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EDITORIAL

The transformative law of political economy in Europe

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1. Law of political economy: beyond micro-level perspectives

The intersection of law and political economy has experienced a resurgence of scholarly attention in recent years. Defying a unified and shared theoretical framework and composed of authors from different disciplinary and geographical origins, the umbrella of 'Law & Political Economy' (LPE) is a testament to a renewed interest in tracing social, economic and ecological change within legal thought. New problem constellations of the early 21st century are at the forefront of the discussion. Central topics are social inequality and precariousness, the effects of outsourcing work in the globalised world, socio-economic imbalances between cities and rural areas, as well as overall issues concerning economic, environmental, and social sustainability.

More fundamentally, the new law and political economy debate implies a return to a macro perspective on society, emphasising questions of overall societal coherency (and, relatedly, of participation, distribution, and equality). This represents a markedly different focus point than the prevailing one in the past 40 years or so. Beginning in the 1970s, the two most dynamic approaches to law in this period have been the twin paradigms of Law & Economics and human rights law. While the two approaches articulate substantially different normative views and bring different things to the table, they share a common methodological individualist foundation. Law & Economics derives most of its toolbox from microeconomics focusing on the effects of individual choices[1], while human rights law, in its most dominant articulations, remains exclusively focused on the rights of individuals.[2] In both cases, the assumption is that addressing legal problems at the micro level is sufficient for achieving societal coherency. In other words, society is conceived of as consisting of the sum of individual actions and choices. Expressed somewhat stronger: Law & Economics and human rights law do not conceive of society as a phenomenon in its own right and consequently also do not depart from a concept of society – and hence cannot apprehend its structural shifts under globalisation. Both approaches, though for human rights law unintentionally, share Margaret Thatcher's view that 'there's no such thing as society'.[3]

[1]See however the calls for an 'expansion' of the economic theories that inform the approach, eg G Calabresi, *The Future of Law & Economics. Essays in Reform and Recollection* (Yale University Press 2016) 7 (stressing that the economic theory used to inform Law & Economics 'can be Marxist economics, pure utilitarianism, Vienna transplanted to the Windy City, or Keynes redux in New Haven'); F Esposito, *The Consumer Welfare Hypothesis in Law and Economics. Towards a Synthesis for the 21st Century* (Edward Elgar 2022).

[2]See for this critique D Kennedy, 'The International Human Rights Movement: Part of the Problem?' 15 (2022) Harvard Human Rights Journal 101,109–13; conversely on some limitations of strategic human rights litigation A Fischer-Lescano, 'From Strategic Litigation to Juridical Action' in M Saage-Maaß, P Zumbansen, M Bader and P Shahab (eds), *Transnational Legal Activism in Global Value Chains. The Ali Enterprises Factory Fire and the Struggle for Justice* (Springer 2022) 299–312.

[3]The full quote in its context: 'I think we have gone through a period when too many children and people have been given to understand "I have a problem, it is the Government's job to cope with it!" or "I have a problem, I will go and get a grant to cope

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The long list of challenges facing 21st century-society, as illustrated above, however indicates the limitations and indeed the dire consequences of an exclusive micro focus. That does not mean, of course, that human rights, for example, are not of crucial importance, just as the micro-economic toolbox can be a helpful element in legal practice. But micro actions need to be systematically linked to a concept of society, its overall level of coherency, and institutional dynamics. As described in the next section, this link is provided by legal institutions understood as meso-level formations linking micro and macro.[4] A suitable approach to law and political economy needs to work on and integrate all three levels.

While 'Law and Political Economy' is a somewhat new term, the *problématique* it deals with has been with us at least since the beginning of modernity. Moreover, the perspectives developed in this Special Issue can be labelled as 'Law of Political Economy', indicating that – while law and political economy are presented as co-constitutive – from a legal perspective, law's internal reconstruction of political economy is at stake. The 'Law of Political Economy" suggests and requires a *specific* form of intersecting the epistemologies and methodologies of both law and political economy that is less defined in the enumerative 'Law & Political Economy' perspective.

Traditionally, three core and equally important characteristics have been central to the description of modernity. First, a move towards a linear concept of time,[5] expressed through increased temporalisation leading social processes to rely on shorter and shorter time intervals.[6] Secondly, a move towards increased reliance on functional differentiation as the organising principle of societal processes, including but not only of economic processes.[7] Thirdly, the move towards abstraction, through the increased substitution of direct personal relations with impersonal social exchanges unfolded within carefully choreographed social roles.[8] In addition, one can add the move towards a world society, a socio-temporal constellation characterised by the establishment of world time, ie a synchronisation of social processes throughout the globe with increased social interdependence across space emerging as a result.[9] However, world society is paradoxical in its form in the sense that increased globalisation simultaneously implies increased harmonisation and increased fragmentation. An increased fragmentation has been reflected most notably in the de-centring of first the Eurocentric world in the first half of the 20th century, expressed through de-colonisation, and currently through the ongoing de-centring of the western-centric, that is, the US–American centric world.

The first systematic account of the law of political economy under the explicit modern conditions listed above appears in Georg W. F. Hegel's Elements of the Philosophy of Right (*Grundlinien der Philosophie des Rechts*).[10] Karl Marx followed suit while sociologists such as Émile Durkheim and Max Weber and many others addressed the question of law of political economy from an explicit sociology of law perspective. A virtual explosion in scholarship took place post-WWI just as new institutional socio-economic imaginaries emerged, as for example

with it!" "I am homeless, the Government must house me!" and so they are casting their problems on society and who is society? There is no such thing! There are individual men and women and there are families and no government can do anything except through people and people look to themselves first.' M Thatcher, 'Interview for "Woman's Own" ("No Such Thing as Society")' in *Margaret Thatcher Foundation: Speeches, Interviews and Other Statements* (London 1987), available at: <https://newlearningonline.com/new-learning/chapter-4/neoliberalism-more-recent-times/margaret-thatcher-theres-no-such-thing-as-society>.

[4]For such an analysis of contract law cf ZX Tan, 'Where the Action Is: Macro and Micro Justice in Contract Law' (2020) 83 Modern Law Review 725–60.

[5]R Koselleck, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten* (Suhrkamp 1979).

[6]H Rosa, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2013).

[7]N Luhmann, 'Differentiation of Society' 2 (1977) The Canadian Journal of Sociology 29–53.

[8]For an overview: J Bosak, 'Social Roles' in T Shackelford and V Weekes-Shackelford (eds), *Encyclopedia of Evolutionary Psychological Science* (Springer 2018) 1–4.

[9]N Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt a.M.: Suhrkamp 1998) 145 et seqq.

[10]GWF Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse. Werke Band 7* (Suhrkamp [1820] 1978).

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embodied in the Weimar constitution.[11] However, it was only post-WWII that an institutional settlement was achieved in the Western world through the Bretton-Woods arrangement, the launch of the European integration process, and deep constitutional and welfare reforms throughout the Western world. This process led to a successful institutional stabilisation based on a compromise between different ideological stands concerned with the law of political economy. In the German Federal Republic for example Franz Böhm, Walter Eucken, Wilhelm Röpke and Alexander Rüstow advanced a social conservative center-right position within the framework of ordoliberalism while followers of Herman Heller, Otto Kahn-Freund, Franz Neumann, and Hugo Sinzheimer among others advanced a centre-left social democratic position with the two being eventually combined in the term 'social market economy' coined by Alfred Müller-Armack.[12]

At the centre of the post-WWII approaches and institutional manifestations was a focus on societal stability and coherency with an ambition of being universal, while also acknowledging the strategic function of law for political economy in that regard. The world we live in today is, however, substantially different in its structure and normative orientations than in the mid-20th century. The structural setup of early 21st-century world society in its manifold local, national, and transnational manifestations also means that institutional formations of the mid-20th century cannot act as cognitive frames and practical templates for tackling today's challenges. Rather, the insights into the function of law in relation to political economy and society at large developed in the mid-20th century need to be reframed and remodelled to make them fit for purpose in today's society. In other words, the concrete institutional formations of the law of political economy are faced with a need for transformation.

2. Legal institutions as medium of societal transformation

The project of investigating the law of political economy requires specific attention to the analysis of legal institutions. It is legal institutions that are constitutive for the socio-economic arrangement that we understand as political economy and it is, therefore, legal institutions that matter for bringing about and stabilising socio-economic transformation.

This, of course, raises the question of what qualifies as a (legal) institution. In the sociological sense, institutions are defined as complexes of expectations that structure social relations; institutions pre-define what can be expected.[13] This comes close to economists' understanding of economic institutions. Economists define those similarly as the stabilised rules that are able to constrain economic behaviour.[14] In political economy literature, it has long been recognised that institutions are foundational for bringing about and stabilising a specific form of social order.[15] This suggests that, for the constitution of political economies, institutions are pivotal.

Institutions are, however, not specific to a particular system. Economic institutions are not only economic in nature, political institutions are not only a matter of politics; *institutions bridge system boundaries* and combine multiple references within them. It is thus unsurprising that the central economic institutions property, market, and hierarchy are not only constitutive for

[11] M Goldmann and AJ Menéndez, 'Weimar Moments: Transformations of the Democratic, Social, And Open State of Law' MPIL Research Paper Series No. 2022-12.

[12] PF Kjaer, 'The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law' 2 (2021) Global Perspectives, 1, 1–17.

[13] N Luhmann, *Rechtssoziologie* (Rowohlt Taschenbuch Verlag 1972) 68.

[14] Foundational for the economic literature D North, *Institutions. Institutional Change and Economic Performance* (Cambridge University Press 1990).

[15] W Streeck and K Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in W Streeck and K Thelen (ed), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press 2005) 1–39 call institutions 'building blocks of the social order', 'mini social orders'.

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the market economy, but they are also institutions present in the legal system.[16] In fact, the law is pivotal for stabilising the economic institutions; it does so, amongst others, by recognising them as legal duties and offering the legal system's power of enforcement.[17]

The institutions we investigate in the context of the law of political economy thus have economic, political and legal meanings in their own respective systems, but, at the same time, build bridges between these systems that stabilise the political economy.[18] Political theorist Roberto Esposito has developed a particularly useful understanding of institutions for this purpose. Although institutions are persistent as a constituting factor for different systems, their inner life is highly dynamic. When looking at the inner dynamics of institutions, we find economic, political, religious, and legal aspects without being necessarily able to distinguish between them.[19]

This suggests that social change and transformation happens primarily within the dynamics of these social institutions. In this regard, transformation can originate in the legal system when a change in the legal rules that support a particular social institution may lead to change in the way in which this institution is organised and operates in the economic system.

A transformative law of political economy ought to look at the most central institutions that constitute, with legal and political means, a particular economic system and its distributive patterns. The present Special Issue seeks to provide a starting point by looking at the institution of the corporation, competition and contract as well as providing an overall foundational frame of how to think of institutional transformation.

Yet, the contributions in this Special Issue offer a variety of perspectives on how to link these economic institutions to legal rules and thus suggest that a transformative law may need to encompass the rules of different areas of the law. In this regard, the analysis of the institution of the firm (economically speaking), ie (legally speaking) corporation is a case in point.[20] All authors agree that, at the core, the law stabilises firms as hierarchical organisations through the legal concept of personhood. It is the act of incorporation and creation of personhood separate from the economic capital that forms the economic actor as a legal entity. At the same time, the authors' accounts differ on the institutional foundation of this personhood. While Jean-Philippe Robé emphasises the role of property that has allowed corporations to create new legal persons as in parent-subsidiary relations and hereby become globally operating multinational corporations,[21] Lilian Moncrieff links corporate personhood to the contractual relation with government and identifies the transformative potential in the need to reform the (social) contract between public and private actors.[22] And Marija Bartl focuses centrally on the corporation as a self-standing institution that through (EU) law requires transformation. In this regard, one can see very clearly how the understanding of an institution of political economy may be interpreted differently in terms of the rules that govern it and, consequently, how transformation has to be conceived of.

[16]PF Kjaer, 'The Law of Political Economy: An Introduction' in PF Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 2.

[17]S Deakin et al, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' 45 (2017) Journal of Comparative Economics 188. For institutional references as a maxim for contractual interpretation, see D Wielsch, 'Contract Interpretation Regimes' 81 (2018) Modern Law Review 958–88.

[18]G Teubner, 'Legal Irritants: Good Faith in English Law or How Unifying Law Ends Up in New Divergences' 61 (1998) Modern Law Review 11.

[19]R Esposito, *Institution und Biopolitik* (Diaphanes 2022) 36.

[20]On the importance of this difference, see J-P Robé, 'Being Done With Milton Friedman' 2 (2012) Accounting, Economics, and Law xvii.

[21]See J-P Robé, 'Property, Corporations and Constitutionalization in a Global Political Economy' 1 (4) (2022) European Law Open 891.

[22]See, L Moncrieff, 'Creabimus! Re-Thinking the Corporation and the Social Contract for the Post-Pandemic Age' 1 (4) (2022) European Law Open 914.

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3. Institutional imagination of transformation

How should one, how do the pieces in this Special Issue understand 'transformation'? Law is tasked with two seemingly antagonistic missions in modern society: to facilitate steady ordering while allowing for openness, evolution, and the pursuit of highly pluralistic life plans. It is *in the medium of law* that society both maintains and transforms itself.[23] With Roberto Unger, legal analysis provides the grammar and the institutional imagination for transformation and should be assertively aware of this power.[24] Like law, Unger tells us, institutions are both constraining and stabilising for social life *and* open to radical transformation. Overcoming the 'false necessity'[25] of the institutional status quo hence becomes an integral element of Unger's politics. The concrete *mode* of transformation requires law to adjust the lens through which it perceives the social world, ie its cognitive receptors and their respective focal points and blind spots.[26] In legal analysis, the tensions resulting from the dual orientation towards stability and transformation are concealed behind the alleged timelessness of legal institutions. In the conventional view, law becomes a passive and neutral enabler of change, irrespective of its direction. The idea of law's impartiality in moderating social change makes it attractive as a tool both for advocates of the status quo and for social reformers. At the same time, it has contributed to a 'self-imposed poverty' of legal thought.[27]

Unmasking law's inherent biases in privileging certain paths of innovation over others hence goes to the core of the concept of law in modern society. Thinking of law as 'transformative' refers to an open intellectual endeavour to carve out the centrality of law to grand societal challenges. These will often be addressed *via indirecta*, exposing law as a deeply entrenched part of the problem, rather than merely offering straight solutions. Many of the *transformative* perspectives collected in this Special Issue draw on perceptive accounts of the *formative* role of law. They reject the idea of a 'natural', pre-political, or pre-legal order as a status quo that might be 'transformed', but rather assume a continuous formation of social realities through various legal fields and thereby detect possible sites of intervention. Some of such interventions take an explicit constitutional or regulatory perspective while others work on specific legal doctrines, imaginaries, or worldviews. *Law qua law* is transformative and bears a specific legal rationality of its own. Decades of instrumental thinking about law and private law in particular have relegated law to an expression of the legislator and consequently overlooked law's force as an institution in its own right that empowers and disempowers people, organisations, states, discourses, and processes. This understanding of law – as a social system with its own resources and operations – suggests an inward turn and focusses on the legal process itself.

4. In this Special Issue

The 'Law of Political Economy' as institutions in (trans)formation – it is these three components that shape what this Special Issue analyses as the transformative law of political economy. The contributions have been invited to allow for a foundational perspective that discusses how such legal institutional transformations can be conceived of theoretically as well as to zoom in on some core institutions. Being conscious about the partial arbitrariness of such choice for particular institutions, the Special Issue looks at the three institutions of the corporation, competition, and contract. Corporation has been chosen not only because of its foundational character for the

[23] D Wielsch, 'Die Zukunft des Rechts. "Future Concepts of Law" zur Einführung' in D Wielsch (ed), *Grundrechtsfunktionen jenseits des Staates* (Mohr Siebeck 2021) 2.

[24] R Unger, 'Legal Analysis as Institutional Imagination' 59 (1996) Modern Law Review 1.

[25] R Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Verso 2004).

[26] See for a systems theoretical reading of Unger's 'institutional imagination' E Christodoulidis, 'The Inertia of Institutional Imagination: A Reply to Roberto Unger' 59 (1996) Modern Law Review 377, 383–93.

[27] Unger, 'Legal Analysis' (n 24) at 3.

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law of political economy, but also because it provides – in particular with the recent national and EU-wide debates about transformation towards sustainability and corporate human rights compliance – manifold examples for analysing institutional transformation. Competition is one of the central organising principles of modern society just as competition law is a fundamental pillar of the law of political economy.[28] And contract is undoubtedly one of the core infrastructures that set the path for the economy. One could have added property to the institutions, but, despite not being an institution analysed in its own right, it still features in some of the contributions, most notably in Jean-Philippe Robé's analysis of property in corporations. The Special Issue can also be read as an invitation to add further perspectives.

A. Foundations

Three cross-cutting contributions set the stage by elaborating on the need and timeliness, conceptual and political inclinations and allies of a transformative approach to the 'Law of Political Economy'. Relatedly, it becomes apparent that law itself is not a stable category, but highly dynamic and contextual in its form and place in society. Is the study of single legal institutions, reflective somehow of a related disciplinary division within law, even a tenable approach given the ever more scattered nature of laws and regulations? Or, quite the contrary, can linking these growingly specialised legal regimes back to the underlying basic legal institutions allow to form a conceptual framework that can make sense of dispersed legal developments?

In his opening piece to this Special Issue, Poul F. Kjaer[29] identifies 'transformative law' as a nascent stage in the sequence of different legal epistemes – one that takes the complexity of World Society and some of the shortcomings of its predecessor, 'reflexive law', as a starting point. In a broad historic conceptualisation, Kjaer argues that law has been periodically understood as an objective, as a tool, as an obstacle and as a mechanism of reflection. Its reflexive design made law vulnerable to a dilution of its norm-setting function in society. 'Transformative law' arises in light of accelerating and overlapping crises of World Society and stresses the form-giving nature of law to social dynamics and institutions as central to laws strategic position in society. Law, Kjaer argues, not only maintains norms over time, but simultaneously differentiates and interconnects different social processes. The role of law amounts to a 'soft constituent effect', institutionalising social processes which foremost reproduce themselves on the basis of their own logics, but in concurrence with a legal form. Law then becomes 'infrastructural' for social processes, understood as the grid and the channels through which administrative, economic, mass media and other social processes are unfolding. While such a 'transformative law' is still more a 'potentiality rather than a reality', Kjaer's contribution culminates in 12 characteristics that set it apart from previous legal imaginaries.

Kerry Rittich puts forward a transformative approach to the political economy of labour that looks beyond events and processes within the market, to include those at the edges and the niches of informality.[30] Rittich takes the moments of economic crisis as particularly revealing for how certain groups are situated within labour and how law distributes risks and rewards at work. In the light of the rise in importance of macroeconomic governance in times of crisis, she zooms in on two sites of labour which are at the center of distributive struggles at work now, unpaid household care work and informal labour. Legal classifications were central in the historical separation of the household and market labour, ie the simultaneous production of waged labour and valueless care, and underline the centrality of the legal constitution of value – or its lack – for questions of

[28] PF Kjaer, 'Context Construction through Competition: The Prerogative of Public Power, Intermediary Institutions and the Expansion of Statehood through Competition' 16 (2) (2015) Distinktion 146–66.

[29] PF Kjaer, 'What is Transformative Law?' 1 (4) (2022) European Law Open 760.

[30] K Rittich, 'In the Middle of Things: The Political Economy of Labour Beyond the Market' 1 (4) (2022) European Law Open 781.

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inequality today. A such legal constitution implies however an expanded lens on the sources and processes of law. Numerous legal fields and regimes, ranging from family law, tax law, contract to corporate law are all implicated in the growth of informality, precarity and the ensuing gender and racial fragmentation at work.

Engaging with the pieces by Kjaer and Rittich, Ioannis Kampourakis[31] develops a revised framing of the constitutive role of law to draw the contours of a transformative instrumentalism, where law functions as an instrument for the articulation of political and social objectives. He shares the scepticism regarding reflexive law's ultimate reliance on system-specific logics of self-limitation and self-change and suggests a transformative account that centres around substance, not form alone. An engagement with 'political' economy inevitably leads to questions of content, ie the substantive standards that shape social relations of production and define dimensions of exploitation. Legal critique must be explicit about the outcomes it endorses – it cannot remain value-neutral if law is understood as a basis for social relations of production, distribution, and coercion. Importantly, Kampourakis finds that mobilising law's constitutive function for specific outcomes implies no flat instrumentalism that exhausts itself in a meta-telos of regulation. Rather, it may operate as a normatively guided pragmatism that prioritises objectives while remaining open to different concrete legal forms or policies that will materialise such objectives. Indicatively, directions of such transformative instrumentalism involve reforms generative of collective subjects and centres of democratic power ('non-reformist reforms') and a renewed focus on the role of law in and as planning.

B. Corporation

The contributions linked to the institution of the corporation are particularly illustrative, as they – read together – reveal a significant difference of how a transformative law of the corporation can look like depending on how to conceive of the involved economic and legal institutions.

Jean-Philippe Robé's property-centric perspective shows, first, analytically how the concept of property rights in its connection with legal personhood have allowed multinational corporations to evolve as a powerful actor on a global level.[32] Therefore, his normative proposal on transformation is closely linked to a transformation of property as held in corporations. Robé's transformative law of the corporation is a proposal for a movement of constitutionalisation that is grounded in binding corporate property to human rights and environmental duties hereby limiting private corporate property and adding to it a social, binding, obligation. It is a pluralistic mode that works with the concept of legal duties in the public interest for corporations that should initiate a public-interest oriented logic of corporate property. Using the example of court decisions on the French Devoir de Vigilance[33] and the Dutch ruling on *Milieudefensie* v *Shell*,[34] Robé then emphasises that this public-interest oriented logic should not be at the disposal of the corporation but requires public scrutiny and social control.

Lilian Moncrieff provides a contrasting perspective when she identifies, based on a thorough and enlightening intellectual history of corporate law, the social contract between government and capital as the foundation for the corporation.[35] She continues to explain that it is the social contract between corporations and government that have led to the calculating market-logic of corporations and, consequently, that it is pivotal to rethink precisely this social contract for the

[31] I Kampourakis, 'Legal Theory in Search of Social Transformation' 1 (4) (2022) European Law Open 808.

[32] J-P Robé, 'Property, Corporations, and Constitutionalization in a Global Political Economy' 1 (4) (2022) European Law Open 891.

[33] Law Nr 2017-399 of 27 March 2017 on the Corporate Duty of Vigilance.

[34] District Court of The Hague, *Milieudefensie et al. v Royal Dutch Shell PLC* (26 May 2021) C/09/571932/HA ZA 19-379, ECLI:NL:RBDHA:2021:5337.

[35] L Moncrieff, ''Creabimus!' Re-thinking the Corporation and Social Contract for the Post-Pandemic Age' 1 (4) (2022) European Law Open 914.

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post-pandemic age. Such social contract needs to be grounded in collective regulation in the public interest that limits the autonomy of corporations rather than delegating authority to those corporations.

Marija Bartl's forward-looking contribution identifies the transformative law of the corporation in the rules on company law on the EU level.[36] Her understanding of the corporation is very much grounded in the autonomy of the corporate legal person and its interest that, she argues, is strongly influenced by the neoliberal economic vision of shareholder primacy. Accordingly, rather than linking the transformation of the corporation to other economic institutions as Moncrieff and Robé do, Bartl argues for a transformation that takes place in the corporation, its 'imaginary' and its distinct 'corporate interest'. Bartl here argues for a new image – linked to the recent EU debate on the corporate interest – that adopts a collective prosperity perspective, which need to be integrated into the EU company law rules that address the corporation and its interest.

These differences look as if they are only relevant on a theoretical level. But the difference plays out very concretely when we look at how the authors evaluate recent legislative proposals and court decisions that have transformative potential. A particularly obvious example is the proposed EU Directive on Corporate Sustainability Due Diligence[37], which all authors mention and identify as a potential contribution to a transformative law of the corporation. Bartl – focussing on how such legislative proposals can target the corporate interest – seems relatively sympathetic to such type of regulation as possibly leading to a transformation of the corporate interest. An obligation to conduct due diligence, even though she criticises the concrete EU legislative proposal as too limited, has the potential to steer corporations towards a collective orientation. Robé, focussing on the parallel law on due diligence in France, emphasises that such due diligence laws could be transformative, but only if the substance of the duty is not left to corporations and their risk management, but is societally and legally controlled in the public interest. What is needed is a property held in corporations that contains legally binding public dimension that is controlled by the public. Moncrieff, in contrast, criticises this move to due diligence precisely because of its reliance on the autonomy of the corporation and its calculating logic. While due diligence could possibly transform the corporate interest, it does so by reinforcing the existing social contract between corporations and the government that provides autonomy to the corporation. In her account, a true transformative law needs to be changing, however, precisely this social contract.

C. Competition

Competition law and inquiries into the promises and pitfalls of competition as a mode of social ordering have gained much attention recently, not least in the wake of the increased macroeconomic outlook in times of crisis. Clearer even than other institutions it provides a powerful illustration of how economic and legal imaginaries are interlinked.

In her contribution, Or Brook, however, shows that there is no single acceptable economic imaginary ascribed to the notion in Europe.[38] The search for the meaning of competition is an ongoing journey, from the launch of the European integration process until today. She departs from a distinction between three parallel, partly conflicting, imaginaries influencing the notion in EU competition law: Keynesian, Ordoliberal, and neo-liberal and she demonstrates that no single imaginary was adopted by EU primary, secondary, or soft laws. Subsequently, she engages in an analysis of the Commission's annual reports on competition (1971–2020) in the search for the meaning of competition. From her analysis it becomes apparent that the notion of competition

[36]M Bartl, 'Towards the Imaginary of Collective Prosperity in the EU: Reorienting the Corporation' 1 (4) (2022) European Law Open 957.

[37]European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence, 23 February 2022, COM(2022) 71 final.

[38]O Brook, 'In Search of a European Economic Imaginary of Competition: Fifty Years of the Commission's Annual Reports' 1 (4) (2022) European Law Open 822.

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had undergone a transformation from Keynesian and Ordoliberal imaginary of competition to a neo-liberal notion in some aspects but not in others. Finally, the paper argues that although the lack of a clear definition for competition undoubtedly raises challenges relating to the rule of law, legal certainty, and uniformity, its ambiguity also serves as a powerful tool in safeguarding the durability and legitimacy of competition as an economic imaginary. It allows tailoring the notion of competition to changing legal, economic, and social conditions without a Treaty amendment.

Ioannis Lianos explores the processes of value generation and capture in the digital economy to draw lessons for the optimal design of regulatory intervention and in particular the role of competition law in the future.[39] His focus is in five core developments that are of relevance to examine this question. Firstly, the transition of the economy to a new economy is characterised by financialisation and the logic of futurity, with the development of new business models structured around the 'shareholder value' principle.[40] Secondly, there is the extraction of economic value through new forms of labour and outside traditional work environments, in ways that fall outside employment relationships and hence the purview of current laws protecting labour.[41] Thirdly, the emergence of digital value chains that rely on multi-sided platforms, and the formation of digital ecosystems, where value is co-produced and exchanged between different categories of users, allows platform owners to extract monopolistic rent.[42] Fourthly, the generation and extraction of value through new categories of commodities and scarcities, natural and artificial, shape new types of social relations of production in the digital economy in accordance to the logic of futurity. Fifthly and finally, the constitutive role of the legal system, has either by action or by (motivated) inaction has enabled digital platforms to capture the most significant part of the surplus value generated by human activity in the digital economy, thus raising issues of embedded power and fairness.

D. Contract

The project of demystifying the abstractions and archetypes of contract has been at the heart of much LPE work. Contract is no monolithic institution but exists in plural forms and designs. Regarded as the 'legal side of the market economy' by Max Weber, contract has proven highly adaptive to new economic models, from global supply chains to the sharing economy. At the same time, contract provides the legal infrastructure to many non-economic forms of social interaction and has adjusted to such contexts.

Klaas Eller uses the example of tenancy contract law to illustrate how a particular contract law regime despite its 'social' or 'materialised' orientation today fails to formulate answers to Europe's aggravating housing crisis.[43] Contract law, he argues, forms part of an inner-legal fragmentation that has depoliticised, deflected and rendered inaccessible the 'housing question'. In Eller's diagnosis, tenancy contract law has not only been blind to the recent structural shifts in the housing market, notably through financialisation. What is more, tenancy contract law has taken a conservative drift by bracketing macro-level factors and effectively re-individualising tenant responsibility in the eye of hardships that originate from outside the contractual relation. To prevent tenancy contract law from becoming an implicit vehicle of neoliberal housing policies, Eller argues for political economy as a vantage point to put the contract and its limits into perspective. This

[39] I Lianos, 'Value Extraction and Institutions in Digital Capitalism: Towards a Law and Political Economy Synthesis for Competition Law' 1 (4) (2022) European Law Open 852.

[40] W Lazonick, 'The New Economy Business Model and the Crisis of U.S. Capitalism' 4 (2) (2009) Capitalism and Society 1–70.

[41] H Ekbia and B Nardi, *Heteromation and Other Stories of Computing and Capitalism* (The MIT Press 2017).

[42] I Lianos, A Ivanov & D Davis, 'Global Food Value Chains: A Conceptual Guide' in Lianos, Ivanov & Davis (eds), *Global Food Value Chains and Competition Law* (Cambridge University Press 2022) 1-28.

[43] KH Eller, 'The Political Economy of Tenancy Contract Law. Towards Holistic Housing Law' 1 (4) (2022) European Law Open 987.

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culminates in a call for a 'transformative tenancy law' that is not solely calibrated around mitigating superior landlord bargaining power but around curtailing a hegemonic and expansive market rationality that undermines the social and material meaning of housing.

Daniela Caruso takes the shortcomings of 20th-century type European 'materialised' contract law in facing structural predicaments of the market economy as a starting point for a Law & Political Economy-inspired remodelling. LPE grounds the decontextualised ideal form of contracts in multifarious social realities.[44] Discussing Eller's contribution on tenancy law, Caruso highlights how contract law's traditional self-centeredness must give way to an awareness of alternatives – of scales, competencies, institutions, or entitlements. While unequivocal about the fact that 'contracts scholarship gets much harder in the age of LPE', Caruso offers two directions for implementing LPE perspectives on contract law. The first consists in 'plotting the land,' ie identifying the plurality of legal, economic, and political factors that contribute to exploitative market dynamics *before* delving into private law analysis. Recent scholarship on the distributive effects of the consumer welfare standard or employment arrangements in the gig economy serve as illustrations. The second direction, drawing on Critical Race Theory, insists on foregrounding the identity of contracting parties, such as their belonging to communities which are historically racialised or otherwise systemically penalised as market participants. Both renewals are meant to broaden and productively question, not outrightly replace the mechanisms of interpersonal justice that are inherent to private law.

5. More in this issue

This issue also contains four pieces discussing Stefan Eich's *The Currency of Politics*. Eich's book is likely to be read in different ways by different audiences. In the eyes of political theorists, it might be regarded as a powerful reminder of the central role that money and monetary policy used to play in political theory, from Aristotle to Keynes. From the standpoint of constitutional law and theory, it is likely to be seen as an authoritative addition to the (recent) literature stressing the extent to which the design of money and monetary policy may well predetermine the fundamental norms organising power in a given society (or, as is usually put, the extent to which money is a *constitutional* project). Precisely for those reasons (not least the last), it seemed imperative that the book should also be discussed by Eurolawyers. But there is more. While European integration only makes a cameo appearance in the footnotes to the introduction, the book was written in a context marked by the Eurozone fiscal crises. It is hard to avoid the conclusion that the set of problems and questions that Eich was struggling with when writing were precisely the same that tormented not only European institutional actors, but European citizens. Or to put it differently, *The Currency of Politics* could be seen as made up of two books, the second written between the lines of the first and worth a dedicated symposium exploring what the book entails for the government of the European Union. This is the spirit that animates the four contributions published in this issue. Trivellato approaches the book setting the political character of money in the context of the long European past, Goldoni takes issue with the implicit assumptions underlying the increased reliance of the ECB (and other central banks) on 'communication', while Losada finds that the political character of (European) money requires taking civic reciprocity much more seriously than it has been so far by European institutions. In her turn, Smolenska sets herself the task of imagining a green turn in European monetary policy which would take seriously the political character of (Euro)money. Stefan Eich's rejoinder will be published in a future issue.

The issue continues, fittingly, with a review essay by Christian Joerges on one of the enduring classics of political economy and a major influence on modern LPE scholarship, Karl Polanyi's *The Great Transformation*. Working through the core Polanyian concepts of embeddedness, labour as a 'fictitious commodity', and the double movement, Joerges explores the importance

[44] D Caruso, 'Contracts Scholarship Beyond Materialisierung' 1 (4) (2022) European Law Open 1006.

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of Polanyi's work for European law and legal scholarship in general, and in particular pays tribute to the influence of Polanyi's core normative principles on his own work on democracy-enhancing conflicts law.

As readers are aware since the first issue, one of the aims of this journal is to spark debate on a number of issues which have been rather neglected in EU studies, in particular in European law. One of such issues is the long shadow that European empires cast over the history of the European Union. The impulse to create a federal Europe was at the core of the program of resistance movements across Europe, but also, and more sinisterly, of many nostalgics of the days of old, in which European plutocrats underdeveloped Africa. Megan Brown's *The Seventh Member State*, covering the complex relationship in which Algeria stood to the European Communities before and after independence, is a revealing and vital intervention. The two short pieces by Kiran Klaus Patel and by Megan Brown herself may physically close this issue, but we hope that they contribute to open a debate that cannot be postponed any longer.

Competing interests. The authors have no conflicts of interest to declare.

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