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# Law in Economy and Society: Introductory Comments

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A few years ago it was suggested that economic sociologists have not paid enough attention to the role of law in the economy, and a call went out for “an economic sociology of law” (Swedberg 2003). Since that time, a number of important insights have been generated, and a number of important studies have been produced that deal with the role of law in the economy. It has been argued, for example, that economic sociologists must not confuse law on the books with law in action, and that the state and the legal system are often overlapping in modern national administration but by no means identical.

To mention some recent studies, there is the important comparative work by Jens Beckert on inheritance law (Beckert 2007a; Beckert 2007b for a short version). Bruce Carruthers and Terence Halliday have carefully tracked recent attempts to create an international bankruptcy law (Halliday and Carruthers 2007; Halliday and Carruthers 2009). And there is Lauren Edelman’s ongoing attempt to see how modern economic organizations deal with the law and how these, in some cases, even end up by creating it (e.g. Edelman and Stryker 2005).

But there is also much that remains to be done, as this issue of the *Newsletter* shows. In addressing the issue of what should be on the agenda of the economic sociology of law today, one may want to distinguish between a general discussion of the basic principles of this type of approach, and the concrete topics that should be addressed. In the rest of this introduction we will first discuss some of these general principles, then give a few examples of important topics in need of analysis.

It is important to discuss the general principles of economic sociology, in order to be reminded why we need this topic in the first place. One way to approach this subject would simply be to hold up and draw attention to the part of Max Weber’s sociological work that deals with the inter-

section of law and the economy (see especially Weber 2003; 1978: 63-211, 641-900; Swedberg 2006). While Durkheim, Marx and many others have made important contributions to the economic sociology of law, Weber is clearly its patron saint.

But while it is definitely the case that much work still needs to be done both in presenting and understanding Weber’s “economic sociology of law,” we shall take a somewhat different stance toward his work in this introduction. We shall elaborate a bit on what can be seen as Weber’s basic ideas on this topic, but in doing so also develop them in new directions. We do this in order to show the fertility of Weber’s approach as well as to illustrate how to work with Weber’s ideas, rather than just duplicate them. Our attempt in this direction is presented below in the form of three general propositions that may be useful to keep in mind.

## I. Everything Economic has a Legal Dimension.

We propose (following Weber’s discussion of conceptual jurisprudence) that everything economic also has a legal dimension, and that this may be used as a rule of thumb by economic sociologists. We mean by this statement that whenever an analysis is carried out in economic sociology, one may also want to routinely ask what the legal dimension of the problem is, and determine if it warrants special investigation. It is indeed the case, we argue, that every economic phenomenon is addressed by law, either in the form of positive prescription or prohibition, or in giving contractual freedom to parties to determine its shape and direction. Related to this latter point, there also exists a grey area in law, which includes economic phenomena that have not yet been directly addressed by positive law, but for which regulation may be seen as imminent, due perhaps to increasing political attention and social controversy.

## II. Law Provides Economic Legitimation as well as Official Economic Justice.

Law, as Weber suggests, has become an important part of the legitimation of political rule in modern society – and also, we suggest, of economic rule. Economic inequality is partly accepted in society, for example, precisely because it is based on economic action and accumulation of wealth that is sanctioned by law. It is also important to emphasize in discussing economic justice, that the legal system expresses what we may term “official economic justice”. The law, however, is also the natural venue for citizens’ demands for economic justice more generally. We mention this because of recent attempts by behavioural economists to introduce justice (“fairness”) in the form of a primarily *psychological* phenomenon. We, in contrast, want to draw attention to the social or sociological dimension of economic justice.

## III. Modern Law Should Add to the Flexible Stability of the Economy.

Law is a remarkable means for establishing order and stability in society, including its economy. Bourdieu has pointed to the role that is played in this process by the habitus of the judge (Bourdieu 1987). Tocqueville argues that law can only be strong if it is backed by underlying mores (Tocqueville 1945). To this we want to add that one also needs to better understand the role that legal categories and legal education play in producing social and economic stability (see below; see also Ford forthcoming).

But the modern capitalist economy does not only need stability, it also needs flexibility. It needs flexibility, as Durkheim was the first to note, in order to help modern society to develop and improve (Durkheim 1964). To achieve a proper balance between stability and flexibility, between law-abiding behaviour and innovative behavior, represents a key challenge for social as well as economic legislation.

## IV. Topics that Need to be Better Understood: # 1: Roman Law

The economic sociology of law needs to go to the bottom of things; and when it comes to law, the bottom of things means Roman law. The reader may be familiar with a recent edited volume in which Janne Pölonen makes a thorough and persuasive case for a “Sociology of Roman Law”

(2006). As an historian, Pölonen argues that a renewal of scholarly effort to understand the Roman legal system “as it developed and operated” in ancient society – the roughly 1000-year period from the Twelve Tables (~450 B.C.) to Justinian’s great codification in the Fifth Century A.D. – is a worthwhile project for sociologists who seek a generalized understanding of law as it operates in societies. Here we wish to complement Pölonen’s arguments by pointing to the modern relevance of Roman law for the economic sociology of law.

We argue that Roman law has modern relevance in three respects: (1) as a direct influence on modern legal systems around the world, (2) as a direct influence on socio-economic and political theory, particularly through the tradition of “natural law”, and (3) as a direct influence on modern socio-economic and political institutions, through its influence on legal culture – the language, concepts, and categories of law – which has, in turn, influenced the broader culture in which politics, law, and the economy are discussed. In short, if an economic sociology of law is to include explanation, and if explanation involves the search for causal influences and mechanisms, the effort to understand Roman law and its modern influences must be part of the economic sociology of law.

■ *Roman law has directly influenced modern legal systems around the world.* This may seem like an indefensibly broad claim. However, it is worth recalling that Emperor Justinian’s codification of Roman law was undertaken in Istanbul (Constantinople), and applied primarily in the Eastern Empire, which extended across Greece, the Balkans, Turkey, the Levant, and North Africa (Jones 1986). The Eastern Empire was much more stable than the Western Empire, declining under repeated military attacks, but only finally collapsing in the Fifteenth Century; Byzantine Roman law survived “in Greek dress”, however, in the Balkans and Russia (Stein 1999).

In Europe, Roman law provided structure and content to ecclesiastical Canon law, the law of the “barbarian” Franks, Goths, and Lombards, and later to the civil codes of emerging European nation-states (Stein 1999; Helmholz 1996; Wieacker 1995). English law, while it is often contrasted as a “common law” system, actually absorbed Roman law through multiple channels, including ecclesiastical courts applying Canon law, courts of equity, and courts administering the *lex mercatoria*, which drew on the Roman “law of all peoples” (*ius gentium*) for legal principles applicable regardless of citizenship (Helmholz 2001;

Holdsworth 1922). Hugo Grotius drew extensively on Roman law in laying the foundation for modern inter-national law; through the combination of colonialism, intentional incorporation, and international treaties, European and Anglo-American legal principles built on the foundations of Roman law have spread across the globe (Henkin et al. 1993; Rheinstein 1953; Grotius 1949 [1625]).

■ *Roman law has directly influenced socio-economic and political theory, particularly through the tradition of "natural law."* As is briefly discussed in Ford's contribution to this issue of the *Newsletter*, and as has been shown by many other authors (e.g. Stein 1999; Buckle 1991; Tuck 1981), the natural law tradition is derived from ancient Greco-Roman narrative traditions, and from classical and imperial Roman law sources drawing on those traditions; as early as the Second Century, Roman law sources began to equate the "law of all peoples" (*ius gentium*) – a law that could be applied regardless of citizenship – with the law of "nature" and "right reason". In Montesquieu's *Spirit of the Laws* (1989 [1748]), the natural law tradition was developed in substantially new directions with the notion that *positive* laws might be intentionally crafted to match the governmental structure, cultural "spirit", and material economic conditions of a particular society. Nevertheless, in seeking to understand the "nature and principle" of different governments, the "spirit" of different societies, and in tracing the history of French law, Montesquieu drew extensively on the older natural law tradition, and on Roman law directly. The natural law tradition forms the backdrop to Enlightenment political theory (Buckle 1991) and economic theory (Schumpeter 1996 [1954]). Karl Marx, Max Weber, and Emile Durkheim all referred to Roman law in their theoretical discussions addressing the sociological and economic impacts of law.

■ *Roman law has directly influenced modern socio-economic and political institutions, through its influence on legal culture.* Property, contract, the corporate form, the mercantile partnership-association (*societas*), the distinction between "public" and "private" spheres, and possessory legal "rights": each of these is well-attested in Roman law. Whether, how, and to what extent these conceptual forms influenced modern institutions has been a topic of great debate. During the Nineteenth Century, the controversial issue of Roman law influence on German legal institutions sparked the historicist movement in law, which led directly to the *Methodenstreit* of Max Weber's time (Agevall 1999; Wieacker 1995). In Ford's contribution to this issue of the *Newsletter*, a theoretical perspective ("seman-

tic legal ordering") is briefly sketched, to be more fully developed in Ford (forthcoming). This perspective builds substantially on Max Weber's economic sociology of law (Weber 1978), and on the example of his dissertation pertaining to the emergence of the modern business corporation (Weber 2003). The guiding insight for this theoretical perspective is that lawyers ("jurists"), due to their distinctive training in legal thought, have drawn on archetypal "forms and formulas" from Roman law in bringing conceptual and analytic clarity to new economic, social, and political developments. In doing so, they have drawn new developments under the embrace of old forms, adding stability and clarity to these underlying developments, at the same time as they have extended the old forms. Through the influence of lawyers and jurists, modern institutions such as property, contract, the nation-state, and the corporation continue to be shaped by archetypal forms of Roman law, despite the undeniable fact that these institutions would be virtually unrecognizable to the Roman jurists who originally developed these legal forms.

## V. Topics that Need to be Better Understood: # 2: Financial Law

The current financial crisis has made many economic sociologists realize that they need to have a better knowledge of the financial system, including its legal dimension. It is clear that many attempts are currently going on – in fora like the G-20, the Bank for International Settlements and so on – to strengthen the financial system, in legal and other ways, so that it will not break down again. This is part of the process, to use the current vernacular in these circles, to "strengthen the international financial architecture" (e.g. Vestergaard 2009).

Much less attention, however, is currently being directed at another, but equally important task: how can we get the best productive use out of the financial system and what role can laws and regulations play in this? The function of the financial system is to serve the rest of the economy with money, credit and capital; it does not constitute a goal in itself.

In discussing the financial system, one needs to distinguish between national financial systems and the international financial system. These two overlapping systems also pose distinct legal challenges, since there currently does not exist an overarching international authority, similar to the nation-state. There is obviously also a link between the

national financial systems and the international financial system, which needs to be better understood. Should the two, for example, be decoupled to some extent, with the help of legislation? Or would it be preferable to introduce what we may call "legal road bumps", so that what happens in the financial system of one national system does not immediately spread to those in other countries?

There also exists an asymmetry in the current international financial system, with some countries being extremely strong (the United States, England), while others are extremely weak (many developing countries and, more generally, small countries that are not part of some larger association like the European Union). Is there a need, for example, for legislation that regulates or at least slows down the movement of short-term international capital? Do we need legislation that prevents volatility in the foreign exchange market? A return to stable currencies, as before the breakdown of the Bretton Woods system?

As mentioned earlier, capitalist economies need stability as well as flexibility, and legislation plays a role in this. How are financial innovations to be handled? Would it make sense to introduce new *regulated* incentives for financial innovation based on variations of intellectual property (e.g. a variation on a patent system), through which proposed financial innovations could be examined prior to their introduction into the financial system? While such an approach may seem shocking to lawyers and economists who value the channels for innovation provided by freedom of contract, recent events do point to the need for preventing the disruption that unbridled freedom of contract can pose to an internationally-integrated financial system. In this context, it may be worth recalling Karl Polanyi's argument in *The Great Transformation*: that legal regulation may be most effective in controlling the rate of change in economic life, and that this control over the rate of change may be more important to social and economic stability than any attempted control over the *direction* of change (Polanyi 2001: 38-40).

Many more topics should in our view be on the agenda of the economic sociology of law, since this type of analysis still has a long way to go. A thorough discussion of the general principles of an economic sociology of law is also needed. Some of these topics and issues are addressed in the following articles in the Newsletter. And the reader will hopefully also be inspired to pursue what remains to be done on his/her own.

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