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Frerichs, Sabine

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The Rule of the Market: Economic Constitutionalism Understood Sociologically

Sabine Frerichs

Abstract

Setting out from the works of Max Weber and Karl Polanyi, this chapter outlines a sociology of economic constitutionalism. The starting point is a functional definition of economic constitution as the law constituting the market order, no matter if it is public or private, national or international, official or informal law. Economic constitutionalism is understood as a system of thought, which emphasises the role of a liberal economic constitution in integrating the global economy.

Adapting Weber's ideal-typical method, the economic constitution is conceived as a constitutional ideal type, next to juridical constitution, political constitution, social constitution, and security constitution. Sociologically speaking, these ideal types capture different constitutional rationalities, which are all culturally significant but not equally successful in the global age.

Drawing on Polanyi's work, which exposes the self-regulating market as an artefact of economic thinking, the argument proceeds by highlighting the constitutive role of economics in constructing the law of the globalised market society. After economic law came to be embedded in national welfare states in the twentieth century, economic constitutionalism furthers the opening up of national laws and economies. In contrast to the rule of law, the rule of the market is inherently transnational in character.

Keywords

economic constitution, market society, Max Weber, Karl Polanyi, functional differentiation, ideal types, embeddedness, commodification, economic sociology, sociology of law

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The Economic Sociology of Law: From Weber to Polanyi

This chapter outlines a sociology of economic constitutionalism from the viewpoint of the economic sociology of law. I will start with some notes on terminology. The subject of analysis is ‘economic constitutionalism’, which means a system or school of thought (-ism) in which the role of a liberal economic constitution is emphasised. An ‘economic constitution’ can be understood in different, formal or functional, terms. In a narrow, legal understanding, it refers only to those elements of the economic order, which are codified in the formal constitution of a state. In a wider, economic understanding, it extends to all legal rules that together constitute the economic order of a state as well as to non-legal norms, which are subject to informal sanctions only. Along these lines, an economic constitution can be national, international, supranational or transnational in character.

In this chapter, economic constitution is understood in functional rather than in formal terms: as the ‘law of the market’, of the ‘market economy’, or ‘market society’. Its primary reference point is the economic system and not the legal system. However, the system of thought, or ideology, of economic constitutionalism does prominently include the juridical dimension. It promotes the ‘juridification’ of economic constitutions, that is, their prioritisation and proliferation through ‘higher law’. In this regard, we can also speak of the ‘constitutionalisation’ of the law of market society.

The analytical starting point of this chapter is in sociology and, more precisely, in a sociology which regards the law and the economy, as well as law and economics, as its legitimate subjects. This includes perspectives from general sociology, economic sociology, and legal sociology, which all merge in the ‘economic sociology of law’. The economic sociology of law is located between three established disciplines (economics, sociology, jurisprudence) and three interdisciplinary research fields (economy and society, law and society, law and economy). It is a ‘holistic’ venture focusing on the relations of law and economy in society.

Economic constitutions were already a matter of interest in my doctoral thesis (Frerichs 2008). Shortly after, this research topic became linked with the perspective of the economic sociology of law (Frerichs 2009). My postdoctoral thesis then evolved around the question “what constitutes the market society?” (Frerichs 2012). The most straightforward answer would be ‘the law’. However, the ‘constitution of market society’ refers not only to the legal constitution of the economy, which is an economy centred around markets, but also to the economic constitution of the law, which creates and regulates these markets.

Importantly, a sociological understanding of the constitution of market society goes beyond the formal and substantive aspects of economic constitutions, which are emphasised, respectively, in law and economics. Indeed, ‘constitution’ can also mean ‘construction’, which refers less to the normative than to the cognitive dimension of how the market society is envisioned and enforced. A sociological concept of the “social and political constitution of the economy” thus includes the idea “that any economy, of whatever society, is socially and politically constructed, and that such construction, and reconstruction, takes place continuously in the course of social and political development” (Beckert and Streeck 2008: 12-13).

Varying this, one can speak of the legal construction of the economy, and of economic rationalities, as much as of the economic construction of the law, and of legal reasoning. The economic sociology of law may thus ask “in what ways, if any, are the cognitive infrastructures of markets – and therefore the particular forms of calculative rationality characteristic of such markets – created, entrenched, and mobilized through law and legal practices?” (Lang 2013: 170)

Alternatively, it may start from the opposite end, including the important observation that “concepts of law and justice are increasingly *defined* in economic terms and understood through the lens of market efficiency” (Edelman 2004: 182; original emphasis).

In this chapter, I will draw two important strands of my work together, which outline a sociology of economic constitutionalism. The first strand starts from the work of Max Weber and, in particular, it builds on his method of ideal types. This methodology is reflected, in its latest form, in Weber’s posthumously published work *Economy and Society* (1978 [1922]) that also contains his “sociology of law”, which is actually concerned with the relation between “economy and law” (ibid., Part Two, Ch. VIII). This makes Weber a pioneer of an integrated view on law, economy, and society – and, hence, of the economic sociology of law. Not surprisingly, then, his work has been emphasized in the rediscovery of this field of intersections (Swedberg 2003; 2006). Using Weber’s ideal-typical method, the economic constitution will be identified as one of a range of four or five ‘constitutional ideal types’ which are all culturally significant but not equally successful in the global age (Frerichs 2010).

The second strand developed in this chapter takes the work of Karl Polanyi as its starting point and lays particular emphasis on the problem of embeddedness. In his famous book *The Great Transformation* (1957 [1944]), Polanyi summarises his idea and critique of the market society as follows: “Instead of economy being embedded in social relations, social relations are embedded in the economic system.” (ibid.: 57) Social embeddedness of the economy, and of markets in particular, is considered the ‘normal’ case throughout history and taken as a normative standard to pinpoint processes of ‘disembedding’ or ‘re-embedding’. In contrast, the modern market society is characterised by the “embeddedness of economic markets in economics” (Callon 1998). In other words, the market is a scientific artefact. Extrapolation of Polanyi’s argument to the law of market society allows developing an economic sociology of law, which highlights the intellectual foundations of economic constitutionalism (Frerichs 2011; 2016).

Weber’s Sociology of Law and the Method of Ideal Types

Max Weber (1864-1920) started his career as a legal scholar and ended it as a sociologist. In fact, his academic life could be divided into three phases: a legal one, an economic one, and a sociological one, and in all of them, historical perspectives played an important role (Swedberg 2006, 74). The link between legal and sociological terminology in Weber’s work is obvious. As a variation on Nietzsche’s famous phrase (2005 [1872]), Gephart (2003) speaks of “the birth of sociology from the spirit of jurisprudence”. In his attempt to make a “Case for an Economic Sociology of Law”, Swedberg (2003) holds that “[t]he thinker [...] who has made the most sustained attempt to establish the general relationships between law and the economy from a sociological perspective is Max Weber” (ibid.: 11). In fact, Weber’s work already contains the key elements of a research programme in the economic sociology of law. His approach to the law and the economy as well as their interrelations is genuinely sociological.

Weber considers legal theory and legal sociology as distinct endeavours, one dealing with the legal order as it ought to be (normative validity), and one considering how it actually is, that is, how it works in practice and namely affects social action (empirical validity). From a sociological point of view, legal order thus “refers not to a set of norms of logically demonstrable correctness, but rather to a complex of actual determinants [...] of human conduct” (Weber 1978 [1922]: 312). Comparing the viewpoints of “legal dogmatics” and “interpretive sociology”, Weber (1981 [1913]: 159) claimed: “It is the inevitable fate of all sociology that it must very often use rigorous legal expressions (rigorous because based on the logical interpretation of norms) for the

investigation of the actual action, which is in continual transition between the ‘typical’ cases of action, in order, then, to substitute its own meaning for the essentially different legal meaning.” This principle is well demonstrated in Weber’s opus magnum *Economy and Society* (1978 [1922]), which is full of ‘legalistic’ definitions. In this work, Weber combines a macro-sociological approach, which focuses on the development and characteristics of social collectives, with a micro-sociological approach, which starts from the meaning that individuals attach to their action and interaction. At its core is the method of sociological ideal types, which makes it possible to systematise and classify cultural differences in historical comparison, but which also sheds light on the differentiated value spheres and rationalities that coexist and compete in modern society. As a means of cultural reflection and self-reflection, ideal types help to answer the question that was at the core of Weber’s work: “What is the constitution of modern society, and how did this particular type of society emerge?” (Lindbekk 1992: 295).

Weber developed his method of ideal types “in several stages” (ibid.: 287), moving from an ideographic ideal to a more nomothetic understanding of the science of culture (Albert 2007: 61-62). His ideal-typical method thus developed from the description of singular cases to the systematic study of (modern) society in historical and cross-cultural perspective. In Weber’s earlier, more ‘inductive’ period of work, ideal-types emerged from the study of the historical material. In his famous essay on “The ‘Objectivity’ of Knowledge in Social Science and Social Policy” (2004 [1904]), he emphasised “our ability and need for *conceptually ordering* empirical reality in such a manner as to lay claim to *validity* as experiential truth” (ibid.: 365; original emphasis). On this account, ideal types help to identify cultural ideas that are effective – albeit not necessarily fully realized – in practice. They are realistic inasmuch as “the features so characterized are taken from significant parts of our lived culture and rendered into a unified ideal image” (ibid.: 388). In Weber’s later, more ‘deductive’ period of work, the heuristic function of certain generalised sets of ideal types became more dominant. As Lindbekk (1992: 295) notes, “[e]ach single group” of ideal types then “presents a complete classification system”, which facilitates historical and cross-cultural comparison. Arguably, these ideal types stand not only for different types of orders prevailing in different types of societies but also for the competing principles of order at work in modern society itself. In a Weberian perspective, the “constitution of modern society” could thus be described as an “interplay between various organized interests articulated through meaning-complexes”, which may be captured “with the help of generalized [ideal] types” (ibid.).

This strategy can be illustrated with examples taken from the sociology of law enclosed in Weber’s *Economy and Society* (1978 [1922]). The first example is Weber’s classification of social action according to the ideal types of (a) instrumentally rational, (b) value rational, (c) affectual, and (d) traditional action. All social action can thus be interpreted (*verstehen*) and explained (*erklären*) according to this “basic set of pure cases” (Rex 1977: 163), which forms the cornerstone of Weber’s micro-sociological theory of action. The second example is Weber’s taxonomy of forms of legitimate order and domination. In contrast to the previous set of ideal types, the present set is more macro-sociologically oriented. However, as the terminology shows, both classification systems are closely related: “The actors may ascribe legitimacy to a social order by virtue of: (a) *tradition*: valid is that which has always been; (b) *affectual*, especially emotional, *faith*: valid is that which is newly revealed or exemplary; (c) *value-rational* faith: valid is that which has been deduced as an absolute; (d) positive [instrumental] enactment which is believed to be *legal*.” (ibid.: 36; original emphasis). The third example concerns the law itself. Again, Weber arrives at a set of four ideal types, which includes formal and substantive as well as rational and irrational forms of law (ibid.: 656-657). Modern Western law comes closest to the ideal type of formal rational law, which is based on formally determined and generally applicable norms – hence, on legality. In contrast, substantive rational law is based on value rational belief systems, including natural law; substantive irrational law is based on authoritative, ethical or

pragmatic, case-by-case reasoning; and formal irrational law on charismatic or religious revelation, including oracles, prophecy, and magic (cf. Gephart 1993: 519-522).

Constitutional Ideal Types in the Global Age: Statics

Weber's ideal types of legitimate order, which form part of his sociology of the state, and his ideal types of law, which form part of the sociology of law, could be developed into ideal types of the political constitution but less so of the economic constitution, whose reference point is not the state but the economy. The term 'economic constitution' (*Wirtschaftsverfassung*) appears in the German original of *Economy and Society* (1978 [1922]) and is even listed in the index, but it is not developed as a concept and plays no role in the English translation. Weber's notion of constitution is related to 'organisation' (*Verband*), which includes the state (*Staatsverband*) and then pertains to "the law of the state" or "the state's legal order" (ibid.: 49). At the same time, his notion of 'order' (*Ordnung*) covers political, legal and economic orders alike, which may coexist and overlap: "The fact that, in the same social group, a plurality of contradictory systems of order may all be recognized as valid, is not a source of difficulty for the sociological approach" (ibid.: 32).

Weber is most concerned with the interaction of economic and legal orders, and the empirical connection between capitalism and the rule of law, or "the modern economic order" and "the legal compulsion of the state" (ibid.: 65; cf. ibid.: 329). In its broadest sense, the idea of an economic constitution is thus covered by Weber's notion of 'economic order'; in a more specific sense it is represented by his notions of 'economic regulation' (*Wirtschaftsregulierung*) and 'market regulation' (*Marktregulierung*) (ibid.: 82 and 351). Market regulation is defined as "the state of affairs where there is a substantive restriction, effectively enforced by the provisions of an order, on the marketability of certain potential objects of exchange or on the market freedom of certain participants", be it through tradition, by convention, or by law (ibid.: 82-83). Besides "various types of formal and substantive regulation of [private] economic activity", modern states regulate the national economy through their own economic activities (i.e., the public economy), the monetary order (*Geldverfassung*), and foreign trade policy (ibid.: 193-194).

In order to develop the economic constitution as a Weberian ideal type, it can be distinguished from other 'constitutional ideal types'. Drawing on Tuori's *The Many Constitutions of Europe* (2010), the economic constitution can be distinguished from and compared with the political constitution, the social constitution, the security constitution, and the juridical constitution. Interpreted as constitutional ideal types, these capture different systems of order, which were, arguably, relatively integrated in the classical framework of the nation state but become more differentiated "in post-national times" (Blokker 2012). Tuori (2015: 9; original emphasis) speaks of a "constitutional relation between constitutional law and its object of regulation: that is, a constitutional object". The different constitutional ideal types thus relate to different social spheres or areas of regulation, namely the economy, the polity, the community, security, and the law itself (cf. ibid.: 23-24). Leaving out the juridical constitution, which represents law's 'formal rationality', this set of constitutional ideal types captures different 'substantive rationalities' of the law (Weber 1978 [1922]: 809), which can be classified, among other ways, in terms of their respective 'models of man', or the individual, and their 'models of society', or the collective (Frerichs 2010).

The concept of the economic constitution is prominently connected with ordoliberalism, an economic school of thought, which emphasises the functional link between economic and legal order. In this context, the state guarantees the legal framework for a free and competitive market

economy. The main purpose of this ‘order’ (*ordo*) is to constrain undue economic power by public as well as private actors. As a sociological ideal type, the economic constitution emphasises individuals over collectives. The model of man which underpins this is the *homo economicus*, a self-interested actor who maximises his or her own benefit. The model of society which determines it is market society, where market exchange is the overriding principle of social organisation. The reference system is, at least in principle, the global economy.

As to the political constitution, we can start from Weber’s understanding of legitimate order and domination, as it is applied to the modern state. Under conditions of formal rationalisation, the rule of law limits, legalises and legitimises state power. However, the political constitution goes further in establishing democracy, or the self-government of the people. In contrast to the economic constitution, the emphasis of the political constitution is not on economic freedoms, but on political rights. The model of man that supports the political constitution is *homo politicus* who engages in other-oriented communicative action rather than in self-interested strategic action. The model of society that informs it is civil society, an “associative democracy” (Hirst 1994). The reference system can be a national or transnational polity.

The concept of the social constitution is related to the “social life-world” (Tuori 2010: 10). It reflects “social values” and may take the form of “social rights”, which links it to the modern welfare state (ibid.: 24). The model of society associated with the ideal type of the social constitution is a solidary community which builds on mutually binding normative commitments. Whereas traditional, closely integrated communities are characterised by very concrete forms of solidarity, highly differentiated modern societies rely on more abstract forms of solidarity. The respective model of man is the classic *homo sociologicus*, which can be described as an over-socialised, norm-abiding individual. The reference system is typically a national community. The function of the security constitution is to protect and defend the public order against threats both from without and within, aiming at hostile foreign powers on the international level as well as potentially dangerous individuals on the domestic level. Since the security constitution may justify excessive restrictions or even repression, Tuori (ibid.: 25) also characterises it as an “anti-constitution” which is at odds with the rule of law, or the principle of a constitutional state (*Rechtsstaat*). The model of society associated with this ideal type is the control society. The model of man is “someone who is eminently governable”, that is, a subject which is directly or indirectly controlled by the state (Foucault 2008: 270). The main reference system is national government.

Constitutionalisation Beyond the Nation State: Dynamics

This taxonomic set of constitutional ideal types does not yet say anything about the dynamics of constitutionalisation, namely processes of ‘sectoral constitutionalisation’ within and beyond the state. In his recent book, Tuori distinguishes between two ‘framing constitutions’: political and juridical constitutions, and three ‘sectoral constitutions’: economic, social, and security constitutions. With regard to the framing constitutions he extrapolates from the classic understanding of a “state constitution” which establishes the state’s “political and legislative sovereignty” (ibid.: 25). How this sovereignty is used – for example, to regulate economic, social, and security matters – is, again classically speaking, outside the purview of constitutional law: “sectoral policy fields [...], as a rule, do not enjoy constitutional dignity” (ibid.). This is different in the European constitution and the European constitutionalisation process, which is interspersed with sectoral constitutionalisation. Here, the “functional primacy of the economic constitution” has, without doubt, left its mark (ibid.: 26). In European law, the fundamentals of the single market and the monetary union do enjoy constitutional dignity, which is generally respected by

the member states. This bears witness to the transnational dimension of ‘economic constitutionalisation’.

The analytics of constitutional ideal types differs from the narrative of classical constitutionalism first of all in that there is not one ‘holistic’ constitution but that there are many ‘partial’ ones. Moreover, there is no single act of foundation, in which the constitutive power appears on stage, but a functionally differentiated process of constitutionalisation, which seems to follow a logic of its own. The question is how the economic constitution stands out in this context and how, perhaps, it drives sectoral constitutionalisation.

There are two major discourses that specifically address the plurality of constitutional orders ‘beyond the nation state’: constitutional pluralism and societal constitutionalism. The first discourse, constitutional pluralism, aims to overcome “state-centredness” in constitutional theorising; however, its interest in “new forms of legal rule and political community in and between sub-state, transstate, supra-state and other non-state units and processes” still reveals a certain preoccupation with the political and juridical dimension of constitutionalism (Walker 2002: 320). In the European context, constitutional pluralism thus focuses on how sovereignty is ‘divided’ between the national and supranational level, and between different member states. Even though sovereignty is redefined “in non-exclusive terms”, which allows including “polities whose posited boundaries are not (or not merely) territorial, but also sectoral or functional” (ibid.: 346), sectoral constitutionalisation still plays a subordinate role in this discourse. This is different in the second discourse, societal constitutionalism, which takes the principle of functional differentiation as a starting point. Accordingly, law can only aspire to ‘regulate’ the subject matter of other social spheres by adopting the language, or rationality, of the respective subsystems. Since the functional logic of ‘non-political polities’, such as “the economy, [...] science, education, health, art or sports” is not confined to national territories but ideally globalised (Fischer-Lescano and Teubner 2004: 1015), the law of these subsystems is globalised as well: “The national differentiation of law is now overlain by sectoral fragmentation.” (ibid.: 1008) In the end, the ‘new’ polities constitutionalise themselves by establishing reflexive mechanisms of law-making specific to their own rationalities (ibid.: 1016).

Tuori’s theorem of ‘the many constitutions’ (2010; 2015) takes inspirations from both these discourses and actually mediates between the two. In focusing on sectoral constitutionalisation it draws on societal constitutionalism, whose reference point is the functionally differentiated world society. At the same time, it preserves the interest of constitutional pluralism in the particularities of the European polity. Bridging these two discourses, Tuori’s approach makes it possible to situate Europe’s constitution between the opposite poles of nation-state constitutions and global civil constitutions. This, in turn, promotes a better understanding of the fragmented logic of the constitutionalisation process.

If we combine the principles of territorial and functional differentiation, we obtain a grid of three territorial affiliations (nation, Europe, world) and four or five functional specifications (economy, polity, solidarity, security, law). In order to understand the dynamics of sectoral constitutionalisation beyond the state, it helps to compare the constitutional ideal types with regard to their globalisation potential. For this, we can draw on the models of man (*homo economicus*, *homo politicus*, *homo sociologicus*, *homo gubernabilis*) and models of society (market society, civil society, solidary community, control society) connected with the different constitutional ideal types. The ideal types of the economic and the political constitution are marked by a focus on individuals and a bottom-up logic of social organisation. In contrast, the

ideal types of the social and the security constitution are characterised by a focus on collectives and a top-down logic of social organisation.

If one looks at how the four constitutional ideal types perform in practice, it can easily be seen that social and security constitutions have so far been biased towards national collectives. Security has been connected with the monopoly of force of the modern nation state, and solidarity has been confined, in its organised form, to the national community. However, more recent notions of ‘security community’ (Adler and Barnett 1998) and ‘network solidarity’ (Münch and Frerichs 2008) also point beyond this strictly national framework, towards more regional and transnational integration. In contrast, economic and political constitutions empower individual actors not only within but ideally also beyond national borders and may thus further the development of transnational polities. However, there is an important difference between the two: markets are based on strategic action and, thus, they operate much more easily on a global scale than associations which are premised on communicative action. In other words, a globalised market economy is normatively less demanding than a global civil society. The globalisation potential is, therefore, greatest for the economic constitution.

On this basis, if observed through the lens of the different constitutional ideal types, the European constitution evolves between the unitary constitutional logic of the nation state and the fragmentary constitutional logic of world society. Quite evidently, the economic constitution has reached the most advanced position on the path of sectoral constitutionalisation. In this respect, functional differentiation clearly trumps territorial differentiation, as evidenced by the wide applicability of the principle of free movement, which is at the core of market integration. The opposite can be observed for the social constitution, which is still, by and large, nationally determined, despite the fact that ‘national’ social rights already have to be balanced with ‘European’ economic freedoms.

So far we have studied the economic constitution in comparison to other partial constitutions, their ideal-typical characteristics and performance in the global age. In the following, we will focus on how economic constitutionalism informs and shapes the modern market society. This requires moving from a Weberian to a Polanyian approach.

Polanyi’s Economic Sociology and the Problem of Embeddedness

Karl Polanyi (1886-1964) started his career as a doctor of law, but he later earned his reputation as an economic sociologist and anthropologist. Law does play a role in *The Great Transformation* (Polanyi 1957 [1944]), but it is not systematically developed, neither as a subject matter nor as an analytical category. Hence, in contrast to Weber, Polanyi makes no meaningful contribution to the sociology of law. However, he shares with Weber a historical-comparative macro-sociological approach, which, as such, lends itself to exploring the interconnections between law, economy and society. Accordingly, it does not seem too far-fetched to respond to Swedberg’s (2003; 2006) initiative by making a Polanyian case for the economic sociology of law (Frerichs 2011).

A Polanyian approach to the ‘law of market society’ and ‘law’s great transformation’ (Frerichs 2016) has indeed much to offer for a sociology of economic constitutionalism. This is not least the case because Polanyi’s economic sociology already includes a “sociology of economics” (Zafirovski 2001) – that is, a sociology of the economic discipline, which can be extended to studying the interplay of law and economics in inventing and implementing the market society. To illustrate this, we have to start from the concept of ‘embeddedness’, which is closely

connected with Polanyi's name and has become a trademark of economic sociology more generally.

In *The Great Transformation* (1957 [1944]: 57), Polanyi uses the concept of embeddedness to describe how, in traditional societies, the “economy [is] embedded in social relations” and how, in the market society, “social relations are embedded in the economic system”. The embeddedness approach distinguishes economic sociology, which is ‘institutionalist’ in its nature, from economic theory, which furthers, at least in its neoclassical mainstream, a ‘disembedded’ view of the market economy. In sociological theorising, one can distinguish between four analytical levels of embeddedness: the micro-level of actors, the meso-level of relations, the macro-level of regimes, and the meta-level of rationalities (Frerichs 2009). Whereas ‘old’ economic sociology, as spearheaded by Karl Polanyi, focuses on the macro- and meta-levels of regimes and rationalities, ‘new’ economic sociology, as inspired by Mark Granovetter (1985), lays more emphasis on the micro- and meso-levels of actors and relations (Frerichs 2011).

The institutional pattern that distinguishes market society from pre-market societies is that market exchange has become a dominant form of social organisation (Polanyi 1957 [1944]: 56-57). In the market society, markets are normatively disembedded from society but cognitively embedded in liberal economic thinking. This is already suggested by the above quote, which contrasts the ‘social embeddedness of the economy’ with the ‘economic embeddedness of society’. However, this only makes sense when one interprets the relation between economy and society not only in ontological terms but also in epistemological terms.

What is characteristic about the market society, then, is that it is understood – or constructed – in economic terms. Polanyi (*ibid.*: 57) speaks of “the running of society as an adjunct to the market”. For him, this undermines the very foundations of society and is, thus, the road to catastrophe. Whereas the embedded economy had prevailed, albeit in different forms, throughout the history of mankind, the deregulated or disembedded market economy creates an exceptional and ‘anomalous’ state of society that calls for concerted efforts of re-regulation and ‘re-embedding’. Based on these observations, one can distinguish between ‘cognitive embeddedness’ and ‘normative embeddedness’ (Frerichs 2011). Whereas the former focuses on the meta-level of rationalities and its epistemic effects on actors, relations and regimes, the latter is mainly about the macro-level of regimes and its normative impact on micro- and meso-level phenomena. Cognitive embeddedness defines a fundamental condition of all economies whereas normative embeddedness provides a contingent value standard for certain economies. Economies are ‘always embedded’ in the sense that they are moral, scientific or cultural constructions, which are usually unquestioned but which also remain historically contingent. But economies are also ‘more or less embedded’ when measured by the moral, scientific or cultural standards that are institutionalised in a given society. Put differently, cognitive embeddedness focuses on how economy and society are, first of all, constructed and counterposed, and normative embeddedness focuses on the institutional settings that interconnect and integrate the two. In this sense, cognitive and normative embeddedness do not necessarily contradict each other.

With regard to the constitutive role of economics in bringing about the modern market society, Polanyi's chapter on “Political Economy and the Discovery of Society” (1957 [1944]: Ch. 10) is most instructive. His emphasis is here not only the discovery of society as a subject matter, but also the discovery of a science which both re-discovers and re-constructs society according to the laws of the market: the science of political economy, or what later became the discipline of economics. What the economic discipline discovered were “the laws governing a complex society” (*ibid.*: 83), or, rather, “the laws governing a market economy” (*ibid.*: 125). From a

constructivist point of view, economic theory actually creates the economic laws, or rationalities, that are then ‘found’ in economic reality. While Polanyi acknowledges the laudable intentions of a ‘science’ of national wealth and social welfare, he is deeply concerned with the real-life consequences of the “utopian experiment” of the market society (ibid.: 81 and 250). Besides its very visible social effects, this includes its effects on “our social consciousness” (ibid.: 83), producing what he later referred to as “Our obsolete market mentality” (Polanyi 1996 [1947]).

Against this backdrop, a Polanyian approach to the law of market society would focus not only on law’s embeddedness in the economy as a field of actors, relations and regimes, but also on law’s embeddedness in the discipline of economics, which provides this field with its distinctive economic rationality. An approach that emphasises the cognitive dimension of embeddedness and, in particular, the role of scientific constructions, reflects Polanyi’s interest in the perilous effects of economic orthodoxy, and in the role of economic science in shaping market society more generally. This naturally leads to an understanding of economic sociology as a sociology of economics and, consequently, of the economic sociology of law as a sociology of law and economics, which is at the roots of the sociology of economic constitutionalism.

The Law of Market Society: Disembedded and Commodified

Even though the role of the law is somewhat neglected in *The Great Transformation* (Polanyi 1957 [1944]), the different stages of legal development that this ‘transformation’ implies can be induced from the overall argument (Frerichs 2011). Accordingly, pre-modern economies were still embedded in an organic complex of “custom and law, magic and religion” (ibid.: 55). This means that the law itself was also embedded in social beliefs and practices. In contrast, the modern market economy has been liberated from many of these constraints, and it builds on the law of the market instead, which is “put under the authority of Nature herself” (ibid.: 125). This quasi-natural law of the market stands for a disembedded stage of law’s development, and its redefinition through economics. This is the law of market society, which is at the core of a Polanyian approach to the economic sociology of law. In addition, one can also speak of a third stage of legal development, which is marked by the rise of “socially oriented legal thought” in the twentieth century (Kennedy 2006: 19). This means that law is increasingly understood “as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations” (ibid.: 22). In short, it becomes an instrument of social engineering and social regulation, which is supposed to have a re-embedding effect on the market forces, working towards a more ‘social’ market economy.

The law of market society, which means the law ‘constitutive’ of the market economy, which is, at the same time, ‘constituted’ by liberal economics, can be explored using Polanyi’s concepts of institutions and commodities (Frerichs 2016). As an ‘institution’ (among others), law regulates the market economy. As a ‘commodity’ (among others), law is itself subject to market forces. The first chapter of *The Great Transformation* (Polanyi 1957 [1944]) describes the historical and institutional context of the emergence of market society. Accordingly, “[n]ineteenth century civilization rested on four institutions”: the “balance-of-power system”, the “gold standard”, the “self-regulating market”, and the “liberal state” (ibid.: 3). Polanyi adds that “[c]lassified in one way, two of these institutions were economic, two political” and that “[c]lassified in another way, two of them were national, two international” (ibid.). Law is not singled out as an institution; however, some form of law, both national and international in scope, is implied by the interplay of the above institutions. Polanyi speaks of the “organization” of the world, which he conceives not in terms of “centrally directed bodies acting through functionaries of their own” but in terms

of the “universally accepted principles” and the “factual elements” on which the international order rests (ibid.: 18). Alternatively, one could speak of international economic law, including its national underpinnings.

In this overall system, politics is subordinated to economics. With regard to the two national institutions, Polanyi makes it clear that “the liberal state was itself a creation of the self-regulating market” (ibid.: 3). The premise of the liberal state is non-interference in the formation and functioning of markets and, namely, the price mechanism (ibid.: 69). In positive terms, this means that “only such policies and measures are in order which help to ensure the self-regulation of the market by creating conditions which make the market the only organizing power in the economic sphere” (ibid.). In practice, such ‘laissez-faire’ policy could entail an enormous increase of “control, regulation, and intervention” to make the markets work according to their ‘own’, disembedded logic (ibid.: 140). Part of this is the creation of what Polanyi refers to as ‘fictitious commodities’, namely labour, land, and money. These are defined by the fact that they are traded on the market but have not been produced for the market in the first place. In other words, they are artificially subjected to market forces. From a substantive point of view, “labor is only another name for a human activity which goes with life itself” and “land is only another name for nature, which is not produced by man” (ibid.: 72). Similarly, money reflects complex social relations, such as relations of credit and debt, and cannot be reduced to its equivalence function in quasi-anonymous market exchange ‘on the spot’.

In “The Economy as Instituted Process” (2001 [1957]), Polanyi further develops his ‘substantivist’ approach to the economy. Even though law is not particularly mentioned, it can easily be identified as one of the institutions providing the economic process with “[u]nity and stability, structure and function, history and policy” (ibid.: 36). Arguably, law plays an important role both in the commodification process as well as in reversing it through ‘decommodification’. The utopian reality of the market society is based on legal artefacts. Commodification means that the fictions of the economic discipline are translated into legal fictions (Supiot 2007: 94). The relationship between law and economics is thus twofold: the market is shaped by legal institutions, but the law is also shaped by economic thinking. Law is thus a ‘commodifier’ and potential ‘decommodifier’ at the same time.

Moreover, by instituting the self-regulating market the law itself may become cognitively embedded in economics and ultimately, commodified. In other words, it turns into a means serving the ends of the market: of creating competition, increasing efficiency, and furthering growth. Law then appears as a production (or consumption) factor, just like labour, land, and money (or capital), which has a price. In the microeconomic sense, the commodity character of law materialises whenever regulatory competition allows a ‘law market’ to arise (O’Hara and Ribstein 2009). A certain legal rule or regime can then be marketed and shopped for at the national, regional or global level. In the macroeconomic sense, commodification of the law is promoted when the law of the market is enshrined in the form of a liberal economic constitution. On the national level, this includes the constitutionalisation of the relation between the self-regulating market and the liberal or neo-liberal state. On the international level, the same applies to monetary regimes that prioritise market forces, such as the classical gold standard, which Polanyi (1957 [1944]: 195) described as a “self-regulating mechanism of supplying credit”. If this is the commodity form of the law, its original substance may be found in the essence of social obligations. For Durkheim (1984 [1893]), law was but a symbol of social solidarity, which is embedded in a community of interdependent and mutually committed individuals. In this sense, the market society turns the bonds of community into an exchange of commodities, from which the law is not exempt.

The Transnational Momentum of Economic Constitutionalism

From a Polanyian point of view, the law of market society includes all types of law that constitute or regulate the (allegedly) self-regulating market, that is, ‘enabling’ private law as well as ‘restrictive’ public law. Together, these ‘market-constitutive’ and ‘market-regulative’ forms of law can be summarised as ‘economic law’ (*Wirtschaftsrecht*), which represents the “‘ordo’ part of [the] ordo-liberal model” of economic constitutionalism (Grundmann 2008: 555). Moreover, the law of market society not only cuts across public and private law but also concerns both national and international law and naturally extends to transnational and supranational law. This is captured by a functional definition of economic law, as it is suggested by scholars at the interface of law and economics.

In this perspective, international economic law would “not [be] defined by its legal sources but rather by its object: the global economic system” (Ortino and Ortino 2008: 94). It is the “law of the global economy”, which includes not only “formal laws” but also “informal laws, such as non-legally binding customs and practices influencing economic behaviours” (ibid.: 93-94). Analogously, Petersmann (2011: 536 and 571) emphasises the “‘functional unity’ of private and public, national and international regulation of the economy”, which is reflected in a conception of international economic law as “multilevel economic regulation”. Moreover, if the subject of regulation is the “*transnational* division of labour” between “billions of producers, investors, traders and consumers” it seems preferable to move from “state-centred ‘top-down conceptions’” to “citizen-oriented ‘bottom-up’ conceptions” of international economic law (ibid.: 537, 544, and 573; original emphasis). Merging this with a “cosmopolitan conception”, which brings the ‘constitutional rights’ of global citizens to the fore, Petersmann’s vision is that of an economically confined “‘multilevel constitutionalism’” (ibid.: 572; cf. 2012: 927). In the context of the European Union, and former European (Economic) Community, the juridification and constitutionalisation of economic law through treaties and case law is very advanced. Even if the European economic constitution is understood in functional terms, its formal core is undeniable (Sauter 1998). Tuori and Tuori (2014) distinguish between micro- and macro-economic layers of the European economic constitution.

Accordingly, the original Treaty of Rome (1958) primarily consisted in a micro-economic constitution focusing on the “behavior of individual economic actors” inasmuch as this has “cross-border implications” (ibid.: 16-17). This remained the main emphasis of European ‘integration through law’ until and beyond the Single European Act (1987) ‘completing’ the internal market. Individual actors could invoke their ‘European’ rights to free movement in national courts, which could then turn to the European Court of Justice in the so-called preliminary reference procedure. Based on the doctrines of supremacy and direct effect, developed in the 1960s, market freedoms and competition law could thus be implemented in Member States without the need for further Community legislation. Integration through law proceeded as ‘integration through courts’ (Sciarra 2001).

A meaningful macro-economic constitution focusing on “aggregate economic objectives and economic policies”, such as price stability, was only added to this ‘constitutional’ framework with the Treaty of Maastricht (1993), which laid the ground for the monetary union (ibid.: xii). Prior to this, the provision of monetary stability had formally been left to the member states and substantially been externalised to the system of Bretton Woods (Tuori and Tuori 2014: 19). Since Maastricht, the juridification and constitutionalisation of the macro-economic layer has likewise been progressing. The Stability and Growth Pact put forward by the Treaty of Amsterdam (1999)

was meant to enhance fiscal credibility in the Eurozone, but still turned out to be rather “toothless”: in the first practical test involving leading Eurozone members, “the strict rules of the pact proved to be unenforceable” (Heise 2013: 52). The recent Eurozone crisis then entailed a number of reforms leading to a ‘hardened’ regime of fiscal and macroeconomic coordination, with the Fiscal Compact (2012) including quasi-automatic sanctions for countries violating the deficit criteria. A bone of contention in this process of juridification has been that the posited rules seem to be more of an economic than a legal nature: what is the case economically (regarding the fiscal situation of a member state) cannot easily be translated into legal responsibility (Menéndez 2013: 516-517). Critics speak of efforts to create a new “Gold Standard without gold” (Thomasberger 2015: 195; cf. Wilsher 2014).

If we accept the “gold standard / Eurozone analogy” as valid (Holmes 2014: 584), the European economic constitution appears to be the logical outcome of law’s great transformation, that is, its development alongside “the rise and fall of market economy”, which Polanyi (1957 [1944]: Part II) described for the nineteenth and early twentieth century, and the “reformation” of the market economy from the mid-twentieth century onwards (Streeck 2009). Of course, one could go even further back in time and find already in the merchant law of medieval times “an essential foundation of the laissez-faire capitalist economy that emerged in the nineteenth century” (Berman 2003: 377). However, our modern understanding of law and constitutions is premised on the civil revolutions and the emergence of the nation-state and, thus, on the division of public and private, national and international law (Thornhill 2011: 8-12). The European economic constitution embodies the new, transnational drift of the law of market society, which has above been described as sectoral constitutionalisation.

In a nutshell, the nineteenth century was characterised by an emphasis on universal legal forms, which were supportive of the agenda of economic liberalism (Kennedy 2006: 20). Towards the end of the ‘long’ nineteenth century, nationalist tendencies became stronger, ultimately leading to the First World War. In the twentieth century, legal thinking came to embrace ‘the social’ (ibid.). After the Second World War, the international economic order was built on “embedded liberalism”, a compromise between the “two extremes” of “economic liberalism” and “economic nationalism” that had clashed before (Ruggie 1982: 393). The law of the welfare state was more interventionist and redistributive in its character. In private law, a substantive ‘instrumentalist’ rationality gained weight with regard to the formal ‘juridical’ rationality (Michaels 2011). The European economic constitution is still in line with this functionalist orientation, but its substantive rationality differs from the national welfare state: European economic law promotes market regulation but not social redistribution (Joerges 2005). Linking law back to economics, the social function of law becomes, at least in tendency, denationalised and depoliticised, if not ‘privatised’, in the sense of furthering a private choice of law under the premise of regulatory competition.

Toward a Critical Sociology of Economic Constitutionalism

In this chapter, economic constitutionalism has been approached from a sociological perspective. The starting point has been a functional definition of economic constitutions, and of economic law more generally. The term is thus broader than what lawyers may formally understand as the constitutionally dignified part of the economic order. At the same time, the ordo- and neo-liberal ambition to wed the rule of law with the rule of the market points to an increasing overlap between formal and functional definitions of economic constitutions. Moreover, the concept of economic constitution has been developed as an ideal type and explored in its cognitive embeddedness, but it has not been studied from an ‘internal’ legal point of view: “The use of the

word constitution in relation to European economic law [...] does not inform us about the validity claims of the economic constitution, let alone, its (normative) legitimacy” (Joerges 2005: 465). Nevertheless, our sociological use of the functional definition – taking it as ‘given’ by economic thinking – is not uncritical. Considering the indubitable cultural significance and political weight of economic constitutionalism, the underlying question is what is behind this movement, what are its disciplinary origins and governmental effects.

The Weberian and Polanyian perspectives presented in this chapter add to the ongoing debate on constitutionalism beyond the state. Modern societies may generally have been conceived in national terms by the classical texts of sociology, but the principles of ‘modernisation’ are global in character. The functional differentiation and formal rationalisation of social spheres, such as the law, the economy, politics, and science, takes place not only within but also across national borderlines. With Weber (1978 [1922]: 32), we take the “plurality of contradictory systems of order” seriously. The coexistence of different legal orders in the same local context has long been discussed under the label of ‘legal pluralism’ in legal anthropology and the sociology of law. In contrast, “global legal pluralism” is still a more recent discovery (Michaels 2009: 244), at least in the strongholds of legal theory, as is “world societal constitutionalism” (Teubner 2011: 223). Whereas studies of legal pluralism have traditionally been concerned with the overlaps and conflicts between ‘official legal systems’ on the one hand and ‘cultural normative systems’ on the other, many of which were indeed localised, global legal pluralism lays more emphasis on ‘functional normative systems’, including the ‘economic/capitalist normative system’ (Tamanaha 2008: 397-399). In its global expansion, the latter is credited with “the most powerful contemporary impetus, momentum, and penetration of new norms” (ibid.: 406). This may justify singling out the economic order, among other normative systems, for sociological analysis and critique.

Even though the rule of the market is transnational in character, the rule of law is usually bound to a territory. European constitutional pluralism is still very conscious of questions of sovereignty, its location and division. Focusing on Europe, and the European economic constitution, make it possible to study how the principles of functional and territorial differentiation are articulated between the nation state at the one end of the ‘constitutional continuum’ and the world society at the other. Arguably, economic constitutionalism is most clearly expressed in the European context because at this level the different ‘geographies’ of the rule of law and the rule of the market can be favourably combined. Moreover, from a Polanyian point of view, the European economic constitution can be understood as the quintessence of the transformation of the law of market society: from its universalist origins in the nineteenth century to its national closure in the twentieth century, and to its transnational openings in the twenty-first century (Frerichs 2016). The market logic is legally made possible and enforced beyond the state, but not without the state.

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