation and management in the public sector, for example, through the introduction of *quasi* markets.⁵ These approaches tend – implicitly or explicitly – to be combined with normative undertakings aimed at expanding an economic way of observing and evaluating social phenomena in areas of society not previously dominated by economic logics, thereby producing performative effects.

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

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

In spite of the different points of departure, the various positions tend implicitly to share a number of assumptions. First, the primacy of the economy in so far as both the affirmative and critical approaches tend to see the economy as the central driver of societal evolution, with the in-built logics of profit generation, welfare maximisation, and creative destruction embedded in economic processes as the fuel. This is also

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

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

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

the case for those which explicitly seek to highlight the role of the state or the structural demand for a societal embeddedness of economic production processes, in so far as they tend to invoke the notion of capitalism, understood as an overarching process which integrates economic and political logics, thereby making it difficult to separate the political and economic dimensions of capitalist reproduction.⁸

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

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

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

produced by this policy regime.¹⁰ In a simplified form, one might therefore argue that the ordoliberals are interested in the connection between political economy and law, while law and economics is interested in the connection between economics and law.

II The Law of Political Economy – A Sub-Case of a Grand Debate

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

II.1 *Holism versus Differentiation*

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

As also observable in the self-descriptions of society, the progressive advancement of modernity can be understood as a gradual move away from a holistic notion of society, and towards an increased reliance on a differentiation-based notion of society.¹¹ Hobbes’ theory of the Commonwealth is, at least in the Anglo-American world, often considered the first theory of society based upon modern premises. But,

¹⁰ For more on this, see Dzmitry Bartalevich, ‘Do Economic Theories Inform Policy? Analysis of the Influence of the Chicago School on European Union Competition Policy’, Ph.D. Dissertation, Copenhagen Business School, 2017. See also the contribution of Jotte Mulder to this volume.

¹¹ Reinhart Koselleck, *Begriffsgeschichten* (Frankfurt aM: Suhrkamp Verlag, 2006); Niklas Luhmann, ‘Gesellschaftliche Struktur und semantische Tradition’, in: Luhmann, *Gesellschaftsstruktur und Semantik, Band 1* (Frankfurt aM: Suhrkamp Verlag, 1980), pp. 9–71.

although a differentiation between state and society is implicit to the theory, its starting point is, as also illustrated by the famous frontispiece of *Leviathan*, a holistic (i.e. organic), notion of body politics.¹² In the Hobbesian world, there are many bodies in society, but they are all encompassed by the ‘meta-body’ of the state in the monarchical form. As such, Hobbes’ theory introduces a modern element but never really escape the pre-modern understanding of society as a holistic whole. In a ‘two steps ahead’ and ‘one step back’ manner, the history of modern western thought from Locke and Montesquieu to Rousseau, Kant and Hegel are the history of the gradual shift – sometimes bemoaned and sometimes celebrated – from holism to differentiation. A movement which culminated in the theory of classical modernity, defined as the *époque* between 1789 and 1989, *par excellence*, in Hegel’s *Philosophy of Rights*.¹³

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

The classical modernist narrative, as embodied in the advancements of the Atlantic Revolutionary movements, in Europe, North and South America, from the 1770s to the 1820s,¹⁵ implied a focus on progress,

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

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

¹⁴ Jürgen Habermas, ‘Hegels Begriff der Moderne’, in: Habermas, *Der philosophische Diskurs der Moderne* (Frankfurt aM: Suhrkamp Verlag, 1985), pp. 34–58.

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

emancipation and freedom, while the ‘dark side’, from Hegel onwards, has been consistently problematised through terms such as *alienation* (Marx), *anomie* (Durkheim), *colonialisation* (Habermas), *de-differentiation* (Luhmann), *disciplination* (Elias and Foucault), *existential fear* (Kierkegaard), *rationalisation* (Weber), *reification* (Adorno and Horkheimer), and *technification* (Heidegger), upon the basis of what ultimately points in the direction of either a longing for, or at least serving as reflections on, the consequences of a lost world understood and observed in holistic terms.¹⁶

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

Within economics and political economy, a sub-variant of this debate has unfolded. With initial skirmishes unfolding from Smith and Ricardo to Hegel and Marx, the defining battle emerged with the constitution of economics as a largely self-contained academic discipline in the switch from the dominance of the German historical school, associated in various ways with von Schmoller, Weber, Schumpeter and others, to the analytical, model based, largely US-based economic discipline of today. The switch from the ‘real world’ (i.e. history), to analytical models is normally considered a switch from holism to differentiation because the German historical school ultimately subscribed to a particular holistic inspired philosophy of history.¹⁷ This view, however, is highly questionable. Rather than representing an advancement of modernity, analytical economics remain stuck in the past, in so far as the axis around which modern economic theories circulates is a notion of ‘equilibrium’ and the idea that markets tend towards it. Any notion of equilibrium, or balance, however, presupposes a whole which can be ‘in balance’. Contemporary economics is yin and yang science, where the whole (i.e. ‘the market’), is a body which is greater than its parts (i.e. supply and demand). This is also expressed by the everyday stylisation of the market as a *persona* with autonomous

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

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

agency, as expressed in statements such as ‘the market expands’, ‘the market rebounds’ or ‘the market expects’.¹⁸

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

The above, somewhat crude, characterisation of the dominant traits of contemporary economics has, of course, been heavily criticised by the political economy discipline, which went its own way in the wake of the differentiation of economics from its neighbouring disciplines. But, even in contemporary political economy, the critique of ‘market fundamentalism’ and the crude world view concerning the nature of economic relations which dominates the economic discipline has, however, not implied an abandoning of the holistic premise, but merely a substitution of market holism with cultural holism. *The Three Worlds of Welfare Capitalism* approach, associated with Gøsta Esping-Andersen, advances, as is also apparent from the title, an image of distinct universes of welfare capitalism.¹⁹ In a similar manner, *The Varieties of Capitalism* literature tends simply to speak of ‘France’, ‘Germany’ or the ‘United States’, assuming that they are unified and singular entities. From this perspective, the state/society distinction does not exist or is at least disregarded in so far as the objects of study are ontological presupposed and assumed to be ‘culturally given’ holistic national units, made up of all social communications unfolding within their respective borders and seen as tending to move towards some sort of institutional equilibrium.²⁰ In the German context, Fritz Scharpf and Wolfgang Streeck have, moreover, advanced an implicit culturalistic version of political economy, in which, for

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

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

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

example, the German political economy (i.e. the German capitalist state), is seen as a unitary and holistic system which includes all activities unfolding within the borders of Germany,²¹ or through an understanding of the Eurozone as characterised by not only unbridgeable cultural divides, but also by static cultures which are essentially resistant to change.²²

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

The divide between market holism and cultural holism was particularly highlighted in the stand-off between Friedrich August von Hayek and Karl Paul Polanyi (*Polányi Károly* in Hungarian) which, to a large extent, continues to dominate contemporary debates on political economy.²⁴ In 1944, Hayek and Polanyi published *The Road to Serfdom* and *The Great Transformation* respectively and, in doing so, asked the same question: Why had totalitarianism emerged and

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

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

²³ Jürgen Habermas, *Nachmetaphysisches Denken* (Frankfurt aM: Suhrkamp Verlag, 1988). An important exception can, however, be found by Ngai-Ling Sum and Bob Jessop. In their version of cultural political economy, analyses of sense- and meaning-making are linked to instituted economic and political relations, thereby combining semiotic and structural features without falling into the trap of foundationalism. See Ngai-Ling Sum and Bob Jessop, *Towards a Cultural Political Economy: Putting Culture in its Place in Political Economy* (Cheltenham: Edward Elgar Publishing, 2013).

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

succeeded?²⁵ The answers they gave were, however, diametrically opposed to one another. Hayek's answer was that the economy had not been differentiated enough from the rest of society (i.e. that society had become characterised by de-differentiation and a capture of the economy by politics). For Polanyi, the main problem was, on the other hand, a society in which the economy had become 'too detached' and dis-embedded from the rest of society. In short, the answers that they gave were yet another variation of the holism versus differentiation debate.

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

Yet another variant of the holism versus differentiation tension can be observed in the gradual substitution of the 1970s variant of structural Marxism with structural Liberalism (i.e. neoliberalism), as the fashionable ideology of the day. In theoretical terms, this merely implied a switch from one side to the other of the same coin, in so far as both assumed that society could be understood as being predominantly structured by economic interests and motivations, and that 'society' could be equalled to

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

²⁶ An equally skewed reactionary-communitarian version of the Polanyian approach can be found in Wolfgang Streeck in his comparison between the real existing capitalist market economy and an ideal vision of democracy which, for Streeck, is equal to nationally constituted and embedded left-wing social democracy. For this capitalism versus democracy dichotomy within a nationalist frame, see, for example, Wolfgang Streeck, 'How will Capitalism End?', *New Left Review*, 87, May/June 2014, 35–64.