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Theorising the relationship between social law and markets in regional integration projects

ABSTRACT:

This article explores regional integration projects in the global South and constraints upon them. Its focus is on the use of economic sociology of law as a methodological approach through which to rethink the relationship between law, markets and state – and to explore how these interact in the context of one regionalisation project (the European Union) as well as interrogating whether economic sociology can similarly cast light on another regionalisation project (the African Union). The article examines the role of the ‘social state’ and of labour market institutions as part of an array of adjustment mechanisms responding to the liberalisation of trade and the opening of national borders: to what extent can social law and social rights mediate the operation of markets, and what does this mean when viewed from the perspective of developing as well as industrialised countries?

KEY WORDS:

Regional integration, labour markets, economic sociology of law

INTRODUCTION

This article examines what space there can be for labour law and social rights in projects of regional integration, a question I have previously examined in the context of the European Union (EU) and now also increasingly in the context of the African Union (AU). It explores how the normative mission at the centre of the labour law project, seeking to use law to govern and ameliorate markets, can be realised by thinking through different institutions, which emerge from and are applicable to the global South as well as the global North, and which don’t presuppose formal labour relations or broad capacities of the state.

To do that, the article is interested in three areas of contestation. The first, overarching, question is how can we better conceptualise the relationship between economy, society and law? The objective here is not to compare regions, the AU with the EU, as such. Rather, the aim is to interrogate the utility which accounts of the interaction between markets and (social) law, of notions such as ‘embeddedness’ and ‘social regionalism’ which have been developed for and applied in the context of the global North, can have in other contexts, including that of the AU. Second: of the many differences between the two regional integration projects of the EU and AU, this article focuses on conceptualisations of development: where their constituent member states are located on the ‘path’ towards economic development and how one defines development. Third: the article interrogates the related issue of the extent to which and the terms on which the constituent states are integrated into global trade, the narratives within orthodox economics about how trade works and the role of law in this.

Accordingly, to return to the overarching theme of the article, the insights which may have been pertinent to understanding the relationship between the economy/market on the one hand, and the state/region on the other developed in the context of industrialised economies of the global North and applied to the EU, may have less purchase in the context of the AU. This leads to a turn to a more contextualised study of the economy and markets. In doing so, the article draws upon the methodological approach and insights offered by ‘economic sociology of law’, the use of sociological approaches (empirical, normative, analytical) to investigate relationships between (labour) law and economy. Defined by Sabine Frerichs (2012) as an academic venture located in the middle of the social sciences, economic sociology of law ‘is not to be understood as an overspecialized approach, which dissects legal, economic, and social aspects and focuses on the smallest possible subset only, but as an integrative effort in reconnecting law, economy, and society, both as spheres of reality and as fields of scholarly interest’.

My interest is thus to map ways in which markets and trade liberalisation have been embedded within one example of regional economic integration (the European Union), in order to examine the wider significance of an economic sociology of law analysis – at a different historical time, with reference to the South rather than the North, and against the backdrop of a changed global economic order. More specifically, I investigate the ameliorative potential of regional collective action by developing states, which are industrialising as they integrate into world markets.

ECONOMIC SOCIOLOGY OF LAW AND THE EU INTEGRATION PROJECT

In attempting to understand the relationship between social rights and markets and the role for social rights in the operation of markets, this article engages with and also seeks to go beyond Polanyi's concept of embeddedness (1944). Much neoclassical or even new institutional thinking on regulation is, for the most part, premised on an opposition between 'market' and 'regulation' or 'market' and 'state'. Neoliberal ideology, in particular, is founded on a belief in the legitimacy of markets, and '[t]o establish this legitimacy, neo-liberals treat markets, usually without explicit acknowledgement, as existing outside society and outside history. "The market" is simply 'there' (MacEwan, 1999: 11). As Granovetter (1985: 505) shows, even the new institutionalist version of neoclassical economics 'deflect[s] the analysis of institutions from sociological, historical, and legal argumentation and show[s] instead that they arise as the efficient solution to economic problems'. If one accepts the thesis that the market 'emerged naturally', then state action is seen as an added extra – as an exogenous interference in the workings of the market.

Scholarship within the field of economic sociology has done much to illuminate the implications for thinking about law which follow from the recognition that markets do not exist in a 'state of nature'. Drawing upon the work of Polanyi, the tradition of economic sociology challenges the idea that markets are a separate realm, instead arguing that they are embedded in social relations (Block, 1990: 23). From a socio-legal perspective, rather than being natural phenomena, markets are understood to be social constructs, constituted by law and social norms. Polanyi's primary intuition that economies are enmeshed or embedded within non-economic institutions is a helpful one.¹ They are thus not autonomous or self-regulating as classical economic theory suggests, but located within a web of institutions, politics, social relations. What Polanyi refers to as the counter-movement relates to a political, regulatory response to the 'freeing' of markets: the forces of laissez-faire economic liberalism are offset by principles of social protection.²

What is noteworthy about the economic sociology approach is the assertion of the importance of state action and social relations not only in terms of the counter-movement, but also as constitutive of markets and essential for 'productive organization'. By this Polanyi meant not only in the establishment of rules to enforce contract and protect property rights, but further, in the protection of society from market liberalism by anchoring markets within institutional regulation (Beckert, 2007: 8). Hence statements such as '[l]aissez-faire was planned' and '[e]ven free trade and competition required intervention to be workable'

(Polanyi, 1944: 147 and 156). The notion of a ‘self-regulating’ market is, he emphasises, utopian.

There are at least two meanings of ‘embeddedness’ at play in Polanyi’s thought.³ On the one hand, the term is used to mean that all economies, and economic behaviour, are enmeshed in non-economic institutions; the constructedness of markets is a given in Polanyi, in contrast to their supposed naturalness. On the other hand, there is the idea that embeddedness alters from one economic system to another; that whilst it is not possible to fully disembed the economy from the rest of society, there are differences in the degree of enmeshment. In my view, these two conceptualisations are reconcilable. The instinct that prompts one to reject the orthodox account of the rise of the self-regulating market as a utopian project, surely makes it difficult to conceive of markets as being entirely disembedded. I think the primary intuition about embeddedness is a helpful one, whilst cognisant of the difficulties with this approach to the relationship between market and society. These include, primarily: the criticism made by Viviana Zelizer and others, of the Polanyian distinction between the embedded and disembedded economy (Steiner, 2009); the argument that embeddedness does not go far enough in debunking standard economic models (Zelizer, 2012: 148); and the concern about the way in which the language of embeddedness conjures up an image of separate spheres or systems: with ‘markets’ as asocial and separate from ‘society’, and with the two somehow communicating with each other, rather than being co-constitutive. In truth, many neo-Polanyians refer to the idea of the ‘always embedded market’ (see Barber, 1995: 400). So, the notion of embeddedness does not speak to the specific characteristics of modern capitalist economies, or to the specificity of market organisation (Beckert, 2007: 19). Drawing together Polanyi’s use of embeddedness with the insights of the ‘varieties of capitalism’ literature (Rogers Hollingsworth and Boyer, 1997; Hall and Soskice, 2001) Block (2003: 299-300) points to how different market societies are embedded within diverse matrices of ideas, rules and institutional structures. Ruggie takes this embeddedness reasoning further, to examine international regimes, applying Polanyi’s insights to the institutional reconstruction of the postwar international economy (1982; 2003). For Ruggie, the essence of the embedded liberal compromise is the formulation of a type of multilateralism, one which is predicated on domestic intervention, and which is compatible with the requirements of domestic stability (1982: 393, 398, 399).

The contention underpinning this article is that such Polanyian embeddedness can occur at the regional as well as at the national level. Through a case study of the European Union, I show (Ashiagbor, 2013) that the ‘embedded liberal compromise’ of this regional integration project was predicated on the ability of these industrialised nations to embed the market

within national institutions of social citizenship - principally labour and social welfare law. But this national-level social policy was ultimately shored up by social policy initiatives at EU level.

Regional integration within the EU was premised on the existence of background rules at national level, institutions of social citizenship to ameliorate the effects of economic liberalisation. The drafters of the original European Community treaties considered it essential to guarantee free movement of the 'factors of production' - goods, persons, services, and capital - to attain the perceived economic advantages of integration in general and the creation of a single market in particular (Molle, 2006; Weatherill, 2004). Namely: enhanced efficiency in production made possible by increased specialisation in accordance with the principle of comparative advantage; increased production levels due to better exploitation of economies of scale; improved international bargaining positions, made possible by larger size, leading to better terms of trade; enforced changes in efficiency brought about by intensified competition between firms. In the creation of a common or internal market, however, national economies come under pressure to deregulate so as to remain competitive, since national capacity to regulate markets is severely reduced due to removal of barriers to trade, mobility of capital, and fear of capital flight (see Ashiagbor, 2009). Arguably, states may feel pressured to reduce (fiscal, labour or other) regulatory costs in order to keep or to attract capital and foreign direct investment. Nevertheless, the orthodoxy was that there was no need for labour standards at the European level to balance trade liberalisation within the new economic community: domestic welfare states would serve as social stabilisers, to counter the effects of the strong liberalisation of the internal market and to maintain social cohesion domestically - through mechanisms such as social transfers, public infrastructure and labour law.

With regard to these background conditions, Lang refers to the 'shared commitment to the political ideology of embedded liberalism' in the postwar era, which shaped, for instance, the GATT regime and other institutions emerging from the Bretton Woods conference. In contrast with today's *laissez-faire* liberalism, the dominant philosophy forming the backdrop to postwar trade liberalisation and to regional integration between industrialised nations, was a recognition that governments *should* intervene to protect their populations 'from economic instability and insecurity' and promote their own versions of a welfare state (Lang, 2011: 29). The institutional reconstruction of the postwar international economy accepted that liberalism or trade liberalisation had to be embedded in society (Ruggie, 1982).

After its initial 'hands off' approach towards social policy, the EU in time evolved a supranational social dimension both to protect vulnerable regions, sectors and workers from the effects of *intra-EU* trade liberalisation, and to offer protection against *global trade*. As examples, we have social security and residence rights for Community workers and EU citizens. But, further, the EU also developed major redistributive policies - adjustment assistance and financial instruments to address economic and social imbalances at EU level, in the form of the European structural and investment Funds⁴ - what one might call an example of 'social regionalism' (Blackett, 2002). The embedded liberal compromise in the EU context principally involved embedding the *European* internal market within *national* social policy; presupposing the existence and the capacity of the national systems of labour law and social welfare law mentioned earlier. The EU sought to shore up working and living standards in the face of economic liberalisation, but did so principally by supporting the Member States in so doing. Indeed, the social harmonisation which has emerged at EU level has never been intended as a replacement for the more substantial social provision assumed to exist at national level. The bulk of the burden of financing the social transfers ameliorating trade liberalisation falls on the states.

Of course, as far as the EU is concerned this social dimension has to a great extent been unravelling in recent years, even prior to the current sovereign debt crisis.⁵ But the central points I wish to raise here, are: *first* that the EU has illustrated how regional integration can complement the efforts by states to protect society from global market forces; it has shown the possibility of regionalisation with a strong social dimension. *Second*, industrialised economies of the global North, including those in Europe, undertook an opening to regional and then global markets in an era favourable towards embedded liberalism. This applies both to the evolution in the protective capacities of individual states of the North during the twentieth century and, later, the evolution in the protective capacities of the *region*. It differed from the current era of what might be called resurgent neoliberalism, or what Gill (1995) refers to as 'disciplinary neoliberalism', characterised as it is by market fundamentalism. And *third*, to be explored in more detail below, the ability of these industrialised states to embed the market through social transfers and welfare state regimes, and the subsequent embedding of the European internal market within national systems, was made possible in large part because of transfers from 'periphery' to 'core': from the global South to the global North by means of uneven patterns of trade (Blackett, 2007).

PATHS TO DEVELOPMENT: THE ROLE OF LAW AND THE RULE OF LAW

This section turns the lens of economic sociology of law, and its integrative effort to reconnect law, economy, and society, away from its more familiar focus on the industrialised states of the global North, and on to a study of developing states. The questions here relate to development, and to the terms on which African states are integrated into global trade. With regard to the former, what is the role played by law in the economic development process? Is the adoption of formal legal institutions - so long argued to be a precondition for economic development more broadly - also a prerequisite for the proper functioning of labour markets and employment relations?

Theoretical conceptualisations of 'development' (in relation to the causes and determinants of major societal and economic change) and the question of how such theories should be put into practice, have been in an almost constant state of contestation.⁶ 'Development' is a field, and way of understanding the world, which is in a state of flux, with shifting dominance of competing approaches. The decades since the 1940s have witnessed transitions and competition between structuralist-developmental approaches, neo-Marxist dependency perspectives, neoliberalism, and more recently the post-Washington consensus eclecticism, and human and sustainable development approaches (Desai and Potter, 2014).

Hettne suggests that ['d]evelopment is one of the oldest and most powerful of all Western ideas' highlighting the hegemonic force of a narrative centred around growth and progress, and premised on models emerging from these countries' own experiences and prejudices (Hettne, 1990: 39, 47). This view is at the root of 'modernisation theory', a paradigm which adopts an evolutionary perspective, predicting the movement of countries from a state of underdevelopment, 'by means of an imitative process, in which the less-developed countries gradually assumed the qualities of the industrialized nations' (Hettne, 1990: 60). Today, the development strategies of international development institutions such as the World Bank have coalesced around the 'rule of law' as the key to transforming developing countries into market economies although, as Santos notes (2006: 257) several competing conceptions of the 'rule of law' might be in play at any one time.

In her account of the troubled evolution of 'law and development' or 'legal development' scholarship and practice, Perry-Kessaris notes what has been identified as the beginnings of a (post-modernisation theory, post-neoliberalism) 'third moment' in law and development among both academics and practitioners (2014: 2). This new approach is characterised by 'the new attention to the limits of markets, the effort to define development as freedom not

just growth, the stress on the local, the interest in participation, and the focus on poverty reduction' (Trubek and Santos, 2006: 7). However, this 'new mainstream' or 'third moment' within law and development practice does not offer a complete break with earlier periods of orthodoxy, in particular those approaches which placed the 'rule of law' centre stage in the understanding of the development process (Santos, 2006). What is notable about this more recent stage in mainstream law and development practice is that it remains marked by a (mostly unreconstructed) market fundamentalism, although offering what Kennedy (2006) refers to as a 'chastened neoliberalism'. In contrast, critical law and development scholars interrogate and challenge the assumptions which have led new and old mainstream theorists and practitioners, especially the international development institutions and other transnational actors, to be so dedicated to the notion that particular legal forms and institutional frameworks are necessary for economic growth and development. As will be seen, identifying (or demystifying) the 'correct' forms and institutions required to realise economic development, is also an apt focus for the economic sociology of law approach.

The relationship between law, institutions and development is one which preoccupied Weber, and indeed a version of Weberian thinking is central to mainstream law and development thinking, as is a Hayekian conception of the rule of law. Weber's observations on the central role of 'rational' legal systems in the emergence of modern capitalism and on economic development more generally have been implicitly and explicitly co-opted by the World Bank and other international financial institutions (Santos, 2006: 272-3; Shihata et al, 1991). According to Weber, one of the most important preconditions for the development of a market economy ('capitalistic enterprise') was the 'rationalization and systematization of the law in general', namely the predictability and security gained from a formal legal process (1956: 883). In an interpretation which located Weberian thought at the centre of development theory, policy and praxis in 20th century USA (Thomas, 2006), but has been criticised for simplifying Weber (Cohen et al, 1975; Trubek 1972), Parsons outlined a 'modernisation' theory, which posited that:

- (1) there is a universal path towards economic development which features the emergence of a highly differentiated social structure;
- (2) this path features the centrality of free market entrepreneurs;
- and (3) states that wish to succeed in economic development should do as much as possible to free constraints on entrepreneurs and investors.⁷

Parsons' interpretation of Weber has arguably misapplied Weber's typology in order to develop a universalistic account of economic growth, and placed Weber 'in the service of a particularly American version of capitalism' (Thomas 2006: 409-410; 416). However, the

orthodoxy which took hold has been influential within the international financial institutions, feeding into the ‘Washington Consensus’, namely the view that *all countries* ‘should adapt their institutions to a global template based on constitutional guarantees for private property, a minimalist state, and the liberalization of trade and capital flows’ (Deakin, 2011).

Both the modernisation theory and the Washington Consensus accord significant priority to private law rights, as can be seen in the focus on the formalisation of property rights. But what of regulatory law, of the sort which labour lawyers typically advocate? Trubek and Santos characterise neoliberal law and development thought as focused primarily on the law of the market, with regulation often presented as an unnecessary intrusion on the market, and ‘relatively little concern ... shown for law as a guarantor of political and civil rights or as protector of the weak and disadvantaged’ (Trubek and Santos, 2006: 2). Positioning the rule of law as a development strategy arguably adopts a reductive view of law. As Kennedy notes (2003: 20), such rule of law advocates tend to go beyond seeing the need for ‘minimum national institutional functionality’ but rather see *the* rule of law as a formula to be applied wholesale, in a way which makes simplifying assumptions about the form and content of law, prioritising formalisation of law and the elimination of ‘corruption’.

Granovetter (1985), argues that orthodox neoclassical economic accounts provide an ‘undersocialized’ account of economic action, whilst sociology offers an ‘oversocialized’ conception. Whilst *economic sociology* can avoid these two extremes, by applying a ‘sociological lens’ (Perry-Kessaris, 2014) to economic phenomena, the emerging discipline of *economic sociology of law* can go further, by bridging the intellectual disconnectedness between the ‘legal’, ‘economic’, and ‘social’ which is a hallmark of much orthodox thinking from the international development institutions. As an example of work in the tradition (if not at that time using the language) of economic sociology of law, Perry-Kessaris’ study of the relationship between national legal systems and foreign direct investment has shown the World Bank’s reliance on the economic approach to be responsible for its overestimation and misunderstanding of the role of law as a determinant of foreign investment in Sri Lanka and the inaccuracy in its measures of investors’ perceptions and expectations of legal systems (Perry-Kessaris, 2013; 2008; 2001).

THE STATE, MARKETS AND PATHS TO INDUSTRIALISATION

I want to continue this analysis of ‘development’ by turning now to the terms on which African states are integrated into global trade. There are at least two facets of the critique of

modernisation theory which are linked: relating to the 'free trade' economic underpinning of the theory, and to the 'colonial ideology' inherent in the modernisation approach (see Thomas, 1999; Pahuja, 2011).

In its economic analysis, modernisation theory emphasised institutional order and assumed that underdeveloped countries would follow a similar path to that of developed capitalist ones (Snyder, 1980).⁸ In contrast to these orthodox economic approaches, more heterodox economic thinking, in the form of structuralist and import substitution industrialisation models of development, contend that the uneven terms of trade between the global North and the global South have hindered the development of the latter. Indeed, the Prebisch-Singer hypothesis goes so far as to suggest that the economic, productive and labour market structures of the developed 'centre' and of the less developed 'periphery' countries differ so greatly that free trade can actually be harmful to the latter (Cypher and Dietz, 2008: 175; Prebisch, 1962; Singer, 1950). Emerging from, yet offering a critique of structuralism, in particular, the structuralism of the United Nations Economic Commission on Latin America under Prebisch, dependency theory built on the notion of uneven terms of trade between the centre and the periphery - but did so more overtly in terms of a critique of imperialism. Whilst there may be 'no such thing as a single unified body of thought called dependency theory' (Harding, 1976), nevertheless a core concern of this approach is that if some countries today are underdeveloped, it is arguably due to the operation of predatory capitalism in its colonial and postcolonial (more accurately, perhaps, neocolonial) forms. As Bernstein (1979: 83) puts it:

The countries of the Third World were actively underdeveloped in the process of the emergence and consolidation of capitalism as a world system. The original centres of capitalism established their wealth and their power through incorporating and exploiting other parts of the world. The primary accumulation of capital in the metropolises or centre was fed through a drain of wealth from the satellite or peripheral countries, typically involving their colonization, a 'surplus drain' which continues to the present day even if its forms may have changed, and direct colonial rule is no longer a necessary condition of this process.⁹

Historically, African economies have been deeply integrated into the global economy; but the terms of that integration have been highly unfavourable to say the least (Hendrickson, 2012: 40). Neo-Marxist and related 'world systems theory' adapt dependency approaches to further challenge the assumptions of 'modernisation'. In particular, they question the view that the less developed countries could follow the same path to development as the highly

industrialised ones, by reconceiving the primary unit of analysis as the capitalist world economy, seeing the world as divided into core, semi-periphery and periphery (Petras, 1981; Amin, 1976; Wallerstein, 1974). Accordingly, 'catch-up' by less developed countries is impossible given that relations within the world capitalist system are marked by an 'unequal exchange' involving the transfer of surplus value from the periphery to countries in the core through 'the extension of the capitalist market at the expense of pre-capitalist systems' (Bieler and Morton, 2014: 40). Thus, these heterodox theories of development suggest that the exploitation of many Third World/global South countries by colonial and neocolonial core countries continued if not intensified following their achievement of political independence (Conway and Heynen, 2014: 113). The theory of economic surplus developed by Baran (1957) is particularly significant for the light it potentially casts on the contemporary economic order of trade liberalisation and 'free trade'. Baran argued that the effects of Western European capitalist penetration of the outside world resulted, in Latin America, Africa and Asia, 'in outright plunder or in plunder thinly veiled as trade, seizing and removing tremendous wealth from the places of their penetrations'. Such intercontinental resource flows fed the industrial revolution in Europe, whilst leaving the 'donor' countries systematically underdeveloped (Baran, 1957; Foster, 2007). Thus, according to Baran, the reason for the poverty of less developed countries was not lack of capital or expertise or excess population as economic orthodoxy would have it; rather, the source of their poverty was to be found in the extraction by the core of this 'surplus' - defined as the mass of resources (actual or potential) which a society could have at its disposal to be reinvested in productive ways to facilitate growth (Cypher and Dietz, 2008: 190-1).

Such drain on colonial and postcolonial countries is arguably exacerbated by the formation of 'rules of the game' of the global economic order. As Thomas (1999: 4) puts it, 'the legal rules of the international economic order, though informed by liberal ideals of egalitarianism, perpetuate Northern economic hegemony by failing to address the entrenched economic inequality of the South resulting from the colonial era'. The 'unequal exchange' is marked by the transfer of surplus value from the 'periphery' to the 'core', and also by the extension of the capitalist market at the expense of pre-capitalist systems (Bieler and Morton, 2014). Arguably therefore, the 'embedded liberalism' which underpinned the redistributive capacities of individual states of the North and the redistributive capacities of the EU integration project was predicated on the transfer of value from the global South. The pattern of exchange between the 'core' and the 'periphery', the extraction of raw commodities from the South, and the commodification of the labour power of colonial states made possible the redistributive welfare state of the global North (Blackett, 2007; Polanyi, 1944).

RETHINKING THE STATE-MARKET DICHOTOMY THROUGH THE DEVELOPMENTAL STATE

In what institutional structures can the postcolonial economy be embedded? I want to explore two possible answers: at the level of the individual state, and at the level of the region. One example of societal self-protection akin to welfare states in the industrialised North is the evolution (and subsequent decline) of the postcolonial ‘developmental state’, based on state-led industrialisation behind protectionist barriers. The concept of the developmental state contains something of a contradiction in that the very notion of *the* developmental state presupposes *one* path or route to economic growth and development, whilst the literature is highly diverse in identifying a multiplicity of conditions or prerequisites for the emergence of the developmental state (Routley, 2012: 14).¹⁰ This tension may in part be explained by the fact that scholarly observers of developmental states tend not to advocate ‘mono-causal’ explanations, and indeed, much of the focus is on the interaction between conditions (Routley, 2012: 15). For instance, Fine and others (Fine and Stoneman, 1996: 14-15; Fine, 2013) characterise the literature on state and development as falling into two schools or approaches. The economic school takes ‘market failure’ as its starting point to justify state intervention in order to ensure, for instance, requisite economies of scale or coordination of investment within and across sectors to support economic growth (Fine, 2013: 4). This approach typically leaves unanswered the question of the political capacity of the state to identify and implement policies which can correct for market failure (Fine and Stoneman, 1996: 15). Thus, the political school seeks to fill that gap through a focus on the nature of the state itself and whether it has the potential and the independence to adopt the necessary developmental policies – ‘remarkably aloof from consideration of the economy itself and the nature of the policies required to bring about development’ (Fine, 2013: 4).

What both schools have in common though, and what the paradigm of the developmental state model offers most distinctively, is departure from both modernisation theory and dependency theory (Fine and Stoneman, 1996: 18) and latterly, a departure from neoliberalism. This is evidenced in the regions with which the developmental state paradigm is most closely associated: with east Asian countries which enjoyed latecomer catch-up industrialisation. For example, Chalmers Johnson’s key initial study of Japan (1982) focused on its Ministry of International Trade and Industry (MITI), and the rigid control over the private sector by bureaucratic government elites. Similarly, Taiwan and South Korea are held up as examples of ‘governing the market’ (Wade, 1990) that is, of substantial state intervention into or against the market. What was also central to early instantiations of the developmental state paradigm was the contrast drawn between ‘state’ and ‘market’, an

arguably false dichotomy (Fine and Stoneman, 1996: 19). Certainly, though, there was a rejection of the market fundamentalism of international financial institutions such as the World Bank and the International Monetary Fund. As Routley (2012: 4) puts it:

This emphasis on the significant role of the state in successfully achieving economic growth conflicts with the neo-liberal market focused assumptions about how to promote development that many development actors had been working with. Rather than seeing the state as the agent which could act to produce growth, these neo-liberal approaches saw the state as part of the problem and pushed to reduce its size and influence in order for development to take off.

In other words, the developmental state paradigm is a challenge to, and challenged by, neoliberal developmentalism. The pressure to liberalise and open up national markets arguably limits the 'development space' available to states (Wade, 2003), constraining the scope to adopt the sort of 'protectionist and nationalistic' approach adopted by developmental states in the past (Routley, 2012: 28). But the developmental state idea or paradigm should not just be used as a proxy for state intervention.

Musamba (2010) reviews the defining features of the developmental state concept with reference to the experiences of East Asian countries. She seeks to challenge the view that the developmental state approach is not viable in Africa, critiquing the 'impossibility theorem', which is sceptical as to whether the East Asian development experiences can serve as a model for Africa (Musamba, 2010: 30). This 'impossibility theorem' has been adopted in particular by the international financial institutions especially the World Bank (1993) but, as Mkandawire and others (Mkandawire 2001 and 2004) have suggested, this approach is 'characterized more by an ideological preference of the market approach to development rather than a careful analysis of the role of the state in development' (Musamba, 2010: 30).

The debate about the applicability of the East Asian model in other contexts, in particular in Africa, is in part located, as Chang (2006: 30) argues, in the neoliberal distinction between markets, which are seen as 'natural' endowments which can be transplanted from one region to another, and institutions (such as modern bureaucracy), which are seen as man-made and thus not transplantable.

THE SCOPE FOR SOCIAL REGIONALISM WITHIN SUB-SAHARAN AFRICA

I want to turn now to this question of the ability of institutions to protect from the market, in the context of regions and regionalism. Developing states lack the policy space, institutional or economic capacity to moderate the harmful domestic effects of market exposure. In addition, their economies are characterised by high levels of informalisation, in labour and other markets (Heintz and Pollin, 2003). It is highly problematic to expect *individual* states within, for example, sub-Saharan Africa to be the only, or main, source of their own (social) adjustment (Blackett, 2007). My question then becomes, if not the state, what of the region? If there is no 'social state' within which to embed liberalism, what is the potential of regional integration as a response to globalisation (Van Langenhove and Scaramagli, 2011)? As witnessed in the case of the EU, regional integration, with its removal of barriers to trade between states, can be a cause of, or an exacerbating factor in, undermining the autonomy of the state to operate systems of social protection. But equally, regional integration offers a potential solution or potential counter-weight to open markets.

The point I want to make about the value of the region is that, in the past, and in the case of the EU, it was able to serve as a complement and even a bolster to the social state. The regulatory response to markets, which Polanyi predicts, occurs at the regional or supranational level rather than solely at the national level. To what extent can the work done by the concept of embeddedness and the experience of social regionalism in the global North have resonance in the global South, given that the two conditions outlined above do not apply? First, the terms of global trade are less sympathetic towards government intervention; second, the individual states are less able to provide social stabilisers.

Examination of a number of features of the design of continent-wide regional integration - the African Union and sub-regional integration through the eight regional economic communities (RECs) which are recognised by the African Union - reveals a series of key external and internal constraints.¹¹ As will be explored below, internal constraints relate to the institutional design of regional integration in Africa and the different models of integration and regionalism the AU and its member states might be said to be adopting. *Externally*, attempts at regional economic integration are undermined in general by the broad context of the global trading regime (the 'rules of the game' of the global economic order), unequal exchange, and also by cross-cutting bilateral trade agreements.

Unfettered intra-region trade poses myriad challenges, as does the broader liberalisation of global trade. The developing countries of the African continent have, in addition, also had to

contend with the social dislocations caused by European trade policies, and intrusions into their sovereign status resulting from the institutional design of the global trade regime. As noted, postcolonial states never enjoyed protective capacities equal to those of 'the core'. These disparities were exacerbated by neoliberal policies of structural adjustment from the 1970s onwards. But long before such interventions, global economic inequalities were entrenched through the continuation of colonial preferences even after the formal end of empire, as discussed above, through the persistence of a pattern of exchange (or unidirectional trade) between the 'core' and the 'periphery'. As Polanyi (1944: 192) noted:

'But if the organized states of Europe could protect themselves against the backwash of international free trade, the politically unorganized colonial peoples could not. The revolt against imperialism was mainly an attempt on the part of [colonial] peoples to achieve the political status necessary to shelter themselves from the social dislocations caused by European trade policies. The protection that the [Europeans] could easily secure for [themselves], through the sovereign status of [their] communities was out of reach of [the colonized] as long as [they] lacked the prerequisite, political government.'

For example, the EU's economic model potentially destabilises the development of regional integration in its developing country trading partners. It also potentially destabilises redistributive social institutions, or region-specific adjustment mechanisms within industrialising states with which it trades. For instance, the mechanism for regional redistribution of customs duties between the five members of the Southern African Customs Union (SACU; Botswana, Lesotho, Namibia, South Africa and Swaziland) has been severely undermined, in general, by the lowering of external trade tariffs in the context of global trade liberalisation, and in particular, by a reciprocal trade agreement negotiated between South Africa and the EU. This EU-South Africa Trade, Development and Cooperation Agreement,¹² has arguably led to a reduction in revenues for all SACU states as the EU accounts for 40% of SACU imports. Certainly, the common tariff revenue pool has been reduced, with Swaziland and Lesotho losing out in particular, as 50 percent of their fiscal revenues come from this tariff revenue pool (Assarson, 2005).

More generally, the likely adjustment costs for African states of the move to full reciprocity in international trade will be severe. EU trade with the group of 77 African, Caribbean and Pacific (ACP) states has been marked by the core principle of non-reciprocal trade preferences first enshrined in the Lomé Convention of 1975 (Bartels, 2007), which has meant the ACP countries were under no obligation to offer reciprocal market access to the EU, except for treatment no less favourable than that offered to other non-developing countries

(Bartels, 2007: 734). However, such preferential treatment of products from ACP states is steadily disappearing as these bilateral trade agreements are progressively made WTO-compatible. The reliance on tariff revenues coupled with the prominence of EU imports into the African continent means that the required tariff dismantlement will lead to acute shortfalls in revenue (African Trade Policy Centre, 2005).

But there are *internal* constraints too. The relative success of the social regionalism which has occurred within the EU is because the constituent member states of the EU had domestic social and welfare systems – a social state - which were able to fund social policy interventions. But in addition, supranational decision-making was undoubtedly an important prerequisite for the development of the European social model (Ashiagbor, 2013). In contrast, the reluctance of developing and/or newly postcolonial states to constrain their sovereignty through supranational (as opposed to intergovernmental) decision-making may limit regional integration, and the development of the social dimension of that integration.

Having acquired political autonomy and statehood relatively recently and facing constraints on policy action from outside their borders, individual states are unwilling to cede norm-making power to a central or supranational body. Integration arrangements within regional economic communities across Africa are thus normatively loose, tending towards what one might call decisional intergovernmentalism.¹³ But perhaps a better view of the ‘looseness’ of these institutional arrangements is that they are designed to be flexible regimes of cooperation, precisely in order to better suit the multiple policy objectives of the African context and to allow for greater state sovereignty (Gathii, 2010). Second, the multiplicity of regional economic communities, and their overlapping ‘mandates, objectives, protocols, and functions’ (UNECA, 2006: 110) further inhibit the development of spheres of policy influence at the regional level that are able to direct or influence national policy. The multiple overlapping memberships complicate regional governance (UNU-CRIS, 2008; Brosig, 2011) one outcome of which is weak regional support for emergent national institutions of social citizenship, in part due to the lack of institutional arrangements to attract either international or intra-regional transfers (Yeates and Deacon, 2009: 29).

The institutional design of regional economic integration within Africa, namely, which models of governance the AU and its member states are adopting, thus limits the possibilities for regionalisation and the social dimension of that integration. It arguably remains unclear which model of integration and continental governance the AU and its member states are adopting; or rather, the models which are being pursued are pulling in competing directions. Laporte and Mackie (2010: 13) contend that it ‘remains an open question whether African

leaders will ultimately make a clear choice for a supra-national or an inter-governmental type of institution'. However, a better view is that it is inappropriate to allow EU-style institutionalism (and sovereignty pooling) to shape perceptions about how regionalism *should* look (Söderbaum, 2012: 51). Indeed, the Constitutive Act of the African Union which came into force in 2001 and brought the AU into being by replacing the Charter of the Organization of African Unity (OAU) should be read as a compromise between advocates of a federal union with supranational decision-making, and those unwilling to concede national sovereignty. The persistence of fragile states and weak resource bases generates ambivalence towards deep forms of regional integration and the pooling of sovereignty. Söderbaum puts it more bluntly, that 'weak states tend to place heavy emphasis on formal and absolute sovereignty' (2004: 426).

For Gathii (2010), the spaghetti bowl of overlapping regional economic communities is no bad thing if it reflects, as he would argue, a desire on the part of these nation states to retain national sovereignty rather than be enveloped within an inexorable move towards closer, tighter, more supranational forms of integration. His argument is that it suits post-colonial sub-Saharan African states to enter into these looser regional arrangements, and not to aspire to the form of economic integration, with binding centrally-determined norms, that have characterised European regional integration (Ashiagbor, 2014).

But allied to this model of integration (adopted primarily by the heads of state and governments of AU states), is the approach to markets being adopted within the AU and its regional economic communities (advocated in particular by the technocrat elite within the institutions of the AU and RECs), a market orientation which, following the neoliberal turn, as the dominant mode. My conclusions, in particular in light of interviews with AU Commission officials, are that this emphasis on intergovernmentalism, together with the existence of a multiplicity of regional economic communities with overlapping memberships, determines the structure of regional governance and arguably undermines potential for emergent trade adjustment mechanisms. The second observation relates to the market-oriented approach of the AU and the RECs: there is an observable shift away from earlier forms of integration based on protectionism, towards the neoliberal trade liberalisation paradigm. Whereas, it could be argued, the aims of the original wave of regional integration projects of the 1960s and 1970s had at their core the evolution of the postcolonial developmental state, concerned with reducing North-South dependence; the wave of regionalism since the 1990s has in contrast been more focused on the objective of integrating these developing economies more closely into global markets (Olivet and Brennan, 2009: 67), even though the terms of such integration remain uneven. There has been a shift, within

the continent of Africa, away from an earlier form of integration based on protectionism, towards the neoliberal trade liberalisation paradigm. Accordingly, Olivet and Brennan (2009) refer to the task of 'reclaiming regional integration from the neo-liberal trend'.

CONCLUSIONS

This article has sought to examine cross-national market integration projects, namely the European Union and the African Union, by applying insights of economic sociology of law to industrialised *and* developing economies and regions. It contends that there is real value in the approach offered by economic sociology of law: that is, the use of sociological approaches (empirical, normative, analytical) to investigate relationships between (social and labour) law and economy. The approach allowed us to interrogate understandings of the interaction between law, economy and society which inform the economic development process as witnessed, for instance, in the experimentation with the developmental state and neoliberal developmentalist paradigms. The economic sociology of law approach also illuminates the role of state action, including in the context of regional integration, and the differential capacities of the state the North and the South to steer, govern or embed the market.

Writing in a paper entitled, 'Universal Capitalism or Regional Planning?' Polanyi cautioned that 'regionalism is not a panacea' (1945: 89). Whilst regional cooperation has the potential to contribute to a more equitable pattern of globalisation, nonetheless, the question remains: in what form of regionalism will the postcolonial state be located, and in what institutional structures are these nascent forms of market integration to be embedded? Challenges posed to the sustainability of European welfare states have led to a retrenchment of these social protective elements, and an unravelling of that embedded liberal bargain (Ashiagbor, 2013; Vis et al, 2011). In industrialising states, in contrast, it is necessary to explore political and economic constraints on regional integration which frustrate what could well be a genuine 'counter-movement' to ameliorate the fundamentalism of the market. Undoubtedly, the active role of the developmental state in stimulating and directing economic growth has been challenged by the neoliberal turn in the international economic order and the dominance of the Washington Consensus. It is clear that a societal response at the regional level may well be muted if priority is given to market governance in order to secure entry into the global trade regime. How then, in the newer waves of regional economic integration in the global south, can the shift away from the explicitly protectionist developmental nation state, nevertheless create space for a regulatory rejoinder to free markets?

NOTES

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- ¹ As I have explored elsewhere (Ashiagbor, 2013) the concept of embeddedness is not very well defined within Polanyi's major work, *The Great Transformation*, and, as Krippner et al point out (2004: 109-110), there are 'clear tensions between Polanyi's initial use of the concept and its use today'. See also Dale, 2011.
- ² As examples of which he includes trade union and anti-trust legislation, as well as legislation relating to public health, factory conditions, workmen's compensation, municipal trading, social insurance, public utilities and trade associations.
- ³ The following draws on Ashiagbor, 2013. A third conceptualisation of embeddedness is that offered by Granovetter (1985), who argues that orthodox neoclassical economic accounts provide an 'undersocialized' account of economic action, whilst sociology offers an 'oversocialized' conception; whereas in fact, he posits, most economic behaviour is closely embedded in networks of interpersonal relations. However, this interpretation of embeddedness, focussing on network structures, has been criticised for leaving 'intact the notion of an analytically autonomous economy criticized forcefully by Polanyi': Krippner and Alvarez, 2007. Granovetter himself later observed 'I use the term "embeddedness" [in the 1985 article] in a narrower and somewhat different way than Polanyi meant it': Krippner, Granovetter et al, 2004: 113.
- ⁴ There are five European structural and investment funds: the European regional development fund, the European social fund, the Cohesion fund, the European agricultural fund for rural development, the European maritime and fisheries fund. http://ec.europa.eu/info/funding-tenders/european-structural-and-investment-funds_en. Structural funds are allocated to regions of the EU depending on GDP per capita; regions with less than 75% of the EU average are designated as 'less developed' and receive 52% of total spending. The 'less developed' regions are concentrated in Eastern Europe, particularly those former communist countries that have joined the EU since 2004, though parts of Greece, Portugal, the south of Italy and Spain are also included; they also include West Wales and the Welsh Valleys, Cornwall and the Isles of Scilly. The UK is therefore unusual among northern European countries in having any 'less developed' regions. See Browne et al (2016).
- ⁵ Or rather, the economic constitution which was always the core of the EU project is now serving to undermine the capacity of Member States to maintain certain social models, especially corporatist forms, at national level. See Ashiagbor (2013).
- ⁶ In mapping the history of development thinking, Hettne (1990: 39) argues that 'development' entails: development theories, development strategies and development ideologies – all of which are highly contested.
- ⁷ Thomas, 2006: 423.
- ⁸ Early 'law and development' scholarship, or rather, the dominant liberal legalist paradigm critiqued by Trubek and Galanter can be seen as the legal counterpart of modernisation theory (Trubek and Galanter, 1974) in that law and development scholars 'relied heavily, if not exclusively, upon modernization theory for their presuppositions and theoretical frameworks' (Snyder, 1980: 731).

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- ⁹ See also Frank 1966: contemporary underdevelopment can be understood not as a product of that country's own economic, political, social, cultural characteristics, but in large part 'the historical product of past and continuing economic and other relations between the satellite underdeveloped and the now developed metropolitan countries'.
- ¹⁰ 'Of course, the diversity of these accounts is indicative of the lack of consensus in the literature on the key aspects of the routes that states have taken to become developmental, but it may equally reflect the variety of routes states have taken'.
- ¹¹ The eight RECs recognised by the African Union are: the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD)²; and the Southern African Development Community (SADC).
- ¹² See, for example, 2004/441/EC: Council Decision of 26 April 2004 concerning the conclusion of the Trade, Development and Cooperation Agreement between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other part, O.J. L 127, 109 (Apr. 29 2004); Deacon, 2001: 18. Further, on 10 June 2016, the EU and six countries of the SADC EPA Group – Botswana, Lesotho, Namibia and Swaziland (BLNS), South Africa and Mozambique – signed an EPA, the first of its kind between the EU and an African region pursuing the objective of economic integration. See Assarson, 2005.
- ¹³ For discussion of a contrasting approach, the slow turn to a form of 'decisional supranationalism' within the EU, see Weiler (2001).

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