

Continuing towards an economic sociology of law

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This special issue represents one of several important milestones on our continuing journeys towards an ‘economic sociology of law’ – that is, shared understandings of how and why one might use sociologically inspired approaches (analytical, empirical and normative) to investigate relationships between legal and economic phenomena; and of what might be gained and lost in the process.

Behind this special issue is an ongoing Economic Sociology of Law Reading Group held at SOAS, University of London.² As readers, we have gone back to the classics and neoclassics,³ outwards to heterodox economics and legal anthropology,⁴

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- 1 Email da40@soas.ac.uk, prabha.kotiswaran@kcl.ac.uk and a.perry-kessariss@kent.ac.uk. In order to present an integrated picture of the wider project of which this special issue forms a part, this introduction draws extensively upon D Ashiagbor, P Kotiswaran and A Perry-Kessariss ‘Towards an Economic Sociology of Law’ (2013) 40(1) *Journal of Law and Society Special Issue* 1. We are fortunate to have worked with an excellent group of workshop participants, discussants and authors. We name each of them here in recognition of their contribution to this intrinsically collaborative effort: Fred Block, Ritu Birla, Sharad Chari, Emilie Cloatre, Roger Cotterrell, Rohit De, Ruth Dukes, Michelle Everson, Sabine Frerichs, Antara Halder, Sarah Keenan, Andrew Lang, Paddy Ireland, Kerry Rittich, Dzodzi Tsikata, Kenneth Veitch and Clare Fisher Williams.
 - 2 This informal gathering of faculty and students has drawn participants from across disciplines and institutions in London and the south-east of England. For details of meetings past and future and how to join, please see <www.soas.ac.uk/law/events/readinggroups/esol>.
 - 3 Such as M Cain, ‘The Main Themes of Marx’ and Engels’ *Sociology of Law*’ (1974) 1(2) *British Journal of Law and Society* 136; K Marx (1939) ‘Introduction: Production, Consumption, Distribution, Exchange (Circulation)’ in *Grundrisse: Foundations of the Critique of Political Economy*, Martin Nicolaus (trans) (Penguin Books and New Left Review 1993); M Weber, ‘The Economic System and the Normative Orders’ in M Rheinstein (ed), E Shils and M Rheinstein (trans), *Max Weber on Law in Economy and Society* (Simon & Shuster 1967); K Polanyi, ‘The Self Regulating Market and the Fictitious Commodities’ in *The Great Transformation* (Beacon Press 1944); and H De Soto, ‘The Costs and Importance of Law’ in *The Other Path: The Invisible Revolution in the Third World* (Harper Collins 1990).
 - 4 For example, B Fine, ‘Social Capital in Wonderland: The World Bank behind the Looking Glass’ (2008) 8(3) *Progress in Development Studies* 261; E F Schumacher, ‘Buddhist Economics’ in *Small is Beautiful: A Study of Economics as if People Mattered* (Harper & Row 1973); D McCloskey, *The Secret Sins of Economics* (Prickly Paradigm Press 2002); and A Riles, *Collateral Knowledge; Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011).

across to feminist and postcolonial perspectives,⁵ and from the empirical through to the abstract.⁶

Between the reading group and this special issue lies an invitational workshop held at SOAS in September 2012, generously supported by the *Journal of Law and Society* and the School of Law at SOAS, University of London. This special issue is the second in a pair publishing the proceedings of that workshop. The first was published in 2013 as a special issue of the *Journal of Law and Society* entitled 'Towards an Economic Sociology of Law'.⁷

Participants in this project have come to economic sociology of law from very different perspectives. For example, we three editors were variously provoked by an engagement with the social dimension of regional integration and the 'embedded liberal bargain' between European states; an interest in the role of national legal systems as a determinant of foreign direct investment in South Asia; and a frustration with feminist legal theorising that, in presenting the commodification of sex as nothing but violence, obliterated the economic agency of women. Each of these distinct themes is interwoven, together with many others, into the stories of other contributors to this special issue and its accompanying volume. What unites us is a desire to scour our disparate empirical, analytical and normative resources for 'lessons, examples, warnings, connections and opportunities, whether lost or not yet found'.⁸ In these we hope to find robust foundations upon which to build shared understandings of social phenomena, including the economic and the legal.

As workshop organisers, we explicitly located economic sociology of law within the broader tradition of the sociology of law. We followed Richard Swedberg⁹ and others in placing Weber's sociological analysis of law and the economy as an early prototype for an economic sociology of law.¹⁰ We also noted that the prototype had endured, exerting considerable influence on policy-makers. In particular, Weber's observations on the central role of 'rational' legal systems in the emergence of modern capitalism and on economic development more generally have been implicitly and explicitly co-opted by the World Bank.¹¹ We also highlighted Karl Polanyi's dramatic and troubling probing of economic

5 Such as S E Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law and Social Inquiry* 975; R Birla, 'Introduction' and 'Hedging Bets: Speculation, Gambling and Market Ethics 1890–1930' in *Stages of Capital: Law, Culture and Market Governance in Late Colonial India* (Duke University Press 2009); and P Kotiswaran, 'Born unto Brothels: Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area' (2008) 33(3) *Law and Social Inquiry* 579.

6 For example, R Cotterrell, 'Community as a Legal Concept? Some Uses of a Law and Community Approach in Legal Theory' in *Living Law: Studies in Legal and Social Theory* (Ashgate 2008) ch 2; A Perry-Kessaris, 'Reading the Story of Law and Embeddedness through a Community Lens: A Polanyi-meets-Cotterrell Economic Sociology of Law?' (2011) 62(4) *Northern Ireland Legal Quarterly* 401; J Butler, 'Performative Agency' (2010) 3(2) *Journal of Cultural Economy* 147; M C Suchman and E Mertz, 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) *Annual Review of Law and Social Science* 555; R Hale, 'Bargaining, Duress, and Economic Liberty' (1943) *Columbia Law Review* 63; and M Callon, 'What Does It Mean to Say that Economics is Performative?' *Papiers de Recherche du Centre de Sociologie de l'Innovation* No 5 (Ecole des Mines de Paris 2006).

7 Ashiagbor et al (n 1).

8 *Ibid* 2.

9 R Swedberg, 'The Case for an Economic Sociology of Law' (2003) 32 *Theory and Society* 1.

10 See, for example, D Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) *Wisconsin Law Review* 720; and D Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' (2004) 55 *Hastings Law Journal* 1031.

11 A Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in D Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006); I F I Shihata, *The World Bank in a Changing World: Selected Essays* (Brill 1991); and C Thomas, 'Re-reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform' *Cornell Law Faculty Publications Paper 118* (Cornell University 2008).

history, as set out in particular in *The Great Transformation*,¹² which has tended to receive less attention than the rather familiar Weberian version. Interest in the Polanyian perspective is undergoing a revival, attesting to a wider resurgence of intellectual attentiveness to the ‘social embeddedness’ of market societies. In particular, those working in the discipline of economic sociology draw on Polanyi to challenge ‘economics imperialism’,¹³ most especially the assumption of the self-regulating market economy, by asserting the importance of both state action and social relations as constitutive of markets.¹⁴ However, it is also true that legal scholars have only recently joined the fray. So a major component of our plan was to generate more attention to and from law, whether drawing upon Polanyian- or Weberian-inspired scholarship, or building on the so-called ‘new economic sociology’ that owes so much to Granovetter.¹⁵ In addition to bringing to the fore work which has been in the tradition – if not using the language – of economic sociology of law, we wanted to uncover connections between Polanyian and Weberian approaches to the intersection between law, economy and society. In the accompanying volume, Sabine Frerichs¹⁶ responded by placing the (non-contemporaneous) ‘historical’ scholarship of Weber and Polanyi as the first of three ‘generations’ in the evolution of economic sociology of law, followed by ‘legal realists’ and ‘constructivist socio-legal’ scholars. Articles in both special issues contribute to a deeper understanding of all three ‘generations’ of thinking about economic sociology of law.

The workshop was also intended to generate new analytical frames that go beyond both the often ‘over-socialised’ views of social action presented in ‘law and society’ and the characteristically ‘under-socialised’ analyses of social action offered by ‘law and economics’.¹⁷ As Antara Haldar’s case studies, in this volume, illustrate, ‘the false dichotomies posed by law and society versus law and economics approaches’ to law and development exacerbate the continuing crisis and the state of ‘self-estrangement’ in the field. So there is a strong case for an economic sociology of law that ought to be better able to contend with the complexities and the dualities inherent in the study of law and development. Thus, in the accompanying volume, we saw Andrew Lang reaching specifically for ‘the sociology of knowledge, including the sociology of science’ as new and ‘powerful intellectual resources for rethinking the role of law within economic life’;¹⁸ and Ritu Birla setting out a postcolonial approach to economic sociology of law to ‘chart colonial genealogies of contemporary forms of governing’.¹⁹ In this volume, Clare Fisher Williams meanwhile offers a stimulating discussion of the relevance of yet another lens through which to consider an economic sociology of law, namely Anthony Giddens’ notion of structuration. Williams brings to bear both the idea of communal networks and

12 Polanyi (n 3).

13 B Fine and D Milonakis, *From Political Economy to Freakonomics: Method, the Social and the Historical in the Evolution of Economic Theory* (Routledge 2008).

14 See, for example, T Halliday and B G Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press 2009); C Joerges and J Falke, *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart 2011); and B Lange and D Thomas, ‘Socializing Economic Relationships: A Critique of Business Regulation’ (2011) 62(4) *Northern Ireland Legal Quarterly* 393.

15 M Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’ (1985) 91 *American Journal of Sociology* 481.

16 S Frerichs, ‘From Credit to Crisis: Max Weber, Karl Polanyi, and the Other Side of the Coin’ (2013) in Ashiagbor et al (n 1) 7.

17 Granovetter (n 15).

18 A T F Lang, ‘The Legal Construction of Economic Rationalities?’ (2013) in Ashiagbor et al (n 1) 155.

19 R Birla, ‘Maine (and Weber) Against the Grain: Towards a Postcolonial Genealogy of the Corporate Person’ (2013) in Ashiagbor et al (n 1) 92.

structuration in outlining what these approaches offer the data collector, specifically in her own empirical analysis of the relations between multiple stakeholders in foreign direct investment in Sri Lanka.

An important theme emerging from this project, which echoes earlier conversations among economic sociologists,²⁰ is the receding utility of that touchstone of economic sociology: ‘embeddedness’. A number of contributors to the companion volume focused on the oxymoronic and ill-defined qualities of ‘embeddedness’ as a concept.²¹ Cotterrell’s idea of communal networks and Block’s use of Zelizer’s notion of relational work were put forth as alternative and more productive formulations in the companion volume.²² In this volume, Haldar echoes the critique of the concept of embeddedness by suggesting that, although it was helpful in establishing that markets need to be situated in *something* beyond markets, it was a blunt tool in identifying what this something was. Kerry Rittich, in this volume, meanwhile draws together many of the threads of their concerns and points to their practical implications when she writes:

Observations such as the following are commonplace. Markets are embedded in society. Markets are permeated with social norms. Markets depend on social trust. Markets build, and are built by, a robust civil society. Such observations are revealing: they capture the multiple facets and deep interpenetration of social and economic even as they end up marking them as distinct forces or entities . . . We routinely distinguish the rules and regulations needed to build and support the operation of markets from the social rights, social policy, social programmes and social initiatives whose purpose is to ameliorate the effects of market forces on communities and individuals. Yet although this heuristic has a certain historical plausibility . . . it may now have diminishing utility and traction. (323–4)

Other contributors focus upon concrete, empirical, institutionally specific interpretations or manifestations of the term. For example, Ashiagbor (in this volume) explores the notion of ‘embedded liberalism’—the idea that in the European Union ‘market liberalisation has been embedded within labour market institutions and institutions of social citizenship at domestic level’ and that these have ‘served as social stabilisers to counter the far-reaching effects of the internal market and global trade’ (265). She wonders ‘what relevance does [this version of embeddedness] have’ in, for example, Sub-Saharan Africa, where governments may ‘lack the policy space, institutional or economic capacity to moderate the harmful domestic effects of market exposure’ (266). She concludes that ‘the concept of embeddedness may retain a utility, provided we do not assume it predetermines or encodes the specific characteristics of modern capitalist economies, or the specificity of market organisation’, rather that it denotes characteristics such as ‘*interdependence* of market and society’ and ‘*varieties* of institutional regulation’ (269).

The precise nature of such embeddedness has been taken up by postcolonial scholars. Birla’s paper in the companion issue to this volume powerfully articulates a postcolonial approach to economic sociology of law in terms not just of an empirical project to detail

20 G Krippner, M Granovetter, F Block, N Biggart, T Beamish, Y Hsing, G Hart, G Arrighi, M Mendell, J Hall, M Burawoy, S Vogel and S O’Riain, ‘Polanyi Symposium: A Conversation on Embeddedness’ (2004) 2(1) *Socio-Economic Review* 109.

21 F Block, ‘Relational Work and the Law: Recapturing the Legal Realist Critique of Market Fundamentalism’ (2013) in Ashiagbor et al (n 1) 27; Cotterrell, ‘Rethinking “Embeddedness”: Law, Economy, Community’ (2013) in Ashiagbor et al (n 1) 49; P Kotiswaran, ‘Do Feminists Need an Economic Sociology of Law?’ (2013) in Ashiagbor et al (n 1) 115; K Veitch, ‘Law, Social Policy, and the Constitution of Markets and Profit Making’ (2013) in D Ashiagbor et al (n 1) 137.

22 Block (n 21); Cotterrell (n 21).

new global case studies of law's role in economic life.²³ Instead she offers colonial governmentality and its construction of the economy as an object of governance and legitimating sign of sovereignty as a productive lens through which to understand contemporary neoliberal modes of market governance. Key to her exploration of the evolution of corporate legal personality is the mistranslation by legal fiction of persistently messy, informal kinship-based economic relations. Also significant for her is the making of the legal subject as economic man. Antara Haldar brings this postcolonial perspective to the present day with an exploration of the persistent attempts of economic policy to tame the informal markets in the developing world. Her comparison of land-titling in Peru and microcredit in Bangladesh instructs us how to avoid, by institutional design, the mistranslations that the law engenders. She shows how a dynamic rearrangement of both formalistic and social aspects of institutions can take us closer to the goals of development.

Some participants in this project have centred on another common frame of reference: the public–private divide.²⁴ In this volume, particular attention is paid to the shifting registers of the social and the market, as mediated by the law. Kerry Rittich tracks the transition of our understanding of 'the household' from 'synonymous with the economy' to 'a private sphere', to be distinguished from the 'increasingly normal and pervasive phenomenon' of wage labour associated with industrialisation and the spread of capitalism. 'Different logics . . . were soon attributed to these spheres: while the market was the locus of self-interest, governed by the logic of utility maximisation, the family and the household became identified as the repository of moral values such as altruism and sharing' (325). Drawing on Foucault's notion of liberal governmentality, Rittich plots the rise of labour market flexibility as an expression not only of economic rationality in the labour markets, but also as a market truth consolidated by technocratic expertise and social programmes. Labour market flexibility thus functions simultaneously as a logic, a set of regulatory practices and as a metric for measuring labour market regulation (333), while always rendering the worker infinitely responsive to market signals (338). In an almost contrasting vein, Ruth Dukes draws on theories of global constitutionalism and on systems theory to argue for transnational democratic deliberation and control over the regulation of labour. Trade unions can, she argues, play a part in the constitutionalisation of the global economy, through state conferral of authority and legitimacy on non-state decision-making, including systems of worker representation and worker voice. Emphasising the enduring conflictual nature of working relations, Dukes also outlines a parallel argument for social rights, as not simply subservient to and reinforcing of economic efficiency, but as a Polanyian check to the expansion of the market. Here labour and capital seem to be brought back into more direct conversation than Rittich suggests to be possible.

For us, economic sociology of law accommodates a wide range of methodologies and substantive fields. So our participants are legal historians, sociologists and lawyers trained in more than one discipline, all of whom are attuned to the idea that, because it is a 'social phenomenon', law 'must be understood empirically (through detailed examination of variation and continuity in actual historical patterns of social co-existence, rather than in relation to idealised or abstractly imagined social conditions)'.²⁵ And they cover diverse

23 Birla (n 19) 92.

24 Birla (n 19); Veitch (n 21); Kotiswaran (n 21); Lang (n 18).

25 R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) *Journal of Law and Society* 171, 183.

topics from labour,²⁶ social policy,²⁷ climate change²⁸ and gender;²⁹ to regionalism,³⁰ the corporate form,³¹ high-frequency trading,³² money,³³ the construction of economic rationalities,³⁴ microfinance³⁵ and law and development generally.³⁶ We hope that this and the accompanying collection will encourage other scholars to engage with each other, and with us, to explore the foundations and test the limits of economic sociology of law.

26 Ashiagbor, Dukes and Rittich in this volume.

27 Veitch (n 21) and Ashiagbor in this volume.

28 A Perry-Kessaris '*Anemos-ity, Apatheia, Enthousiasmos: An Economic Sociology of Law and Wind Farm Development in Cyprus*' in Ashiagbor et al (n 1) 68.

29 Kotiswaran (n 21).

30 Ashiagbor in this volume.

31 Birla (n 19).

32 Cotterrell (n 21).

33 Frerichs (n 16).

34 Lang (n 18).

35 Haldar in this volume.

36 See Haldar in this volume and A Perry-Kessaris 'The Case for a Visualized Economic Sociology of Legal Development?' (forthcoming 2014) 67 *Current Legal Problems* 169.