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"Economic Law" and the Contractual Constitution of Global Supply Chains

Rereading / Wiedergelesen: Die Position des Wirtschaftsrechts im sozialen Rechtsstaat, in: Helmut Coing / Heinrich Kronstein / Ernst-Joachim Mestmäcker (Hrsg.), Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70. Geburtstag von Franz Böhm am 16. Februar 1965, Karlsruhe 1965, S. 41–62

1. What Is Economic Law?

In the first part of his 1964 inaugural lecture – "*Die Position des Wirtschaftsrechts im sozialen Rechtsstaat*" – Rudolf Wiethölter[1] makes a reference to what he calls a 'political anthropology'. Its necessity emerges, he argues, along with the effort to create a 'culturally as well as socially responsible, new society'. Through the use of a political anthropology it would and should become possible to conceptualize a *homo oeconomicus* for a highly rationalized market society as well as a *homo politicus* and *homo socialis* for a 'modern democracy'.[2] Meanwhile, he sees current realities marked by 'business representatives who are sweeping political plans off the government's desks, union leaders who declare themselves as the determinative social class while employer representatives dismiss union demands as backward-oriented, Marxist class politics.' This ties these conditions to the emergence of the welfare state as part of an inevitable political infrastructure through which to address and, indeed, as some hope, *solve* the tension between political and economic power.[3] Wiethölter wastes no time identifying the precariousness of such an undertaking, as long as it remains based on a dualist understanding of an unpolitical, 'private' sphere of the market, on the one hand, and a political, allegedly common-good committed, 'public' sphere of the state, on the other.

* I am grateful to Priya Gupta and Laura Knöpfel for excellent feedback and comments.

1 This paper is dedicated to Rudolf Wiethölter at the occasion of his 90th birthday, 17 July 2019.

2 Die Position des Wirtschaftsrechts im sozialen Rechtsstaat, in: Helmut Coing/Heinrich Kronstein/Ernst-Joachim Mestmäcker (eds.), Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70. Geburtstag von Franz Böhm am 16. Februar 1965 (C.F. Müller: Karlsruhe, 1965), 41–62 (45) (reprinted in P.Zumbansen/M.Amstutz [eds.], Recht in Recht-Fertigungen. Ausgewählte Schriften on Rudolf Wiethölter [Berliner Wissenschaftsverlag: Berlin, 2014), 293–310) (cited here and in the following from the original).

3 For a penetrating analysis of such aspirations, see Niklas Luhmann, Political Theory in the Welfare State (John Bednarz transl., Walter de Gruyter: Berlin, 1990) [orig. German: Politische Theorie im Wohlfahrtsstaat (Olzog: Munich/Vienna, 1981)].

DOI: 10.5771/0023-4834-2019-4-670

> *"Wirtschaftsabläufe sind heute von politischer Relevanz, in welcher sie mit Kategorien wie Intervention des Staates in die Wirtschaft, Schranken und Lenkung der ‚an sich' freien Wirtschaftsbetätigung ebenso zu eng gesehen werden wie entsprechendes Schranken- und Grenzendenken im politischen Bereich."*[4]

It is against this background that Wiethölter recognizes the emergence of 'economic law' (*Wirtschaftsrecht*) during the First World War as a pivotal moment at which the *legal* transition from night watch state to welfare state was at stake. But, looking ahead and given the 'historical urgencies of the Reich's termination', he writes, namely 'the improvisations of the Weimar Republic, the NS Regime and the reconstruction after 1945', the opportunity never seems to have really presented itself to 'lay the foundations of an economic law framework, whose institutional design and architecture would have been adequate for the conditions of the twentieth century as they became apparent.'[5]

> *"Economic law served both as magic formula for a present it could not master and as a program of hope."*[6]

But, because 'economic law' would soon enough become a go-to label for the political decisions made in response to the regulatory demands of the day, it could neither provide for a concise conceptual framework to explain 'law''s relation to 'the economy' nor help in satisfyingly distinguishing between the two. Instead, the more the term became employed in the context of ever faster expanding and deepening areas of regulatory governance, the less was it able to offer clear guidelines – doctrinally *or* normatively. The elephant that had begun taking up ever more space in the modern state's regulatory laboratory could now easily be confused with our own, nagging feeling that we won't be able to resolve the mystery of *how* the law is related to the economy and *how* we can, in the end, differentiate between the two.

1.1 Missed Opportunities

Wiethölter's lecture offers a critical historiography of economic law's trajectory from the early 1900s onwards. For Wiethölter, that trajectory is marked by the recurring of missed opportunities – for different reasons. One such opportunity was lost for 'economic law' when, instead of serving as a critical tool to investigate the inherited but no longer convincing distinctions between public and private law in a 'mixed economy', both public and private law had in fact started to absorb and, one might want to ad, neutralize different dimensions of economic law. With the dividing lines between public and private law neatly redrawn, each had received a dose of 'economic law', which did not go beyond having attached the 'economic law' label to a number of functions in public or private law fields to the respective degree that they were perceived to have direct contact with

4 Wiethölter, Position des Wirtschaftsrechts (Fn. 2), 47. ("Economic processes today are of political relevance, but capturing them with the help of categories such as intervention by the state into the economy, or through imageries of boundaries and steering of the 'per se' free economic exercise they will be seen too narrowly, as manifests itself already in thinking about the political sphere in terms of boundaries and frontiers." (P.Z. transl.).

5 Id., at 50.

6 Id. „Das Wirtschaftsrecht diente gleichsam als Zauberwort für eine nicht zu bewältigende Gegenwart und zugleich als Hoffnungsprogramm."

'markets', 'economic planning' or 'steering'. If by contrast, 'economic law' ever had a chance of survival, such an opportunity, Wiethölter finds to have evaporated over, on the one hand, the 'hopeless' disputes over how to differentiate economic law from traditional fields of law, particularly private law. On the other hand, it would have crumbled under the impact of the emergence of modern theories of legal method, for which 'the recognition of sociological, economic and social interests had become second nature'. In this double dissolution, both potential (registers) of economic law – the law of 'the economy' and business *and* a method of socio-legal analysis – were eventually lost.

Meanwhile, and each in their own way, public and private law both became implicated in the *materialization* of the rule of law on *to* and *through* an expansive social state on the way to a full-fledged welfare state. The missed opportunity here, if there ever really was one, was that of mobilizing and forging public and private law in their operation as increasingly functionally-fragmented regulatory fields of a modern society into vehicles to work towards a *democratic concept/theory of law*. Instead, by allowing the deceptively neat distinction between 'public' and 'private' law to serve as reference framework for an evaluation of how 'the economy' was *and should be* governed, the state – increasingly discredited as 'interventionist and corrective' – ended up on the losing end. Again, does that sound familiar?[7]

It is against this background, then, that the rule of law is acknowledged as being the primary battle zone – conceptually and politically. For Wiethölter – writing in 1965 – the debate over the nature of the 'rule of law' was not yet settled. And, it would likely continue as long as the disjunction between an 'unpolitical-legal form of the state' and a 'political form of the state' was upheld. By contrast, Wiethölter inquires into the chances to understand the nature of the rule of law as the '*unity of rule of law, social state and democratic state*'.[8] And it is in light of this question that he ultimately defines economic law in the following way:

> "*Economic law is the (three-pronged) rule-of-law, social-state and democratic responsibility of the political community for order, providence (welfare) and social peace.*"[9]

By comparison, in private law, the challenge posed by a concept and idea of 'economic law' translates itself thus: just as it had happened in public law, private law concepts, too, had for a long time been formally narrowed and petrified through 'a purely juristic emphasis on concepts. As a result, law was effectively detached from its political and social preconditions'. In this somber light, Wiethölter asks private lawyers to take up the task of rebuilding 'a comprehensively oriented private law theory'.[10]

He must have seen the chances for such a project, however, somewhat ambiguously, especially when considering the contemporary and continuing psychological conditions of a majority of private law theory and private law adjudication. Characterizing private law – '*bürgerliches Recht*' – as being built around its central system thought of 'subjective

7 William A. Schambra/Thomas West, The Progressive Movement and the Transformation of American Politics, The Heritage Foundation, 18 July 2007. But see Femke Laagland, Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction?: The Clash between the European Business Freedoms and the National level of Workers' Protection, 9:1 European Labour Law Journal (2018), 50–72.

8 Wiethölter, Position des Wirtschaftsrechts (Fn. 2), 54.

9 Id. (Fn. 2), 56.

10 Id.

right' and requiring 'partners engaging in exchange on equal footing and free from violent intervention', led him to the verdict that, meanwhile, the same private law 'lacks the typical functional categories to grasp social and economic violence.'[11] And, yet, while – despite laudable efforts made by the likes of von Gierke[12] and Renner[13] – private law never appeared to have offered a proper space for 'modern social integration processes',[14] it is nevertheless important to note – again, Wiethölter is writing in 1946/65 – the influence on private law through a 'social model'[15] which is changing and continues to change. Examples to support this thesis come, for instance, from the growing role played by general clauses 'as vehicles for the introduction and the processing (*Verarbeitung*) of material value principles, going hand in hand with a changed perception of the judge, in particular the changed relationship between making and applying law.'[16] Encapsulated in this modern private law normativity, Wiethölter finds 'a good deal of the social state (*Sozialstaatlichkeit*), which, however, is bound to unsettle the classical system, once foundations such as will power and guilt (*Willensmacht und Schuld*) are replaced by socially just and reasonable principles of tolerance and compensation.' (*sozial gerechte und vernünftige Rücksichts- und Ausgleichsprinzipien*).[17]

11 Id.

12 See, e.g, Otto von Gierke, Die soziale Aufgabe des Privatrechts, translated by Ewan McGaughey, The Social Role of Private Law, 19:4 German Law Journal (2018). Regarding the separation of public and private law, von Gierke states the problem as it used to be perceived thus (id., at 11):
"The sharp, basic opposition is inviolable for us. We cannot eliminate it entirely without sacrificing the very achievements we seek to protect. If public law ceases to be a unity of an existentially higher order, with an independent purpose, in place of the noble idea to serve an everlasting common existence, it is reduced to be the means of everybody to follow individual purposes, or simply the majority's purpose. With this, the hard-won sovereignty of the state would fall! In private law, if we cease to recognise the individual as an autonomous end in itself, if we paralyse its arrangements as a means for corporate purposes, the Christian revelation of each person's unique and immortal worth would be lost in vain. World history would have developed the ideas of freedom and justice for nothing!"
In response, he posits (id., 12):
"We need a public law, which through and through follows the rule of law; which recognises reciprocity between the whole and its members, between the highest generality and the smallest associations, between the community and the individual; which binds and penetrates the state from peak to valley, even when coercion fails…"
And, regarding private law (id., 13):
"But we also need a private law, where despite the revered and inviolable sphere of the individual, the thought of community lives and weaves. Stated simply: our public law should be blown a scent of natural law freedom and our private law must absorb a drop of socialist ointment."

13 Karl Renner, The Institutions of Private Law and Their Social Functions (Agnes Schwarzschild transl., Otto Kahn-Freund ed., Routledge & Kegan: London, 1949), 56:
"Social life is not so simple that we can grasp it, open it and reveal its kernel like a nut, by placing it between the two arms of a nutcracker called cause and effect."

14 Wiethölter, Position des Wirtschaftsrechts (Fn. 2), 57.

15 Wiethölter makes reference here to both Max Weber's idea of a material ethic of responsibility (materiale Verantwortungsethik) and Franz Wieacker's idea of a 'social model': Franz Wieacker, Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft (1953), in: Franz Wieacker, Industriegesellschaft und Privatrechtsordnung (Scriptor Verlag: Kronberg/Ts., 1975).

16 Wiethölter, Position des Wirtschaftsrechts (Fn. 2), 57.

17 Wiethölter, Position des Wirtschaftsrechts (Fn. 2), 57–8.

1.2 Economic Law in a Democratic Society

Building on this diagnosis of the public-private law interplay in effectively insulating legal concepts and doctrine from social and political critique, Wiethölter puts forward *nine* theses regarding the idea and the concept of economic law. In this endeavor he argues for a *politicization of economic law* as a vital component of the rule of law and the social state dimensions in a democratic and, at the same time, pluralist community. He posits that the legal ordering of 'our economy' depends – 'as does our legal order' on the play of political power which is itself constitutionally legitimated and controlled by both the judiciary and 'the public', and which has its center in parliamentary will formation processes. These, in turn, have to be understood as the primary forum for the sovereign law maker – the people – who are deemed to be comprehensively 'in charge'.[18]

In a democratic community, there shouldn't be, he argues, a separate legal constitution for the economy apart from the political constitution. He commends the Federal Constitutional Court to have kept the economic order 'politically open' and for not having constitutionally sanctioned a particular political, national-economic or Christian model.[19] At the same time, Wiethölter denies the existence of per se state-free zones for the economy. Because 'free' sections of the economy or those which are regulated only through framework legislation (*Freie oder nur dem Rahmen nach regulierte oder durchnormierte Bereiche der Wirtschaft*) are dependent on the constitutional and other legal structure of a community, we are bound to miss the target when we think about the relationship between the state and the economy through concepts of interventions, steering, guiding or boundaries. It is in that sense Wiethölter observes that the economy *is* actually being *democratized* as we speak, however tentative the steps on this path have been so far. The goal should be the continuing integration of the economy into the political economy.[20]

A central consideration in this context is, as we saw already, to associate 'economic law' neither with private nor with public law, as these areas need themselves to be redefined. For Wiethölter, economic law is distinct from labour law. While both can be understood as the Dioscuri[21] in the newly emerging legal zones as a consequence of the civil and industrial revolutions, labour law is marked by the relatively clearly defined interest spheres of the employee and the social partners. By contrast, economic law, for Wiethölter, is 'political law.' To speak of economic law requires a going beyond a mistaken perception of 'the state', 'the economy' and 'society'. With regard to the economy, we are still heirs to Rousseau's idea that there are no intermediaries between state and citizen, out of which grows an understanding of liberal constitutionalism according to which everyone in society qualitatively enjoys the same sphere of freedom in relation to the state. But, once we would be able to overcome these perceptions, it might as well become superfluous to even use such a term of economic law. For Wiethölter, this moment has arrived when *a modern theory of the state and private law had become available*.

18 Wiethölter, Position des Wirtschaftsrechts (Fn. 2), 59.

19 See, in this regard, the remarkable decision of the Federal Constitutional Court (BVerfG) of 18 July 2019–1 BvL 1/18, 1 BvR 1595/18, 1 BvL 4/18 "Mietpreisbremse". The reasoning echoes the comments made by Justice Holmes in his famous dissent in Lochner v New York, 198 U.S. 45 (1905).

20 Wiethölter, Position des Wirtschaftsrechts (Fn. 2), 60.

21 Castor and Pollux.

2. The Idea of an Economic Constitution

Such ideas never play out in an abstract realm of philosophical and jurisprudential nit-picking. Instead, the background for Wiethölter's analysis is formed by the complex and charged social field of Germany's political economy in the two decades following the end of World War II and Nazi rule. Unsurprisingly, the engagement with the actual formations and the attending, albeit competing validations of the rule of law and the social state[22] were deeply implicated in the contemporary debates around an economic constitution – *Wirtschaftsverfassung*. The latter had become a crucial battle ground at a time, when the Bonn Republic was still young, but the clocks of economic integration and internationalization had already begun to tick faster – in Germany and everywhere else. The astute analysis more recently provided by the political scientist John Ruggie of the transformation of nationally-based and -steered economies onwards from what Karl Polanyi describes as the dis-embedding of the market from society[23] to the decline of 'embedded liberalism' forms, at least in part, the background against which such battles were waged.[24] In many ways, this 'great transformation' has not yet ended as, instead, a hyper-financialized economy continues to embarrass both traditional and innovative conceptualizations of regulation and governance.[25]

Another dimension of this conflict was the only slowly progressing digestion *of* and the even more delayed, critical engagement *with* the state-interventionist and state-steering legacies of the Nazi Regime.[26] 'The state', when invoked against that background, could never be an easy-to-grasp, let alone, value neutral term or entity. Instead, the debates around the meaning, the function and the significance of the state would forever – or, so it seemed at the time – be entangled in conflicting historical-political assessments of its troubled and dark transformations over since 1871.[27] Arguably, once the consequences of the Christian-conservative revolution since the early 1980s had been consolidated across a range of far-reaching policy shifts towards privatization and de-regulation, to

22 Ernst Forsthoff, Wolfgang Abendroth, Zum Begriff des demokratischen und sozialen Rechtsstaats im Grundgesetz, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (De Gruyter: Berlin et al, 1954).

23 Karl Polanyi, The Great Transformation (Beacon Books: Boston 1944), 71.

24 John Gerard Ruggie, International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order, 36:2 International Organization (1982), 379–415 (385 ff.).

25 See, e.g., Karl-Heinz Ladeur, The Financial Market Crisis – A Case of Network Failure?, in: Poul F Kjaer/Gunther Teubner/Alberto Febbrajo (eds.), The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation (Hart Publishing: Oxford, UK/Portland, OR, 2011), 63–92, Moritz Renner, Death by Complexity – the Financial Crisis and the Crisis of Law in World Society, id., 93–111; Josef Vogl, The Specter of Capital (J.Regner/R.Savage transl., Stanford University Press: Stanford, 2015 (orig. German, Das Gespenst des Kapitals, 2015); Steve Keen, Can we avoid another financial crisis? (Polity: Cambridge, 2017).

26 Norbert Frei, Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit (C.H.Beck: Munich, 1996). But, see, of course, Franz L. Neumann, Behemoth. The Structure and Practice of National Socialism (Oxford University Press: Toronto, New York, London, 1944).

27 A fascinating read is still Ernst Forsthoff's study, Der Staat der Industriegesellschaft (2nd ed., Munich 1970). For a critical discussion of Forsthoff's treatment of administrative governance, see Ilse Staff, Die Wahrung staatlicher Ordnung. Ein Beitrag zum technologischen Staat und seinen rechten Propheten Carl Schmitt und Ernst Forsthoff, Leviathan (1987), 141–162.

speak of 'the state' could never be the same.[28] A third dimension of the deeply conflictual debate around the state's role in the economy or, put differently, the prospects for the reform and future-orientation of national political-democratic constitutions in the face of (the states' – varied – place/s in) a globally interconnected economy would be the background theme for the larger part of the then ever faster unfolding process of European integration.[29]

Today, the talk of constitutions risks becoming tired, as the – mostly Western – elaborations of what might be meant by 'global constitutionalism' appear to have little impact on strengthening an otherwise deeply disturbing and fast expanding defiance of civil liberties and constitutional and other rights. After the ill-fated initiation of the 2003 Iraq war through an – under international law – illegally acting 'coalition of the willing' and the now-permanent 'war on terror', who is to blame those who receive news of a financial industry re-emerging stronger and more prosperous than ever from the allegedly greatest crash since 1929 in a growing state of frustration, alienation and, eventually, anger?[30] Arguably, these should be the time to speak again of an economic constitution in the Wiethölterian sense. Yet, the circumstances in which debates around a democratic political-legal project are taking place today – in countries around the world – seem precarious, fragmented and volatile. Social strife, discrimination and exploitation, an incredibly dire state of regard for human rights and dignity and – despite all the hype[31] – an ever deeper consolidation of inequality do not offer the most conducive conditions for us 'all coming together'.[32]

By comparison to matters as ephemeral as 'the constitution', are the prospects of mobilizing a critical project of 'economic law' more promising? Most of us seem to have – with varying degrees of resignation or indifference – settled into a practice of taking a term such as economic law at face value, as descriptive and practical, rather than as an entry way into a world-to-be-created, a critique-to-be-waged. Economic law, when taught in law schools, practiced in the 'real world' or negotiated in the increasingly heated arena of international trade wars, carries little magic and even less symbolic force. The question, then, is how to identify the right moment for a critical engagement with the role of law in relation to economic processes, especially given the ever faster growing evi-

28 Christoph Möllers, Staat als Argument (C.H.Beck: 2nd ed, Munich, 2001); Peer Zumbansen, Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag (Nomos: Baden-Baden, 2000).

29 For an assessment of the tension between competing models of the state and democratic governance within the European Communities, see Joseph H.H. Weiler, The Transformation of Europe, 100 Yale Law Journal (1991), 2403, and Christian Joerges, What Is Left of the European Economic Constitution II? From Pyrrhic Victory to Cannae Defeat, in: Poul F. Kjaer/Niklas Olsen (eds), Critical Theories of Crisis in Europe. From Weimar to the Euro (London-New York: Rowman & Littlefield International, 2016), 143–160, and Christian Joerges, Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik, in: Rudolf Wildenmann (ed.), Staatswerdung Europas? Optionen einer Europäischen Union (Baden-Baden: Nomos 1991), 225–268 (= EUI Working Paper No. 91/15, San Domenico di Fiesole, 1991).

30 Pankaj Mishra, The Age of Anger. A History of the Present (Allen Lane: London, 2017).

31 Thomas Piketty, Capital in the Twenty-First Century (Cambridge: Harvard University Press, 2014).

32 For a sobering anatomy in the U.S. context, see Arlie Russell-Hochschild, Strangers in their own Land. Anger and Mourning in the American Right (New York: The New Press, 2016).

dence of a looming destruction of the foundations of human and planetary life under present and continuing conditions.[33]

2.1 The Fate of Economic Law in an Age of Global Value Chain Capitalism

Considering the constraints of space in the present publication we can only suggest a few possible avenues of inquiry into the fate of *economic law* in today's interconnected markets. Our case in point will be the constellation commonly described as 'supply chain', or, more adequately, 'value chain capitalism', as it has become more appropriate to speak of global *value* chains, particularly with regard to the comprehensive relations that mark the actual life of 'the chain', including the attending interactions of a multitude of different stakeholders, communities and other local and transnational actors.[34] As such, we suggest to shift our attention beyond the foremost organizational infrastructure perspective on supply chains to take into sharper view the wider context in which chains are embedded, through which they are being shaped and into which they intervene in various ways. This shift is not without consequences for the methodological orientation of related projects. As we turn our attention to the intricate details of the chain's inner and external *lives*, the here fronted instruments of legal theory and political economy must be grounded on a distinct empirical knowledge basis.[35] It is against this background that ensuing investigations concerning the role that law might play in and around global value chains are likely to mirror the renewed inter-disciplinary and empirical turn that legal theory projects have been taking in recent years. Driven importantly by insights in comparative political science, 'global' political economy, sociology and geography, on the one hand, and post-colonial critique, on the other, boundaries between descriptive and normative disciplines have come under pressure, but that alone does not explain this notable rise in interest in critically engaging with 'facts' and 'epistemologies'.[36] The continuing de-stabilization of what Boa Santos has depicted as the 'cognitive empire'[37] occurs against the background of a profound transformation of post-World War II geopolitical settlements, resulting in the erosion, fragmentation and re-arrangements of international coalitions as well as 'stand-offs', in the emergence of new 'superpowers' on the basis of an explicit rejection of inherited power-relations but also with regard to paradigmatic shifts in terms of technological advancements.

A study of 'the law' of global value chains emerges under difficult conditions, and it might only be by placing the conundrum of the global value chain in the context of contemporary capitalism that the interdependencies of geopolitical transformation and the emergence of spatialized systems of production and dissemination become more appar-

33 Naomi Klein, This Changes Everything (2014).

34 Sabrina Zajak/Eva Kocher, Die Selbstregulierung von Arbeits- und Sozialstandards in transnationalen Wertschöpfungsketten – Rechtsschutz in privaten Beschwerdeverfahren?, Kritische Justiz (2017), 310 ff.; Claire H. Hollweg, Global value chains and employment in developing countries, World Trade Organization, Global Value Chain Report 2019, Geneva, 63ff.

35 See Marina Welker/Damani J. Partridge/Rebecca Hardin, Corporate Lives: New Perspectives on the Social Life of the Corporate Form, 52:S3 Current Anthropology (2011), S3-s16.

36 See Loubna El Amine, Beyond East and West: Reorienting Political Theory Through the Prism of Modernity, Perspectives on Politics 14 (2016), 102–120, 105: "Why have we been unable to conceive of the theorist as being anything but a Westerner?".

37 Boaventura de Sousa Santos, The End of the Cognitive Empire (2018).

ent. Instead of focusing on distinct avenues of defining legal responsibility of the chain towards those who are affected by it, our focus will be on an exploration of the legal forms that give shape to the chain and its ever-changing infrastructure in a context of an evolving global political economy. Quite literally, then, the search for the *law of global value chains* is in itself the project of a critical legal theory of contemporary transnational capitalism. As regards the exploration of a particular angle of the chain in doctrinal terms, we will explore the role of *contractual governance and contract law* in providing, on the one hand, the glue of the chain and, on the other, in offering possible inroads for accountability and, as we will see, advocacy interventions. Finally, we will try to draw a few 'lessons' from this example for the term of economic law and '*Wirtschaftsverfassungsrecht*'.

2.2 Capitalism, Disembedded, Financialized, Algorithmitized

Global value chains need to be understood in the context of international markets, their practical and functional infrastructure and of the way in which domestic, international and transnational normative regimes provide both glue and stop-gaps to their functioning. Today, after more than thirty years of writing and thinking – often very inadequately – about the different dimensions of globalization, it remains true that a crucial aspect of this process is the increasing borderless-ness and seemingly limitless insatiability of economic processes. Not wishing to deny the historical facticity of global trade practices which go back much further in historical time,[38] we are turning our attention to the parallel emergence of a both financialized, post-industrial economy,[39] on the one hand, and a hyper-integrated and networked production and dissemination economy,[40] on the other. Both continue to unfold under the deafening, seeming *faits-accompli* of a neoliberalism which, apparently, is here to stay.[41]

The consolidation of this type of capitalism has been and continues to occur in ways that resemble the frog in a pot of increasingly warmer water. Surrounding and engulfing, it has become our natural habitat, however destructive and all-consuming it might be.[42] The hyper-specialization of knowledge of our time both feeds on and feeds back into the material and immaterial environment, with an 'ethics of practice' having become simulta-

38 Fernand Braudel, The Wheels of Commerce. Civilization & Capitalism 15th-18th Century, Vol. 2 (Cambridge et al.: Hart & Row Publishers, 1982). And, see Peter Vries, A very brief history of economic globalization since Columbus, in: R.C. Kloosterman et al (eds.), Handbook on the Geographies of Globalisation (Cheltenham: Edward Elgar, 2017).

39 Ronald Dore, Financialization of the global economy, 17:6 Industrial and Corporate Change (2008), 1097–1111.

40 Jeffrey Neilson/Bill Pritchard/Henry Wai-chung Yeung, Global value chains and global production networks in the changing international political economy: An introduction, 21:1 Review of International Political Economy (2014), 1–8.

41 William Davies, The Limits of Neoliberalism (Los Angeles et al: Sage, 2017); Quinn Slobodian, The Globalists (Harvard University Press, 2018).

42 Randy Martin, Financialization of Daily Life (Temple University Press: Philadelphia, 2002); Wolfgang Streeck, 'What Should Capitalism Studies Become?', Interview at the Transnational Law Institute, King's College London, November 2017, available on https://www.youtube.com/watch?v=K6WfhdoBZ-4&t=79s; Amitav Ghosh, The Great Derangement. Climate Change and the Unthinkable (University of Chicago Press: Chicago, 2017).

neously more urgent and elusive than ever.[43] Standards of (best) behavior, 'best practice', guidelines, benchmarks, or recommendations are the currency of a hyper-fragmented, multi-polar governance infrastructure defying inherited understandings of parliamentary, democratic will formation processes based on public debate.[44] A derivative of this understanding of democratic rule, if you will, is the idea of a – however temporary – basic understanding and compromise in a political conflict which can serve, at times, as bottom line or as horizon. A crucial dimension of the hard fought-over and hard fought-for project of political consensus is its appeal to its *validity* beyond today and its *acceptance* by many. In a complex universe of specialized discourses, measurements and algorithms which serve as the new 'objective' and value-neutral justifications of substantive policies, however,[45] the appeal to a collective of authors and subjects of law-making has become illusory.[46] Not the elephant, but the monster of 'algorithmic' governance stands in the rooms of democratic societies and sucks the air right out of them. Today's decisive lever of regulatory governance is to get the 'numbers', to interpret and to mobilize them.

> *"Jede Benennung ist der Versuch, eine spezifische Lesart sozialer Phänomene zu etablieren. Gelingt es, Verständnisweisen und die Art, wie über sie kommuniziert wird, zu prägen, kann diese Lesart eine hegemoniale Stellung beanspruchen. Benennungsmacht beeinflusst dann den Common Sense einer Gesellschaft, also sozial geteilte und daher geltende Vorstellungen der Angemessenheit, die zudem häufig institutionell verankert werden, etwa indem sie in das Berichtswesen einfließen oder von offiziellen Stellen genutzt werden. Die ‚Wahl der Zahl' bekräftigt und institutionalisiert hierbei nicht nur eine Konvention, sondern etabliert zugleich eine bestimmte kognitive Voreinstellung."*[47]

While the wholesale and microscopic turn to individualizing and atomizing algorithmic governance[48] poses potentially overwhelming challenges for social and political theories built on the liberal foundations of subjectivity and human agency, the ubiquitous reliance on algorithms – rankings, 'likes' and 'indicators' – as knowledge vehicles in a wide variety, including complex and, increasingly, global governance areas suggests to be more than just a fashion. The quantification of the world not only as it – allegedly – *is* but also how it should *become* continues to exert a seemingly irresistible and 'seductive' pull.[49]

43 Martijn Konings, Capital and Time. For a New Critique of Neoliberal Reason (Stanford University Press: Stanford, 2018).

44 With regard to the limited legal control of privatized governance regimes, see also Andreas Kruck, Privatisierung von Regieren und die Dynamiken und Grenzen der rechtlichen Kontrolle private Autorität(en), Kritische Justiz 49 (2016), 439–452 (440): „Insbesondere angesichts von zunehmend politisiertem privatem Governance-Versagen und menschenrechtsverletzendem Machtmissbrauch gerät die mit „viel Macht und wenig Verantwortung" versehene Stellung privater Autoritäten zunehmend unter Druck."

45 Steffen Mau, Das metrische Wir. Über die Quantifizierung des Sozialen, Frankfurt 2017.

46 Alain Supiot, Governance by Numbers. The Making of a Legal Model of Allegiance (Hart Publishing/Bloomsbury: Oxford, UK/Portland, OR, 2017), 15, 167 ff.

47 Mau (Fn. 45), 187.

48 Supiot (Fn. 46), 144 ff.

49 For an astute critique of the 'reality construction' inherent in the vast expansion of indicators, see Kevin E. Davis/Benedict Kingsbury/Sally Engle Merry, Indicators as a Technology of Global Governance, Institute for International Law & Justice Working Paper 2010/2; Sally Engle Merry,

Law, as understood here, is a *chiffre* for a comprehensive engagement with theories of society and social order, and it is deeply affected by these shifts. While the obstinate disregard among the legal mainstream for the longstanding work in critical and political legal theory from the late nineteenth century onward prompted the lament that neither Critical Legal Studies nor Holmes or Llewellyn 'ever happened',[50] today the ground beneath our feet surely feels to keep shifting. The project of grounding, developing and, eventually directing (a promising) political critique against an 'enemy' or towards a goal requires no longer only the *negotiation* of competing political stances and ideologies, but the *navigation* of a multitude of competing, intersecting and in themselves highly volatile governance modes. As the clamor around 'right' and 'wrong' and, even worse, 'us' and 'them' rises in volume (and, election numbers), the social reality which forms the stuff that political transformation will be based on and directed at, appears to escape most of our inherited analytical as well as normative parameters.[51]

3. Value Chain Capitalism as Fate or Opportunity

How, then, can a timely project of critical legal theory *as* political theory be developed? Taking the well-founded cue to neither start nor remain in an abstract sphere,[52] any such project should be based on good 'intel' regarding the context into which it purports to intervene and on the choice of a good example. This context which is here in question and which mesmerizes and yet suffocates us is that of a globally integrated form of capitalism, which has become distinctly de-nationalized, financialized and hyper-accelerated, using ever-more optimized combinations of computation and coding.[53] This condition provides the context for contemporary capitalism's particular rendering in the form of 'supply chain capitalism', which the anthropologist Anna Tsing defines in the following manner:

> *"Supply chain capitalism here refers to commodity chains based on subcontracting, outsourcing, and allied arrangements in which the autonomy of component enterprises is legally established even as the enterprises are disciplined within the chain as a whole.*

The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking (University of Chicago Press: Chicago 2016).

50 Pierre Schlag, Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art), 97 Georgetown Law Journal (2009), 803–835 (805): "It's as if cls never happened. Hell, it's as if Holmes and Llewellyn never happened."

51 A frightening, yet understandable, parallel development is the rise in self-help and 'self-realization' literature. Alexandra Schwartz, Improving Ourselves To Death. What the self-help gurus and their critics reveal about our times, The New Yorker, 8 January 2018. "In our current era of non-stop technological innovation, fuzzy wishful thinking has yielded to the hard doctrine of personal optimization. […] What [self-help gurus] are selling is metrics. It's no longer enough to imagine our way to a better state of body or mind. We must now chart our progress, count our steps, log our sleep rhythms, tweak our diets, record our negative thoughts—then analyze the data, recalibrate, and repeat."

52 Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Columbia Law Review (1935), 809–849 (809), with a decisive nod to Ihering's depiction of the 'heaven of pure legal concepts' ('juristischer Begriffshimmel').

53 See also Matthew Zook/Michael H. Grote, The microgeographies of global finance: High-frequency trading and the construction of information inequality, 49:1 Environment and Planning A: Economy and Space (2017), 121–140.

> *Such supply chains link ostensibly independent entrepreneurs, making it possible for commodity processes to span the globe. Labor, nature, and capital are mobilized in fragmented but linked economic niches; thus, supply chain capitalism focuses our attention on questions of diversity within structures of power."*[54]

Tsing[55] rightly insists on taking a close-view approach to the analysis of supply chains. Rather than reducing them to a socio-organizational phenomenon or to focus predominantly on identifying anchor points for legal liability *by* or *within* the chain, she prompts us to see them as a manifestation of a particular stage of capitalist markets. Opening up, thus, a historical perspective on supply chains, she urges us to acknowledge the respective blind spots that have marked contemporary forms of engaging with supply chains over time. This is the more important, the more the conditions for labor rights protection and collective action are under threat through governmental action or due to the particular architecture of global supply chains. "A major problem for workers, even in places where there is substantive country legislation, is the lack of an adequate remedy for when their rights are inevitably violated. Local supplying companies are unlikely to face accountability because administrative or judicial processes are too slow, weak or corrupt. At the same time, lead firms are usually immune from any legal accountability, since there is no cause of action or jurisdiction over them in either the host country or the home country."[56]

What becomes apparent through the study of supply chains from the perspective of labor law is the need to more adequately understand the particular organizational infrastructure that marks the chain. The integrated nature of development ("R&D"), knowledge transfer, fragmented production, logistics, dissemination and retail which marks global value chains poses far reaching questions not only for labor law in any sense we might want to call 'traditional', but for legal regulation itself. Comparing the hyper-globalized infrastructure of a chain with, say, the itself overly abstracted bakery where *Lochner* had contracted his employees to work more hours than the New York State legislature had allowed,[57] reveals the conceptual as well as doctrinal abyss which separates these two scenarios. A however contested[58] decision of the early twentieth century still had a few reliable parameters in place, including the referred-to statute, the 'higher law', namely the U.S. Constitution and, especially, the Fourteenth Amendment, as well as, of course, a recourse to a judicial process. In stark contrast to this setting, seeking to establish legal accountability in the Chain is a different case.[59] It comes as no surprise that efforts of de-

54 Anna Tsing, Supply Chains and the Human Condition, 21:2 Rethinking Marxism: A Journal of Economics, Culture & Society 148–176 (2009), 148–9.

55 This section draws in small part on Reinke/Zumbansen, Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability' in: Sophie Schiller ed., Le devoir de vigilance (Lexis Nexis: Paris, 2019), 157–183.

56 S. Burrow, Global supply chains: What does labour want?, OpenDemocracy, 31 May 2016, online. See also Jana Hönke, Unternehmen für Menschenrechte und Frieden? Zur Reichweite und Performativität freiwilliger Unternehmensstandards, Kritische Justiz 49 (2016), 468–478 (469 f.).

57 Lochner v. New York, 198 U.S. 45 (1905); Paul Kens, Lochner v New York. Economic Regulation on Trial (University of Kansas Press: Lawrence, 1998).

58 David E. Bernstein, Rehabilitating Lochner. Defending Individual Rights against Progressive Reform (University of Chicago Press: Chicago, 2011).

59 Peer Zumbansen, Lochner Disembedded: The Anxieties of Law in a Global Context, Indiana Journal of Global Legal Studies 20 (2013), 29–59.

veloping adequate legal strategies for the establishment and enforcement of legal rights within and around the Chain continue to play out simultaneously in a host of different approaches and initiatives.[60]

3.1 Beyond CSR: Towards an Ethnography of Global Value Chains

At the core of such an emerging legal paradigm for 'supply chain liability' is the question of corporate fragmentation, which is itself based on the legal relevance of the 'legal person'. Hailing, as it were, from a distant-seeming past, are the invocations of Salomon's former but, eventually, Salomon & Co Ltd's customers of a "relationship" with him, not the company.[61] Today, the genius of the separate legal person lives on in numerous decisions around corporate liability, and with the breath-taking proliferation of supply chain regimes the principle has acquired a somehow novel, awe-inspiring significance.[62] The border-lines between a carefully elaborated claim with regard to what a powerful company did know or could and should have known about the on-goings in the production facilities of their subsidiaries or contractual suppliers[63] and the polemical dismissal of such claims are the new battlegrounds for global supply chain law.[64] Furthermore, the navigation of these lines takes place against the background of myriad interpenetrations of

60 For a compelling analysis and discussion of the interdisciplinary challenges presented by a project of supply chain regulation, see the collective work by Grietje Baars et al, The role of law in global value chains: a research manifesto, London Review of International Law 4 (2016), 57–79.

61 Salomon v. Salomon & Co. Ltd. [1897] 22, at 27: "And what difference to creditors could it make whether the debentures were held by the vendor or by strangers? Whoever held them had the preference over creditors – that is the future creditors – all the old creditors having been paid off by the vendor. There was no misrepresentation of fact, and no one was misled: where is 'the fraud upon creditors' spoken of in the Court of Appeal? The creditors were under no obligation to trust the company; they might, if they had desired, have found out who held the shares, and in what proportion, and who held the debentures. […] Then, if the company was a real company, fulfilling all the requirements of the Legislature, it must be treated as a company, as an entity, consisting indeed of certain corporators, but a distinct and independent corporation." See also Ewan McGaughey, Donoghue v Stevenson in the High Court, Journal of Personal Injury Law (2013), 249: "Taken literally, Salomon did more than draw a veil between a company's personhood and its investors and agents. It cast a shadow over the principle that people were held to obligations arising from their conduct." Cited after SSRN (https://ssrn.com/abstract=2237965), Ms. p. 2.

62 Chandler v. Cape plc. [2012] E.W.C.A. Civ 525. See also Genevieve LeBaron, Jane Lister and Peter Dauvergne, Governing Global Supply Chain Sustainability through the Ethical Audit Regime, Globalizations (2017), 1–18, 2: "As global production has decentralized and diffused in recent decades, corporations have put in place strategies to try to control their supply chains while avoiding legal ownership."

63 Chandler, previous note. See the discussion and analysis by Margaret Conway, A New Duty of Care? Tort Liability from Voluntary Human Rights Diligence in Global Supply Chains, Queens Law Journal 40 (2015), 741–768, 768ff. See also Julia Hartmann and Sabine Moeller, Chain liability in multiplier supply chains? Responsibility attributions for unsustainable supplier behavior, Journal of Operations Management 32 (2014), 281–294.

64 Das v. George Weston Ltd, 2017 ONSC, 4129, at 412 d: "In the case of the Plaintiffs' claims against Loblaws and Bureau Veritas, the negligence claims fail the Caparo test for a duty of care because even assuming foreseeability and a proximate relationship, the policy factors favouring a duty of care are very few and they are overwhelmed by the policy factors that negate a duty of care. Visualize, in circumstances where the Plaintiffs may have alternative remedies, the imposition of liability against the defendants would: (1) impose an unfair liability given that the defendants

'public' and 'private' regulatory forms with regard to the creation of 'voluntary' obligations, monitoring requirements and compliance regimes. Heralded, often enough, as a decisive step in multinational companies taking ownership in the fight against human rights abuses through labor rights violations and human trafficking,[65] on-the-ground research in fact suggests that many of these regimes tend to further insulate companies from legal liability and thus benefitting them rather than having a positive effect on workers.

Recent years have seen an increasing level in ethnographic work carried out by anthropologists who study the 'life' and community relations of an MNC favor in a concrete local context.[66] While the significance of such field work for the generation of a wider and deeper evidentiary basis for the development of promising advocacy work in the context of deeply conflictual interactions, for example, between local inhabitants and companies and their security personnel,[67] is only going to grow as the field of 'business & human rights' continues to mature,[68] we can already discern how detailed ethnographic studies of corporate-community interactions on-the-ground render a clearer picture of what actually happens inside the chain. Importantly, legal anthropologists have started to

did not create the danger, had no control over the circumstances that were dangerous, and had no control over the employers or employees or other occupants of Rana Plaza; (2) impose an indeterminate, and disproportionate, liability; (3) inundate [sic!] the courts with an expansive range of claims; and (4) encourage other potential defendants to socially detrimental defensive practices that could disturb the contractual allocation of risk, adversely affect similarly situated plaintiffs, the economy and international trade."

65 See, for example, the critical discussion around the 2010 California Transparency in Supply Chains Act: Corporate Accountability Lab, Is the California Transparency Chains Act Doing More Harm Than Good?, 25 July 2017, online, and Adam S. Chilton and Galit Sarfaty, The Limitations of Supply Chain Disclosure Regimes, Coase-Sandor Working Paper in Law & Economics No. 766 (2016), online, 6–7: "[…] while most disclosures concern the quality of a firm's product or service, supply chain disclosures are likely to be uniquely difficult to interpret because they do not provide information on [7] the actual number of human rights abuses a company has committed. They instead only provide information on the level of due diligence companies conduct to minimize the risk of human rights violations in their supply chains."

66 See, for example, the work by the Justice and Corporate Accountability Project at Osgoode Hall Law School in Toronto: The "Canada Brand". Violence and Canadian Mining Companies in Latin America, JCAC Report, 24 October 2016. See also Pooja Parma, Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings (Cambridge University Press: New York, 2015); Christiana Ochoa, Generating Conflict: Gold, Water and Vulnerable Communities in the Colombian Highlands, in: Celine Tan/Julio Faundez (eds.), Natural Resources and Sustainable Development: International Economic Law Perspectives (Routledge, 2017). Lauren Coyle, Tender Is the Mine: Law, Shadow Rule, and the Public Gaze in Ghana, in: Charlotte Walker-Said and John Kelly (eds.), Corporate Social Responsibility? Human Rights in the New Global Economy (University of Chicago Press, 2015).

67 JCAC Report, The "Canada Brand", previous note, at 49: "…forms of violence impacting community members and workers, like the deliberate burning of crops and vehicles, forced or coerced dispossession of land, assassination attempts without recorded injuries, work accidents, or physical or psychological harm arising from community conflict, environmental contamination and land dispossession."

68 James Gomme, World Business Council for Sustainable Development, Entering a new era of human rights transparency, 12 April 2018, online: "Despite these gaps a strong sense remains that the work of embedding the UNGPs into practice is maturing fast, with a number of WBCSD members displaying marked leadership in this field. The challenge ahead is to turn increasing levels of awareness and intention into concrete action."

focus on the multi-tiered array of an MNC's 'communication' with its environment. Reiterating a hall-mark insight from relational contract theory and now gathering detailed, empirical data, we gain a clearer picture of the real-world experience and impact of a company's chain contract on the members of the community where an MNC or its subsidiaries or its contracting parties are operating. According to Laura Knöpfel,

> "*Corporate CSR communication provides an answer to the century-old question whether corporations, despite (mostly) being entities of private law, have broader social responsibility towards their employees, consumers and the general public. The documents entailing CSR communication appear in the form of annual sustainability reports, codes of conducts, human and labour rights policies. The documents communicate corporate decisions about their positioning concerning human and labour rights. By doing so, the CSR communication forms a constituting part of the corporate person. They seek to influence the public perception in the social, political and economic environment of corporations which should then be reflected back on them.*"[69]

This suggests that the legal-anthropological lens will become more and more important as a tool to develop a more adequate understanding of the organizational assemblage and of the regulatory landscape that *is* the supply chain.[70] Arguably, the contractual arrangement that we see taking shape is one that appears to exist *in* and *between* the written word and the lived experiences of intentional interaction between the company and its stakeholders. Now, the invocation of a combination of written and 'lived' contractual interaction giving rise to contractual liabilities can easily be accused of being more conspiracy theory than sound legal reasoning. The long and intricate history of evolving contractual, pre- and extra-contractual duties suggests, indeed, that one must err on the side of caution when it comes to interpreting a contractual-regulatory arrangement.

Such reflections cannot change the fact that there is no 'global supply chain law' as such, at least not yet. Meanwhile, legal concepts regarding tort liability, contractual duties, both internally and with regard to third parties, as well as degrees of company directors' liability have been the primary sites of engagement in this context. "The current model of many MNCs is to use a fissured configuration of contractors and workplaces in such a way as to maintain sufficient control over its subordinate operations to preserve its core brand or products, while at the same time avoiding direct responsibility and liability. This shift of liability to the overseas chain contractors and their employees creates problems when workers down the chain work in substandard conditions, and are not paid, and local laws are not enforced."[71]

69 Laura Knöpfel, CSR communication in transnational human rights litigations against corporations, paper for the 4th International Congress of the German-speaking Law & Society Association, ms. on file with author.

70 For further elaboration of this idea, see Peer Zumbansen, Transnational Legal Pluralism (Cambridge University Press, forthcoming, 2019/2020).

71 Ronald C. Brown, Up and Down the Multinational Corporations' Global Labor Supply Chains: Making Remedies that Work in China, 34:2 Pacific Basin Law Journal 103–133 (2017), 109.

3.2 Value Chains as Contracts

The dire consequences of this constellation have increasingly been made the subject matter of highly conflictual adjudication, as – recently – in the case of Jabir v KIK. In September 2012, a fire killed or injured almost 300 workers in a sewing factory of *Ali Enterprises* (*AE*) in Karachi, Pakistan. *AE* is a supplier of the German retail giant *KiK Textilien GmbH* (*KiK*).[72] As part of the supply agreement, *AE* commits to *KiK*'s codes of conduct, including a detailed set of fire and safety regulations. While the causes of the fire are still under dispute, a group of surviving workers and relatives of the deceased brought legal action against *KiK* before the regional court of Dortmund, Germany (*Jabir et al. v. KiK Textilien & Non-Food GmbH*), supported by the NGO *European Center For Constitutional and Human Rights* and *Medico International*.[73] The claimants went before the court in the pursuit of damages on the grounds that the company violated its obligation to monitor and enforce the fire and safety regulations set out in the supply agreement with *AE*.

While there is a host of legal avenues that has been under consideration in *Jabir* and other cases, we shall confine our observations here to the question whether the contractual arrangements in the chain can give rise to legal liability. In that regard, one needs to ascertain whether the *KiK* case should rest on the argument that there was a *contractual* relationship.[74] In essence, this would entail that *KiK* and *AE* have not only concluded a supply agreement with each other, but an agreement which grants enforceable rights to the workforce of *AE as a third-party beneficiary*.[75] This argument is based on the content of *KiK's* codes of conduct, which set our detailed fire and workplace safety regulations as well as monitoring and auditing procedures.[76] This is a crucial intervention as the contractual argument has the potential to challenge the view that the legal validity and bindingness of a norm should be primarily be based on the affirmation of state authority. As, at the international level, recommendations for codes of conduct are often referred to as a voluntary form of self-government,[77] their legal nature may change when they become part *of* or connected *to* a contractual arrangement. In that regard, their binding effect *as*

72 https://cleanclothes.org/safety/ali-enterprises.

73 Jabir and others v. KiK, Judgment of the Regional Court Dortmund, 10 January 2019, Ref.-No. 7 O 95/15, online.

74 Ingrid Heinlein, Zivilrechtliche Verantwortung transnationaler Unternehmen für sichere und gesunde Arbeitsbedingungen in den Betrieben ihrer Lieferanten, Neue Zeitschrift für Arbeitsrecht 276–283 (2018), at 279.

75 Heinlein, previous note, at 279. The legal concept of a contract constituting enforceable rights for the intended third-party beneficiary against the promisor, even if the third-party beneficiary is not included in the actual agreement, is established both in civil law and common law jurisdictions. See section 328 subsection 1 of the German Civil Code and the US Restatement Second of Contracts § 304.

76 For such a close scrutiny with regard to what a particular code of conduct, issued by the parent company, actually says, see Lungowe v. Vedanta, UK Supreme Court [2019] UKSC 20.

77 Owen E. Hernstadt, Voluntary Codes of Conduct: What is Missing?, 16:3 The Labor Lawyer 349–370 (2001); Gunther Teubner, Self-Constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct, 18 Indiana Journal of Global Legal Studies (2011), 17–38 (19):
"There is still ambivalence when it comes to assessing the effects of these two kinds of corporate codes. In many cases, "public" corporate codes remain mere recommendations with no effects whatsoever. Similarly, the self -commitments in "private" codes are often only strategic attempts to

part of a legal contract has been recognized by German courts[78] and is becoming a potentially important avenue for the establishment of third-party related contractual duties on the part of a major buyer.[79]

Alternatively, rather than taking the supply agreement as the core contractual architecture which underlies the dispute, we may consider that the codes of conduct between *KiK* and *AE*, especially the MNC's promise to establish an audit and control system to secure a certain level of work and safety standards, direct our attention to the *contractual arrangement* which obliges *KiK* to provide services to the workforce of *AE* in the sense of a contract *for the benefit of third parties* (*Vertrag zu Gunsten Dritter*).[80] This may well be, however, the only scenario in which German law could become applicable at all.[81] As long as a tort law approach is being pursued, it is highly unlikely that substantive German law will ever become applicable to a supply-chain litigation brought against a German MNC. The very idea behind a transnational supply chain relationship is that the supplier and its workforce are located in a low-cost production country, generally situated in the Global South. Due to the *lex loci damni* principle enshrined in Article 4(1) of the Rome II-Regulation, in each case, the applicable law is the law of that country, and thus not German tort law.

The same assessment with regard to the applicable law holds to be true if the claim was based on the argument that the supply agreement between *KiK* and *AE,* complemented by its codes of conduct, would have protective effect for the claimants – a legal concept described in German law as a *Vertrag mit Schutzwirkung zugunsten Dritter*, a contract with protective effects for third parties.[82] Such claims would be governed, despite their

preempt state regulation through a nonbinding declaration of intent, or they are mere public relations strategies without any effective change of behavior."
See also Adelle Blackett, Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct, 8 Indiana Journal of Global Legal Studies (2001), 401–447 (406):
"Although codes of corporate conduct have proliferated in recent years, they have a lengthy, cyclical history, which suggested early on the limits of self-regulatory devices to secure labor rights absent enabling regulatory, enforcement-based mechanisms. Heightened contemporary concern over MNE action, coupled with the recognized limits of international initiatives like the OECD Guidelines and ILO MNE Declaration to rein in the abuses of global capital, has led to a proliferation of private sector workers' rights initiatives, which vary tremendously."

78 Decision of the LAG Düsseldorf on Wal-Mart's codes of conduct dated 14 November 2005 – Ref.-No. 10 TaBV 46/05.

79 See, for example, Haley Revak, Corporate Codes of Conduct: Binding Contract or Ideal Publicity, 63 Hastings Law Journal (2012), 1645–1670, 1657 ff., with further references.

80 Heinlein (Fn. 74), at 279. For the concept of a contract for the benefit of third parties (Vertrag zu Gunsten Dritter), see section 328 of the German Civil Code. Such a contract would take us to lit. (b) of Article 4(1) of the Rome I-Regulation. In this case, German contract law would govern the dispute.

81 Heinlein (Fn. 74), at 279.

82 Cyrill Rieder, Vertrag mit Schutzwirkung zugunsten Dritter nach Schweizerischem Recht, 2:1 Hanse Law Review 82–89 (2006); J.R. Midgely, To What Extent Should Third Parties Have Contractual Rights? A South African Perspective, 42:1 International & Comparative Law Quarterly 136–147 (1993), 137: "As a general rule, contracts bind those who are party to them and parties who are not privy to an agreement have no contractual remedy against the contracting parties. However, for many years an incorrect interpretation of the privity of contract doctrine resulted in the belief that parties to a contract do not owe any duties, including those based in tort, to strangers to their transaction."

contractual terminology in German, by the Rome II-Regulation and ultimately by Pakistani common law because they are argued to be in essence comparable to negligence claims.[83] A third-party beneficiary claim, on the other hand, would fall under the Rome I-Regulation and be ultimately governed by German law. While a third-party beneficiary claim based on a *Vertrag zugunsten Dritter* requires *intent* by the parties to establish an enforceable right for the third-party beneficiary,[84] a claim based on the German concept of a contract with protective effects for third parties is essentially based on criteria of proximity and foreseeability, which are comparable to the tort of negligence. This would be an important point for consideration in the continuing efforts of outlining the levels of responsibility and care that have been assumed by powerful actors in the chain. And, it is here, where the value of ever more concrete, ethnographic evidence of the chain's local, on-the-ground operation and 'life' becomes plain to see.[85]

A closer scrutiny of the normative arrangements between suppliers and retailers/buyers sheds light on the regulatory DNA that makes up the network organization and opens up avenues of moving away from a perspective on supply chains predominantly from the vantage point of corporate law. To be sure, while the contracts between supplier and buyer, despite frequent iterations regarding the suppliers' use of further sub-contractors etc, tend to spell out the core pillars of the production, supply and purchase agreement, such contracts operate as long-term oriented frameworks for cooperation.[86] As such, they reflect the parties' understanding and acknowledgement that they are themselves in a forward-going business relation in which there is room for adaptation and flexibility, aspects that relational contracts scholars have long highlighted.[87] Business law scholars, organizational theorists and supply chain management theorists have long in-

83 One has to note that applicability of the Rome II-Regulation for such claims is not undisputed. However, the majority of the literature seems to support the application of the Rome II-Regulation rather than the Rome I-Regulation. See for example: Anatol Dutta, Praxis des Internationalen Privat- und Verfahrensrechts, 293–299 (2009) with further references. It is important to note that the Dortmund Court discussed both, a liability based on a contract for the benefit of third parties (Vertrag zu Gunsten Dritter) as well as on a Vertrag mit Schutzwirkung zugunsten Dritter, a contract with protective effects for third parties, under German contract law. See Jabir and others v. KiK (Fn. 73). However, it did so in order to show that even if one assumes the applicability of German contract law it would still have to dismiss the claim.

84 See for example Restatement (2nd) of Contracts § 304 (1981) or § 328 of the German Civil Code which require an "intended beneficiary" or pursuant to the German provision that "a performance to a third party may be agreed by contract".

85 Welker et al, Corporate Lives (Fn. 35); Knöpfel (Fn. 69).

86 Andreas Norrman, Supply chain risk-sharing contracts from a buyer's perspective: content and experiences, 1:4 International Journal of Procurement Management 371–393 (2008), 376:
"Governance of interorganisational relationships or exchanges involves more than formal contracts. […] Different social processes that promote norms such as flexibility, solidarity and information exchange are important. Through these, relational governance may also function to mitigate the exchange hazards targeted by formal contracts – hazards associated, for example, with exchange-specific asset investments, difficult performance measurements and uncertainty […]."

87 See Stewart Macaulay, Non-contractual relations in business: a preliminary study, 28 American Sociological Review 55–69 (1963); Ranjay Gulati, Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice in Alliances, 38:1 Academy of Management Journal 85–112 (1995), 92:
"The idea of trust emerging from prior contact is based on the premise that through ongoing interaction, firms learn about each other and develop trust around norms of equity, or 'knowledge-based trust'."

sisted on the decisive need of empirical research of the actual business practices inside the chain.[88] The deepening 'anthropology' of supply chains as part of a wider expansion of ethnographic, empirical field work in the fragmented locals of global supply chains will continue to play a crucial part in this regard.[89]

What follows from the above for the *Jabir* case, then? As discussed in the context of establishing the applicable law, the establishment of *supply chain liability* could arise from the contractual relations within the chain. Because there are no direct contractual relationships between *KiK* and the workforce of *AE* the latter could only base its claim on a third-party beneficiary claim opposed to a direct contractual claim.[90] The key for such an approach would have to be found in the close-up analysis of the contractual arrangements that the MNC has entered into inside the chain, in particular the contract between the MNC and its producers and suppliers. In this context, the question arises what is to be considered *part of* this contractual arrangement. Especially, two elements of the MNC's behaviour towards its direct contractual partners and the general public, the company's wider circle of stakeholders, require our attention. Namely, where an MNC engages in either or both activities of a) issuing a code of conduct and b) making public statements – each of which arguably containing elements that detail the level of responsibility the company recognizes towards its contractual parties and its stakeholders – the crucial question is whether the company has bindingly assumed responsibility for the welfare of these stakeholders.

To answer this question, we need to enter the conflicted and murky terrain of contract interpretation. But, how can this terrain be mapped and how can it be navigated? In a post-legal realist age,[91] the definition and mapping of 'context' is as crucial as it has become ever more contested. In light of the interpenetration of contractual arrangements and various 'side-agreements', compliance guidelines, CSR statements as well as codes of

88 See the foundational work by Gary Gereffi and his collaborators: e.g., Gary Gereffi, Shifting Governance Structures in Global Commodity Chains, With Special Reference to the Internet, 44:10 American Behavioral Scientist 1616–1637 (2001); Gary Gereffi/John Humphrey/Timothy Sturgeon, The governance of global supply chains, 12:1 Review of International Political Economy 78–104 (2005). And, see Howard Price, The anthropology of the supply chain: witch-doctors and professors, 2:2/3 European Journal of Purchasing & Supply Management 87–105 (1996).

89 Benedict Brøgger, The Rise and Demise of a Supply Chain, 2:2 Journal of Business Anthropology 232–253 (2013), providing a compelling discussion and analysis of 'entrepreneurship research'. See also Anna Tsing, Beyond economic and ecological standardisation, 20:3 The Australian Journal of Anthropology [TAJA] 347–368 (2009), 349:
"Supply chain capitalism has not displaced modernisation and development, with their goals of state and corporate standardisation. Instead, supply chain heterogeneity and modernist homogenisations depend on each other as warp and woof, weaving our future in their entangled relationship. Yet theorists of capitalism and its relationship to the state have focused only on global standardisation. In part, perhaps, this is because there have not been enough anthropologists among the theorists. Or perhaps anthropologists have been too willing to take our marching orders from philosophers, who follow disciplinary precedence in finding a single set of principles to generate the global situation. When we want to study transforming economies and changing states, we follow the tracks of Agamben, Foucault, or Hardt and Negri; we cannot but find standardisation, even in the exception. By contrast, I argue that supply chain capitalism calls out for ethnography. Its principles of niche heterogeneity require attention to economic and ecological specificity and the cultural practices that produce this specificity."

90 The possibility of such an approach generally is recognized by the Dortmund Court even though it did not find the requirements to be met in the case at hand. See Jabir and others v. KiK (Fn. 73).

91 Joseph William Singer, Legal Realism Now, 76 California Law Review (1988), 465–544.

conduct, 'the contract' under the interpretive lens lives in and is constituted by an assemblage of norms, which is itself neither harmonious nor does it constitute a unified reference system. Each of the norms that feed into and accompany the contract in question has again potentially its own idiosyncratic reference system. In that light, the long standing distinction between a grammatical and a contextual approach to contract interpretation soon reaches its limits:

> *"The first restricts interpretation to the words used in the contract and the other accepts extrinsic evidence about what one or both of the parties to the contract intended that the words would mean or objective evidence of the meaning supplied by context or evidence of how ordinary commercial parties in a trade used the term or behaved in the current contract."*[92]

Behind this dilemma lies a larger one. It is that 'contract' carries in its term the symbolic representation of the very idea of agreement, of consensus, of union. But, 'contract' is also the label for a social practice, and it is here where it is widely accepted that contracts may come into being in numerous ways. While, then, contract is a loaded concept, it is also a mere description for an agreement which was entered into between one or more parties as a one-off, as part of a long-term arrangement or history of cooperation, or in another form and with a different purpose. An important part of the history of contract law is that these two poles do not keep their distance and that, at times, a contextual, ideologically motivated interpretation is justified against the background of what is considered 'normal' and politically neutral',[93] while at other times such an approach is rejected because it seems to break down the boundary between law and politics.[94] The pivotal status that contract law and contract theory hold in modern political theory has often been taken to translate – quite materially – into a world governed by contracts, entered into by 'free will' and bringing together autonomous and independent actors,[95] while a socio-legal approach suggests that contracts can only be understood in their context.[96]

Today, the front-lines of a formalist v. realist approach are harder to identify, as social theory in numerous colors has left a lasting imprint on contract doctrine. But as the 'con-

92 Juliet P. Kostritsky, Plain Meaning versus Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation, 96 Kentucky Law Journal 43–98 (2007), 43–4.

93 David Charny, Illusions of a Spontaneous Order: 'Norms' in Contractual Relationships, 144 University of Pennsylvania Law Review 1841–1858 (1996).

94 Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale Law Journal 997–1114 (1985).

95 See, for example, Charles Fried, Contract as Promise (Harvard University Press, 1981); see ibid., Contract as Promise Thirty Years On, 95 Suffolk Law Review 961–978, 962:
"Contract as Promise sought to assert the coherence of standard contract doctrine as providing the structure by which actors could determine for themselves the terms of their interactions and cooperation – whether in commercial or in personal relations. The thesis was avowedly moralizing. It was based on a morality of autonomy, respect for persons and trust. Promise is a kind of moral invention: it allows persons to create obligation where there was none before and thus give free individuals a facility for extending their reach by enlisting the reliable collaboration of other free persons. That we must not harm another and that we must fulfill the terms of special relationships that may not have been of our choosing are moral obligations that are laid upon us."

96 Stewart Macaulay (Fn. 87); John P. Esser, Institutionalizing Industry: The Changing Forms of Contract, 21:3 Law & Social Inquiry 593–629 (1996); Peer Zumbansen, Private Ordering in a Globalizing World: Still Searching for the Basis of Contract, 14:2 Indiana Journal of Global Legal Studies 181–190 (2007).

tract law' fields of specialization multiply, both in adaptation and anticipation of ever-changing contract innovations,[97] this poses considerable challenges for a legal system which officially continues to be oriented towards a neutral, non-interventionist concept of contract law and doctrine, beginning from the prevailing wisdom in law schools' first-year contracts pedagogy through to contract law's institutionalized adjudication routines. Surely, this is a problem, which is in part quite old, while in other ways a novel one. As an old problem, the issue relates to a gap between the 'law in the books' and the 'law in action'[98] where the conflict over 'legal certainty' often enough served as a cover-up for what at its core a political fight over competing concepts of justice and the role of law and lawyers in their pursuit. While it might well still be the battle over 'freedom of contract', whether in old[99] or new[100] disguise, the problem between the law in books and law in action has never really gone away. Much of the nation state-embedded architecture which provided for a long time the loved/hated reference background for a fight over autonomy and rights appears to have undergone fundamental change. While the architects of spatialized commercial regimes strive for a design with minimal jurisdictional footprint, the status of the norms that govern the supply chain remains highly ambiguous as they fluctuate between contract, corporation, and organization. The supply chain constitutes a particular challenge to existing theories *of* and *disputes* over contract and contract doctrine as it is unclear where to look for guidance. The doctrinal struggle over its complex architecture summons earlier (and, continuing) debates regarding the demarcation lines between contract and tort[101] and between contract and organization,[102] but possibly

97 Robert J. Gilson/Charles F. Sabel/Robert E. Scott, Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms, 88 New York University Law Review 170–215 (2013).

98 Roscoe Pound, Law in Books and Law in Action, 44 American Law Review 12–36 (1910), 22: "Law has always been and no doubt will always continue to be 'in a process of becoming.' (…) However much the lawyer, enamored of his ideal of an absolute certainty in legal rules, may seek to evade these demands, the people will not permit it. Men will do what they are bent on doing, laws and traditions to the contrary notwithstanding. The forms may be kept, but the substance will find some fiction or some interpretation, or some court of equity or some practice of equitable application, to sanction change." And see, id., at 30: "When in a period of collectivist thinking and social legislation courts and lawyers assume that the only permissible way of thinking or of law-making is limited and defined by individualism of the old type, when, while men are seeking to promote the ends of society through social control, jurists lay it down that the only method of human discipline is 'to leave each man to work out in freedom his own happiness or misery', conflict is inevitable." And, id., at 34: "The history of juristic thought tells us nothing unless we know the social forces that lay behind it."

99 Friedrich Kessler, Contracts of Adhesion – Some Thoughts About Freedom of Contract, 43 Columbia Law Review 629–642 (1943); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harvard Law Review 1685–1778 (1976); Ellen Frankel Paul, Freedom of Contract and the 'Political Economy' of Lochner v. New York, 1:1 New York Journal of Law & Liberty 515–569 (2005).

100 Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, 22 Berkeley Technology Law Journal 577–598 (2007).

101 Grant Gilmore, The Death of Contract (Ohio State University Press, 1974); see the critical discussion by Robert W. Gordon, Wisconsin Law Review 1216–1239 (1974).

102 See the contributions to Terence Daintith/Gunther Teubner (eds.), Contract and Organisation (Walter de Gruyter, 1986); see Gunther Teubner, Coincidentia Oppositorum: Hybrid Networks beyond Contract and Organization, in: Robert W. Gordon/Morton J. Horwitz (eds.), Festschrift in Honor of Lawrence Friedman (Stanford University Press, 2006).

the key lies in a distinctly context-specific and context-adequate interpretation of the norms in place.

4. Value Chain Law as Transnational Economic Constitutionalism?

Coming back from our journey deep into the supply chain, does it make sense to raise the question whether the normative arrangements we have encountered should be considered as having constitutional quality? Is now the right time to ask, or is the question itself wrong? The fear, quite unsurprisingly, is that by taking the sociological analysis and, in fact, appreciation of the intricate regulatory infrastructure of the chain 'too far'. But, is the attempt to unweave the complex, normative web that ties supply chains together, the same as uncritically buying into the self-regulatory, anti-state *affect* of global business regulation?[103] Does the socio-legal engagement with the chain's regulatory DNA mean we have *given up* on 'the state' and its law? What would be the alternative? Should we stand by the proverbial window or behind the trenches and look out onto the wilderness in dusk to speculate about the dangers 'out there'?[104] Or, should we take this opportunity to ask where it is we are standing, and how we come to draw the – lethal – distinctions between "us" and "them"?[105]

That needn't be our worry, however. There is overwhelming evidence, already, of critical scholarship confronting the challenges of transnational regulatory arrangements in a wide variety of sectors, including the burgeoning realms of corporate global self-regulation[106] and, as we have seen, labor, contract, corporate as well as constitutional law dimensions of global value chains.[107] What we learn from this literature is the opposite of neat line-drawing between an allegedly law-less sphere of the 'global' and an 'all-good-here' romantization of domestic legal orders. Instead, value chains have become a crucial

103 For an intriguing and compellingly self-referential depiction of the lex mercatoria as such a system, see Emmanuel Gaillard, Legal Theory of International Arbitration (Brill: The Hague, 2010).

104 For early warnings against such line-drawing between the "here" of the nation-state and the "there" of globalization, see Gunther Teubner, The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy, 31:4 Law & Society Review (1997), 763–788; Peer Zumbansen, Piercing the Legal Veil: Commercial Arbitration and Transnational Law, 8:3 European Law Journal (2002), 400–432.

105 J.M. Coetzee, Waiting for the Barbarians (Ravan Press: Johannesburg, 1981).

106 Adelle Blackett, Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct, 8 Indiana Journal of Global Legal Studies (2001), 401–447; Harry Arthurs, Making Bricks Without Straw: The Creation of a Transnational Labour Law Regime, Comparative Research in Law & Political Economy Paper 28/2012; See, more recently, the impressive study by Anna Beckers, Enforcing Corporate Social Responsibility Codes. On Global Self-Regulation and National Private Law (Hart Publishing/Bloomsbury: Oxford, UK/Portland, OR, 2015); and see Beckers, Legalization Under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes, 24:1 Indiana Journal of Global Legal Studies (2017), 15–42.

107 Madeleine Conway, A New Duty of Care? Tort Liability from Voluntary Human Rights Diligence in Global Supply Chains, 40 Queens Law Journal 741–786 (2015), 768 ff. Julia Hartmann/Sabine Moeller, Chain liability in multiplier supply chains? Responsibility attributions for unsustainable supplier behavior, 32 Journal of Operations Management 281–294 (2014); Jakko Salminen, The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?, 66 American Journal of Comparative Law (2018), 411–451.

intervention point for legal analysis that uses an ever-more sophisticated, i.e. inter-disciplinary tool-box. Rather than attempting to make the chain *fit* into whatever liability and enforcement cookie-cutter forms traditional doctrine had on offer, there is a considerable variety of analytical and conceptual frameworks and lenses which are being applied to the problem at hand.[108]

5. Economic Law as Fluchtpunkt: Past, Present and Future of Law as a Political Project

Taking up the thread from the start of our investigation into the economic constitution, we might now have to ask: 'What *is* the law of global capitalism?' But, before this inquiry, really, lies the question: '*Can* there *be* a law of global capitalism?' How helpful is it to think of law in such a possibly over-simplifying, unifying manner in the light of the complexities here on display?

Surely, the reiteration of any great promises regarding the 'global' dimensions of 'law' has gotten tired by now, and more so every day. Confronted with a sobering increase in incremental detail in just about any sectorial branch of law, the prospects of "a" global law appear as both dim and unappealing. Surely, while talk of 'global law' speaks to the issue of 'reach' and 'enforcement', this can perhaps better be explained with reference to global law's underlying claim of being concerned with a legal-normative project that would be able to respond to problems, presenting themselves on a new – global – scale, as a matter of urgency.[109] From a sociological perspective, such a global law is not in sight. This might be because it's still a good time away or because it is – as far as we can know – impossible as such. By contrast then, it is important to be mindful of the way in which law and the categories with which it exercises its real and symbolic reign but with and in which it also carries inherited meaning, broken or fulfilled, yet fragile promises onward – reaching back to times that are both real and imagined.[110]

This recognition is important as we try to develop a legal theory that would be able to respond to what we experience as emerging, incipient challenges. It is important because this search for something 'new' in response to what is framed as 'new' itself (think of 'globalization', 'pluralism', 'climate change' or, 'populism') tends to insulate somebody's tomorrow from our today. As a result, we become the deer that gets frozen in the beams of the approaching head lights – rather than remembering – even for a split second – of how we got into this thicket. Re-framing this question of a law for the future might, instead, lead to an alternative approach. The question of '*whether*' could then turn into a question of '*how?*' and, even, '*why not?*' From that angle, our concern with the absence of a particular kind of law for our present condition can be understood as a deeper anxiety about the absence of the law that we think we should have (had) and that we think we deserve. At its root, this anxiety is about the way in which law continues to fail us. Asking the 'how?' question prompts an inquiry into the way in which law is implicated in bringing about the conditions of present-day life. It helps, then, to turn our mind to

108 Kevin B. Sobel-Reid, Global Value Chains: A Framework for Analysis, 5:3 Transnational Legal Theory (2014), 364–407.

109 Rafael Domingo, The New Global Law (Cambridge University Press: Cambridge 2010); Neil Walker, Intimations of Global Law (Cambridge University Press: Cambridge, 2014).

110 Peer Zumbansen, Carl Schmitt und die Suche nach politischer Einheit, 30:1 Kritische Justiz (1997), 63–79.

the role that law is *already* playing rather than looking, in a very principled and ultimately too abstract-normative and aspirational form, to some law to come in out of the blue – impossibly tasked with bringing redemption and with rescuing us from, among other things, global capitalism. The 'how' question shifts our inquiry from a utopia and philosophy to an anatomy and to a re-engagement with law's implications in the current situation. It takes seriously our concern with *the ways in which* law works at this very moment, in this place and others.

Where are we when we ask these questions, and *when*? Neither place nor time are simply representable or grasped, as they are conditioned conditions, emerging through an engagement with how we set out to count time and how we identify the factors that drive events, associated with 'development', 'progress', or 'regression'. Meanwhile, what is 'the place' in which we locate and with which we associate the above movements, successes, failures, defeats? Is that place a particular, significant institution (the *Bundesgerichtshof),*[111] or is it a symbolical, post-war achievement (the *Bonn Republic*)?[112] Is it the emergent and contested space of the 'darker legacies',[113] a political-constitutional conundrum – the EU – caught between the past and the future? Or, is that place always one which exists – like Wiethölter's law – in both a highly conflicted 'reality' and in a realm of possibility, a space of contestation and struggle? Is Tony Judt's "Postwar"[114] an anatomy of an incredibly burdened project, or is it a manifest of what is at stake and why it matters? We actually know it is both.[115]

The second advantage of re-framing the '*can there be…?*' into a '*how?*' question is that we don't hyper-realize some distant-utopian condition while invisibilizing the existing state of things. But, by turning our attention to the law 'as is', we are bound to be confronted with the sticky entanglements of law in complex realities we are struggling to 'unpack'. Unpacking means to theoretically penetrate and politically transform them. Such struggle never occurs in a vacuum. Instead, 'law' becomes the reference point, but also the *point de fuite*, the '*Fluchtpunkt*' as in Peter Weiss' acknowledgement as he, after years of uprootedness and exile, exits the Paris Metro near Monçeau to find himself at once standing alone on a Boulevard and, at the same time, belonging to a geographically fragmented but still closely connected intellectual community: an ever-elusive yet inescapably paradoxical point of reference *from* which and *towards* which we try to formulate reasonable explanations of how we got 'here' and promising strategies of how to arrive 'there'.

Wiethölter's anatomy of the socio-economic conditions of his time and of the law that only too often and repeatedly fails to democratically transform them,[116] is deeply caught

111 Anon., Federal Court of Justice Celebrates 50th Anniversary, 1 German Law Journal (2000).

112 Thomas Duve/Stefan Ruppert (eds.), Rechtswissenschaft in der Bonner Republik (Suhrkamp: Frankfurt, 2018).

113 Christian Joerges/Navraj Singh Ghaleigh (eds.), Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions (Hart/Bloomsbury Publishing: Oxford, UK/Portland, OR, 2003). Review Symposium on the "Darker Legacies of Law in Europe", 7:2 German Law Journal 71–255 (2006).

114 Tony Judt, Postwar. A History of Europe since 1945 (Penguin 2005).

115 See, in that vein, also his Ill Fares the Land (Penguin 2009).

116 Wiethölter, Position des Wirtschaftsrechts (Fn. 2); Wiethölter, Die Wirtschaftspraxis als Rechtsquelle, in: Das Rechtswesen – Lenker oder Spiegel der Gesellschaft? (Munich 1971), reprinted in P.Zumbansen/M.Amstutz (eds.), Recht in Recht-Fertigungen. Ausgewählte Schriften von Rudolf Wiethölter (Berliner Wissenschaftsverlag: Berlin 2014), 187–197.

up in such a – admittedly melancholy – engagement with the *here* and *now*. Re-reading his work concerning the idea (and, project) *of* and the demand *for* an 'economic law' reminds us of the importance of a locally embedded and historically informed practice of legal and political critique. What he practices, tirelessly and always at the forefront of available literature, is a discipline of relating and connecting dots. This praxis is constituted by an interpenetration of analyzing concrete events such as a court decision or a political program with an engagement not just of jurisprudential genealogies but also of the conceptual frameworks with which to make sense of one's present moment – the triad of critical theory, law & economics and sociology – altogether against the background of a historical positioning of inheritances and trends.[117] Were Wiethölter writing about *Wirtschaftsrecht* now, he would probably reference the presently more common terms which are being used to depict, that is, to place, to situate and to unpack the state of the – likely irreversibly – globalized economy. I could imagine he might have some sympathies with efforts – mainly among scholars who engage with anthropology, sociology and cultural theory as they try to grasp the present-day architecture and structures of transnational political economies. While I don't see him being keenly interested in overly playful and perhaps too aestheticized renderings of 'globalization', he takes grounded and well-informed sociological accounts of how things really *work*, *exist* and *function* very seriously. The challenge of shifting the analytical focus from a critical project, which is deeply rooted *in* and in constant contestation *with* the 'institutionalized and practiced' (*eingerichtet und ausgeübt*)[118] forms of largely nationally self-referential relationships of state and market,[119] to that of a project which seeks to conceptually and politically scrutinize the moving pieces of a disembedded, transnationalized political economy, is all but daunting. As such, it is an undertaking which must both work *with* and *challenge* existing reference points and frameworks – be that labour,[120] democracy,[121] human rights[122] or, well, 'law',[123] itself.

117 For a however modest attempt to trace some of these engagements across Wiethölter's work as a scholar, teacher, mentor and institution builder, see P.Zumbansen/Marc Amstutz, Statt einer "Einleitung": Recht?, oder: Theorie, Lehre und Praxis als Gesellschafts-Rechtstheorie, in: Zumbansen/Amstutz (eds.) (Fn. 2), xiii–xxxvii.

118 See Wiethölter, Zur politischen Funktion des Rechts am eingerichteten und ausgeübten Gewerbebetrieb, 3 Kritische Justiz (1970), 121–139, also reprinted in Zumbansen/Amstutz (eds.) (Fn. 2), 113–132.

119 Wiethölter, Thesen zum Wirtschaftsverfassungsrecht, in: Peter Römer (ed.), Der Kampf um das Grundgesetz. Über die politische Bedeutung der Verfassungsinterpretation (Cologne 1977), 158–177, also reprinted in Zumbansen/Amstutz (eds.) (Fn. 2), 47–54.

120 Harry Arthurs, Labour Law Without a State, 54 University of Toronto Law Journal 1–45 (2006); Adelle Blackett, Transnational Labour Law, in: P.Zumbansen ed., Oxford Handbook of Transnational Law (Oxford University Press: Oxford, 2019 – forthcoming).

121 Jürgen Habermas, Die Postnatinale Konstellation (Suhrkamp: Frankfurt, 2001); Jürgen Habermas, The Fall of a Monument, 7:4 German Law Journal 701–709 (2006); Nico Krisch, Beyond Constitutionalism. The Pluralist Structure of Postnational Law (Oxford University Press: Oxford, 2011).

122 Upendra Baxi, Towards socially sustainable globalization: reflections on responsible contracting and the UN Guiding Principles on business and human rights, 57:1 Indian Journal of International Law 163–177 (2017).

123 Domingo (Fn. 109); Peer Zumbansen, Transnational Law, With and Beyond Jessup, in: P.Zumbansen (ed.), The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal (Cambridge University Press: Cambridge, 2019).

More a 'tease', if you will, than what should have been a proper birthday gift, the here offered observations on what has come to be called 'supply chain capitalism' were meant to pick up his cue, namely of *verba docent, exempla trahunt*. Which connections are available today between critical legal theory which Wiethölter practices against the background of an itself unstable domestic and, to some degree, *international* political economy, on the one hand, and the in again other ways themselves highly ambiguous formations of transnational regulatory landscapes and fragmented political economies, on the other? Many of the concerns but also of the analytical tropes which reappear in the present context, in new and violent forms take us straight back to Wiethölter's work on '*Wirtschaftsrecht*', '*Wirtschaftsverfassungsrecht*' und '*Wirtschaft als Rechtsquelle*'. As such, it also becomes possible to revisit his (and, our) frustration with a legal doctrine which, all along, tends to contend itself with elaborating legal normativity as from an elevated, outside or neutral position. Such doctrine purports to operate on an abstract meta-level while it is, in fact, deeply implicated in ideological war fare. The persistence with which strict reverence is paid to what is allegedly part of 'public' or 'private' law[124] is a normative intervention. It showed its face when it denied the challenges of the 'mixed economy' and, more recently – under conditions of globalization – when it reasserts the same ill-fated dualism in the face of the emergent infrastructures of transnational organization/s.[125] This doomed transposition of an already problematic legal theory which failed and continues to fail – from law school to law school, first year class room to first year classroom – to critically engage the interdependence of 'public' and the 'private' through a political critique of the de-politicized market into a realm of globalization, itself allegedly marked by the 'absence of government',[126] reiterates the core critique that legal realists and those after them had launched against a deeply un-ironic understanding of formalist law.[127] The lack of irony on the part of the classic positivists but also of the neoliberal 'efficiency' lawyers would manifest itself in the pronouncement of law being allegedly value neutral, but still instrumental for a liberal society. Having the cake and eating it appears to have been the deeply internalized motto – and one that could only work as long as one accepted a strangely natural law-appearing understanding of property rights, on the one hand, and a blatantly instrumentalist view of contracting, on the other.[128]

Economic law is dead. Long live economic law.

124 Wiethölter, Rechtswissenschaft (Frankfurt: Fischer, 1968), 168.

125 For a critical approach, see Deidre Curtin/Linda Senden, Public Accountability of Transnational Private Regulation?, Amsterdam Centre for European Law and Governance, Working Paper 2011–06.

126 Michael Zürn, Governing the World without World Government. States, Societies and Institutions Interact in Many Ways, WZB (Wissenschaftszentrum Berlin) Report (Berlin 2014), online; Thomas G. Weiss, What Happened to the Idea of World Government?, 53:2 International Studies Quarterly (2009), 253–271.

127 Oliver Wendell Holmes, The Path of the Law, 10 Harvard Law Review (1897), 457–478.

128 Deborah Zalesne, Racial Inequality in Contracting: Teaching a Core Value, 3 Columbia Journal of Race and Law (2013), 23–47.