

# On the Sociology of Law in Economic Relations

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## Abstract

A focus on law's role in economic activities was central to many of the classical sociologists, and it remains a key theme in the sociology of law, although no longer central. The view of capitalism as a market economy is reflected in formalist perspectives on economics, law and even sociology, and limits these understandings. Economic sociologists and institutional economists have examined the extensive institutionalisation of economic activity due to the shift to corporate capitalism since the last part of the 19th century, and have focused on law's role in these processes. The neo-liberal phase of capitalism since the 1970s brought a renewed emphasis on property rights and market-based management, but accompanied by an enormous growth of new forms of regulation, often of a hybrid public-private character, leading to a new view of law as reflective or responsive, very different from traditional formalist perspectives. We argue that law's role in the economy can be better understood by examining the social processes of lawyering, mediating between the realms of political and economic power, through practices of legal interpretation that both reflect and shape economic activity.

## Keywords

Corporation, economic law, law and economics, lawyers, property rights, regulation

## Introduction

A focus on law's role in economic activities was central to many of the classical sociologists, and it remains a key theme in the sociology of law, although no longer

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central. Much of this is due to the divergence between sociology and economics, especially since the emergence of neo-classical economics. From the end of the 19th century, mainstream economics and sociology both increasingly distanced themselves from their origins in the political economy of the enlightenment. This also separates both from law, which is tied to politics and the state, and so has long been a focus for political philosophy. Hence, the challenge for a contemporary sociology of law in the economy is to restore a more holistic perspective that combines structural analysis from political economy with actor-centred perspectives from sociology, to examine legal concepts, institutions and practices in relation to economic activity.

This article<sup>1</sup> aims to provide an introductory overview of socio-legal approaches to the role of law and lawyers in the economy, particularly since the 1980s, but in a longer historical perspective. Given its purposes, and the constraints of space, we do not engage in depth with even the authors we pick out, but aim to indicate what we consider they have contributed to the jigsaw of this complex field. The picture we present of that field is of course ours, but we hope that others find it recognisable, at least as a guide to its characteristics and important features. It is therefore not intended to be a complete survey, rather we hope that it can contribute to other efforts aimed at refining socio-legal approaches to research on law and economic relations (e.g. Britton-Purdy et al., 2020).

Our approach traces how the role and forms of law, as well as their understanding by theorists, has changed with the transformations of capitalism and of the state, from the generalisation of commodification, through the institutionalised forms of corporate capitalism, to neoliberalism, the regulatory state and financialised rentier capitalism. The key economic legal forms remain rights of property, liability and contract, but they have been adapted and refashioned far beyond the forms of exclusive rights and voluntarist bargains, to underpin the highly institutionalised structures of a corporate capitalism that paradoxically also rests on febrile trading, especially in financial products, which brought the great financial crash in 2007–2009.

We begin by considering how the view of capitalism as a market economy is reflected in the formalist perspectives of neo-classical economics and legal positivism, largely echoed in Max Weber's sociology of law and taken to an extreme in Chicago-school law-and-economics, and the limitations of these understandings. Focusing on the key legal institution of the corporation, the second section outlines the extensive institutionalisation of economic activity due to the shift to corporate capitalism since the last part of the 19th century, and the increasing attention from economic sociologists and institutional economists to law's role in these processes. The third section discusses the neo-liberal phase since the 1970s, with a renewed emphasis on property rights and market-based management, but accompanied by an enormous growth of new forms of regulation, often of a hybrid public-private and corporatist character, leading to a new view of law as reflective or responsive. The final section argues that law's role in the economy can be better understood by examining the social processes of lawyering, mediating between the realms of political and economic power, through practices of legal interpretation. We analyse the sources of law's indeterminacy to provide an essential element in understanding how law can both reflect and shape economic activity.

## Markets, the Law and Property Rights

Capitalism is generally thought of as a market economy, but often with little consideration of what this means. Mainstream economics has increasingly taken as its starting point the operation of markets, especially since the emergence and increasing dominance of neo-classical economics during the 20th century. This is not based on studying real-life markets (Hodgson, 2015: 129) but entails constructing an abstract system in which transactions are assumed to take place between economic actors (individuals, households, firms) based on their rational preferences (utilities) and with full information. It asserts that competitive markets can achieve efficiency and optimum social welfare, at least when there is perfect competition. Under such ideal conditions a market system is said to achieve general equilibrium, which is the point at which additional market exchanges cannot improve any one person's welfare without worsening that of another person. These are clearly totally unrealistic assumptions, and could never exist in any real human society. They are highly simplifying abstractions needed for the elaboration of models that picture 'the economy' as a formal system which is internally coherent.

From this perspective, law's role is to facilitate and support free markets, particularly by guaranteeing the fulfilment of agreements. However, mainstream economics also recognises that markets do not always conform to the ideal of efficiency, so the state and law also have a role in cases of 'market failure'. These may be classified into two broad types. The first is imperfect market structures, due to imbalances between contracting parties such as monopoly or asymmetric information, and can be remedied through measures aimed at restoring competitive markets. Secondly, government action outside market mechanisms may be justified for wider social welfare due to 'externalities' or social costs, when transactions create costs (or more rarely benefits) beyond the transacting parties, sometimes for society as a whole. This gives rise to public economics, analysing the efficiency of such government action, aimed at providing 'public goods', such as education. Thus, any government 'intervention' in the economy should aim either to enable markets to be competitive, or to provide any 'public goods' that private actors and markets are not able to supply.

Such a system is also regarded as the ideal for liberal capitalism, since markets are considered to require minimal state intervention, allowing decentralised decisions by free individuals, constituting what Adam Smith described as the 'invisible hand' of the market. Marx begins his analysis in *Capital* with the nature of the commodity and commodification, but offers an ironic critique of theories centred on the sphere of exchange, which he refers to as 'the very Eden of the innate rights of Man':

There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their own free will. They contract as free agents, and the agreement they come to is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself. The only force that brings them together and puts them in relation with each other, is the selfishness, the gain and the private interests of each. Each looks to

himself only, and no one troubles himself about the rest, and just because they do so, do they all, in accordance with the pre-established harmony of things, or under the auspices of an all-shrewd providence, work together to their mutual advantage, for the common weal and in the interest of all. (Marx, 1887: 123)

Of course, Bentham's liberal political and legal philosophy of utilitarianism ('the greatest happiness of the greatest number') pre-dated the emergence of neoclassical economics. His seminal 'legal positivism' viewed law as commands, forming a closed and coherent system in which decisions can be made by logic without reference to external factors such as morality or politics. This closed formal system mirrors that of the neo-classical economists' model of the economy.

From a sociological perspective, Max Weber analysed the type of law that emerged with, and shaped the development of, capitalism as an economic system based on the generalisation of exchange. He traced the historical emergence in Europe of what he described as a type of 'formal rational' law capable of logical application, as a 'unique feature which made it more conducive to capitalism' (Trubek, 1972: 722). Like Bentham, he described this as creating a normative framework for the interactions of individual legal subjects, disregarding their social or political status, through specialists who apply abstract and neutral rules by 'the logical analysis of the meaning of the legal propositions' (Weber, 1978/1921: 656–657). For Weber, modern law under capitalism serves to provide certainty of the fulfilment of legitimate expectations, particularly that promises will be kept. However, he also pointed out that legal rights grant power, backed by the state's monopoly of legitimate coercion, and he classified them as 'the rights of individuals to prescribe, or prohibit, or allow, an action vis-à-vis another person' (Weber, 1978/1921: 667). Hence, for Weber, modern law under capitalism serves to provide certainty of the fulfilment of legitimate expectations, particularly that promises will be kept – essential for a system based on exchange.

This perspective underlies much of the scholarship on law in the promotion of economic development – the 'law in development' movement (Tamanaha, 1995) – and has informed the policy prescriptions in recent years of organisations such as the World Bank on the role of law in economic development. The emphasis is on providing certainty and predictability for private economic transactions, especially investment, through a formal legal system that can guarantee the enforcement of individual rights without influence from external political, economic or social factors. The state should ensure the 'rule of law', and be 'market-friendly', limiting its interventions to remedying 'market failures' (World Bank, 1997).

However, even market-centred analyses recognise that the state, and therefore law, play an important part not only in underpinning market transactions, but in establishing the pre-conditions for markets. Key to this is creating and guaranteeing private property rights, which fervent advocates of capitalist commodification such as Peruvian economist Hernando de Soto see as exclusive rights of private property. Indeed, it is the definition of property rights by state action that sets the conditions for economic activities which take the form of exchange between equal transacting parties. Hence, capitalism as a system of generalised production and circulation of commodities is based on state action and coercion, especially to create, maintain and define property rights. Thus,

political power creates and maintains economic power, with law mediating the relation between the two, especially through the formulation and interpretation of property rights. This occurs not just at revolutionary moments, but as a continuous process of struggle (Pistor, 2019: 218). Indeed, the changing forms of property rights, as moulded in law, have been central to the wider transformations of capitalism.

As the term suggests, these are rights to *appropriate*, referred to by Weber as ‘the power to control an object or a person’ (Weber, 1978/1921: 667), recognising that they entail a power relation, backed by the state. Although property is commonly thought of in objectified terms as a thing, both lawyers and economists understand it to be a bundle of rights between persons, often in relation to things. Property is often seen as a ‘natural’ right, rooted in Enlightenment ideas linking individual ownership to liberal rights and freedom, reinforced by the attachment of individuals to their personal possessions, although private property goes well beyond personal property.<sup>2</sup> The essence of private property is the right to exclude others from benefiting from an asset, and economists consider this to be justified for goods that are ‘rivalrous’ (if enjoyment by one person reduces the ability of another to enjoy it). However, rivalrousness is always relative, due ultimately to the social character of economic activity, indeed of all human life. Hence, property rights cover a wide spectrum of excludability, and different rights also interact. Economists accept that inequalities in ownership of property underlie social inequalities, but they are not seen as affecting the efficiency of markets. Indeed, the continual extension of private property rights is seen as promoting economic efficiency, by widening the scope of transactional decision-making.

This can be seen in much of the work in ‘law and economics’ since the 1970s, developed by the ‘Chicago School’ led by lawyer Richard Posner (Posner, 2014/1972) and economist Gary Becker. Work in this vein generally applies market-based economic analysis to legal institutions, to consider how they could be made more ‘efficient’. It also depends on the theory that private property rights encourage more efficient use of resources by enabling market transactions to internalise the costs of managing them (Demsetz, 1967). For example, allocating private property rights is considered superior to shared use of natural resources, to avoid over-exploitation, or the ‘tragedy of the commons’.<sup>3</sup> However, Elinor Ostrom’s detailed studies of governance of common property resource systems around the world, from California groundwater to inshore fisheries in Turkey, has shown that they have long been governed by collective action and delicate normative interactions to manage the long-term interests of different types of user (Ostrom, 1990), while evidence is plentiful that the profit motive leads to short-term decisions and disastrous over-exploitation. Nevertheless, the focus on markets in law-and-economics has extended well beyond rights to land or other physical resources. Market-efficiency analysis has even extended to highly personal relations: Becker has applied cost-benefit analysis to marriage, while Posner has considered creating markets in babies for adoption. All this is evidently very remote from a sociological perspective.

The law-and-economics approach originated with Ronald Coase, a British economist based at Chicago Law School from 1964 for almost 50 years. Coase criticised the sharp distinction made by welfare economics between the market and the state, and stressed the importance of analysing actual examples of the interactions of law and economics in managing the market-state relationship. The history of institutions such as lighthouses

and broadcasting showed that they have not always been provided by the state and hence are not intrinsically public goods.<sup>4</sup> He was also scathing about the crudity of ‘blackboard economics’, and developed the concept of ‘transaction costs’ to debunk the assumptions of perfect competition and market efficiency, although this was largely ignored by most of his followers, including Posner. Nevertheless, Coase’s approach used neo-classical economics to analyse the relative costs of coordinating economic activities through markets or through administrative structures, whether by the state or by the firm. His emphasis on cost-benefit analysis, and the uncertainties of predicting and calculating the effects of state action, led him to prefer market-based solutions, and this was certainly the direction taken by law-and-economics, especially in the period of economic liberalisation from the mid-1970s.

The ambivalence of Coase, and his paradoxical impact, can be seen particularly in relation to the issue of environmental pollution, discussed in his seminal article ‘The Problem of Social Cost’ (Coase, 1960). This analysed how the relative rights of neighbouring property owners would affect their economic activities if one caused pollution damaging the other. The first part showed that under conditions of perfect competition, bargaining between the parties would ensure an efficient outcome, regardless of whether the law imposed liability on the polluter or not (the so-called ‘Coase theorem’). This is essentially because ‘the right to do something which has a harmful effect . . . is also a factor of production’ (Coase, 1960: 44). This implicitly recognises, like Weber, that all legal rights, not just those protecting property ownership, empower economic actors – but also that the activity of these actors (and their economic power) can shape law’s outcomes. The article examined court decisions in conflicts over liability for harm between neighbours, to show that judges applied the test of what is a ‘normal use’ of land in a flexible way, sensitive to the social context. He did not make this point explicit, but this acknowledgement that law is flexible was very different from the view that law provides certainty and predictability by applying formal rules in a socially neutral way.

Coase’s analysis also pointed to the limits of markets, since he understood well that in reality there are substantial ‘transaction costs’. Hence, he acknowledged that governing an activity that has widespread harmful effects, such as smoke pollution, would be difficult through individual rights and transactions. On the other hand, he cautioned that both the administrative costs and the economic effects of government action should be carefully evaluated (Coase, 1960: 18). Coase wrote at the time of the policy debates in the UK following the experience in London and other large cities of noxious ‘smog’, caused by coal-burning domestic fires, that had resulted in the Clean Air Act 1956. This, followed by similar measures in other countries, initiated a continuing pervasive role for states in air quality management, culminating in today’s extensive internationalised measures to combat climate change, discussed in the ‘Neo-Liberalism and the Regulatory State’ section below.

A very different approach to the role of law in the capitalist economy stems from the Marxist tradition. Marx’s comments on the equality of rights and markets, cited above, were based on his analysis of exchange as only one moment in the cycle of economic activity. It was Marx’s genius, writing during the heyday of the emergence of industrial capitalism, to be able to combine the best of the critical philosophy and political economy of the Enlightenment to unite a structural analysis with a theory of agency based on

class conflict. His point was that economic activity should be viewed from the perspective of social relations as a whole, and that exchange depends on production; indeed, he gave it ontological primacy over circulation, and analysed economic systems as modes of production. For him, markets are ubiquitous in capitalism, because it is a historically specific system driven by commodification, so that social relations between persons are seen in terms of the exchange of things. The equality and freedom of parties involved in market transactions is mirrored by their political status as free and equal citizens, but these appearances conceal the wider reality of social inequality and power. Since law provides the essential link between politics and economics, it performs a paradoxical role: it facilitates apparently equal economic exchanges that in wider social terms permit and reinforce inequalities. For Marx, these inequalities are not external to legal forms but can be seen as inscribed in those forms, if considered from the perspective of the totality of the social relations they mediate.

The key relationship for Marx was employment, which under capitalism takes the economic form of a bargain between free persons. Weber pointed out that this formal right in practice enables the more powerful party, the employer, to impose the terms (Weber, 1978/1921: 729–730). Marx went a step further and argued that what the employer pays for is not labour, but what he termed labour-power: the possibility of extracting surplus value by controlling the work to be done. Indeed, as large-scale employment expanded under factory production, employment was generally conceptualised in law as a ‘contract of service’, so that the employer has the right to direct the worker, while a ‘contract for services’ framed an independent relationship for the delivery of specified outputs. More recently, the digitalisation of the economy has enabled new modes of labour exploitation in the ‘platform economy’ by firms such as Uber and Airbnb. These use technological disruption to try to avoid the legislative protections for employees (social security, sick pay, holidays) by treating those whose work generates revenue for the platform as independent suppliers of services (Daugareilh et al., 2019; Makela et al., 2018). This shows that, while the legal form both reflects and shapes socio-economic power relations, it is essential to take account of the whole socio-economic context in order to understand how (Dukes, 2019).

From such a wider perspective, feminists have pointed to the particular burden on women of the unpaid domestic work needed for social reproduction, while the prioritisation of men in the labour market leads to the systematic under-valuation of jobs considered to be women’s work, such as caring, or women’s sexual exploitation. The problematisation of the family-market and private-public divides provides fertile ground for feminist critiques of economic analyses of private law, but also poses dilemmas about attitudes to commodification, strengthening the need for a more holistic perspective (Kotiswaran, 2013).

These explorations also show that the flexibility and malleability of legal forms allows them to be moulded to different contexts. Katharina Pistor has recently provided a sophisticated account of how lawyers have adapted what she describes as the basic modules of the legal code, particularly contracts and property rights, to create the ‘code of capital’ (Pistor, 2019). She focuses particularly on the coding of assets, in other words property rights, arguing that the key attributes that enable them to create wealth are priority, durability, convertibility and universality (Pistor, 2019: 13). She examines

many episodes and important examples of the codifications and recodifications that have enabled the generation of wealth, or capital, and protected its accumulation. She shows how it was through battles over the codification of land rights that the more powerful interests acquired and preserved control over this valuable asset, from the enclosures and entails of post-feudal Britain to the dispossession of first peoples by colonial settlers in places as diverse as Belize, New Zealand and the USA. She is particularly concerned with financial instruments, tracing how they have been transformed from their origins in bills of exchange to the residential mortgage-backed securities that combined trusts and contracts into the ‘quintessential legal steroid’ (p.87) which caused the great financial crisis in 2007–2008. Drawing on critical legal studies, she debunks the notion of ‘clear property rights’, since legal reasoning is ‘open-ended’ and involves multiple sources of law, so that the fashioning of property rights is ‘a complex process pregnant with value judgments and power’ (Pistor, 2019: 28).

## **Institutions and Corporate Capitalism**

A wider view of the nature of economic activities became increasingly important during the 20th century, as capitalism far outgrew the small-scale systems of production and distribution based on manufacture, family-owned business and local markets, to the complex, large-scale, bureaucratised and globalised systems of today. Such a view is provided by institutional economists, beginning with the ‘old’ institutional economists early in the 20th century, notably Thorstein Veblen and John R. Commons (Commons, 1924), and the more recent neo-institutionalists. These frequently see law as central (Hodgson, 2015), leading to closer collaboration between institutional economists and economic lawyers (Deakin et al., 2017). Economic sociologists have also begun to pay greater attention to the role of law (Ashiagbor et al., 2013; Edelman and Stryker, 2005; Swedberg, 2003). They unite in arguing that economic activity does not occur spontaneously, relegating law to a secondary role of validating or legitimising transactions, but that law plays a key constitutive role for economic activity. Even a simple exchange requires law since it consists of a transfer of legal rights, although often fetishised as the transfer of a physical object. More importantly, they both see economic activities as social, going well beyond exchange, and hence embedded in institutions, created and shaped by law.

The key institution that has dominated economic activity for some 150 years is the corporation, which exists only due to state action through law. Prior to the rise of industrial capitalism, the trading companies such as the British and Dutch East India Companies were as much political as economic institutions, granted charters by European states to spearhead colonial exploration and plunder (Coornaert, 1967; Dalrymple, 2019). Others performed public functions, such as education, religion, or urban services, and later large-scale infrastructure projects such as highways, canals and railways. The modern form, allowing any group of citizens to create a corporation by simple registration, emerged in the second half of the 19th century, justified again by the need to organise activities for public benefit, as well as to democratise participation in collective activities through a membership institution.



The legal framework for incorporation confers the key privilege of legal personality combined with limited liability. This means that a company can engage in economic activity in its own name and on its own account, and its members are not liable for its debts beyond the 'shares' of capital that they have subscribed to contribute. Hence, political economists such as Adam Smith opposed use of the corporate form by entrepreneurs, because unless they risked their own capital they would become reckless. Facilitation of incorporation was championed in the UK in the mid-19th century by a curious coalition of socialists, struggling for the right for workers to form collectives, and liberals arguing for greater economic competition (Djelic, 2013). Establishing a legal framework for registers of shareholders and filing of accounts was considered an essential safeguard against risk and fraud. However, the 'joint stock company' form was little used at first, and a separate legal statute was devised for cooperatives.

The corporate form has been described by economic sociologist William Roy as 'socialised property, altering the basic relationships among owners, workers, managers, suppliers, and consumers' (Roy, 1997: 6); he also shows that it cannot be explained in terms of market efficiency, but rather by power. In fact, economic activities are planned and organised administratively within the firm, insulated from the market. Thus, the key advantage of the corporate form is the ability to exploit the power of socialised labour, as recognised by theorists as apparently divergent as Marx and Coase.<sup>5</sup> Although it is a collective and public institution, the corporation became based on private property, through the development of the legal transferability of shares and the emergence of markets for them (Ireland, 1996). This turned company members into shareholders with a purely financial interest, and gave corporations access to larger pools of finance.

This became important during the booms and busts of overproduction and recession of the last part of the 19th century. This was the period of emergence of big business, which could plan production either through cartels (using contracts or trusts), or by financing amalgamations of smaller enterprises into large corporations (Fligstein, 2001: 36–37; Lazonick, 1991; Roy, 1997). The political reaction against the 'robber barons' in the US led to the anti-trust laws, which provided a legal arena for battles that shaped the emergence of a regulated oligopolistic corporatism (Sklar, 1988). These battles were mediated by a new breed of corporate lawyers who devised the legal forms and principles that deflected populist challenges and legitimated corporate power (Gordon, 1984: 59–62; Hovenkamp, 1991). In other countries, both state enterprises and cartels played an important role, until US influence transplanted competition laws to Japan and Europe after the second world war, and the privatisations of the 1980s laid the foundations for the worldwide spread of competition regulation by the 1990s.

The corporate form was further adapted to enable the creation of large and complex corporate groups, some consisting of hundreds of affiliates, operating trans-continentially and transnationally: the transnational corporations (TNCs) which have spread 'business cultures, practices, perspectives' worldwide (Wilkins, 1998: 103). Corporate lawyers devised the sophisticated structures and lobbied for laws allowing a corporation to own shares in another,<sup>6</sup> then used the competition between jurisdictions for company registrations to create corporate laws favourable to dominant interests of various kinds. From the 1920s to the 1970s the pre-eminent type of TNC became the large multidivisional firm run by professionalised managers, allied to long term institutional or bank investors,

coordinating 'Fordist' mass production with distribution to expanding consumerist markets (Berle and Means, 1932; Chandler, 1962).

From the 1980s the emergence of post-industrial capitalism, with automation and then digitalisation, and the shift to dematerialised commodities or services, led to new combinations of corporate and contractual structures. A 'networked enterprise' such as MacDonalds, Nike, Apple or Zara can use long-term contracting to manage producer supply chains, as well as distribution systems controlled through franchising or brand-names. Their global social reach gives increased importance to image and reputation, which has also led to consumer-based campaigns for 'corporate social responsibility', allied with campaigns for environmental protection and labour rights, pressing for the widening of corporate accountability beyond shareholders to other 'stakeholders' (McBarnet et al., 2007). Yet the strong pressures on TNCs to respect rights on the same scale as their economic operation have resulted mostly in voluntary self-regulation, such as corporate codes of conduct, rather than binding law (Ruggie, 2018). Both socio-legal scholars and activists have debated the effectiveness and legitimacy of this type of governance. While some argue that these norms offer little transformative potential (Shamir, 2004), or may even delegitimize public regulation of TNCs, others suggest that under certain circumstances such codes may provide a focus for successful counter-hegemonic strategies, for example to protect labour rights (Rodríguez-Garavito, 2005).

This also revived interest in more clearly alternative 'social' forms of enterprise, particularly cooperatives. These have a long history – indeed, enabling workers' collectives was one of the drivers for the emergence of the corporate form, as mentioned above. However, worker cooperatives have found it hard to expand to the large scale needed to compete with big business, and the extensive chains of consumer cooperatives in many countries either crumbled or became very similar to shareholder-owned companies during the consumerist boom of the 1960s and 70s. Nevertheless, cooperatives have found important niches in some sectors such as small-scale agriculture, and in particular countries or regions. An egregious example has been the Basque country in Spain, where both family firms and worker cooperatives became important especially during the Franco period of economic isolation. Particularly successful has been the group coordinated through the Mondragón Cooperative Corporation (MCC). The group structure enables each cooperative to remain small enough to be democratically run by its worker-owners, while providing diversification and a wider financial base, including bank and insurance cooperatives. Its continued survival despite the tensions of balancing cooperative values with global corporate competition is perhaps due to its deep roots in Basque culture (Cheney, 1999; Kasmir, 1996; Whyte and Whyte, 1991).

The success or failure of corporations entails much wider social and cultural considerations, going well beyond competitiveness (Schoenberger, 1997). Although the corporate form has spread around the world, there are significant differences in its legal framework, generally linked to national variations in the wider institutional features such as the structures of financial intermediation, the role of the state and the components of the social wage, so that there are 'varieties of capitalism' (Hall and Soskice, 2001). Yet, there has also been a converging global trend that has been described as the financialization of the corporation: the increasing importance of finance even for non-financial corporations (Horn, 2017). This can also be seen as part of wider shift to a new form

of ‘rentier capitalism’ (Christophers, 2020). The prioritisation of ‘shareholder value’, combined with other legal forms such as tying the remuneration of managers to the value of shares, creates a relentless drive for corporations to cut other costs, often affecting jobs and working conditions, and undermining environmental, labour and taxation standards. The prioritisation of financial interests over the welfare of workers and society as a whole has been facilitated by a range of ingenious legal devices, culminating in 2007–2009 when investment bankers walked away with millions despite having caused the global financial crash (Pistor, 2019: 62–64).

Hence, the flexibility of the corporate form, and the ability to combine it with other basic legal devices such as contracts, partnerships and trusts, have made it adaptable to different socio-economic and cultural contexts around the world, and to enormous changes in the social relations of production and distribution. Increasingly complex economic activities have been managed through legal frameworks that go far beyond the discrete contracts and basic property rights of a simple ‘market economy’, even though in formal terms a company share is just a transferable property right and a franchise is just a contract. The unpredictability and volatility resulting from unbridled market competition have been tamed, to some extent and for periods of time, through legal institutions for managing and planning economic activity – albeit through institutions based in private property and driven by capital accumulation.

## **Neo-Liberalism and the Regulatory State**

Governments took an increasing role in the economy during the second world war, and this continued during the ‘thirty glorious years’ of the post-war boom, with the spread of welfare states, particularly in Europe. Also, the dependent or developing countries, that grew rapidly in number following decolonisation, generally adopted state-led policies of economic development, extending to widespread nationalisations especially of natural resource extraction, reaching the peak of its expression with the UN Declaration on the New International Economic Order of 1974. However, the oil price shock of 1974 and ensuing widespread de-industrialisation led to a backlash, with criticisms on all sides of corporate ‘capture’ of the state. While the political left criticised the suborning of the public sector for private profit, the right-libertarian critique attacked the assumption in welfare economics that ‘public goods’ must necessarily be provided by the government. These arguments fell on fertile ground, as the growth in government spending led to fiscal crises, and bloated bureaucracies were often incapable of effective management of public services, especially in a period of rapid technological change.

Thus, market-based perspectives gained ground in the 1980s. This involved privatisation of government-run economic activities such as basic services (railways, water, power), which essentially involved a transfer from public to private corporate bureaucracies, accountable to shareholders not citizens. Despite the ideological pressures to reduce state ‘intervention’ in the economy and restore free markets, in practice more markets meant more rules (Vogel, 1996). Hence, although often considered a period of deregulation, in fact there was an enormous growth of regulation, to the point that some have described the emergence of a ‘regulatory state’, and even ‘regulatory capitalism’

(Braithwaite, 2008). This also stimulated the emergence of a new interdisciplinary field of regulation studies, extending far beyond economic activities (Picciotto, 2017).

While this entailed an enormous expansion of the role of public bodies, the aim has been to be 'market-friendly'. This has included the deliberate establishment of markets by extending private property rights. A notable example is the creation of markets for carbon emission permits based on 'cap-and-trade' mechanisms, created following the Kyoto Protocol of 1997. This involved a complex interaction of political pressures, technocratic decision-making, and competitive profiteering ranging from corporate capture to wide-scale fraud. One study concluded that it had become hard to distinguish private from public actors, and that 'markets do not exist independently, but . . . they are socio-technocratic artifacts that depend on public state regulation for their existence and on good regulation for their daily functioning' (Lederer, 2012: 537).

There has also been a great extension of 'intellectual property rights' (IPRs). This is paradoxical, since from a free-market perspective it is hard to justify the grant of exclusive rights of private property over technological innovation and cultural creativity. There is no need to conserve scarce or depletable resources, since IPRs protect 'non-rival' goods (their utility does not diminish when they are shared) – indeed, IPRs artificially create scarcity. Hence, strengthening IPRs does not ensure 'free' markets, but confers market power. IPRs in their modern form emerged in the late-18th-century, justified by Enlightenment ideas of the right of innovators and creators to the fruits of their labour, and copyright in particular became powered by Romantic ideals of authorship.<sup>7</sup> However, they became used as weapons to gain and protect competitive advantages, as part of the expansion of capitalism, both by large firms and by states.

Initially, state laws protected only national novelty, encouraging the free importation or local manufacture of foreign inventions or cultural works such as books, which today is denounced as piracy.<sup>8</sup> Gradually states, especially in Europe, agreed reciprocal protection, culminating in the multilateral agreements establishing the Paris Industrial Property Union of 1883 and the Berne Copyright Union of 1886. However, the US continued to require local publication of books, and did not join the Berne Union until 1987. By this time the US government had become a fervent advocate for strong international protection of IPRs, resulting from lobbying by its high-tech sectors, and this was secured by the inclusion of the agreement on Trade Related Intellectual Property Rights (TRIPS) in the package establishing the World Trade Organisation in 1995.

Thus, the expansion of IPRs has been driven by large TNCs, to help cement their oligopolies: copyright for the media and later the software sectors, patents for pharmaceutical and later biotech companies, trademarks and image rights for most TNCs, and database rights or trade secrets now for the many highly digitalised TNCs aiming to control big data. They have used these protections to create and maintain their oligopolistic domination of the economic exploitation of innovation and creativity. However, IPRs are not simply instrumental rights, but rather a battleground for contention over the content and scope of protection, as well as for challenges to its legitimacy. This is due to the fundamentally paradoxical endeavour of creating private and exclusive rights in relation to social practices that thrive from being public and collective.

The basic legal principles attempt to manage this tension, but have been continually contested. Patents protect inventions, not discoveries found in nature; but the biotech

industry secured their extension to ‘micro-organisms’, although the patentability of genetic fragments and sequences remains highly contested (Pistor, 2019: 112–114). Copyright is justified by the creativity of authorship, but it has been secured for computer software and databases. It does not protect ideas but only the form of expression, yet conflicts continue over issues such as reverse engineering or decompilation and the ‘look and feel’ of a computer program.

Although excludability is needed to protect private property rights, commercialisation depends on diffusion, and the distinction between producers and consumers became more blurred in the digital age. Exploiting the rights of purchasers to private use, peer-to-peer file-sharing struck a deadly blow at the recording industry giants which were slow to adapt to the internet, lulled by their comfortable super-profits from sales of digital discs. However, this opened the way for new corporate giants such as YouTube, TikTok, Spotify and Netflix to build enormous global communities for cultural content, which could be commercialised more indirectly. In parallel, the ‘copyleft’ movement has created ingenious legal frameworks to protect the ‘commons’, such as the General Public Licence for software, and ‘creative commons’ licences for creative works, which use authorship to create governance regimes for a non-commercial ‘commons’, although this inevitably intersects with for-profit corporations (Picciotto, 2011: 433–436). An explicitly collective form is provided by geographical indications or appellations of origin, devised in France early in the 20th century to enable wider commercialisation of small-scale wine and food production, and they have been internationalised and expanded to try to foster both food and cultural products of communities also in developing countries (Dagne, 2010).

Managing the tension at the heart of IPRs has therefore spawned a range of regulatory arrangements to regulate the interactions of a variety of rights. Private ownership of copyright has been reconciled with diffusion to a wide public through collective licensing organisations, beginning with performing rights bodies in the 19th century, then broadcasting rights, and more recently blanket licensing for educational use. The possibility of patenting living organisms opens up the prospect of private ownership of genetically modified plants, animals and even humans, or the ‘commodification of life’. The new bioscience also involves novel methods for the collection and storage of plant, animal and human genetic material, creating problems including the appropriation of traditional knowledge and culture and the exploitation of biodiversity through ‘biopiracy’. The resulting conflicts have resulted in national and international regulatory structures governing a host of ethical, social and ecological issues, intersecting with trade and marketing rules, as well as remuneration arrangements.

Thus, privatisation and the extension of property rights cannot be said to have created ‘free’ markets to manage economic activities through individualised sales transactions, as advocated by neoliberal theories. Instead, there has been an enormous growth of corporatised bureaucracies, whether private, public or of a hybrid character. Regulatory agencies have been created, often semi-autonomous from the central state, tasked with a range of functions, including granting licences, permits or franchises (often including elaborate performance obligations), establishing quality and performance standards, and setting the terms for markets and competition, including pricing. This has resulted in closer interactions between bodies regarded as public and private, through a range of

public-private ‘partnership’ arrangements. Public and private bodies have come to resemble each other, adopting similar managerial techniques. Indeed, many such bodies are hybrids, blending the characteristics of public and private. However, the far greater resources of for-profit corporations ensure that they dominate regulatory fields, particularly as these fields become more technicised and complex.

The proliferation of regulatory regimes in the neo-liberal era has also created complex interactions between them, especially internationally. This involves various forms of both competition and coordination between such regimes. Powerful economic actors, especially TNCs, were able to exploit regulatory differences both within and between countries, to select favourable regimes, and put pressure on others to modify their requirements. This causes a ‘race to the bottom’, although sometimes to the top also, especially where there are strong social counter-pressures (Murphy, 2004). Some jurisdictions became regulatory ‘havens’, for activities such as ship registration (flags of convenience), and ‘offshore’ banking. TNCs and wealthy people historically developed the international tax haven and offshore secrecy system, taking advantage of their global reach to mould international tax rules to facilitate tax avoidance.

This helped to pave the way for the transformation of the international system of interdependent states to one of multi-level global governance, with more fluid interactions between legal and normative systems, including new types of supranational, infra-national and global ‘soft law’. Lawyers acting for powerful interests can deploy new strategies of forum selection and forum shifting (Pistor, 2019, Chapter 6), for example challenging national legislation in private arbitrations under investment protection agreements, or under the dispute settlement procedures of the World Trade Organisation.

Regulatory failures have led to frequent scandals and crises, most starkly the great financial crash of 2007–2009. The crash led to calls for a restoration of trust in capitalism, with ideas for a more responsible and ethical ‘new capitalism’. However, there was a wide gap between these ideals and the regulatory reforms that ensued, as initially radical proposals for the restructuring of finance were eroded by corporate lobbying. This has strengthened the scepticism towards attempts to transform corporate culture to restore trust. A re-examination by Nesvetailova and Palan (2020) of financial malpractice argues that this is not just an aberrant deviation from the norms of market behaviour, but is inherent in the competitive drive to maximise profits. They draw on the perception of Thorstein Veblen, based on observation of early-20th century big business practices, that the pressure for profitability generates an urge to ‘sabotage’ market rules, which turns efficient market theory on its head. This suggests the need for more fundamental structural changes rather than regulatory reform of finance.

These changes have also transformed public and private law, which have become less distinct – indeed, regulatory law occupies a space between the two. Private legal forms classically considered to concern voluntarist transactions between individuals have increasingly been used for purposeful governance of a public character. For example, public services contracts are used to regulate the delegation to corporate providers of activities ranging from refuse collection to the management of social housing (Vincent-Jones, 2006). This has exacerbated the tensions in private law: between contract as a discrete individual bargain and as a planning tool (Collins, 1999), and in the law of torts or obligations, between the regulatory and redress models (Goldberg, 2005). Scholars

have addressed the relationship between regulation and these private law forms (Parker et al., 2004), but there remains uncertainty about what it would mean for private law to become more 'regulatory', and whether it could do so without losing its original and perhaps primary role. Private bodies also perform a regulatory role by drawing up standard form contracts, such as the 'master agreement' of the International Swaps and Derivatives Association (ISDA) governing financial derivatives.

Such regulatory contracts aim to manage market uncertainties through legal language combining standard 'boilerplate' provisions with elastic and ambiguous terms (Huault and Rainelli-Le Montagnier, 2009; Riles, 2008). Hence law, rather than providing predictability and certainty for private economic action, is rather a process of exploiting and managing uncertainty. For this reason, attempts to replace law with a digital code using blockchain, which would hardwire commitments and obligations, would fail, because they would lack the flexibility needed to respond to unpredictable events (Pistor, 2019: 191).

The rise of regulation thus brings new perspectives on the role of law, very different from formalism. Regulation aims to move away from a top-down system of 'command-and-control', especially in relation to business activities organised by large corporations. The influential work of Ayres and Braithwaite (1992) argued that regulation should be an interactive process, involving both firms themselves and civil society actors, with the 'big stick' of the state being a last resort. The interplay between state and private ordering should be responsive to industry structure and attuned to the motives of the different actors. The state could promote private regulation through 'enlightened delegation' of regulatory functions to public interest groups, to unregulated competitors, and even to regulated firms themselves, but this should be neither wholesale nor unconditional. The best government strategy should be negotiated self-regulation, agreeing goals while leaving the attainment of them to industry, but making it clear that socially suboptimal compliance would lead to escalation up the 'enforcement pyramid' of intervention.

This drew on the work of Nonet and Selznick, who argued that social change had brought a crisis of the legal formalism of 'autonomous' legal orders described by Weber, resulting in the emergence of 'responsive law' (Nonet and Selznick, 2001). A variation on this, 'reflexive law' was developed by Teubner (Teubner, 1983), influenced also by Luhmann's structuralism. Teubner argued that there had been a dual process of both increased autonomisation of law from other spheres such as the economy, which are 'autopoietic' or self-reproducing, yet an increasing interdependence between them, creating excessive expectations of the purposive role of law. Teubner is more pessimistic than Nonet and Selznick about the effectiveness of law, and considers that these expectations are likely to be disappointed, so that regulatory failure is the rule rather than the exception. He outlines the 'regulatory trilemma': either lack of communication or mutual indifference between law and other spheres; or law would have a disintegrative effect on life-spheres; or finally the autonomy and hence authority of formal law would be overwhelmed (Teubner, 1987). A different and also critical view was offered from a Foucaultian perspective by Rose and Miller, who argued that these 'action at a distance mechanisms' place managers 'as an intermediary between expert knowledge, economic policy and business decisions' (Rose and Miller, 1992: 200).

Hence, the prevalence of market-friendly perspectives driven by neo-liberalism has had paradoxical results. While there has been an extension of property rights, they do not take the form of exclusive private rights, justified morally and politically as a 'natural' right based on an individual's labour and personhood, and underpinning simple exchange transactions in 'free' markets. Rather, economic rights are deployed for the management of economic activities through public, private and hybrid institutional arrangements of a corporatist character. The key private law institutions of property and contract take more directly public forms, applied for the purposeful management of extensive and often collective economic activities, even on a global scale. Law is no longer viewed as a system of top-down command, but as interactive or reflexive regulation, mediating relations of political and economic power.

## Law, Interpretation and the Mediation of Power Relations

As we have seen, law both reflects and shapes economic relations. This poses a puzzle that has long bedevilled the understanding of law. Does law direct economic relations, or are those with economic power able to dictate or disregard the law? Is law just an epiphenomenon, with little real influence over economic activities, or can it have real effects on those activities, prohibit those deemed undesirable, prevent or punish inappropriate behaviour, and correct detrimental tendencies or outcomes? These questions call for actor-centred sociological approaches, that consider law as a social process, and examine the role of lawyers in the transformations of capitalism.

If economic relations are seen purely as market transactions, law's role can be considered as simply *facilitative*: to enable economic actors to transact with each other voluntarily, with a minimum of state compulsion. Certainly, legal rules and institutions do perform such an important facilitative function, providing a normative framework that economic actors can decide to use if and how they choose to do so. In addition, however, law also performs *constitutive* and *regulatory* roles (Edelman and Stryker, 2005: 535). Furthermore, as we have seen in previous sections, these roles are intertwined.

The first section showed that economic transactions depend on the prior constitution of legal rights, especially property rights, which define the object of a transaction and hence set its terms. Ownership entails an assumption of 'exclusive' or prior rights, but these are always contingent on the intersecting rights of others. The second section outlined the way in which economic activity has become increasingly highly institutionalised, with the emergence of a transnationalised and financialised corporate capitalism during the 20th century. This entailed a greater role for state action to create or support the often elaborate legal frameworks for economic activity, as well as direct state management of activities considered to be for the general or public good, such as infrastructure and utilities. Much of this direct involvement of the state was rolled back in the privatisations of the neoliberal period, which also saw significant extensions of property rights to create and stimulate markets. However, as shown in the third section, this did not reduce state intervention but greatly expanded the scope of purposive or regulatory law, albeit in highly privatised forms. Lawyers have clearly played an important and increasing role in these changes.



Sociologists studying business lawyers have pointed out that they act as intermediaries, operating between the political sphere of the state and the economic sphere of the market (Dezalay, 1996). Professional lawyers act for their clients in advising them how to structure their transactions and economic activities, and to justify them especially to other lawyers working as public officials. Economic activities generally involve different intersecting areas of law, and business lawyers are particularly adept at navigating between a great variety of legal rules or norms, seeking the best outcome for their clients. Further opportunities to contest and challenge the applicability or validity of rules, are provided by the interactions between different levels and types of law. As law on a global scale has become more diverse and heterarchical, managing and exploiting this ‘inter-legality’ (Santos, 1995) has become an increasingly important field of legal practice, dominated by business and corporate lawyers, who have also been able to shape national legal systems and hence also states around the world (Shaffer, 2014).

Business lawyers are proactive, both moulding existing rules and lobbying for and helping to formulate new law. This has been documented in a variety of specific fields, such as international taxation (Picciotto, 1995), insolvency and bankruptcy regimes (Halliday and Carruthers, 1993), international arbitration (Dezalay and Garth, 1996), antitrust regulation (Miola, 2016), utilities and infrastructure (de Sa e Silva and Trubek, 2018), as well as in broad political and economic transformations in Africa (Dezalay, 2019), Asia (Dezalay and Garth, 2010) and Latin America (Dezalay and Garth, 2010, Pérez-Perdomo, 2006). Since lawyers both create and interpret legal concepts and discourses, legal practices mediate between the political realm, which provides the necessary underpinning of legitimate coercion, and the real-world sphere of economic activities. Lawyers are involved everywhere, from the formulation of proposals and drafts of texts such as legislation or treaties, to the interpretation and application of these texts once issued as law. Indeed, this is a continuous and recursive process, because if a lawyer fails to persuade a government official or a judge to accept an interpretation that favours a client, the argument can always be pursued in another forum, including lobbying the legislature for new law.

Socio-legal perspectives have examined not only the structural role of lawyers, but also the practice of lawyering. This goes beyond the formalist view that legal rules are simply applied or enforced which, as we have seen in the previous section, became increasingly untenable in the era of regulatory capitalism. Based on observations of lawyers’ practices, Cain described their activity as *translation*: the reconstitution of life-world situations ‘in terms of a legal discourse which has a trans-situational applicability’ (Cain, 1979: 335). Hence, lawyers can design their clients’ life-world transactions to comply with the letter of formal law while avoiding its aims or purpose, described as ‘creative compliance’ (McBarnet and Whelan, 1991). Formalist perspectives consider that such avoidance is because the law is not always clear, but see this as a defect to be remedied. From that viewpoint, the problem of avoidance should be resolved by better design and clearer rules, blocking up ‘loopholes’ in the logical fabric of the law. This often leads to increasingly detailed elaboration of legal rules, resulting in legal complexity, for example in tax law (Picciotto, 2015).

Contrary to the formal picture of law as an internally coherent and logical system, the meaning of legal texts is not clear or fixed, but fluid and contested, and so shaped by the

social process of interpretation. In their constant battles over the meaning of legal rules, lawyers generally contend that the problem is lack of clarity or ambiguity due to poor drafting, but they are in their element in legal grey areas, exploiting legal uncertainty. They fight for what Pierre Bourdieu has called 'le droit de dire le droit' (the right to state the law), to justify their interpretation as the 'correct' one, and thereby sanctify its representation of the world with 'the perceived objectivity of orthodoxy' (Bourdieu, 1987: 839).

The inherent indeterminacy of law is due to three main reasons. First, as linguistic philosophy shows, the meaning depends on the social context and practices. From a sociological perspective this means that specialised technical language such as that used by lawyers is given meaning through the professional practices of 'cognitive communities' of specialists. Secondly, in a liberal legal system legal concepts are in varying degrees abstract and general, leaving considerable scope for interpreting how they should apply to specific situations. Thirdly, legal rules are normative. This means that their interpretation is necessarily teleological or purposive. To put forward an interpretation of a legal rule is to propose the desirability of one norm rather than another. Although lawyers often discuss the meaning of legal rules as if that were the only and obvious way to understand them, they are always to some extent advancing a version that is in the interests of their client, or for some other purpose. Technicism or formalism generally aims to depoliticise the issue under debate, while a purposive approach makes explicit the broader issues involved.

Thus, law's role in stabilising normative expectations emerges from the cognitive community which establishes the shared understandings (in Bourdieu's term, the 'habitus') that normalise accepted interpretations. Access to legal resources gives powerful advantages to ensure domination of this process of normalisation through professional techniques and practices. Hence, power in today's corporate capitalism is buttressed by the ability to mobilise elite lawyers (Pistor, 2019: 158–192) often in large numbers, to dominate professional discourses, and deploy complex strategies in the multiple sites of legal contestation that lie between the public sphere of politics and the state and the private sphere of structuring and managing commercial and corporate transactions.

It is because lawyers mediate between the realms of economic and political power that legal forms, concepts and institutions, through the lawyering practices of interpretation, can both reflect and shape economic activity. The power of the law lies not in providing predictability and certainty for economic actors, as posited by formalist perspectives, but in exploiting and managing uncertainty. In an increasingly conflictual world, rent by inequality and facing existential risks, this places enormous responsibilities on lawyers.


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## Supplemental material

Supplemental material for this article is available online.

## Notes

1. This is an expanded and revised version of Miola and Picciotto (2020).
2. Political philosopher Margaret Radin developed a critique of this conventional view of property rights with a ‘liberal personality theory of property’, arguing for the priority of rights to personal over what she describes as ‘fungible’ property (Radin, 1993).
3. The term comes from an article by Hardin (1968), more often cited than read, which argued for state action to control population growth.
4. Hence, what is a ‘public good’ is socially and politically determined (Malkin and Wildavsky, 1991). This also means that no goods are inherently private: for example, although most economists would consider that banking should be private, it is clearly not inherently so, as seen in the financial crash.
5. Marx captured the contradictory nature of what in his day was the joint-stock company, by describing it as representing ‘the abolition of capitalist private industry on the basis of the capitalist private system itself’, and involving ‘the control of social capital’ in which ‘social means of production appear as private property’ so that ‘instead of overcoming the antithesis between the character of wealth as social and as private wealth, the stock companies merely develop it in a new form’ (Capital vol. 3, chapter 27, text available at [www.marxists.org](http://www.marxists.org)). Coase (1937) saw the firm as a system of planned coordination; analysing the production factors which it would be more efficient to coordinate rather than to buy contractually, he argued that this is most likely to be so when the content of a contract is hard to specify in advance. In finding that this is especially so for labour, due to the power to direct labour in the employment relation, he clearly echoed Marx.
6. Notably James Dill, who acted for Rockefeller’s Standard Oil Trust, lobbied New Jersey to liberalise its laws to attract companies to register there, using the fees to reduce tax rates (Grandy, 1989); subsequently, Delaware became the US state of choice.
7. Earlier, copyright was a means for state control of printing, while patents first emerged in the late Middle Ages to circumvent guild control of innovation (Prager, 1944).
8. Chang (2002: 84); in 1884 a US publisher was happy to be called a pirate (Seville, 2006: 17).

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