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## Article

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# The Legal Constitution of Market Society: Probing the Economic Sociology of Law

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## Towards a multilevel approach of embeddedness

'Embeddedness' can be considered the core concept – or lowest common denominator – of economic sociology (Rizza 2006; Beckert 2007; Krippner/Alvarez 2007; Gemici 2008). Programmatically, this concept displays a critical posture towards neoclassical mainstream economics: While the latter is seen as 'disembedding' economic action from its social context (both analytically and normatively), economic sociology follows the opposite agenda of 're-embedding' economy in society. Embeddedness thus points to conflictive relations between mainstream economics and economic sociology.

At the same time, the concept also reminds of economic sociology's affiliation with general sociology, namely theories of modernization, differentiation and integration. In other words, the problem of embeddedness is not confined to the economy as such but replicated in other 'relatively autonomous' social spheres, such as law, politics and science. Consequently, the embeddedness discourse encompasses – more or less – all levels of sociological analysis:

■ On the microanalytical level, the discussion centres around the concept of *actors* and appropriate theories of action: Whereas microeconomic theories typically presuppose self-centred 'monadic' actors (*ego*), microsociological theories deliberately start from 'dyadic', i.e. interactive and intersubjective entities (*alter*).

■ On the mesoanalytical level, the focus turns from inter-related actors to *relations* in their own right: In economic sociology, this perspective prevails both in network and field theoretical approaches that either draw on the 'struc-

turalist' notion of relational networks or the more 'culturalist' notion of institutional fields.

■ On the macrolevel, the analysis focuses on social *regimes*, or the totality of interrelations in a given society: Regimes are complex institutional constellations that connect – and thus integrate – different spheres of action. Socio-economic regime-analysis draws both on macrosociological theory and comparative political economy.

■ On the metalevel, the analytical focus turns to the *rationalities* underlying a given regime or social order: Rationalities refer to abstract, epistemic categories located in the 'deep' structure/culture of society that organize our perceptions and evaluations of reality. These include 'scientized', i.e. objectified concepts and dichotomies.

Micro-, meso-, macro- and metaanalytical approaches based on the embeddedness paradigm can thus be distinguished by their respective focus on actors, relations, regimes or rationalities. They can also be combined and connected in a multilevel design that offers the whole scale and scope of sociological analysis. Yet, commonly, theoretical paradigms either cluster around bottom-up approaches that focus on the micro- and/or the mesolevel and top-down approaches that focus on the macro- and/or the metalevel. Whereas the former are particularly prominent in the American context and constitutive for the 'new' economic sociology, the latter are traditionally stronger in the European context and representative for the 'old' (or classic) economic sociology.

## From social economics to new economic sociology

To be sure, the relaunch of economic sociology, as pursued by American scholars in the 1980s, was from the outset sceptical of 'oversocialized' conceptions of economic action, as would be found in neo-Marxist as well as post-Parsonian strands of sociology at that time (Granovetter 1985; Convert and Heilbron 2007). Not surprisingly, then, more 'holistic' approaches are largely lacking under the 'new' brand of economic sociology. But this does not

mean that other approaches – classic or contemporary – addressing ‘the sociology of the economy’ (Zafirovski 2001) would not be instructive for understanding the multilayered problem of embeddedness.

Hence, it is worthwhile also reconsidering the origins of economic sociology at the turn of the 19th/20th century (Swedberg 1987): In retrospect, the decades between 1890 and 1920 can be referred to as the classical period of economic sociology which was marked, amongst others, by the pioneering works of Emile Durkheim, Max Weber and Georg Simmel – ‘founding fathers’ of sociology more generally. Alternatively, one could also start a reading list in ‘classic’ economic sociology with the pertinent contributions of Vilfredo Pareto, Joseph Schumpeter and Thorstein Veblen – today better known as representatives of economics.

In the German-speaking countries, the *fin de 20ème siècle* is also known for the first *Methodenstreit* (battle of methods) which, a generation later, was followed by the second *Methodenstreit*, or *Werturteilsstreit* (battle of value judgments). These debates not only shaped the direction that economics and sociology would later take as independent social scientific disciplines but also affected the future development of economic sociology (Zafirovski 2002).

Schematically, one can summarize the formative impact of these decades with Max Weber’s (analytical) distinction between economic history, economic theory and economic sociology which were conceived as interrelated branches of the encompassing field of social economics. If social economics thus formed the ‘undifferentiated’ starting point, the battles of methods mainly worked to differentiate economic history and economic theory. In this sense, ‘reductionist’ theoretical economics (led by the Austrians) ruled out ‘holistic’ historical economics (led by the Germans).

Yet, as a side effect of these definitional struggles, economic sociology was singled out as a subdiscipline much smaller than the original field of social economics and detached from both economic theory and economic history. In fact, the ‘old’ distinction between economic theory and economic sociology still fuels the debate on ‘disembedded’ versus ‘embedded’ views of the economy. And the ‘old’ distinction between economic history and economic sociology has, in the course of time, marginalized more holistic, historicist versions of economic sociology.

The differentiation of social economics thus left a bunch of specialized economic disciplines – economic history, economic theory and economic sociology – with much expertise but little exchange. The same happened on the other, sociological, side of the equation: Whereas Max Weber’s encyclopaedic work on “Economy and Society” still followed a ‘double bind’ policy of relating economic sociology not only to other economic disciplines (such as economic history and economic theory) but also to other sociological disciplines, including the sociology of the state and the sociology of law (Weber 1972 [1922]; Swedberg 2006), these links have later been lost.

Again, the ‘new’ economic sociology is a case in point as it has, on the one hand, dissociated itself from sociology’s theoretical and historical branches and, on the other hand, lost sight of the links between economic, political and legal institutions.

### From E&S, L&S and L&E to the economic sociology of law

More recently, however, there have been calls from scholars (mostly institutionalists) working in the field of economy and society (E&S) as well as in the neighbouring fields of law and society (L&S) and law and economy (L&E) to closer connect economic and legal sociology – and thus further what can be called the ‘economic sociology of law’ (Zafirovski 2000; Swedberg 2003, 2006; Suchman 2003; Stryker 2003; Edelman 2004, 2007; Edelman and Stryker 2005).

All these fields – E&S, L&S and L&E – are interdisciplinary inasmuch as they lie in between the common subject matters of economics, sociology and jurisprudence, namely the economy, the society (or the ‘social’) and the law. Yet, interdisciplinarity denotes not only the reintegrated *ex post* state but also the undifferentiated *ex ante* state of what has come to be known as scientific disciplines. At least the socio-economic field (E&S) and the socio-legal field (L&S) not only follow, but also predate, in this respect, the ‘differentiated’ economic and legal disciplines.

Not surprisingly then, they also share a very similar research paradigm, namely the idea of social embeddedness: Whereas the former focuses on the embeddedness of the economy, the latter concentrates on the embeddedness of the law. In both cases, the negative point of reference can thus be found in ‘disembedded’ conceptions of either the

economy (put forward by economic theory) or the law (put forward by legal theory).

At the same time, E&S and L&S give very similar examples of how scientific debates have restructured once 'integrated' socio-economic/socio-legal fields. The story of the latter (L&S) thus reminds of the story of the former (E&S): Once dominated by 'holistic' historical-cultural approaches – with the German historical school of jurisprudence as a prototype (García-Villegas 2006; Tuori 2007; Grechenig and Gelter 2008) – the socio-legal field was gradually transformed into a differentiated landscape of historical, theoretical and sociological disciplines.

Today, legal history, legal theory and legal sociology are thus rather disconnected from each other; and L&S mainly builds on a narrow understanding of the latter: a sociology of 'law in action' (as opposed to 'law in the books') that disregards both the history of law, including the social history of legal thinking, and the theory of law, including its 'hidden social theories' (Tuori 2007).

Just as 'new' economic sociology has lost its historical-comparative dimension (or rather left it to political-economic approaches) and come to define itself by its critical posture towards orthodox economic theory, today's legal sociology shows, on the one hand, a rather weak account of its macrosociological underpinnings and stands out, on the other hand, by its strong stance against legal orthodoxy (Vick 2004; Tamanaha 2009).

As regards the structure of the third research field in between economic and legal scholarship, the embeddedness paradigm has much less relevance. As a matter of fact, L&E is not about how specialized spheres of action – the law and the economy – are embedded in the wider society. However, it is possible to describe the field in terms of the 'mutual embeddedness' of these specialized spheres, i.e. the legal embeddedness of the economy and the economic embeddedness of the law.

To put it differently: Whereas both the legal and the economic sphere can be considered as independent systems with distinct rationalities (and specific scientific disciplines in charge of their 'rationalization'), they are, at the same time, dependent on each others functioning within one and the same socio-economic/socio-legal regime.

Far from adopting this kind of thinking, L&E scholars nowadays focus on what is called the economic analysis of

law, basically meaning the introduction – or imposition – of economic categories on legal thinking (Bouckaert and De Geest 2000; Fink 2004). In other words, historical-cultural and sociological accounts of the interaction between law and the economy, including the interaction of legal dogmatics and orthodox economics, are largely missing.

Accordingly, it would be the task of a 'renewed' economic sociology of law to provide these more encompassing perspectives and, thus, to 're-embed' the narrowly conceived merger of law-and-economics. In fact, today's L&E appears to be a rather 'disembedded' research field that claims, if only by its name, interdisciplinarity but certainly lacks socio-legal and socio-economic input – not to mention the one-sidedness of many economic approaches to the law.

Taking everything together, we can conclude that the differentiation of the social sciences into independent disciplines has also affected the structure of interdisciplinary research fields such as E&S, L&S and L&E. All these fields are currently marked by a mismatch between middle-range theories employing micro- and mesolevel perspectives and large scale theories also exploring the macro- and metalevels of embeddedness. Insight into this structural imbalance adds to the more trivial – and yet telling – account of E&S lacking the law, L&S lacking the economy and L&E lacking society as (theoretical and empirical) points of reference.

## From economic sociology to the economic sociology of law

An economic sociology of law that builds on the embeddedness paradigm would be able to tackle all these deficiencies. It would link up – and thereby broaden – legal and economic sociology and, in particular, complement today's reductionist 'law and economics' with a sociology of the interrelations of legal and economic spheres. Whereas from a bird's eye point of view, the economic sociology of law would thus be located in the middle of three independent disciplines (sociology, economics, jurisprudence) and three interdisciplinary fields (E&S, L&S, L&E), it can also be conceived as part and parcel of economic sociology as such.

At this stage, I will only mention two points to corroborate this claim. First of all, modern economies are legal artifacts.

In other words, the law is constitutive, supportive or restrictive of many, if not most, economic phenomena; it affects the economy on the level of actors, relations, regimes and rationalities. But apart from this rather general argument, there is also a more specific reason to consider the economic sociology of law as a continuation of the established branch of economic sociology.

This second point builds on economic sociology's identity as an alternative to what is considered today as mainstream economics: Contributions to economic sociology are generally marked by a critical distance to classical and neoclassical economic theory. In fact, economic sociology addressed, from the outset, not only economic practices but also economic thinking. It therefore includes a 'sociology of economic knowledge' (Steiner 2001).

In other words, to get a comprehensive picture of the 'sociology of the economy' one also has to delve into the 'sociology of economics' (Zafirovski 2001). This is supported by Michel Callon's dictum on the economy's embeddedness in economics (Callon 1998), which emphasizes that economic thinking not only reflects and rationalizes but ultimately produces and 'performs' economic practices (thus referring to the 'performativity' of scientific constructions).

Hence, my point is very simple: If economics forms part of economic sociology's subject area, the same will apply to 'law and economics' which is mostly considered as an expansionist style of neoclassic economic scholarship. In order to shed light on the economy's embeddedness in economics, the economic analysis of law thus calls for a sociological analysis of law and economics. In other words, law and economics need to be complemented, on an equal footing, with an economic sociology of law.

The argument on the latter's 'affiliation' to the subdiscipline of economic sociology is thus, last but not least, based on the cognitive dimension of embeddedness, i.e. the epistemic metalevel (rationalities) and its reflections on the substantial micro-, meso- and macrolevels (actors, relations, regimes). 'Cognitive embeddedness' can be distinguished from 'normative embeddedness', which would rather be assigned to the macrolevel (regimes) and its regulatory impact on micro- and mesolevel phenomena.

Referring to recent discussions on tensions inherent in the embeddedness concept (Gemici 2008), I would claim that cognitive embeddedness is a basic condition of all econo-

mies while normative embeddedness is a contingent standard for certain economies: Cognitively, economies are thus always embedded in the sense that they are moral, scientific or cultural constructions (rationalities). Normatively, they are, at the same time, more or less embedded when measured by the moral, scientific or cultural standards that are institutionalized in a given society (regimes).

It would be misleading, however, to interpret cognitive embeddedness (rationalities) and normative embeddedness (regimes) in terms of 'statics' versus 'dynamics': Even though concrete regimes make sense only in the light of abstract rationalities, both can and do change in the course of time. Moreover, one and the same regime makes differently sense under different rationalities. That is to say that alternative rationalities can also compete for the interpretive authority of existing regimes, especially in a state of crisis.

## Analyzing the legal constitution of market society

I would like to conclude with an illustration of how a fully-fledged account of embeddedness can be directed to problems of the economic sociology of law and, thus, elucidate the legal constitution of market society (Frerichs 2008, forthcoming). My approach is strongly influenced by the neoinstitutionalist strand of 'new' economic sociology, especially Neil Fligstein's contributions to the sociology of markets (Fligstein 1990, 2001). Yet, it also goes beyond: Special emphasis is put on regimes and rationalities as these capture best the impact of the legal order.

Methodologically, Fligstein focuses on entrepreneurial actors and the relational fields (or markets) they are engaged in, i.e. the micro- and mesolevels of market society. One of his core ideas is that repeated interaction in the field brings about certain 'conceptions of control' that are shared amongst the actors – business partners and competitors alike – and thus help to reduce uncertainty. With this notion Fligstein comes close to the idea of cognitive embeddedness as pointed out above.

Yet, even though Fligstein is quite explicit about the wider, political-economic context of his studies, namely the constitutive link between states and markets, the macro- and metalevels of his analysis are less elaborate than the micro- and mesolevels. Put positively, while his approach privileges the bottom-up perspective by way of focusing on

actors and relations in a specific field, it can very well be combined and complemented with a more pronounced top-down perspective which also sheds light on overarching regimes and rationalities.

It goes without saying that the ideal counterpart of Fligstein's 'political-cultural approach' would rather be found outside the boundaries of 'new' economic sociology: In this case, the optimal candidate appears to be 'cultural political economy', which stands for a cultural refinement of the critical tradition in political economy (Jessop and Sum 2006). The latter was mostly left aside in the relaunch of economic sociology because of its 'holistic' ambitions and, more particularly, its Marxist legacy.

Yet, whether by coincidence or not, critical political economy provides us with a suitable higher-order equivalent of Fligstein's market- or field-specific conceptions of control: In this case, they are either defined as 'proto-concepts of control' (on an abstract, categorical level) or 'comprehensive concepts of control' (on the level of concrete, cultural realizations). These more encompassing concepts of control (Overbeek 2004) reflect not only the 'social logic' (Zafirovski 2004) of certain markets, but of market society as such. Moreover, they especially point to the contingent character of regimes and rationalities within modern capitalism.

The notion of concepts (or *conceptions*) of control hence allows to combine different levels of analysis – and, thereby, to get a fuller picture of the cognitive embeddedness of markets in society. What remains is to specify these conceptions in a way that they catch the interpenetration of legal and economic rationalities. This can best be done with the notion of 'economic constitutions' which are, by definition, hybrids between economic and legal reasoning.

The proper subject of studies in the economic sociology of law thus consists in the economic constitutions that make up market society. Yet, these 'legal conceptions of economic control' are, of course, contested – even more so in times of crisis. This concerns not only the notorious trade-off between 'economic efficiency' and 'social justice' but also how these terms are defined, first of all.

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