

# ARTICLE

## HIERARCHIES AS LAW

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I. INTRODUCTION .....	132
II. HIERARCHICAL STRUGGLE AND CENTER-PERIPHERY RELATIONSHIP .....	134
A. The Shortfall of Third World Legal Scholarship.....	137
B. Alternative Thinking about Reproduction of Hierarchies—Law as Interplay of Claims of Injury .....	141
III. HIERARCHICAL STRUCTURE OF SOCIETY .....	145
A. Hierarchical Formation of a Subject.....	147
B. The Constancy of Decisions and the Inevitability of Injury .....	148
C. Social Understanding of Injury.....	149
IV. HIERARCHY, LAW, AND INJURY.....	153
A. Law as Background to Bargaining .....	153
B. Hierarchies as Law and Their Reproduction .....	158
i. Hierarchies: Injuries .....	159
ii. Ideology: Memory of Past Hierarchies.....	159
iii. Tools: the World of Ideas, Concepts, and Theories .....	159
C. Hierarchies, Constitutionalism, and Critique.....	160
i. Hierarchies and Constitutional Thinking.....	160
ii. Hierarchies and Critical Thinking .....	162
iii. Public Internal Market and Private International Trade .....	164
iv. Progress of Integration and Order Building.....	166
v. Joining and Leaving a Legal Order: the Question of Brexit.....	168
D. Democracy and Inclusion of the Other as a Tool for Addressing the Hierarchical Struggle.....	170

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E. Political Freedom and Political Incapacity .....	174
F. Reproduction of the Public–Private Distinction.....	177
V. SWITCHING DOMAINS OF THOUGHT .....	180
A. Law and Politics .....	180
B. Critique as a Goal of Our Work.....	181
C. Karl Polanyi and Contemporary Legal Thought.....	182
D. Domination and Center-Periphery as an On-Off Relationship .....	186
E. Life of Law is Experience: a Vision of Subordination.....	190
VI. CONCLUSION .....	191

## I. INTRODUCTION

This article addresses the role of legal thought in social transformation and in reproduction of hierarchies in today’s globalized society. Why do the “haves” keep coming out ahead?<sup>1</sup> Where do we start when thinking about law and social transformation, and how do we articulate and address resistance to the reproduction of the concentration of power, wealth, authority, and prestige in the world?

As much as we like to think that we are all created equal, in the world we live in we find ourselves situated in a plethora of stable and shifting overlapping hierarchical situations. While some hierarchies in our lives seem justified—for example, hierarchies based on merit, innovation, or hard work—many are not. Many hierarchies are based on circumstances in which a person is born, such as class, region, or family; or on history, education, gender,<sup>2</sup> cultural preferences, race,<sup>3</sup> ideology, daily exploitation, socially constructed valuations of our work, seniority, or luck. Yet, when lawyers argue for the need for social transformation in any legal domain in contemporary legal thought—economic law, property law, WTO law, private law, European Union law, or international law—daily hierarchies are rarely addressed. Rather, lawyers often think about change in terms of a reversal of existing hierarchies between ideas and concepts.

In such thinking, alternatives are sought in contradiction and in conceptual oppositions. Alternatives are presented as anti-neoliberal, anti-capitalist, anti-efficiency, anti-free-movement, anti-autonomy, anti-economics, and anti-law. Alternatives are likewise sought in affirmations of perceived totalities, such as economic theories or stages of integration. Furthermore, lawyers are urged to think in terms of critique as a goal in itself and in terms of overtly political discourse which frees us from the shackles of legal language and legal expertise, enabling the real concerns of the people to be voiced. Political incapacity is understood as an obstacle, and political capacity as a solution, to social problems. This conceptual and formulaic legal thinking obscures hierarchical structure of society and often contributes to the reproduction of existing hierarchies. Instead, a legal analysis should consist of reasoning through particular hierarchical relations in contemplation of hierarchical struggle among people in every moment in time.

The hierarchical structure of society as a constant relationship of struggle—of domination and subordination between people—is set as the starting point of legal analysis. The type of claim invoked is secondary to the particular pre-existing hierarchical position of a person invoking it. This is a departure from liberal legalism in which people’s equality is either presumed or sought; in which a type of claim is

<sup>1</sup> See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

<sup>2</sup> See Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS SOC’Y 515 (1982).

<sup>3</sup> See Kimberlé Crenshaw, *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996).

more important than the person who makes it; or in which a particular category or order is being built. If the question of the reproduction of hierarchies is to be addressed more accurately, the hierarchical structure of society should be the starting point of the analysis.

Portraying the hierarchical structure of society unravels three alternative ways of thinking about its construction: (1) the mode of contemporary legal reasoning that balances social and autonomy considerations through a dualism of left and right politics, (2) a constitutional analysis focused on the construction or legitimacy of the existing order or on interactions between legal orders, and (3) the economic theory of integration that demands stages of legal and economic regimes. Three approaches fail in their conceptual emphasis on hierarchies between ideas, missing the ineradicable and constant struggle among people in different positions in society.

Law is at the heart of social reproduction and transformation. Therefore, in order to portray hierarchical struggle and domination in society, we need not only a theory of power<sup>4</sup> but a different account of law. When the phenomenon of law is misrepresented and conceptualized, social reality and power relations are misrepresented. This reinforces the existing state of affairs, hinders social transformation, and contributes to the reproduction of existing hierarchies.

In order to understand the self-perpetuation of hierarchies, we need an understanding of law that is not based on an emanation of the spirit or the will of the people.<sup>5</sup> We need an understanding that is different from law as a system of primary and secondary rules<sup>6</sup> or from law as integrity.<sup>7</sup> Law should not be understood as a simple embodiment of background rules and enforcement institutions that condition the social struggle,<sup>8</sup> or as a background to another phenomenon such as political economy.<sup>9</sup> Our understanding of law should be different from our understanding of the interplay between individualist and altruist considerations.<sup>10</sup> We need an account of law that accounts for our daily lives and hierarchies.

The ultimate aim of this article is to suggest an account of law detached from liberal thought<sup>11</sup> which clouds our inquiry into legal work and into practicable social transformation, a better understanding of governance and of reproduction of hierarchies, as well as a clearer analytic account of the macro hierarchical structure: the center-periphery relationship.

In Section II, I argue that the center-periphery relationship should be understood as a hierarchical struggle. I explain the shortcomings of Third World legal scholarship for its understanding of center-periphery relationships. I outline my alternative view of center-periphery relationship as a structure of constant hierarchical relationships. I explain that injury and recognition should be understood as the lowest common denominator of the legal system. In Section III, I argue that hierarchy and injury are ineradicable. I explain the existing social understanding of injury in the European Union. In Section IV, I argue that every person should be seen as a constant bundle of injuries and recognitions and explain how this understanding

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<sup>4</sup> See Catherine MacKinnon, *supra* note 2.

<sup>5</sup> See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

<sup>6</sup> See HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* 79–81 (1961).

<sup>7</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986).

<sup>8</sup> See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 L. STUD. FORUM 327, 354–55 (1991).

<sup>9</sup> Samir Amin and David Kennedy use this definition of law. See SAMIR AMIN, *CAPITALISM IN THE AGE OF GLOBALIZATION: THE MANAGEMENT OF CONTEMPORARY SOCIETY* 22 (Zed Books, 1997); David Kennedy, *Law and the Political Economy of the World*, 26 LEIDEN J. INT'L L. 7 (2013).

<sup>10</sup> See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685 (1976).

<sup>11</sup> For my understanding of “liberal political thought,” see MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 76 (2005); see also CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 44 (1996); CHANTAL MOUFFE, *ON THE POLITICAL* 11–12 (2005); CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 8 (2000).

of law differs from law as background rules to bargaining. I outline my understanding of the legal system as a structure of hierarchies, ideology and tools we use for restructuring or supporting them. I critique constitutional thinking as well as more critical thinking in the frameworks of Eastern enlargement for blindness to hierarchies. I argue that economic and legal theory resort to building a particular regime of integration rather than considering the hierarchical structure of society as the starting point of the analysis. I also critique seeking alternatives in conceptual oppositions and a particular usage of economic theory. I address the limits of current thinking about democracy, including the principle of representation and inclusion of the other in addressing hierarchical relationships. I argue that the claim of political incapacity is analytically incorrect and does not adequately address structural subordination. Such suggestions reproduce the public-private distinction. I critique waiting for new institutions and new forms of governance. In Section V, I argue that switching domains of legal thought is liable to reproduction of hierarchies and critique the work of Karl Polanyi and some of his followers. I am also critiquing critique as goal in itself. I reject center-periphery relationship as a causal relationship and as an on-off relationship. In Section VI, I conclude with Holmes' view that the life of law is experience and that visions of subordination are needed for challenging hierarchical subordination.

## II. HIERARCHICAL STRUGGLE AND CENTER-PERIPHERY RELATIONSHIP

In developing a hierarchical portrayal of the legal system, I will mostly focus on the relationship between the center and periphery of the European Union (EU). This particular conflict inherent to the structure of the EU has been neglected in the legal discourse, especially in light of the recent and ongoing Euro crisis. The overlook of the center-periphery dynamic in both legal and political discourse has led to the current situation, in which the very integration of the Union has been put in danger and (at least partial) exit of one of the peripheral Member States, Greece, is under serious consideration for the first time in the history of the European Union.

In order to convey an understanding of what is center versus what is periphery within the Union, the model is presented in terms of countries. The socio-economic indicators that portray the initial picture of the center and the periphery are mere manifestations of hierarchies and of their mutual reinforcement in a particular space. While these socio-economic indicators do not tell us anything about legal relationships, they help us interpret and visualize the structural situation of different actors situated in space and society.

What is the center and what the periphery of the European Union? The center countries or regions are those with a much higher gross domestic product (GDP) per capita than the regions of the periphery. They invest more money in research and development and have the best universities. They have more capital and more ingoing and outgoing foreign direct investment (FDI). Their actors, products and services have more prestige. Internationally recognized brands come from the center, which give their owners significant market power. Branded firms enjoy higher margins and more loyal customers, who will also not switch to another brand despite a price increase.<sup>12</sup> The center exports final products and is the seat of powerful corporations and law firms. Countries of the center include Germany, France, the Netherlands, Austria, Sweden, Finland, and the United Kingdom.

The periphery has a much weaker industrial sector and a less efficient agricultural sector. It has very few brands known beyond its borders. Non-branded

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<sup>12</sup> Non-branded companies typically earn gross margins of 3–8 percent and are constantly at risk of being undercut by cheaper rivals. Branded firms enjoy fatter margins (15 percent or higher) and more loyal customers. See *Brand New: Emerging-Market Companies Are Trying to Build Global Brands*, *ECONOMIST* (Aug. 4, 2012), available at <http://www.economist.com/node/21559894>.

companies typically earn lower margins and are constantly at risk of being undercut by cheaper rivals.<sup>13</sup> Some of the few famous brands of Eastern Europe have in fact been bought by established companies of the center.<sup>14</sup> Regions of the periphery have a lower GDP per capita, and the actors, products, and services from the periphery have much less prestige. They often produce semi-final products or final products for a brand of the center. The wages are lower than in the center, and often (with the exception of the European south) the life expectancy is lower. Countries of the periphery include Hungary, Portugal, Greece, Bulgaria, Cyprus, Latvia, Poland, Slovenia, and Estonia.

The three decades of West European post-war economic boom and stability—the “Trente Glorieuses” or the period of “Wohlstand” of “Social” Europe that several authors aspire to in their argumentation about social justice in the European Union<sup>15</sup> are not peripheral histories. The history and experience in the periphery are different. Interests and concerns of the actors of the periphery states in the European Union are difficult to express. For example, while the EU legal discourse envisions a balance between social and economic considerations, it tends to treat both considerations as universal to the Union as a whole. This makes it difficult to discuss alternative arrangements that take into account the particular social and economic positions of periphery actors, which might have very different distributional consequences. In order to understand and challenge the continued tragedy of Central Europe, we need to explore the distribution of material and spiritual values,<sup>16</sup> in the European Union as well as in contemporary legal thought in general, by our daily decisions.<sup>17</sup>

The European Union legal structure will provide both the context for legal analysis of the reproduction of hierarchies as well as a site for critique of paradigmatic structures of thinking. Inasmuch as the EU legal structure shares traits with contemporary legal thought, the critiques relate to any context or domain of law—trade law, property law, international law, or private law—for politics and economics, and inform any practical legal and social problem. Thus, unless particularly noted, the argument is relevant to any hierarchal relationship.

Our daily lives and the life of law is a hierarchical struggle. This struggle is obscured by formulaic thinking in terms of a construction of a particular type of order or conceptual interplay of ideas. According to Carl Schmitt, constant combat depicts our social life. Combat, according to Schmitt, should be understood in its original existentialist sense. It means neither competition, pure intellectual controversy, nor symbolic wrestling. Rather, the entire life of a human being is a struggle and every human being a combatant.<sup>18</sup>

In anti-liberal tradition, conflict is privileged over harmony and coercion over freedom.<sup>19</sup> In this tradition, political antagonism is at the heart of our lives and decision-making. By “the political,” Chantal Mouffe refers to the dimension of antagonism that is inherent in human relations, an antagonism that can take many forms and emerge in different types of social relationships.<sup>20</sup> A different view entails

<sup>13</sup> Branded firms enjoy fatter margins (15 percent or higher) and more loyal customers. *See id.*

<sup>14</sup> For example, the Czech car company Škoda was bought by the Volkswagen group, which is seen as a success story. *See, e.g.,* IBS CTR. MGMT. RESEARCH, VOLKSWAGEN'S ACQUISITION OF SKODA AUTO: A CENTRAL EUROPEAN SUCCESS STORY (2007), available at <http://www.icmrindia.org/casestudies/catalogue/Business%20Strategy/BSTR262.htm>.

<sup>15</sup> *See* Alain Supiot, *Under Eastern Eyes*, 37 NEW LEFT REV. 29 (2012); Floris de Witte, *EU Law, Politics, and the Social Question*, 14 GER. L.J. 581 (2013).

<sup>16</sup> The distinction between spiritual and material values stems from Max Weber. *See* MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 124 (1930).

<sup>17</sup> Damjan Kukovec, *Law and the Periphery*, 21(3) EUR. L. J. 406 (2015); Damjan Kukovec, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo in EUROPE'S JUSTICE DEFICIT*, 319, 324-330 (Kochenov, de Búrca and Williams eds. 2015).

<sup>18</sup> *See* SCHMITT, *supra* note 11, at 33.

<sup>19</sup> *See* Duncan Kennedy, *supra* note 8, at 328–29; *see generally* MOUFFE, *supra* note 11.

<sup>20</sup> *See* MOUFFE, *supra* note 11, at 101.

a fantasy that we could escape from our human form of life.<sup>21</sup> Struggle, conflict, and contradiction are central to our daily existence. There is a cost, a downside to everything in life.

The idea that societies are best understood as arenas of struggle between powerful and powerless groups<sup>22</sup> is reflected in legal analysis. Indeed, much of legal realist analysis is framed in terms of social struggle<sup>23</sup> and anti-conceptualism,<sup>24</sup> which often results in a turn to the actual impact of legal rules—empiricism,<sup>25</sup> consequentialism, and distributional analysis of law.<sup>26</sup> Where there is struggle, there is friction,<sup>27</sup> contradiction, and conflict.

Conflict is generally recognized in contemporary legal thought, though to various degrees. For instance, Mouffe's skepticism of rational consensus is met with Nico Krisch's argument that conflict does not necessarily deny the possibility of reasoned deliberation and consensus between worldviews altogether.<sup>28</sup> Irrespective of these differences, the centrality of conflict to legal argument is acknowledged. The principle of balancing or proportionality, the paradigmatic mode of reasoning in contemporary legal thought,<sup>29</sup> typifies a conflicting situation and reflects the acknowledged ambiguity of the relationship between law and politics. Conceptualism and analytical error, however, continue to pervade our social practice and obscure hierarchies and domination. Moreover, the hierarchical dimension of our lives—and of the phenomenon of law itself above all—is largely missing from legal analysis.

The acknowledgment of struggle, hierarchies, and conflict is even more important for those from the periphery. Intellectuals of the periphery cannot afford pure theoretical experimentation,<sup>30</sup> “progressive” politics and order building,<sup>31</sup> a critique as goal in itself,<sup>32</sup> or another resort to formulaic abstractions and theories unrelated and detached from the practical transformation of society. For a lawyer from the periphery, intellectual *l'art pour l'art* is not an option. The situation and the costs are too imminently tragic.

Instead, words such as State, Republic, Society, Class, Sovereignty, Constitutional State, or Economic Planning are incomprehensible if one does not know exactly *who* is to be affected, combated, refuted, or negated by such a term.<sup>33</sup> But a legal thinker must keep the hierarchical structure of society in mind, remaining

<sup>21</sup> In our desire for a total grasp, says Wittgenstein, “We have got on to the slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk: so we need friction. Back to the rough ground.” LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 107 (1953).

<sup>22</sup> See JEAN-PAUL SARTRE, *CRITIQUE OF DIALECTICAL REASON: THEORY OF PRACTICAL ENSEMBLES* (2004); KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* (1932).

<sup>23</sup> See Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *POL. SCI. Q.* 470 (1923); Duncan Kennedy, *supra* note 8; MacKinnon, *supra* note 2, at 515, 635; Crenshaw, *supra* note 3.

<sup>24</sup> See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935).

<sup>25</sup> See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897).

<sup>26</sup> See Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960); Marc Galanter, *supra* note 1.

<sup>27</sup> See WITTGENSTEIN, *supra* note 21.

<sup>28</sup> See Nico Krisch, *The Case for Pluralism in Postnational Law*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 232–33 (G. De Búrca & J. H.H. Weiler eds., 2012).

<sup>29</sup> For a genealogy of balancing/proportionality, see Duncan Kennedy, *A Transnational Genealogy of Proportionality in Private Law*, in *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* 185 (Roger Brownsword et al. eds., 2011).

<sup>30</sup> See, e.g., David Kennedy, *The “Rule of Law” Development Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 95 (David M. Trubek & Alvaro Santos eds., 2006) (“There are contending ideas, contending interests, contested theories and complex unknowables. Not knowing we must decide. We could even experiment.”).

<sup>31</sup> See *infra* Section IV.C.iv. (“Progress of Integration and Order Building”).

<sup>32</sup> See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 353–354 (2004).

<sup>33</sup> See SCHMITT, *supra* note 11, at 30–31 (2007).

conscious of daily domination and subordination. The aim of legal inquiry should thus be who in the global social structure loses and who gains by our work, our action, and our inaction? Whose claim, as presented in any form of category or theory, are we enforcing? Who is making decisions, and who has authority? Whose outlook, belief, and ideology is understood as common sense? It is by answering these questions that the global hierarchical social structure, the reproduction of existing hierarchies, and a better understanding of the phenomenon of law will be revealed.

Besides race and gender, orientalism in a form of a third world identity is perhaps the central ideological construct through which the phenomenon of domination is articulated and maintained. Orientalism describes the gap between the deviant primitive and the modern,<sup>34</sup> where a different application of norms to different peoples keeps the “primitive” or “backward” “others” outside of the system or manages them until they have caught up.<sup>35</sup> The next section addresses the Third World legal scholarship, explains its drawbacks in legal argument and presents alternative thinking about law, domination, governance, and social transformation in post-contemporary legal thought.<sup>36</sup>

#### A. *The Shortfall of Third World Legal Scholarship*

The center-periphery relationship has been addressed in legal literature by postcolonial theory. Anthony Anghie and other protagonists of “Third World Approaches to International Law” (TWAIL) scholarship have argued that law structures the relationship between the center and periphery of the world, and they have re-imagined international law in these terms. They criticize mainstream international legal scholarship for reproducing the structures that work to subordinate and disempower the peoples of the third world, and intensify global inequality.<sup>37</sup>

The principal contention of TWAIL is that there is an intimate relationship between capitalism, imperialism, and international law, which has always disadvantaged Third World peoples, especially its subaltern groups.<sup>38</sup> More specifically, Anghie demonstrates how international law developed in reference to, and continues to produce, a “dynamic of difference” that characterized the civilized/barbarian distinction used to justify the colonial project. He defines the “dynamic of difference” as the process of establishing the gap between two cultures and then “seeking to bridge the gap by developing techniques to normalize the aberrant society.”<sup>39</sup> Anghie defines the dynamic of difference after colonialism as the more culturally neutral gap between “advanced” and more “backward” societies, which justified particular forms of economic management. The dynamic of difference is a legal construction formulated in such a way to exclude the non-European, following which sovereignty can then be deployed to identify, locate, sanction and transform the uncivilized and reproduce the existing relationship of subordination. In Anghie’s vision, the theories and doctrines of international law

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<sup>34</sup> See, e.g., Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992); DAVID KENNEDY, *supra* note 32, at 184.

<sup>35</sup> For such an orientalist account of the post-Berlin Wall developments in Europe, coupled with the critique of the policy of progress in Europe, see DAVID KENNEDY, *supra* note 32, at 169.

<sup>36</sup> Duncan Kennedy estimates the contemporary legal thought to have ended around 2000. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT (D. Trubek & A. Santos eds., 2006). Given the lack of the name of a yet crystallizing legal consciousness, I am proposing the term “post-contemporary legal thought”.

<sup>37</sup> See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 249 (2007); *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW POLITICS AND GLOBALIZATION, DEVELOPMENTS IN INTERNATIONAL LAW 1* (Anthony Anghie et al., eds., 2004).

<sup>38</sup> See Bhupinder S. Chimni, *Capitalism, Imperialism and International Law in the Twenty-first First Century*, 14 OR. REV. INT’L L. 17 (2012).

<sup>39</sup> ANGHIE, *supra* note 37, at 4.

have, from its earliest beginnings, been used, interpreted, and applied differently to different people in different contexts. Throughout the centuries in legal thought, the doctrines and theories changed, but the common thread of domination in Anghie's account is the dynamic of difference, whereby the empowerment of the Third World is constantly deferred, either by more powerful sovereigns or by international institutions. One of the fundamental premises of Anghie's thesis is orientalism and, specifically, the legal construction of exclusion from full participation in the legal system.<sup>40</sup>

Specifically, Anghie argues that the today's phenomena of governance and globalization can be traced back at least to the work of Vitoria and the beginnings of the modern discipline of international law. According to Anghie, Third World sovereignty is distinctive; Western sovereignty was protected against the intrusion of international law, whereas non-European societies have invariably been subject to international law. Powerful sets of ideas developed over the centuries as to how international law can bring about "good government" have been conceptualised and elaborated in relation to the alleged absence of good government in non-European societies.

According to Anghie, the same dynamic has been ongoing throughout history. Good governance, provides the moral and intellectual foundation for the development of a set of doctrines, policies and principles, formulated and implemented by various international actors, to manage, specifically, the Third World state and Third World peoples. Attempts by Western states to promote "good governance" in the Third World—and this involves far-reaching transformations, relating to the promotion of democracy, free markets and the rule of law—are directed at reproducing in the Third World a set of principles and institutions which are seen as having been perfected in the West, and which the non-European world must adopt if it is to make progress and achieve stability.<sup>41</sup>

Specifically, Anghie argues that the encounter between Spanish and Indians in the New World was managed in a sense that the Spanish and the Indians belonged to two different orders and there was a gap between them. There were two essential ways in which sovereignty related to the Indian: in the first place, the Indian was excluded from the sphere of sovereignty; in the second place, it was the Indian who acts as the object against which the powers of sovereignty may be exercised in the most extreme ways. The most characteristic and unique powers of the sovereign, the powers to wage war and acquire title over territory and over alien peoples were defined in their fullest form by their application on the non-sovereign Indian. The Spanish and the Indians are not bound by a universal, overarching system; instead, they belong to two different orders, and Vitoria interprets the gap between them in terms of the juridical problem of jurisdiction. This gap allowed the Spanish to govern the Indians, who are unable to govern themselves, and further their own economic goals.

Despite the merits of Anghie's approach and the contributions of TWAIL scholarship, they fail to capture an adequate picture of domination through law. In Anghie's picture, inequality and disempowerment are assumed to be the highest norm throughout history. However, if every legal doctrine, (such as sovereignty, human rights, good governance), or every theory, policy, ideology, and administrative expertise can be used to disadvantage the Third World or subordinate its interests by the sweeping assumption of a previously established "gap" and the subsequent management of the uncivilized by more advanced sovereigns and international organizations, then there appears to be no need for a more detailed analysis as to how and why hierarchies are reproduced by our daily work. The subordinate peoples will be managed in an unequal way and domination reproduced

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<sup>40</sup> See generally *id.*

<sup>41</sup> See ANGHIE, *supra* note 37 at 245, 249.

by the establishment of the gap and inequality. Although Anghie does show subordination of the Third World in various contexts by usage of various legal doctrines, such as, sovereignty, unequal treaties, or by management by international organizations, the overarching theme of all usages is the gap and exclusion from the legal system, exclusion from full participation in governance. Yet no single overarching mode of legal reasoning or a single theory could identify the multiplicity of formation of hierarchical relationships. Thus, in Anghie's depiction, there are no legal analytics that could be used in contexts where the "gap" cannot be or has not been established, nor can Anghie's analysis be applied to other domains of law than international law - to domains such as private law, antitrust law or state aid law. These latter legal domains are at least as important to economic development and reproduction of material and spiritual values in the world as the work of international financial institutions or domination on the level of sovereign powers. If Anghie suggested a legal analysis that goes beyond particularized historical accounts, it would have to have plausible applicability in every legal domain. Yet, Anghie's theory is plausible only if actual inequality of treatment or exclusion from law has been established on the basis of Third World identity as a matter of fact. This indeed limits Anghie's analytics to particular historical accounts and does not render it operational in an inclusive context of the European Union.

Moreover, the dynamic of difference between the civilized and uncivilized nations can only apply to the relationship and attitudes between nations and peoples. This limits the portrayal of governance and domination to the power inherent in the political and economic management by advanced sovereigns or international institutions. Such an account misrepresents governance. First, it gives a false impression that only the Third World is governed. Instead, as explained below, we are all constituted and we all govern and are governed constantly. Second, by focusing on relationships between nations on the level of sovereignty and international organizations, it does not acknowledge the multiplicity of power relationships.<sup>42</sup> A relationship of hierarchy is a relationship among people. A relationship of domination between nations on the level of sovereign powers is but a simple representation of these relationships. Anghie thus does not construct a subject of the periphery beyond the large binary identity of Third World as opposed to First World nations. Because of reliance on the attitude of orientalism and exclusion from law on the basis of a "gap," because of misrepresentation of power relationships and governance, and due to his inability to construct a proper subject of the periphery, Anghie's portrayal of domination fails to offer a legal analysis which opens up possibilities of resistance to or destabilization of this oppressive legal system.

Furthermore, some of the TWAIL authors,<sup>43</sup> as well as dependency theorists<sup>44</sup> and the world systems perspective,<sup>45</sup> understand capitalism as central to the relationship between the center and periphery.<sup>46</sup> The key criterion for the determination of a state as central or peripheral according to Samir Amin is whether the local bourgeoisie is in control of the process of accumulation. In the periphery, the process of accumulation is mainly shaped by external constraints.<sup>47</sup> According to

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<sup>42</sup> See MICHEL FOUCAULT, *HISTORY OF SEXUALITY* 92–96 (1978). According to Michel Foucault, "There is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case." *Id.*

<sup>43</sup> Chimni argues that the principle contention of TWAIL is that there is an intimate relationship between capitalism, imperialism and international law that accounts for the fact that it has always disadvantaged Third World peoples. See Chimni, *supra* note 38.

<sup>44</sup> See, e.g., FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (1979); AMIN, *supra* note 9; SAMIR AMIN, *DELINKING* (1985)

<sup>45</sup> See IMMANUEL WALLERSTEIN, *THE MODERN WORLD SYSTEM* (1974); IMMANUEL WALLERSTEIN, *THE POLITICS OF THE WORLD-ECONOMY: THE STATES, THE MOVEMENTS AND THE CIVILIZATIONS* (1984).

<sup>46</sup> For a particular critique of the usage concept of capitalism, see ROBERTO MANGABEIRA UNGER, *POLITICS* 46 (1997); ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED* 57–59 (2007).

<sup>47</sup> See AMIN, *DELINKING*, *supra* note 44, at 10–11.

the world-system perspective, under unequal economic terms of exchange, the center extracts the periphery's surplus value when capital and technology intensive goods of the periphery are traded for low capital and low technology intensive products coming from the center. Unequal power relations underlying the inter-state political system secure, perpetuate, and give legitimacy to the exploitative economic exchange.<sup>48</sup>

When domination of the periphery is perceived in terms of capitalist modes of production, alternative social options present themselves in terms such as autarky, delinking, anti-capitalism, equalizing the terms of exchange, or socialism.<sup>49</sup> However, thinking in terms of delinking and autarky, by which societies would regain control of accumulation of capital, is inapposite to the inevitably interconnected world with constant flows of power, capital, and authority. Moreover, the alternative of socialism cannot be a general remedy to hierarchies and domination, including the domination of the periphery by the center. The relationship between the center and periphery could equally be analyzed within the Eastern socialist block during the Cold War. Socialism does not mean an abolition of hierarchies; they are merely different than those in capitalist societies, and not necessarily worthy of emulation.

Moreover, the centrality of capitalism in the relationship between the center and periphery gives an inadequate account of the role of the legal system in the structure of domination and in the reproduction of hierarchies. There is a misunderstanding of the relationship between the political economy in general and the phenomenon of law, which clouds our understanding of society and thus of subordination. "Capitalism," as experienced by people in every moment in time, is a legal construction, not a totality, as for example Georg Lukács would see it. Lukács intended that the "totality," the conception of the subject and object as determinations of a single relation, be understood as *capital*, as the capitalist mode of production that generated and determined all the relations.<sup>50</sup>

When capitalism is understood as an indivisible phenomenon in the sense that all of its parts would stand or fall together,<sup>51</sup> or as a phenomenon external to law as something that law or democracy must challenge, limit, and oppose,<sup>52</sup> the range of possible alternative legal constructions is significantly narrowed. Indeed, when domination is imagined in terms of political economy,<sup>53</sup> resistance can be limited to refuting, stopping, and reversing the unfolding of an economic theory of causation. The danger of such a conceptual understanding of domination is a hegemonic interpretation of what capitalism or another economic theory in any moment in time "is." Rather than destabilizing existing hierarchies, hegemonic interpretations of capitalism risk to perpetuate them.

Our social system is not a predetermined legal construction and it cannot be understood as an emanation of any totality such as capitalism. Rather, there are infinite layers and forms of domination and reproduction of hierarchies that cannot be articulated by the total concept of capitalism, that are as complex, conflicted, and indeterminate as law and life themselves. Hence, a general critique of capitalism offers a limited range of social alternatives to such domination and masks rather than discloses possible paths of resistance.

Furthermore, to adequately describe domination, one must be able to part with

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<sup>48</sup> See THOMAS SHANNON, AN INTRODUCTION TO THE WORLD-SYSTEM PERSPECTIVE (1989).

<sup>49</sup> For calls for delinking, see AMIN, DELINKING, *supra* note 44, at 18–19 (delinking the criteria of rationality of internal economic choices from those governing the world system). For calls for socialism and autarky, see CARDOSO & FALETTO, *supra* note 44.

<sup>50</sup> See GEORG LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS (1922).

<sup>51</sup> For the critique of indivisibility of capitalism, see UNGER, FREE TRADE REIMAGINED, *supra* note 46, at 58–59.

<sup>52</sup> See Wolfgang Streeck, *How to Study Contemporary Capitalism?*, 53 Eur. J. Soc. 1 (2012).

<sup>53</sup> For one such interpretation of domination, see David Kennedy, *supra* note 9.

TWAIL and other center periphery scholarship<sup>54</sup> in order to offer a deeper account of how the center-periphery dynamic is reproduced *within* the capitalist and working classes or any other social groups. Any multifaceted hierarchical relationship cuts across the class divide, by distributing power and sowing antagonisms both within and across classes and other groups which would seem to be homogenous (e.g., consumers, women, or scholars).<sup>55</sup> Any account of the center and periphery must thus be able to place these parties and their interests in an opposing relationship based on their hierarchical positions. This is because in a particular controversy, workers, companies, and other actors from the periphery can have incompatible interests both within their own groups and within similar groups (workers, companies) situated in the center.

Finally, an account of domination must be more than the story of an empire, defined as “relationships of political control imposed by some political societies over the effective sovereignty of other political societies,”<sup>56</sup> or of anyone’s blunt imperialist imposition of their own system or preferences. While the exercise of such power certainly cannot be excluded, an account of domination must do more than speak of powerful countries or other actors exercising overt power on less powerful ones.<sup>57</sup> It must do more than point out that the rules are often written by overt power,<sup>58</sup> or that law could play its role in limiting or resisting power.<sup>59</sup> To adequately account for center-periphery dynamics in legal terms, one must be able to speak of power that is not external to law, but rather internal to it.

*B. Alternative Thinking about Reproduction of Hierarchies—Law as Interplay of Claims of Injury*

How can power struggles be integrated into legal analysis? The analysis of domination is not merely a story of orientalism. The domination is much more banal than overt imperialism<sup>60</sup> or the dynamics of difference.<sup>61</sup> Domination is perpetuated independently of the question of cultural difference, of the overt or intentional construction and deployment of doctrines or of the rhetoric of exclusion from law.<sup>62</sup> There is more to the way we all argue and reason in our daily work. The exploration of our daily reasoning, arguments, and actions promise to give us a better insight into the reproduction of hierarchies in the world today.

The world is ever-changing, the legal system is ever-changing, and lawyers’ interpretations of the legal system are ever-changing. As Heraclitus professed, no man ever steps in the same river twice, for it is not the same river and he’s not the same man. Despite the constant dynamism and transformation of law and of legal work, there is regularity to legal dynamics, to the way legal dilemmas are debated, and to their resolution. The banality of the pattern of reproduction of hierarchical

<sup>54</sup> See, e.g., Chimni, *supra* note 38.

<sup>55</sup> I depart here, at the level of earnest legal analysis, from classical Marxism and David Harvey. See, e.g., DAVID HARVEY, SPACES OF HOPE (2000).

<sup>56</sup> PARTHA CHATTERJEE, THE BLACK HOLE OF EMPIRE: HISTORY OF A GLOBAL PRACTICE OF POWER 337 (2012) (citing Michael Doyle).

<sup>57</sup> See, e.g., Antony Anghie & Bhupinder S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L LAW 96 (2003); Hans W. Micklitz, *Three Questions to the Opponents of the Viking and Laval Judgments*, in OBSERVATOIRE PAPER SERIES, OPINION PAPER 8, 5–6A (2012).

<sup>58</sup> See Anghie & Chimni, *supra* note 57, at 99. See generally CHATTERJEE, *supra* note 56 (discussing power as diplomatic pressure).

<sup>59</sup> See ANGHIE, *supra* note 37, at 318.

<sup>60</sup> See Chimni, *supra* note 38; Micklitz, *supra* note 57.

<sup>61</sup> See ANGHIE, *supra* note 37. For the argument of the formulation of “exception,” see CHATTERJEE, *supra* note 56, at 225.

<sup>62</sup> See ANGHIE, *supra* note 37, at 313, 315 (arguing that some doctrines were created for the specific purpose of excluding the colonial world and that juridical mechanisms created by the colonial encounter continue to be deployed and used in the present and continue to affect the present).

relationships lies in this regularity. It lies in the pattern in which lawyers and others argue and reason about issues. In order to adequately address the pattern of reproduction of hierarchies, we must explore the way we think and act in our daily routine in various settings.

To describe the reproduction of hierarchies, one must grapple with a question of domination in which the legal rhetoric is, as is the norm in contemporary legal thought, one of inclusion,<sup>63</sup> of taking everyone's interests into account,<sup>64</sup> of the interplay and balancing of free movement and social considerations, of participation, representation, pragmatism, interplay of economic theories, critique, and overt politics. Domination is reproduced not by exclusion from law, but rather by the legal system—our daily work and decisions.

How do we understand the legal structure in which we operate daily? The legal system can be understood as constant interplay of altruist and individualist considerations.<sup>65</sup> A very well-known case in European Union labor law displays the paradigmatic interplay of altruist and individualist considerations in contemporary legal thought. The judgment of the European Court of Justice (ECJ) in *Laval*<sup>66</sup> and reactions to it demonstrate the shortfall of such understanding of law. Laval, a Latvian construction company, was hired through Swedish government procurement to perform a public works contract in Sweden. Laval paid its Latvian workers significantly less than Swedish workers typically would receive for similar construction jobs, making the Latvian company more competitive in this respect. A Swedish trade union took industrial action against the Latvian company, because the latter refused to negotiate the wages for its Latvian workers. The Swedish union's blockade effectively forced Laval out of that business. Laval sued the Swedish union in a Swedish court, which asked the ECJ for an interpretation of EU law on the subject of the case.

The ECJ concluded that under the facts before it, the Swedish trade union had violated Laval's free provision of services. Crucially, however, the ECJ also strongly condemned "social dumping," the use of lower labor standards to undercut competition. The ECJ's holding depended on the fact that Sweden had not set a minimum wage by law or by some generally applicable collective agreement. This effectively narrowed the scope of peripheral workers' freedom of movement to a set of specific and exceptional circumstances, which a state like Sweden could change relatively easily by adoption of a new statute.

The judgment represented just a small win for the periphery, but it caused an unprecedented uproar in legal academia, the media, social science, and the general public. The condemnation of social dumping was praised by critics, but they complained that the ECJ was giving preference to economic freedoms to the detriment of workers' social rights. There were numerous claims that the European Union's social model has been undermined.

The judgment was criticized for insufficient sensitivity to workers' and unions' concerns and was met with intense criticism on this account from authors throughout the European Union. Criticisms were levied from several angles. The judgment was criticized for being neoliberal, for destroying the national welfare state, for violating the autonomy of the unions, for violating social rights and rights of workers, and for

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<sup>63</sup> See Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, (Harv. Jean Monnet Working Paper, 10/00 1991), 13.

<sup>64</sup> See Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L INT'L L. & POL'Y POL'Y 717, 730–36 (1995)

<sup>65</sup> See Duncan Kennedy, *supra* note 10.

<sup>66</sup> Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767. For a similar factual situation, see also Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-1989.

being a testament to overpowering capitalism.<sup>67</sup> These included claims of “regulatory disarmament through the exercise of rights.”<sup>68</sup> The judgments were described as “deeply disturbing,”<sup>69</sup> “a step in need of a correction,”<sup>70</sup> “a most unfortunate affair,”<sup>71</sup> and “a step back.” Critics also complained that the ECJ is not tolerating the “divergent” national systems, with one stating that, “The only solution is to refuse to comply with ECJ rulings.”<sup>72</sup> Fritz Scharpf even advocated submitting the judgment to the check of the political consensus.<sup>73</sup>

Scharpf, for his part, has repeatedly argued that European integration has created a constitutional asymmetry between policies promoting market efficiencies and policies promoting social protection and equality.<sup>74</sup> According to Christian Joerges, the asymmetrical interlinking of the freedoms of the European economic constitution with the fundamental rights of national labor constitutions in *Laval* undermines the autonomy of Member States’ labor and social constitutions.<sup>75</sup> The perception is that the central provisions of the EU Treaties insist upon the vital freedoms for an open and competitive market to operate, but lack a vision of distributive justice.<sup>76</sup> The entire legal framework, not just *Laval*, often treats both “social” and “free movement” considerations as general to society as a whole, making it difficult to discuss alternative social arrangements—or alternative modes of structuring free movement—that might have different distributional consequences.

Deployment of the dichotomy between social claims and autonomy claims results in an endless game of proportionality and balancing between conceptualizations of the social and the economic, with endless reinforcement of existing perceptions of one and the other. The current legal consciousness, which follows thinking in terms of giving preference either to the social/altruist, economic/individualist, or political/legal structure, reflects a conceptual understanding of the world. Countless sets of analytical mistakes are based on or reproduce this conceptualism: that free movement/autonomy claims are always neoliberal,<sup>77</sup> that the weakest claims will always be the social ones, that justice comes from the realization of the social claim, that the poor and the marginalized will automatically benefit from them, and that there is a clear choice between helping all the poor and helping all the rich, which aligns with either the social or economic claim in contemporary legal thought.

By conceiving the conflict in *Laval* as one between Swedish unions’ and workers’ right of collective bargaining on the one hand (the universal “social good” pole), and a Latvian company’s right to free movement on the other (the universal “economic freedom” pole), no one in the *Laval* debate noticed that the case could

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<sup>67</sup> Alexander Somek, *From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination*, 18 EUR. L.J. 711, 721 (2012).

<sup>68</sup> See ALEXANDER SOMEK, *ENGINEERING EQUALITY, AN ESSAY ON EUROPEAN ANTI-DISCRIMINATION LAW* (2011).

<sup>69</sup> *Id.*

<sup>70</sup> Christian Joerges & Florian Rödl, *Informal Politics, Formalised Law and the “Social Deficit” of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval*, 15 EUR. L.J. 1 (2009).

<sup>71</sup> Anne C. L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 INDUS. L.J. 126 (2008).

<sup>72</sup> Fritz Scharpf, *Interview: The Only Solution is to Refuse to Comply with ECJ Rulings*, 4 SOC. EUR. J. 16 (2008).

<sup>73</sup> *See id.*

<sup>74</sup> *See* Fritz Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 J. COMMON MARKET STUD. 645 (2002); *see also* Fritz Scharpf, *The Asymmetry of European Integration, or why the EU Cannot be a “Social Market Economy,”* 8 SOC.-ECON. REV. 211 (2009).

<sup>75</sup> *See* Joerges & Rödl, *supra* note 70.

<sup>76</sup> *See, e.g.,* Study Group Soc. Justice in Eur. Private L., *Social Justice in European Contract Law: a Manifesto*, 10 EUR. L.J. 653 (2004); B. Bercusson et al., *A Manifesto for Social Europe*, 3 EUR. L.J. 189 (1997).

<sup>77</sup> For one of more recent contributions sharing this assumption in EU legal scholarship, *see, e.g.,* Somek, *supra* note 67.

just as well have been framed as a conflict between *Latvian workers'* social rights and *Swedish businesses'* interpretation of freedom of movement provisions which would impede the realization of these rights (in order to make it impossible for a Latvian business to compete with Swedish businesses in Sweden).

In international law, the dichotomy between social and economic considerations is portrayed by Philip Allot's argument that the primary function of managing the traditional public realm, which is to exercise social power exclusively for the public interest, has gradually transformed. It has come to be not the service of some common interest of well-being conceived in terms of general values but the maintenance of conditions required for the well-being of the economy including, above all, the legal conditions.<sup>78</sup> Martti Koskenniemi has further argued that there is a structural bias in the relevant legal institutions that makes them serve deeply embedded preferences, and that something we feel that is politically wrong in the world is produced or supported by that bias. A typical demonstration of structural bias would describe extraterritorial jurisdiction in such a manner so as to show that while domestic courts in the West sometimes extend the jurisdiction of domestic antitrust law, they rarely do this with domestic labor or human rights standards, though nothing in the standards themselves mandates such a distinction.<sup>79</sup> Similarly, he argues that though both free trade and social regulatory objectives are written into the WTO treaties, the former are always taken as the starting point while the latter have to struggle for limited realization.<sup>80</sup> In the same vein, David Kennedy has argued that Eastern European countries found themselves in the process of joining the European Union in a free trade regime as opposed to the European Union's internal market public regime and based his proposals on this presupposition.<sup>81</sup> These distinctions are incorrect.

Even after the demise of conceptualism of classical legal thought<sup>82</sup> and social conceptualism,<sup>83</sup> conceptual thinking, as the *Laval* case suggests, still often forms the legal profession's basis of reasoning today. Instead of thinking in terms of a dichotomy of social/altruist/protectionist and autonomy/individualist/laissez-faire claims, considerations, doctrines, and theories; and instead of a reconstruction of every conflict as a larger conflict of opposing worldviews of left and right,<sup>84</sup> what is a social claim and what is an economic (or "free movement" or "autonomy") claim is a matter of perspective. It is not that one incorporates the other, that there is a social claim within the economic and vice versa. One claim can be interpreted as the other when viewed from a different perspective, and when one takes away all the symbolic meaning from the framing of a particular claim. When the symbolic meaning of the social claim (as an emanation of either the welfare state or altruism) or the autonomy claim (as an emanation of either the market or individualism) is taken away, these claims are reduced to mere *claims and counterclaims of injury*. One's autonomy claim can be understood as social and one's social claim as an autonomy claim.

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<sup>78</sup> See PHILLIP ALLOT, HEALTH OF NATIONS: THE SOCIETY AND LAW BEYOND THE STATE 311–12 (2002).

<sup>79</sup> See MARTTI KOSKENNIEMI, *supra* note 11, at 607–08 (citing Robert Malley et al., *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest and Transnational Norms*, 103 HARV. L. REV. 1273 (1990)).

<sup>80</sup> *See id.* at 607.

<sup>81</sup> *See* DAVID KENNEDY, *supra* note 32, at 169–97.

<sup>82</sup> For the critique of conceptualism of classical legal thought, see FRANÇOIS GÉNY, *METHODS OF INTERPRETATION AND SOURCES IN PRIVATE LAW* (2d ed. 1963).

<sup>83</sup> For the critique of social conceptualism, see Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form*, 100 COLUM. L. REV. 94 (2000); Karl Klare, *The Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978); Karl Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930).

<sup>84</sup> *See* Duncan Kennedy, *supra* note 10; *see also* DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]* (1997).

What first appears as a free movement claim can become a social claim, and what first appears as a social claim can become a free movement claim depending on the angle from which we view the dilemma. The debate in *Laval* was framed as a conflict between Swedish unions' and workers' right of collective bargaining on the one hand, and a Latvian company's right to free movement on the other. However the *Laval* debate could just as well have been framed as a conflict between Latvian workers' social rights and the Swedish interpretation of the freedom of movement provisions, which impedes the realization of these rights. When the symbolic meaning of each claim and allocation is bracketed and when we see that each claim can be interpreted as its opposite, the claims and their final allocations are but a particular legal entitlement.

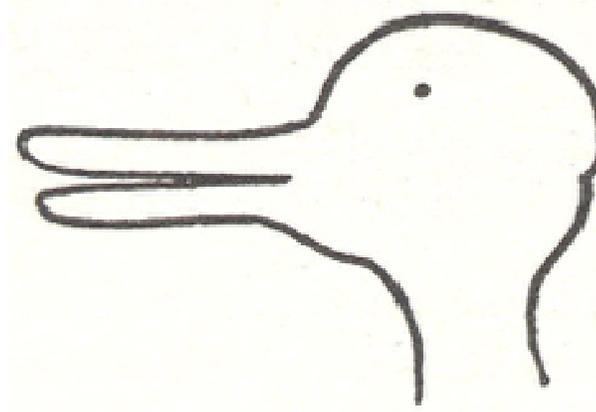


Fig. 1: The Wittgenstein duck-rabbit picture

What appears as a claim of economic freedom in the dominant EU legal discourse<sup>85</sup> could just as well be a social right claim of Latvian workers struggling to improve their livelihood—or, to place it in the register of the EU Charter of Human Rights, their “right to dignity and just working conditions.” What from one perspective looks like a protection against harm looks like a claim for autonomy from another.<sup>86</sup> In fact, like Wittgenstein’s duck-rabbit picture (Fig. 1), what appears as an economic claim is a social claim and what appears social is economic, depending on the angle from which we see the dilemma. In other words, social, altruistic claims are nothing other than economic and individualist. The lowest common denominator of law is injury or a claim of injury, not interplay between individualist and altruist claims or iterations of the larger conflict between altruism and individualism.

### III. HIERARCHICAL STRUCTURE OF SOCIETY

Society is structured by hierarchies and by a constant hierarchical struggle. Hierarchies are ineradicable. They can only be managed and restructured, not obliterated. Hierarchical relationships constitute us as subjects and hierarchies are constituted by injuries – decisions that we take in each moment. The notion of harm

<sup>85</sup> This framing of economic and social considerations was made by the parties in the proceedings, by the European Court of Justice, by the European Commission, and by the intervening Member States. See Kukovec, *supra* note 17.

<sup>86</sup> For the distinction between altruism and individualism, see Duncan Kennedy, *supra* note 10.

or injury has been central to the understanding of law. Modern jurists recognized that much of the legal system consisted of rules that allowed people to harm others.<sup>87</sup> However, contemporary legal thought misses that hierarchy and injury are constant and ubiquitous throughout the social system.

Scholarship addressing hierarchies has been mostly based on identity and, particularly, on the identity based on gender and race. According to Andrea Dworkin, subordination is a broad, deep, systematic dynamic, discernible in any persecution based on race or sex. There is hierarchy: a group on top and a group on the bottom. For women, this hierarchy is experienced both socially and sexually, publicly and privately. Women are physically integrated into the society in which they are held to be inferior, and their low status is both put in place and maintained by the sexual usage of women by men. Thus, women's experience of hierarchy is incredibly intimate and wounding.<sup>88</sup>

According to Catherine Mackinnon, hierarchical relationship is imposed by the dominant group. She points out that the evil of segregation between men and women is not one of mere differentiation but of hierarchy; not a categorization as such but an imposed inferiority; not an isolated event but an integral feature of a cumulative, historical, interlocking social and legal system. It is a segregation forced on them by a dominant group. Not an abstract distinction made on the basis of race, but an officially imposed ordering of one race, white, over another, people of African descent.<sup>89</sup> She further argues that while a hierarchy of people over animals is conceded, and a social hierarchy of men over women is often denied, the fact that the inequality is imposed by the dominant group tends to be denied in both cases.<sup>90</sup> It is true that existing hierarchies are a result of power struggle and thus, imposed. However, hierarchical relationships cannot be seen only as imposed by one group over another, but are rather ontological. Hierarchies and hierarchical struggle are a state of our being. Our daily struggle, within ourselves and between ourselves, is not based on sexual identity or any other form of identity alone. It is ineradicable.

To Sartre, oppression is a historical reality that should be contested, through both self-assertion and collective action. This is because in pure reflection not only does one accept freedom, but one accepts their "being-object," as an inevitable part of their human condition. Sartre argues that we can become aware of ourselves only when confronted with the gaze of another. Not until we are aware of being watched do we become aware of our own presence. However, the gaze of the other is objectifying. We perceive ourselves being perceived and come to objectify ourselves in the same way we are being objectified. The gaze of the other robs us of our inherent freedom and causes us to deny being-for-itself and instead learn to falsely self-identify as a being-in-itself.<sup>91</sup>

According to Sartre, although objectification of oneself, actions, and products by the other is an inevitable part of the human condition, it is not absolutely necessary that one takes the other as ontologically primary and thereby become alienated and oppressed.<sup>92</sup> The ontological condition of objectification is not in and of itself oppression, Sartre insists, for oppression is basically a human decision.<sup>93</sup> Nor is it necessary or inevitable that one person or others chooses to inflict the degrading

<sup>87</sup> See Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 984–85 (1982).

<sup>88</sup> See ANDREA DWORKIN, LETTERS FROM THE WAR ZONE 266 (1989).

<sup>89</sup> See CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 92 (2007).

<sup>90</sup> See *id.* at 77. "The hierarchy of people over animals is not seen as imposed by humans, because it is seen as due to animals' innate inferiority by nature. In the case of men over women, either it is said that there is no inequality there, because the sexes are different, or the inequality is conceded but is said to be justified by the sex difference, that is, women's innate inferiority by nature."

<sup>91</sup> See JEAN-PAUL SARTRE, BEING AND NOTHINGNESS (1943).

<sup>92</sup> See JEAN-PAUL SARTRE, CAHIERS POUR UNE MORALE [NOTEBOOKS FOR AN ETHICS] 338, 341, 380, 398, 484 (1983). Oppression is the result of the human choice. See *id.* at 13, 353, 395–96.

<sup>93</sup> *Id.*

kinds of reification involved in the more obvious types of oppression just mentioned. Though one can never avoid being objectified by others, the authentic individual, Sartre says, totally escapes the category of oppression by non-accomplice reflection.<sup>94</sup> In this sense, Sartre does not see oppression as ontological but sees a possibility of human freedom outside of injury, a flawed position shared by contemporary legal thinking. Though oppression is basically a human decision, there is no escape from it, as we take a decision entailing injury in every moment in time. The hierarchical structure constitutes us as subjects in any moment in time.

#### *A. Hierarchical Formation of a Subject*

According to Michel Foucault, we are constituted subjects. There is no sovereign, founding subject, a universal form of subject to be found everywhere. On the contrary, he believed, the subject is constituted through practices of subjection, or, in a more autonomous way, through practices of liberation, of liberty, as in Antiquity, on the basis, of a number of rules, styles, and inventions to be found in the cultural environment.<sup>95</sup> According to Gilles Deleuze, a subject is neither pre-existent nor stable, but always in the process of becoming-other.<sup>96</sup>

We are simultaneously constituted as subjects and constitute others as subjects by a fluid interplay of the injuries and recognitions of others. A self-consciousness exists for a self-consciousness.<sup>97</sup> Each of us is independent and dependent on others at the same time, as we mutually constitute each other. According to Hegel, self-consciousness exists only in being acknowledged. He writes, “what the master does to the other he also does to himself, and what the slave does to himself he should also do to the other.”<sup>98</sup> Their actions have a double significance not only because they are directed inward as well as against the other, but also because they are indivisibly the action of one as well as the other.<sup>99</sup> Every decision we make is an act of domination or submission within this dialectics. Every decision we make is an act of servitude and act of lordship, an act of injury and of recognition at the same time. We affect one another by injuries and recognitions in a constantly evolving, fluid, and mutually injurious master-slave relationship.

Injury should be understood in two senses. First, in the master-slave relationship, we injure the other by consumption, negation, or incorporation. We also keep injuring ourselves by an unfulfilled desire to fully incorporate the other, as when this fully happens, the other dies and we remain free only indifferently, “like things.” Second, we injure ourselves and the other at any moment, as the relationship with the other could always have been structured differently. In other words, in our daily struggle, we could always take different decisions with different consequences, there is always an alternative to our actions and to the way we constitute ourselves and others.

Injury is not only economic, but also political and spiritual at the same time. The difference between material and spiritual values is constantly transcended, whereby objects are mere media of subordination. We are always and constantly constituted by decisions of others. This is why the man is not “wholly free in the world, with a blank canvas on which to create its being.”<sup>100</sup> We are not free, but are determined by others, by the structure of decisions of others that keep placing us in a particular hierarchical situation and by the ideology that reproduces it.

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<sup>94</sup> See *id.* at 16, 394, 502.

<sup>95</sup> See Michel Foucault, *An Aesthetics of Existence*, in *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS, 1977–1984* 50 (L. Kritzman ed. 1988).

<sup>96</sup> GILLES DELEUZE & FÉLIX GUATTARI, *WHAT IS PHILOSOPHY?* 112 (1994).

<sup>97</sup> GEORG WILHELM FRIEDRICH HEGEL, *PHENOMENOLOGY OF SPIRIT* 110 (1807).

<sup>98</sup> *Id.* at 116.

<sup>99</sup> See *id.* at 112.

<sup>100</sup> SARTRE, *supra* note 91.

*B. The Constancy of Decisions and the Inevitability of Injury*

Our decision-making and the struggle as described by Hegel is, in this interpretation, constant. We make a decision in every moment. Every heartbeat is a decision that forms the hierarchical relationship. According to Sartre, man makes himself by acting in the world. Instead of simply being, as the object-in-itself does, man must *actuate* his own being. Being-for-itself is aware of its own consciousness but is also incomplete. For Sartre, this undefined, undetermined nature is what defines man. Since the being-for-itself lacks a predetermined essence, it is forced to create itself from nothingness.<sup>101</sup> Indeed, we actuate ourselves through constant decisions. We actuate our being and decide constantly, form social bonds, and constitute ourselves and others. Just as our decisions are constant, so is the injury that we impose on ourselves and others in the master-slave dialectics. In other words, decisions and injuries are not exceptional, but are made and imposed at every moment.

Yet, while the element of injury is acknowledged in legal thought today,<sup>102</sup> it is not acknowledged as constant and ineradicable. Harm and coercion usually imply the deliberate interference of other human beings within the area in which one could otherwise act. For example, in the understanding of Isaiah Berlin, one lacks political liberty or freedom only if prevented from attaining a goal by other human beings.<sup>103</sup> For Berlin and those who follow him, then, the heart of liberty is the absence of coercion by others. Consequently, the liberal state's commitment to protecting liberty is, essentially, the job of ensuring that citizens do not coerce each other without compelling justification. Yet, injury and coercion are not necessarily intentional. They are rather, like power, a part of our daily hierarchical struggle. Freedom is inevitably entangled in injury.

Hierarchical relationships do not just tear society apart: they form it at the same time. Social cohesion is attained by constant injuries and recognitions, by our inevitable dependence on others. Hierarchical relationships bind people together. Decisions of others who act in their daily existential struggle is what constitutes the structure and us as subjects. In this picture, everything we own and do connects us with other people. Each person is a node of injuries and recognitions. Social bonds create us as subjects and in this sense are not something that needs to be created or upheld. Hierarchies of recognition and injury, of lordship and bondage, are constantly present.

Every decision we make is an act of domination. But articulation of injury is a crucial part of legal work. Legal articulation requires work that transforms the absence into presence. It transforms an injury into a legal claim by articulating it within our understanding of legality, one which is generally concerned with the present, not with the absent. To explain this absence, consider the work of Ronald Coase. Coase assumes the exceptionality of injury, for example, in arguing that in *all cases of harmful effects* we need to take into account the welfare and conduct of all affected parties.<sup>104</sup> He gives an example of a claim in which a cost is to be imposed either on a farmer or on the rail company who would like to run trains over the field. Coase's argument is that we should always understand harm as relational. Both parties cause the damage, it is never one party who is solely responsible for harm suffered by another and he seeks a socially optimal solution to the dilemma. Coase

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<sup>101</sup> See *id.*

<sup>102</sup> See, e.g., Hale, *supra* note 23, at 471 (noting, while challenging the public-private distinction, that there is no choice between coercion and non-coercion; the choice is always between coercions). "What is the government doing when it "protects a property right"? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents."

<sup>103</sup> See ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 112 (1969).

<sup>104</sup> See Coase, *supra* note 26, at 18.

does not, however, recognize that the owner of the field imposes injury on others until someone desires to run a train over it. Only then the injury becomes present and this is when an injury becomes a legal claim. Considering the countless exclusions of others and the possibilities of ownership of this land, once we account for the absence, the injury was there all along. In this sense, our inaction is constant action. The injury was there even if no one had articulated the desire to run a train over the land. The owner's decision to own land and exclude others from it was there all along. The articulation of a desire to run a train only now made the pre-existing injuries visible, transformed it into an individual injury and finally into the claim we call legal. Other actors were constituted by the decisions of the owner of this land before the desire to run a train over it arose. Or, to give another example, a migrant risking his life crossing the Mediterranean to enter the European Union<sup>105</sup> was a constituted actor of injuries and recognitions by all of us before he articulated them in a claim for a humanitarian residence permit in the European Union. An individual demand based on injuries is thus only transformed into a legal claim.<sup>106</sup> Only select injuries, however, are articulated in terms of legal claims, whereas countless are not.

### C. Social Understanding of Injury

How is harm understood in the EU legal consciousness, and what doctrines are built on the basis of this understanding? The analysis suggests a specific, selective understanding of harm by EU law. Some harms or injuries are illegal and unacceptable while others are invisible or acceptable. In the EU legal discourse, the invasiveness of the extremely dominant economic activity of the center is not perceived as harmful and is not actionable. We, EU lawyers, tend to think about harm in a very specific way—in terms of the harm to actors in a hierarchically privileged structural position—of the center of the European Union.

In the EU context, we see the privileged mindset at work in the context of dumping. The center's social claim—the claim against social dumping<sup>107</sup>—is honored, and this weakens the periphery actor's free movement claim. Whereas social dumping presents a problem,<sup>108</sup> goods dumping within the Union has never been a part of the EU legal vernacular. Given the availability of the existing doctrines, instances of abuse and structural harm to the periphery are difficult to contest. Thus, arguing against such injuries can easily be perceived as absurd and unreasonable.<sup>109</sup>

As a further example of selective understanding of harm, in the *Laval* debate the “bad capitalism” card was raised repeatedly. Migrant workers were deemed to be

<sup>105</sup> For a detailed assessment of the cross-Mediterranean migration into the EU, see PHILIPPE DE BRUYCKER ET AL., *MIGRANTS SMUGGLED BY SEA TO THE EU: FACTS, LAWS AND POLICY OPTIONS* (MPC RESEARCH REPORT 2013), available at <http://www.migrationpolicycentre.eu/docs/MPC-RR-2013-009.pdf>.

<sup>106</sup> See ERNESTO LACLAU, *ON POPULIST REASON* 72–75 (2005). Ernesto Laclau calls the smallest unit “social demand”, a request in a transition to a claim that is a defining feature of populism. Think of a large mass of agrarian migrants who settle in the shantytowns on the outskirts of a developing industrial city. Problems of housing arise and the group of people affected by them requests some kind of solution from the local authorities. Here we have a demand which initially is perhaps only a request. If the demand is satisfied, that is the end of matter; but if it is not, people can start to perceive that their neighbors have other, equally unsatisfied demands—problems with water, health schooling and so on. The requests are turning into claims.

<sup>107</sup> See, e.g., Catherine Barnard, *Regulating Competitive Federalism in the European Union? The Case of EU Social Policy*, in *SOCIAL LAW AND POLICY IN AN EVOLVING EUROPEAN UNION* 49, 63–64 (J. Shaw ed., 2000); Catherine Barnard, *Social Dumping or Dumping Socialism? Case Note on Laval and Ruffert*, *CAMBRIDGE L.J.* 262 (2008).

<sup>108</sup> See Barnard, *Regulating Federalism*, *id.*; Barnard, *Social Dumping*, *id.*

<sup>109</sup> For the argument of unreasonableness of the argument for the actors of the periphery in the *Laval* case, see Somek, *supra* note 67.

a testament to the overpowering nature of “capitalism.”<sup>110</sup> While anti-capitalist thinking and argumentation generally aspire to be transformative, when deployed in legal argument, as in the response to *Laval* judgment, it risks contributing to the status quo of the existing distribution of material and spiritual values.<sup>111</sup> Capitalism, just like the world economy, does not exist independently of legal relations. One solution in the *Laval* case is not more “capitalist” than another. As such, capitalism is not something that can be located in these choices and “tamed.”<sup>112</sup> All possible solutions in the case are capitalist. In this sense, there is nothing outside of capitalism. The solutions are just different and lead to a different constellation of entitlements and distributional consequences within the capitalist structure of society.

Yet, the critique of capitalism is raised only with regard to the dynamics which appear to favor the periphery. Other migrations from the center to periphery—such as goods dumping but also including migrations of high-end services and of people in structurally superior positions—pass by us unacknowledged. They are perceived as necessary, natural, and part of the normal state of affairs. Only free movement considerations that actually or purportedly harm the center pose a concern and are conceptualized as “conflicts in need of a solution.”<sup>113</sup> Those harming the periphery are not on the profession’s radar.

The *Viking*<sup>114</sup> case before the ECJ received as much attention and publicity as *Laval*. The reactions to this judgment equally portray a limited understanding of harm to actors of the periphery. Viking is a ferry operator, operating a ferry between Helsinki and Tallinn. The ferry was registered in Finland with a predominantly Finnish crew working under Finnish labor standards. The ferry was not making sufficient profit, so Viking decided to reflag the ferry in Estonia and replace the Finnish crew with an Estonian crew working under Estonian labor law, which would be far less expensive. Both the Finnish and Estonian seafarers’ unions were members of an international union, which fought against the “flag of convenience” policy and attempted to defend seafarers against low wage strategies. The international union advised its members not to enter into collective negotiations with Viking, and the Estonian union complied. This effectively prevented Viking from reflagging its ship in Estonia.

The debate in *Viking* was framed in the sense of a general conflict between workers and universalized social considerations on the one hand, and companies and universalized economic interests on the other hand. But an interpretation that the periphery workers’ interests aligned with the center businesses’ interests, while the periphery businesses’ interests aligned with the center’s workers interests, is equally if not more plausible. In this interpretation, the interests of workers of the periphery aligned with those of Viking, the company of the center, as those workers gained employment. And the companies of the periphery’s interest aligned with the interests of the particular workers of the center in view of not allowing Viking to relocate to Estonia, a country of the periphery. Companies of the periphery would face, as a result of relocation, stiffer competition from Viking taking advantage of lower labor costs, which could drive them out of the market or at least reduce their profits. However, the general discussion was about workers’ right to strike versus the businesses’ right to relocation. Both of these considerations were considerations of the center. The interests of periphery’s workers and periphery’s businesses were entirely in the background, even in the overtly political discourse of left and right.

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<sup>110</sup> *Id.* at 711.

<sup>111</sup> See generally WEBER, *supra* note 16.

<sup>112</sup> See CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* (1987).

<sup>113</sup> See Joerges & Rödl, *supra* note 70.

<sup>114</sup> Case C-438/05, *Int’l Transp. Workers Fed’n, Fin. Seaman’s Union v. Viking Line*, 2007 E.C.R. I-10779.

Indeed, there is a pattern to the injuries challenged in the European Union. A similar situation to *Laval*, though in the process of an adoption of a Directive, was at play in the case of the adoption of Services Directive. Again, as in the debate over the *Laval* and *Viking* judgments, “social Europe” was interpreted from a particular structural perspective – from the perspective of the center. The controversies over the Services Directive were based on the fear of the flood of the ‘Polish plumber’ (i.e., social dumping) in Western Europe.<sup>115</sup> In the end, despite additional possible economic gains, a Directive that could allegedly benefit the peripheral “Polish plumber” was not adopted in its original form.<sup>116</sup> Indeed, as in the debate over the *Laval* and *Viking* judgments, “social Europe” was interpreted from the structural perspective of the center. Despite the fact that economic analysis shows a benefit from the Directive,<sup>117</sup> both to the periphery and to the Union as a whole, specifically if the country of origin principle is included, the adoption of the Services Directive was tainted by significant delays and dilutions, because of the perceived injuries to the center.

As a further example of the EU’s predominant understanding of injury, lawyers have taken note of the ECJ’s case law regarding freedom of establishment in *Centros*, *Überseering*, and *Inspire Art*<sup>118</sup> judgments in which the Court overturned the company seat doctrine. These holdings imply that entrepreneurs have the freedom to choose whichever legal form among the EU Member states they deem appropriate when founding a company. In effect, critics argue, the ECJ has transformed German supervisory board codetermination, generally perceived as a key element of Germany’s Soziale Marktwirtschaft (Social market economy), from an obligatory to a voluntary institution.<sup>119</sup> The faith of the institution of the German legal system, interpreted as universally social, is thus foregrounded as one of the most significant problems of EU workers, specifically suppressing concerns of workers in other legal systems and in general discounting other concerns of workers in the Union. While concerns like these may be entirely legitimate, a translation of a select set of problems that touch actors in a structural position of the center into the social question of the European Union further confirms a select outlook in terms of the center-periphery relationship.

In the debate surrounding the *Laval* judgment, numerous lawyers complained about the lack of appreciation of social considerations at a supranational level. However, such considerations become a problem in a scenario where welfare benefits could aid actors of the periphery—cases of access to the social safety nets, including to health care, by nationals of other member states. In the *Grzelczyk* judgment, the ECJ emphasized that the requirement for members of one state to extend financial solidarity to those of other member states grows out of community law, as long as this requirement does not unduly burden the finances of the host country.<sup>120</sup> With this expansion of social rights, the Court allegedly struck down the previous norm, which linked the right to residency to a denial of any claims to social benefits during the duration of residency, and which required comprehensive health

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<sup>115</sup> See, e.g., Stephen Castle, *Thousands Protest Ahead of Polish Plumber*, INDEPENDENT (UK) (Feb. 15, 2006), available at <http://www.independent.co.uk/news/world/europe/thousands-protest-ahead-of-polish-plumber-vote-466645.html>.

<sup>116</sup> See, e.g., Catherine Barnard, *Unravelling the Services Directive*, 45 COMMON MARKET L. REV. 323 (2008).

<sup>117</sup> See Bianka Dettmer, *The European Union’s Service Directive: Contrasting Ex Ante Estimates with Empirical Evidence*, 19 JENA ECON. RES. PAPERS 28, 29 (2012).

<sup>118</sup> Case C-167/01 *Kamer van Koophandel v. Inspire Art Ltd*, 2003 E.C.R. I-10155; Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919; Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1495.

<sup>119</sup> See R. Martin Höpner & Armin Schäfer, *Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration* 18 (MPIfG Discussion Paper 2010).

<sup>120</sup> See Case C-184/99, *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193.

insurance. As a result of new jurisprudence, EU citizens have the right, in principle, to claim social benefits in EU countries other than their original homeland, despite the fact that they may not have made financial contributions to the respective social security system.

In this setting, unlike *Laval* and *Viking* where demise of the welfare state was lamented, some have observed the welfare state “comes at a price.”<sup>121</sup> Not surprisingly, it seems that the price might be paid by the Union’s center. Höpner and Schäfer argue that from a migrant worker’s point of view, this line of ECJ case law increases the availability of social benefits.<sup>122</sup> In this sense, it undeniably has social content. They argue, however, that social rights are only one side of the welfare state coin; the other, equally important side is social duties.<sup>123</sup> As Caporaso and Tarrow also note, the Court “weakens the link between national payment and national consumption.”<sup>124</sup>

Höpner and Schäfer conclude that what appears to be the nucleus of supranational social policy might be the recipe for less social protection and redistribution at national level. They conclude, therefore, that granting individual, transnational access to social security and healthcare systems must not be confused with either the establishment of social policies at the European level or their protection at the national level.<sup>125</sup> To Höpner and Schäfer, the possibility that this line of ECJ case law will trigger welfare state retrenchment is at least as plausible as a perspective that interprets it as the nucleus of an emerging European welfare state.<sup>126</sup> Their concern takes root in immigration from the Eastern periphery and in the economic heterogeneity of the Union.<sup>127</sup> In their narrative, the unsolved problem is not economic heterogeneity. Rather, economic heterogeneity and enlargement of the European Union to the Eastern periphery prevents markets from becoming embedded and fuels political conflict.<sup>128</sup>

While other reactions to the *Grzelczyk* judgment were more favorable to the Court’s line of argument,<sup>129</sup> none addressed the structural subordination of actors of the periphery. Nor did they counter the voices of the center, in whose eyes judgments aiding migrants or judgments such as *Laval* could lead to political crisis, Euro-skepticism, nationalism, and extreme right-wing parties.<sup>130</sup> In the latter narrative, political cataclysm and radicalism that result from the neglected concerns of the center threaten to tear the integration apart.<sup>131</sup> On the other hand, hierarchies that

<sup>121</sup> Höpner & Schäfer, *supra* note 119, at 23.

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See* James A. Caporaso & Sidney Tarrow, *Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets*, 63 INT’L ORG. 593, 609 (2009).

<sup>125</sup> *See* Höpner & Schäfer, *supra* note 119, at 23.

<sup>126</sup> *See id.*

<sup>127</sup> They provide Eurostat figures to support these worries. “Immigration in the EU is rising steadily. In 2006, 3,5 million people settled in a new country of residence in the EU-27. 1,7 million of these were EU citizens. In a single year, more than 300000 EU citizens moved to Germany and Spain, more than 100000 to Italy and the UK. Roughly 300000 Poles and more than 200000 Romanians left their country in 2006.” Höpner & Schäfer, *supra* note 119, at 23.

<sup>128</sup> *See generally id.*

<sup>129</sup> *See* Tina Oršolić Dalessio, *The Social Dimension Of EU Citizenship - A Castle In The Air Or Construction Gone Wrong?*, 14 GER. L.J. 869 (2013); ; Hadas Alexandra Jacobi, *A Fürstin By Any Other Name? European Citizenship And The Limits Of Individual Rights In The E.C.J.*, 17 COLUM. J. EUR. L. 643 (2011); Paul O’Neill & Susan R. Sandler, *The EU Citizenship Acquis and the Court of Justice*, 7 RICH. J. GLOBAL L. & BUS. 205 (2008); Francesca Strumia, *Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity*, 12 COLUM. J. EUR. L. 713 (2006); A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis Of American Constitutional Law And European Community Law*, 19 ARIZ. J. INT’L & COMP. L. 803 (2002); Anastasia Iliopoulou & Helen Toner, *Case C-184/99*, 39 COMMON MKT. L. REV. 609 (2002); A.P. van der Mei, *Freedom of Movement and Financial Aid for Students: Some Reflections on Grzelczyk and Fahmi Esmoris-Cerdeiro Pinedo Amoris*, 3 EUR. J. SOC. SEC. 181, 191 (2001).

<sup>130</sup> *See* Höpner & Schäfer, *supra* note 119, at 26.

<sup>131</sup> *Id.*, at 7.

perpetuate the subordination of the European periphery are not addressed. No doctrines articulating resistance to the existing social understanding of injury are constructed. Decisions that perpetuate the subordination of the European periphery are not consciously destabilized.

#### IV. HIERARCHY, LAW, AND INJURY

##### *A. Law as Background to Bargaining*

Law and center-periphery relationship are structured by hierarchies, that are themselves formed by constant injuries and recognitions. Hierarchical legal entitlements structure the relationship between the center and periphery, and they should be reallocated.<sup>132</sup> The role of legal entitlements is vital in order to argue for social change as a scholar from the periphery. First, the conceptual interplay between social and autonomy considerations underlies contemporary legal thought, but a discussion of legal entitlements can avoid it. Second, Joseph Weiler presented the transformation of Europe and the European Union as a transformed set of Hohfeldian legal entitlements—of powers, liabilities, immunities, and disabilities.<sup>133</sup> A focus on legal entitlements diverts the discussion from institutional entitlements in the form of competence or new roles, such as “finding new institutional channels”<sup>134</sup> and “new levers to contest faraway decisions.”<sup>135</sup>

David Kennedy appears to agree that the relationship between the center and periphery is structured by legal entitlements. He also argues that legal entitlements are the glue of the global political economy and of its subsystems.<sup>136</sup> But his understanding of legal entitlements follows an understanding in terms of inequality of bargaining power,<sup>137</sup> i.e., in terms of Robert Hale’s and Duncan Kennedy’s analysis of the role of law in the distribution of income between social groups.<sup>138</sup> This portrayal of legal entitlements, as well as the bargaining and causal description of the center-periphery relationship,<sup>139</sup> is a misrepresentation that obscures law’s role in subordination and misrepresents the relationship between law, economic theory, and political economy.

The relationship between center and periphery as structured by legal entitlements in this portrayal does not rely on Hale’s and Duncan Kennedy’s analysis, but rather begins with Hohfeld. Hohfeld did not discuss “legal entitlements”; this is the language of his interpreters.<sup>140</sup> He argued for a reconceptualization of private law rules as products of an interplay between “justice

<sup>132</sup> See Damjan Kukovec, *supra* note 17; Adam McCann, *The CJEU on Trial: Economic Mobility and Social Justice*, 5 EUR. REV. PRIVATE L. 729 (2014).

<sup>133</sup> I am following Duncan Kennedy’s interpretation of the Transformations of Europe according to which Joseph Weiler deploys Hohfeldian entitlements in the transformation of institutional powers and immunities in the transformation of Europe. Duncan Kennedy, Professor of Law, Harvard Law School, Course Lecture in Comparative Law: Contemporary Legal Thought (Apr. 2009).

<sup>134</sup> David Kennedy, *supra* note 9, at 47.

<sup>135</sup> *Id.*

<sup>136</sup> See *id.* at 25, 31 (“In each of these cases, the villain is not the centre—it is the glue of entitlement that sets up an asymmetric and disempowering dynamic . . . . International lawyers could contribute by situating international law in the larger global political and economic system, interpreting its role as the glue linking leading and lagging ideas, regions or economic sectors . . . . Legal rules and institutions are sinews of connection and distribution among subsystems.”).

<sup>137</sup> See generally *id.*

<sup>138</sup> See Hale, *supra* note 23; Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). The analysis in terms of groups, such as race, women, etc. is also Duncan Kennedy’s approach to this problem: “The power of men as a group and the power of women as a group are constituted through the legal system.” Duncan Kennedy, *supra* note 8, at 344.

<sup>139</sup> See David Kennedy, *supra* note 9.

<sup>140</sup> See, e.g., Singer, *supra* note 87, at 975.

and policy,” rather than as conceptual derivations.<sup>141</sup> Hohfeldian analysis led to a decomposition of the notion of property and contract into bundles of rights, privileges, power, and immunities—together, legal entitlements—without a common conceptual core.<sup>142</sup> The focus of such analysis is not abstract concepts, such as property, contract, restitution, money, or sovereignty, but rather any legal doctrine as a set of freedoms and prohibitions, as juridical composites that enable us to imagine their reshuffling.

This focus is a staple of realist and post-realist analysis in contemporary legal thought, but is nonetheless deficient. Legal doctrines can be reimagined as a bundle of freedoms and prohibitions, but such analysis of the legal system is inapposite to explaining hierarchies and domination. Instead, every person represents a set of freedoms and prohibitions or of injuries and recognitions in every moment in time. Each of us is a constantly fluid bundle of injuries and recognitions that set us into a particular situation in the global hierarchical structure.

In the bargaining model, the law endows some people with rights that are more advantageous than those of others. It is with these unequal rights that people bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining<sup>143</sup> and establish relative positions. Legal entitlements constructing the center-periphery relationship should not be seen as abstract bargaining tools, as abstract endowments that are given to people to perform some other activity, such as bargaining or economic activity. Legal entitlements are not the same as those which are allocated to people by legal rules which lend context to their future bargaining.<sup>144</sup>

Law and legal entitlements do not merely underlie bargaining, effects, economics, or political economy,<sup>145</sup> but are constant occurrences, inseparable from daily life. Law is a phenomenon of and inquiry into our existence. Thus, every account of law needs to be considered in terms of our daily existential struggle. We are constituted by injuries and recognitions, by our own and others’ decisions. People’s actions and inactions bind us together. The struggle for life establishes a close association among the combatants themselves.<sup>146</sup> But it is not just the struggle among ourselves that connects us, but also a struggle within ourselves.<sup>147</sup> Moreover, in the synthesized memory of each of us that is shared or contested by others, it also binds us with our predecessors and with our posterity. Law in this vision is not just a context or a background,<sup>148</sup> but the entire set of injuries and recognitions that constitutes each person in every moment. Nor is law a legal-realist “law in action,” what courts or other institutions do in fact,<sup>149</sup> or a person’s calculation of what they can get and get away with in their relationships with other people.<sup>150</sup> Legal entitlements are our daily injuries and recognitions. There is no *role* of law in the micro-processes of global political and economic struggle.<sup>151</sup> Law is a micro-process of global political and economic struggle. The power of every person is a particular bundle of injuries, allocated to them by their own and other people’s action or inaction and liberated and constrained by our natural selves and our environment.

<sup>141</sup> See Duncan Kennedy, *supra* note 29, at 205.

<sup>142</sup> See *id.*; Singer, *supra* note 87, at 975.

<sup>143</sup> See Hale, *supra* note 23, at 481; Duncan Kennedy, *supra* note 8, at 339.

<sup>144</sup> See Duncan Kennedy, *supra* note 8, at 327.

<sup>145</sup> For such imagery, see David Kennedy, *supra* note 9.

<sup>146</sup> See MIGUEL DE UNAMUNO Y JUGO, *THE TRAGIC SENSE OF LIFE* 111 (1913).

<sup>147</sup> For the argument that we are divided within ourselves between radically different aspirations for our common future, see Duncan Kennedy, *supra* note 10, at 1685.

<sup>148</sup> See Duncan Kennedy, *supra* note 8, at 327.

<sup>149</sup> See Holmes, *supra* note 25, at 460; see also Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

<sup>150</sup> Duncan Kennedy, *supra* note 8, at 357; Oliver Wendell Holmes, *supra* note 25, at 460.

<sup>151</sup> David Kennedy inspects the role of law in the micro-processes of global political and economic struggle. See David Kennedy, *supra* note 9 at 25.

Law should be understood as *our realization*, as injuries and recognitions of each person in any moment inflicted by each of us in any moment.

David Kennedy, in contrast, uses the conceptual apparatus of the liberal idea of law to show the glue of society, the very conceptual apparatus that he is trying to subvert. Legal entitlements as constituting people's bargaining power<sup>152</sup> cannot be understood to be the glue of society. We are not constituted by abstractions or by law as a bargaining tool, by the relative positions of privilege and vulnerability allocated by tools. We are not constituted by tools nor by legal realist "effects" of rules. The idea of such legal entitlements as glue for society misrepresents law.

While Duncan Kennedy's model of law as background rules for bargaining power makes an invaluable point about law's distributive role and is a useful tool of distributional analysis, it does not portray or explain the hierarchical construction of society and the center-periphery relationship.

First, the bargaining imagery of income as the price paid for not using one's coercive weapons reflects Hale's reliance on Marx's idea of overt class struggle.<sup>153</sup> However, coercion as an aspect of negotiation does not portray our daily existence. People do not live under constant threats, just as they do not live under Austinian commands.<sup>154</sup> Rather, people live their daily lives. We do not only bargain with everyone else, fight, cooperate, and exert exceptional pressure on one another. Our daily lives are lives of struggle, but this struggle is not just due to threats, overt coercion, and calculated bargaining. We live and realize ourselves according to a plethora of images of self-realization. We are dominated in more subtle ways than by threats, such as by our consent, by habit, or by striving for comfort. Struggle and hierarchies can also be found in lightness and coincidence. This is not to say merely that coercion can be socially manifested with gentility but that *every* "gentility" is simultaneously a struggle. All in all, the intricacy and banality of domination is not captured by the idea of legal endowments as threats or bargaining chips—in a form of coercion as an aspect of negotiation.

Moreover, the bargaining model relies on identity politics as a key societal unit. The cooperative-adversary analysis focuses on the relationship between identity groups such as the employer/employee, white/black, first-world/third-world, men/women, or any other "wide ranging cleavage that runs through society as a whole."<sup>155</sup> The bargaining metaphor is modeled on the struggle between cooperative-adversary groups with different endowments.<sup>156</sup>

As stated, a particular pattern of daily legal thinking in the European Union both creates and reproduces the identity of the center and periphery and reproduces this macro-hierarchical structure in the European Union. In other words, there is a historically disadvantaged group in the European Union and our daily work perpetuates the subordination of this group.

Arguments framed by subordination of identity are an important tool in daily work and in resisting domination, to persuade others of subordination and injustice. However, the center-periphery relationship and domination—the legal system itself—cannot be explained or analyzed in identity terms alone. We are thrown into a world of countless hierarchies that form the web of the global social structure. Domination cannot be properly understood and analyzed as stemming from group

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<sup>152</sup> See Duncan Kennedy, *supra* note 8, at 346 ("Law is one of the things that constitute the bargaining power of the people.").

<sup>153</sup> See Hale, *supra* note 23.

<sup>154</sup> See HART, *supra* note 6, at 18; Holmes, *supra* note 25, at 465, 475.

<sup>155</sup> Duncan Kennedy, *supra* note 8, at 361.

<sup>156</sup> See *id.* at 331 ("The whole list of factors that we include in bargaining power is subtly constituted by the legal background. The word constituted signals that there wouldn't be a balance of bargaining power in the way we customarily refer to it without a set of ground rules defining *what you can and cannot do to the people you are cooperating with* in production *when the moment comes when you are fighting over the product.*") (emphasis added).

oppression, from oppression by a historically privileged group (whites, men, landlords, Europeans,<sup>157</sup> Europeans of the center) or based on other group identity. The legal analysis of domination cannot be one of inequality between people or between groups, a question of the relative position of one group or member of a group against another group or member of a group,<sup>158</sup> or even of a hierarchy understood in these terms. Injuries that each of us imposes on others and others impose on us are not based only on a particular group identity. They can be based on all the traits of the banalities of everyday life, things that have little to do and are not necessarily linked with one's adherence to a social group. In other words, hierarchy and injury are not constructed or derived from superior group identity, they are our ontological condition.

An analysis in terms of identity politics misses the fact that social struggle cannot be understood as merely organized between groups, it is a struggle of all against all. Hobbes's battle of everyone against everyone did not end with liberal institutions, nor was it created by liberal institutions. It just became structured differently.

Decisions and hierarchies are not an exceptional struggle over a product, and the list of people we are "cooperating with" is never closed. We injure and recognize others in every moment and make countless decisions for ourselves and others while doing so. It is in the structure of these decisions that the reproduction of hierarchies takes place. However, when struggle is deemed to be exceptional or at least not constant and not involving everyone else,<sup>159</sup> one in which the bargainers are "co-operators in producing a joint product,"<sup>160</sup> the bargaining model is at odds with the view of the legal system and legal entitlements as a constant, never-ending infliction of injuries and recognitions by all of us on all of us. In the latter picture, hierarchical struggle is not exceptional and cannot be limited to any particular contexts in which groups have conflicting or competitive goals. Hierarchical struggle is daily, existential, inevitable, and not necessarily conscious or calculated. It is constant, never-ending, and ubiquitous.<sup>161</sup>

Intersectionality, thinking in terms of multiple inequalities,<sup>162</sup> does not solve the deficiency of the analysis in terms of identity politics. Intersectionality embodies a particular dynamic approach to the underlying laws of motion of the reality it traces and traps while remaining grounded in the experience of classes of people within hierarchical relations "where systems of race, gender and class domination converge."<sup>163</sup> The aim of thinking in terms of intersectionality is an anti-essentialist conception of identity. Intersectionality reveals women of color at the center of overlapping systems of subordination in a way that moves them from the margins of single-axis politics that has often set priorities for opposing inequality. On this level, it addresses "the combined effects of practices which discriminate on the basis of

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<sup>157</sup> See Joel Ngugi, *Making New Wine For Old Wineskins: Can The Reform Of International Law Emancipate The Third World In The Age Of Globalization?* 8 U.C. DAVIS J. INT'L L. & POL'Y 73 (2002); James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L.J. 263 (2000); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. (1999); James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT'L L. (1996).

<sup>158</sup> See David Kennedy, *supra* note 9, at 25.

<sup>159</sup> See Duncan Kennedy, *supra* note 8, at 331.

<sup>160</sup> *Id.* at 354.

<sup>161</sup> Here I depart from Jean-Paul Sartre who did not view struggle and oppression as inevitable, but as a historical reality that should be contested. See SARTRE, *supra* note 22.

<sup>162</sup> See Catharine A. MacKinnon, *Intersectionality as Method*, 38 SIGNS 1019 (2013) ("[I]ntersectionality both notices and contends with the realities of multiple inequalities as it thinks about 'the interaction of' those inequalities in a way that captures the distinctive dynamics at their multidimensional interface.").

<sup>163</sup> *Id.* at 1020.

race, and on the basis of sex,” capturing the relationship between inequalities as grounded in the lived experience of hierarchy.<sup>164</sup>

The point of departure and return for this analysis is with the experience of specific intersecting groups. However, hierarchies cannot be explained either by identity of a single group based on class, race, nationality, first- or third-world, gender, religion, or by multiple superior identities such as white, male, or landlord. Our lives cannot be reduced to any one particular or multiple group membership. In this sense, our individuality is inarticulable in these terms. Each of us is thrown into a different hierarchical constellation in a particular moment and place, in an unrepeatable patchwork of hierarchies. All of us are constituted by injuries and recognitions and they, as well as the perception of normalcy of these injuries and recognitions, are not merely based on any pre-existing identity, but on a hierarchical construction of each of us as an individual in every moment. Hierarchies can be based on our preference for the existing state of affairs, or on our habit of injury of those in a subordinate position regardless of their particular social identity. Hierarchy and injury are our ontological condition and neither their genesis nor their reproduction can be explained by or attributed to any identity or to any other “wide ranging cleavage that runs through society as a whole,”<sup>165</sup> nor to multiple identities alone.

A further weakness of the bargaining model is the focus on the body of rules, so that, “changing legal rules would change the bargaining outcome.”<sup>166</sup> Ideology is not a part of this portrayal of the legal system. As Catherine Mackinnon has argued, the struggle for consciousness is a struggle for the world.<sup>167</sup> Feminist and race theory scholars rejected the idea of equality of “coercive weapons” as an answer to subordination,<sup>168</sup> and Marc Galanter rightly argued that the system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice.<sup>169</sup> Indeed, rule change may become a symbolic substitute for redistribution of advantages.<sup>170</sup> In other words, changing “the rules of the game of economic struggle”<sup>171</sup> alone opens up only limited avenues of social change.

Moreover, even if we add a change of ideology to the analytical equation, equalization of bargaining dispositions cannot properly address hierarchy. Inequality of bargaining power does not portray the hierarchical structure of society. It is rather an analysis of inequality and portrayal of the role of a particular source of it—the rules of the game of economic struggle.<sup>172</sup> If we accept hierarchies as ontological, then the equality of bargaining predispositions, including equality in the consciousness of people, David Kennedy’s “dynamics of inequality,”<sup>173</sup> Anghie’s “dynamics of difference,”<sup>174</sup> engineering equality, and elimination of struggle (as

<sup>164</sup> See *id.* Duncan Kennedy sees this thinking as paradigmatic of contemporary consciousness. According to Duncan Kennedy, contemporary legal consciousness organizes rights claimants according to their plural, cross-cutting identities. Contemporary identities cross cut in the sense that each of us has many. One person can be a straight, white, male, married, ruling class, New England Protestant American, not living with disability, not a person living with AIDS, not a survivor (that he remembers) of a childhood sexual abuse and so on. See Duncan Kennedy, *supra* note 36, at 66.

<sup>165</sup> Duncan Kennedy, *supra* note 8, at 361.

<sup>166</sup> *Id.* at 346.

<sup>167</sup> See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 115 (1989).

<sup>168</sup> See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635 (1983); MacKinnon, *supra* note 2, at 515; Crenshaw, *supra* note 3.

<sup>169</sup> See Marc Galanter, *supra* note 1..

<sup>170</sup> See *id.* (suggesting that breaking the interlocked advantages of the “haves” requires attention not only to the level of rules, but also to institutional facilities, legal services and organization of parties).

<sup>171</sup> Duncan Kennedy, *supra* note 8, at 327.

<sup>172</sup> See *id.*

<sup>173</sup> David Kennedy, *supra* note 9, at 12.

<sup>174</sup> See ANGHIE, *supra* note 37.

Karl Marx and his historical followers also tragically missed) are unattainable illusions.

Background rules are tools. Tools do not lie in the background for the bargainers to use. They appear at any moment depending on how they are presented and understood to be, and how they are invoked and deployed. The existence of tools depends on our ideology as to which ones are important, on how we interpret them. Background rules are not only to be used for the purposes of bargaining. Their usage will depend on ideology. Similarly, once we do not see the necessity to use a hammer, we will set it aside and disregard its existence.<sup>175</sup>

Bargaining rules will not necessarily be understood in the same manner by everyone participating in the bargaining exercise. While abstract tools can certainly help build a society, an analysis in terms of bricks which determine *a priori* the relative positions of bargaining power does not accurately portray domination, and a change at the level of rules is not the answer to subordination. Rather, if change is to be taken seriously, ideology and, above all, legal entitlements understood as particular hierarchies need reallocation, not simply “the rules of the game.”

Articulation of social problems as problems of “capitalism” or “political economy” also stems from the perception of law as background rules behind the foreground of another activity. Contrary to Amin’s assumption, law is a vehicle for reproduction of existing hierarchies, not only in the form of an authoritative support for external, unequal bargains on exchange of goods.<sup>176</sup> David Kennedy uses the background world of law and legal expertise as a window for interpreting the foreground of the world political economy, and analyzes the role of law in the distribution of bargaining power within socioeconomic systems of center and periphery. These analyses misconstrue law’s role in domination: a description of reality as an unfolding of the economy or some other activity with the support of law. Rather, law constantly constructs reality, that can be described as the world economic system or politics. Law constructs centers and peripheries. It is not outside of them, in the background, offering to construct their interaction.<sup>177</sup> Law and legal entitlements constructing center and periphery should be understood as hierarchies, formed by our injuries and recognitions in any moment.

### *B. Hierarchies as Law and Their Reproduction*

In order to understand law, governance, the center-periphery relationship, and the reproduction of hierarchies, law and governance need to be understood as a constant (hierarchical) struggle and a temporal element needs to be incorporated into definition of law. Law is indeed only made visible in its temporal character, as time is part of the identity and character of things.<sup>178</sup> A focus on the “now” is vital in the reproduction of hierarchies. It reveals the role of the past in the present. The character of law is only revealed when we see it reproduced in every moment, as a result of the daily struggle. As hierarchies between people are ontological, constant, and constitutive of ourselves and of law itself, the question of why existing hierarchies are reproduced is identical to the question of why law, the legal system itself, is reproduced in every moment. The analysis of the reproduction of hierarchies should thus shed light on the phenomenon of law itself.

The three elements of the phenomenon of law here distinguished are not intrinsically separate elements. They are three aspects of a single phenomenon.

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<sup>175</sup> See MARTIN HEIDEGGER, BEING AND TIME (1962).

<sup>176</sup> For the latter assumption, see AMIN, *supra* note 9.

<sup>177</sup> According to David Kennedy, law offers an index of tools and stakes for interaction between centers and peripheries in the world political system. *Supra* note 9, at 26.

<sup>178</sup> See HEIDEGGER, *supra* note 175.

### i. Hierarchies: Injuries

Law is an assemblage of all hierarchies, injuries, and recognitions as set up in every moment. The constantly fluid patchwork of hierarchies forms our global social system. Our decision-making in every moment in time implies a hierarchy, formed by injury and recognition. Our daily life experience is of course not only one of injury. We experience joy, sadness, guilt, regret, and happiness in myriad forms. But we are at every moment thrown into our own particular set of hierarchical situations. Injuries are not necessarily only material, understood in terms of wealth and income. As Weber has noted, our social inquiry should be made in terms of both material and spiritual values. Injuries can be a result of scorn, hate, a result of perceptions of aesthetics or authority. They can be spiritual, reputational, disapproving, neglectful, negative, or depriving of time and attention.

### ii. Ideology: Memory of Past Hierarchies

The second aspect of the legal system is our ideology, which is memory—our synthesized past experience. This aspect of law explains where our sense of right and wrong comes from. It stems from our select memories of our past experience, from our memories of past injuries and hierarchies that are shared or contested by others.

The legal constellation is a constantly shifting assemblage of hierarchies in every moment in time and this is constantly brought into the present. We synthesize the hierarchies and injuries of yesterday in our memory as the justice of today. Ideology is a constant synthesis of our experience, of our lives and of hierarchies we take for granted or have challenged. Injuries, recognitions, and a selective synthesis of passing moments constitute each of us and all of us collectively. We deny countless injuries we have inflicted on others and on ourselves, and the pattern of our denial reflects the normalcy of harm to the subordinate. Indeed, countless injuries are so deeply ingrained in our consciousness as normal that they are difficult to contest. Their contestation will be met with arguments of absurdity or irrationality.

The hierarchy, injury, and recognition of the past moment are brought into the present by our synthesized memory. The ones that remained unchallenged are given the aura of righteousness. The hierarchy of the moment passed is the normativity of the present moment. The hierarchies of yesterday that remain unchallenged are the law of today.

### iii. Tools: the World of Ideas, Concepts, and Theories

Tools are disjointed, fragmented, and contradictory elements that we have at our disposal in arguing for the reallocation of injuries and recognitions. Legal rules, national laws, international laws, policies, purposes, principles, doctrines, human rights, economic and social theories, statistics, efficiency, left-right and identity politics, critique, legal orders, institutions, capitalism, and social theories are tools to be invoked and deployed for reproduction or transformation of reality.

Legal thought has often focused on the inherent quality of tools. For example, critique is perceived as inherently benevolent, and has been suggested as a goal of our work.<sup>179</sup> Efficiency or economics, on the other hand, are sometimes considered as a bad idea.<sup>180</sup> However, every tool can be used to portray injury, and an *a priori* rejection of a tool because of its alleged imminent quality is to be considered with caution. Just as authoritarian impulses of domination and appropriation can arise from what could be perceived as a most critical intellectual province, a liberating

<sup>179</sup> See *infra* Section V.B. (“Critique as a Goal of Our Work”).

<sup>180</sup> See, e.g., Supiot, *supra* note 15.

hand can reach out from what could be perceived as the most conservative intellectual tradition, thinker, or theory. In other words, tools from every domain of our social life—economics, law, politics, and sociology—and from any intellectual tradition can be used for authoritarian and liberating purposes.

Doctrines, theories, or any other tools cannot be applied equally to those who are differently situated hierarchically. As each of us is thrown into a different position in the global hierarchical structure at any moment in time, any legal rule or other tool applies differently to each of us. “Efficiency,” “the market,” “transnational solidarity,”<sup>181</sup> “social question,” “public interest,”<sup>182</sup> social dumping, the principle of equality, and critique are all tools that tell us relatively little about themselves before they are deployed in reality. The central questions are always who will be injured, and how, by a usage of a tool, and whose hierarchical position will be reaffirmed.

### C. Hierarchies, Constitutionalism, and Critique

Law should be understood hierarchically, as the interplay of injuries and recognitions, rather than of altruistic and individualist considerations or as a background to bargaining. There is a select understanding of injury and only specific injury and hierarchies are destabilized in European Union legal consciousness. How are hierarchies among people and subordination generally acknowledged or challenged in contemporary legal thought?

#### i. Hierarchies and Constitutional Thinking

Constitutionalism is the privileged field of importance in contemporary legal thought.<sup>183</sup> It has also been the privileged mode of legal discussion about European integration. Constitutionalism tries to answer the question of legitimate exercise of public power, the overlaps and interaction between different legal systems, and more recently attempts to construct a collective self: a political community not only in terms of nation states, but one that spans the globe.<sup>184</sup>

Constitutional scholarship often focuses on the synergies and legitimacy of building a legal order, rather than on externalities of its own thinking or on social hierarchies. This has also been the approach of constitutional thinkers in the European Union. The European Union has from its very beginning been conceived as a new legal order. As the seminal judgment *Van Gend en Loos* states, the Community constitutes a *new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and

<sup>181</sup> Frequently, transnational solidarity is discussed in legal literature as if it has an inherent meaning. See, e.g., de Witte, *supra* note 15, at 606; Somek, *supra* note 67, at 711; Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the ECJ*, 9 GER. L.J. 125 (2007).

<sup>182</sup> David Kennedy, *supra* note 9, at 37.

<sup>183</sup> Duncan Kennedy, *supra* note 36. For constitutionalism and global governance, see, e.g., Jessica Lawrence, *Contesting Constitutionalism: Constitutional Discourse at the WTO*, 2 GLOBAL CONSTITUTIONALISM 63 (2013); D. Zang, *Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate*, 33 SYRACUSE J. INT’L L. & COM. 393 (2006); Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19 LEIDEN J. INT’L L. (2006); Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s “Constitution” and the Discipline of International Law* 17 EUR. J. INT’L L. 647 (2006); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT’L L. 623 (2006); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity*, 16 GOVERNANCE 73 (2003); Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT’L L. 651 (2002).

<sup>184</sup> See RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

the subjects of which comprise not only member states but also their nationals.<sup>185</sup> The principle of supremacy, direct effect, and the interaction of the European national orders with the EU have been the central focus of EU legal thought ever since. This work, including the work of unearthing the benefits and added value of integration, is important. There are numerous benefits and synergies to European integration. However, theoretical refinement of this interaction of legal orders obscures relationships of power when the question of hierarchies *among people* is not addressed.

An example of argumentation in terms of hierarchies between legal orders and in terms of added value of proper legal interpretation and proper interaction of various legal orders is Miguel Maduro's argument whereby judicial bodies in the Union should justify their decisions in the context of a coherent and integrated European legal order. For this to be possible, and in order to satisfy the requirement of equality in the competing determinations of EU law, any national decisions on EU law should be argued in universal terms. A national court must justify their decisions in a manner that could be made universal. Such decisions must be grounded in a doctrine that could be applied by any other national court in similar situations.<sup>186</sup>

Social understanding of injury, however, is selective, and the "universal" of the Union often coincides with the "particular" of the center. This universal—the center's particular—is deemed to be the "interest of Europe" and becomes the means for dealing with national issues in daily practice, for dealing with transnational processes, and constitutes the self-imposed constitutional discipline on all national democracies.<sup>187</sup>

The danger of such a debate is that it perceives the EU legal system as an order implicitly containing "the principle of constitutional tolerance," "the logic of inclusion," and ideals of the good society, rather than as a set of specific compromises discussed in ideology that subjects only a selection of social hierarchies to destabilization and debate. As a result, this order appears to need constant theoretical polishing, rationalization, and support, while the legal and political discourses cater to an exclusive debate on a selected set of conflicts and hierarchies. Hierarchical structure of society and subordination of the European periphery are generally not addressed in this debate.

But constitutional universalization is not the only way of legal thinking in contemporary legal thought that obscures subordination. More critical thinking that acknowledges and addresses conflict and contradiction is equally prone to formulaic

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<sup>185</sup> Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 3 (emphasis added). Building new orders is also a staple of legal thinking in general, and of international legal thought in particular. James Gathii's attempts to formulate a Third World approach involves developing an international law that decenters the "Euro-American opposition between liberal internationalism and neo-conservative realism." This same approach is exemplified, in a somewhat different context, by Celestine Nyamu's proposal of a system of "critical pragmatism" that seeks to use both Kenyan custom and international human rights for the protection of the property rights of women in Kenya. In attempting to demonstrate the imperial dimensions of these initiatives, then, it is not that we should dispense with the ideals that inform them—the ideals of "good governance," the "rule of law," and "democracy." Rather, the attempt here is to contest imperial versions of these ideals, and to seek their extension to all areas of the international system. It is remarkable, for example, that the Bank and the IMF are not subject to any "rule of law" in a context when the Bank has continuously extolled the virtues of the rule of law and when serious questions have arisen as to whether these institutions are adhering to their constituent documents, their Articles of Agreement. As Susan Marks puts it, in her own searching attempt to develop a meaningful, substantive idea of "democratic governance," "When ideals begin to seem like illusions, we can jettison and replace them. Or we can reassert and reclaim them." See ANGHIE, *supra* note 37, at 245, 271–72.

<sup>186</sup> See Miguel Poiarses Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in *SOVEREIGNTY IN TRANSITION* 501 (N. Walker ed., 2003).

<sup>187</sup> See Miguel Poiarses Maduro, *Three Claims of Constitutional Pluralism*, in *CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND* 77 (Matej Avbelj & Jan Komárek eds., 2012); MIGUEL POIARES MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* (1998); Joerges & Rödl, *supra* note 70.

reasoning about orders and concepts, obscuring domination and failing to destabilize existing hierarchies.

## ii. Hierarchies and Critical Thinking

One can contextualize the process of enlargement, both the more recent accession of Eastern European countries to the European Union and the Southern enlargement in 1980s, as they share the same structural traits. This analysis reveals a similarity in the understanding of injury before and after the process of enlargement, an understanding of injury from the perspective of the center. More importantly, considering David Kennedy's work, it underscores the deficiencies of distinctions between stages of integration or assumptions about the particular essential quality of a free trade or more "public" legal regime.

According to Jan Zielonka, behind the façade of the carefully engineered project of Eastern enlargement, there was a great deal of chaos and vagueness. The ultra-modernist pretensions were largely utopian. Liberal rhetoric could not hide the power game evolving across the old East-West divide. Under careful scrutiny the accession process looked like an imperial exercise of asserting political and economic control over an unstable and underdeveloped neighborhood. The substance of policies had been similar to many previous imperial exercises: export of laws, economic transactions, administrative systems, and social habits.<sup>188</sup>

In the run-up to the Eastern enlargement, lower wage standards and lax labor regulations in Central and Eastern Europe were expected to serve as a magnet for foreign direct investment, spurring thereby a wave of company relocations from west to east. Fears of delocalization were particularly pronounced in France, where both left- and right-wing politicians pleaded for the "upward harmonization" of social standards in the enlarged EU. The Socialist Party went as far as to advocate a European minimum wage to avoid job losses and "social dumping."<sup>189</sup>

Secondly, the old Member States were wary of the potential influx of migrant workers from the poorer accession states. Germany and Austria, the two "old" EU members bordering on Eastern and Central European countries and traditional migration destinations for Eastern European employees, were particularly concerned. Trade unions in the two countries feared that newcomers would work for less than the domestic workforce, and thus undermine the existing collective agreements and employment standards. Political and social actors in "old" EU member states feared that the influx of Eastern Europeans might have a negative impact on their welfare systems.<sup>190</sup>

Very similar debates took place in the late 1970s and early 1980s, in the run-up to the EU enlargement to Greece, Spain, and Portugal. The nine EU countries, in particular Germany, feared that the uncontrolled inflow of South European workers would exacerbate the unemployment problems that had been besetting their economies since the crisis of the early 1970s.<sup>191</sup> As a result, "old" EU members

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<sup>188</sup> See JAN ZIELONKA, *EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION* 189 (2007) at 49–64.

<sup>189</sup> See B. Clift & W. Howarth, *France, Managed Globalisation, Social Europe and EU Enlargement: Rising Ambivalence on Market Integration in the EU-27*, PSA CONFERENCE PROCEEDINGS (2010), available at [http://www.psa.ac.uk/journals/pdf/5/2010/157\\_447.pdf](http://www.psa.ac.uk/journals/pdf/5/2010/157_447.pdf). See also D. Bohle, *Race to the Bottom? Comparative Institutional Advantages? Competition of Capitalisms in the Enlarged EU* (Pol. Econ. Research Group, Cent. Eur. Univ., Budapest, Mar. 26, 2008).

<sup>190</sup> See Magdalena Bernaciak, *Social Dumping: Political Catchphrase or Threat to Labour Standards?* 12 (ETUI WORKING PAPER, 2012), available at <http://ssrn.com/abstract=2208393>.

<sup>191</sup> See W. Wallace, *Grand Gestures and Second Thoughts: The Response of Member Countries to Greece's Application, in GREECE AND THE EUROPEAN COMMUNITY* 31 (Loukas Tsoukalis ed., 1979).

decided to temporarily restrict South Europeans' access to their labor markets.<sup>192</sup> The second controversy, related to potential trade was a competitive threat posed by the three accession states' low-wage, low-cost sectors offering substitutes for "old" EU members' products. Of particular concern were the branches that showed negative trade balances with the three Mediterranean countries already before their accession, such as textiles, footwear, and yarns production, but also the Spanish steel industry, whose exports were heavily oriented towards the EU. In the end, however, no transition periods were imposed on manufacturing, as the interests of German and French capital and technology-intensive industries, eager to invest in the Mediterranean countries, prevailed.<sup>193</sup>

David Kennedy critiques the consciousness and the set of policies on the basis of which, after the fall of Berlin wall, Eastern European countries were integrated and prepared for EU membership. He critiques an orientalist attitude<sup>194</sup> of the European legal profession in its treatment of Eastern Europe, by which the European legal profession described relations between East and West in chronological terms and compared Eastern Europe to underdeveloped societies of the third world.<sup>195</sup> In this imagery, the development of the East was perceived in terms of progress—of a return to normalcy and catching up, as they were behind, not ready for the internal market.<sup>196</sup> Thus, in David Kennedy's imagery, instead of pragmatic, humanitarian, and progressive policy making, European policy-makers repeated broad ideological narratives about the relations between the normal and deviant, the advanced and the primitive.<sup>197</sup>

David Kennedy saw Western and Eastern Europe living in two legal regimes: the West in the regime of the European Union's internal market and the East in the international trade system. Inside the European Union, Brussels manages a political structure and industrial policy to build an internal market by careful government planning and regulation.<sup>198</sup> In other words, government is a power throughout the market.<sup>199</sup>

While EU lawyers were building public policy at home, they were arguing for private freedom outside the Union. In Kennedy's account, the free trade system has no managed public policy and no regulatory powers. It is oriented to building down governmental distortions of free market prices and strengthening the potential for private ordering, thus mostly composed of exceptional measures designed to overcome perceived abnormalities.<sup>200</sup> According to Kennedy, to be inside the common market is to participate in a highly structured system of planning, wealth stabilization and transfer payments. To be outside is to be subject to the ups and downs of free trade. Before the actual accession to the European Union, the East was thus condemned to the regime of international trade and to private policies of the market. In the East, the difference between a Western market of the European Union and international trade system—the GATT—was simply imperceptible.<sup>201</sup>

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<sup>192</sup> See M. Kelo & B. Wächter, *Brain Drain and Brain Gain. Migration in the European Union after Enlargement*, (Academic Cooperation Association, 2004), available at [http://www.aca-secretariat.be/fileadmin/aca\\_docs/documents/reports/Migration.pdf](http://www.aca-secretariat.be/fileadmin/aca_docs/documents/reports/Migration.pdf).

<sup>193</sup> See Bernaciak, *supra* note 190.

<sup>194</sup> For a critique of orientalist thinking of international lawyers, see ANGHIE, *supra* note 37.

<sup>195</sup> See DAVID KENNEDY, *supra* note 32.

<sup>196</sup> See *id.* at 184.

<sup>197</sup> See *id.* at 195.

<sup>198</sup> See *id.* at 179–84.

<sup>199</sup> See *id.* at 181.

<sup>200</sup> See *id.* at 177.

<sup>201</sup> See *id.* at 174.

## iii. Public Internal Market and Private International Trade

One of Kennedy's assumptions is an essential ideological difference between the internal market and free trade regimes that translates into his preference for the internal market. The former regime is perceived as more regulatory, public, altruistic, social and pursuant of industrial policy. The latter is less regulatory, more private, more individualistic, and composed of exceptional measures designed to overcome abnormalities. According to Kennedy, before the actual accession of Eastern European countries to the EU, "[p]olicy makers might have imagined an association strategy of engagement with the internal market rather than acquiescence in the international trade regime."<sup>202</sup>

It remains unclear why the association strategy of engagement with the internal market legal regime, or generally a more public regime, would have been better for Eastern and Central Europe than the legal regime of "ups and downs" of free trade. Moving from private to public policymaking in itself cannot guarantee that the legal constellation would have been more beneficial to the actors in the East in this crucial time for the building of the initial hierarchies on the European continent once the Berlin Wall had fallen.

The problem of hierarchies, however, is misrepresented and obscured in Kennedy's account, not only because of his assumptions regarding public and private orders and policies and because of the lack of analysis of particular legal domains, but also in his usage of economic theory in legal work. He argues that those were the days of neoliberal ascendancy in development policy circles. Export promotion did not mean the careful government managed export regimes that had brought development to the Southeast Asian tigers.<sup>203</sup> How would usage of a different economic theory have reflected in the constellation of the emerging hierarchies, i.e. of the emerging legal system of the European continent in a manner that would alleviate subordination of the East?

Here, David Kennedy is looking for solutions and alternatives in conceptual opposites. The danger of challenging reality with a theory, however, is that it is challenged within the existing ideology. Theories are tools, bricks for a change of reality, not authorities to be merely applied. Their usage is selective and tied to existing ideology of a particular time. Mere application of a different theory of causation cannot promise to destabilize the existing ideology. Nor can it reframe social cost from the center's view to that of the periphery. Thus, it could not switch the constellation of legal entitlements which structured subordination of the East during that period.

How would the value of goods, services, factories, prestige, and knowledge—the material and spiritual values of the people in the devastated East in 1989—have been understood differently using a different economic theory, as David Kennedy proposes? There are countless elements that structure and reproduce hierarchies and subordination, regardless of the economic theory applied at the time. For example, how did both expertise as well as populace at large at the time value the goods, services and other material and spiritual values of the actors of the periphery and of the center, irrespective of the development theory taken as the lead theory?<sup>204</sup> How did the existing interpretation of corporate law and intellectual property law aid the acquisition or subordination of the companies of the periphery irrespective of models and theories of development? What universalizing arguments were made by the legal

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<sup>202</sup> See *id.* at 196.

<sup>203</sup> See *id.* at 186.

<sup>204</sup> Karl Marx taught us about the objectification of the concept of "value" as a fetish, an ideological representation of human relations as natural relations between things, creating a perception of intrinsic value of things. For his explanation of this concept, see generally 1 KARL MARX, CAPITAL (11867), particularly Part II, Chapter 4; see also Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985).

profession, which doctrines were used and how, and what was the profession's understanding of harm? These assumptions do not change according to the usage of different theories. These are question of the ideology of the moment. They act as external inputs in the interpretation of a theory. An economic theory is merely one of the many tools to be used simultaneously in social struggle. In other words, the aim of legal work in the context of social transformation is not switching between economic theories but a destabilization of the existing hierarchical structure.

Moreover, there is no reason why, in the process of *destabilization* of existing thinking and perceptions of harm and advocating for the structurally subordinate, lawyers should resort only to public policies and not consider doctrines, policies or methods such as efficiency or any other economic or "individualist" method. Likewise, goods dumping is a doctrine of international trade, not of the internal market. Despite its international-trade, ideological pedigree, it may well be used for the benefit of the periphery.

Kennedy's analysis misses how lawyers, of the center and of the periphery, set and distribute values when working in various legal domains such as antitrust law, state aid law, constitutional law, or intellectual property law at any level of governance. It also misses how other professionals or laymen decide and distribute those values in their own domains of work and life. False consciousness of the Eastern Europeans or the European periphery about their position in the legal structure<sup>205</sup> was thus not, as in Kennedy's account, due to the fact that they did not see the difference between free trade and internal market regime. It was due to the failure to see their structural subordination in the existing and forming hierarchical constellation.<sup>206</sup> Kennedy's link between benefit and public policies, however, is universalized. According to Kennedy, for the wealthy outsiders of the European Union, such as Switzerland, with their own well-developed internal markets and established public politics, the combination of public policies at home and an international free trade regime with the European Union may have been advantageous.<sup>207</sup>

Kennedy's suggestion that Swiss national public policies should counter the deregulatory, neoliberal policies of the international level shares the myth of those reactions to the *Laval* and *Viking* judgments. Those reactions maintain that the national, Member state, and public claim advancing social considerations must be protected against the international or European economic, individualist, deregulatory, and neoliberal private sensibility which advances free movement considerations. Both suggestions restate the same problem—the assumption of progress from private policies to public policies and regimes, and conceptualization of regimes and levels of governance in terms of large ideological narratives. The daily hierarchical struggle between people is translated into a struggle between conceptual opposites. However, the fundamental question of power relations in the legal system, as well as of economic development, is not whether the regime has either a free trade or a more social and public character, but rather what kind of legal entitlements are allocated to various hierarchically differently situated actors.

Finally, David Kennedy sees the dividing line between normalcy and abnormalcy in the international trade regime along the lines of the neoliberal

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<sup>205</sup> False consciousness is the dissonance between the decision-maker's view about what is best for those affected by a decision and their own view. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

<sup>206</sup> For the argument of the false conceptual link between protectionist, public considerations and the weakest party see Kukovec, *supra* note 17, 319, 324-330 (Kochenov, de Búrca and Williams eds. 2015).

<sup>207</sup> See DAVID KENNEDY, *supra* note 32, at 173.

economic policies (private) and their opposite (public).<sup>208</sup> The private is perceived as normal and the public as abnormal. However, our reality and normalcy cannot be described by a theory. Normalcy is a constantly shifting selective memory that we share or contest with others in every moment in time. Normalcy reflects our ideology. A distinction between theory and ideology arises. Things never repeat themselves as they occurred in the past. Theories are timeless abstractions, rationalizations that can never adequately describe reality but as a partial *ex post facto* rationalization. Ideology, on the other hand, is constantly fluid and changing, reflecting the hierarchies we collectively find just and unjust. It is the ideology of every moment in time that defines normalcy, not a theory.

All in all, the problem of the subordination of the East was not two regulatory tracks—of international trade and common market, as in David Kennedy's account—that should be brought together to discuss issues pragmatically.<sup>209</sup> The initial building of hierarchies, while manifesting itself in countless forms, constituted a single ideological task. It was this particular track of hierarchies and ideology that needed destabilization.

#### iv. Progress of Integration and Order Building

By conceptualizing the two legal regimes, David Kennedy in fact works towards progressive stages of order building. Lawyers have learned to follow the theory of integration from a free trade agreement, to the internal market and common currency, and understand it as a story of a successive dismantling of obstacles set up by state borders and lack of cooperation.

Bela Balassa defines economic integration as a process and as a state of affairs. As a process, it encompasses measures designed to abolish discrimination between economic units belonging to different national states. Viewed as a state of affairs, it is the absence of various forms of discrimination among national economies. The process of economic integration comprises measures that entail the suppression of some forms of discrimination, such as the removal of trade barriers.

Economic integration can take several forms that represent varying degrees of integration. These include a free trade area, a customs union, a common market, an economic union, and complete economic integration. In a free trade area, tariffs and quantitative restrictions between the participating countries are abolished, but each country retains its own tariffs against non-members. Establishing a customs union involves the equalization of tariffs in trade with non-member countries. A higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove discrimination due to disparities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting-up of a supranational authority whose decisions are binding for the member states.<sup>210</sup>

Just as in Balassa's account of stages of integration, David Kennedy's account of EU enlargement whereby the European continent was split into a private and public order, a legal regime has an essentially and universally different character than the other. One legal regime yields more free trade than the other. Such accounts

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<sup>208</sup> For the critique of the distinction, see Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 547 (1987). For David Kennedy's understanding of normalcy and deviation, see DAVID KENNEDY, *supra* note 32, at 176.

<sup>209</sup> DAVID KENNEDY, *supra* note 32, at 196.

<sup>210</sup> See BELA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* 2–3 (2013).

feed the discussion of deeper integration as opposed to disintegration that reflects the thinking about law and policy of European and international leadership today.<sup>211</sup>

In this thinking, nearly every major political problem and argument of the European Union is translated into a question of integration, the internal market, or federalism. Building an internal market, a free trade regime, or a political union, however, reveals relatively little about the society that is being constructed. A “real” internal market free from barriers to trade is an illusion. The EU internal market is not a constant advancement of free movement considerations over social considerations, as EU lawyers from both political poles would like to see it. Rather, it is a complex set of entitlements allocated differently between different actors in the Union. It is a single market in which some obstacles to some movements are sporadically reduced and some obstacles to some movements or autonomies sporadically added. For example, as portrayed in the discussion of the *Viking* judgment, some privileges to move and injure others are given only to companies in a particular position in a legal structure. Those in a peripheral position are not given these privileges. Even more, they are suffering harm by former companies.<sup>212</sup>

The obstacles to trade that current legal and economic theory acknowledges are articulated in terms of discrimination, an abstract and non-discriminatory ability to cross the border. Abolishment of these obstacles, however, will not affect all people in the Union in the same way. Each reduction will affect them differently, based on their structural position and based on the circumstance they will find themselves invoking it.

There are other obstacles to trade than tariff reduction or measures having equivalent effect. Those in a privileged position have more opportunity to harm those in an inferior position. For example, the European periphery has very few brands known beyond its borders, whereas famous brands come from the center. The injury potentially caused by the privilege to harm by the privileged owners of brands is not identified in the legal order and is understood as a normal part of competition. A dominant position on the market and the connected abuse of a dominant position is deemed exceptional and subject to criteria such as position on the market of a particular firm and its actual competitors, constraints imposed by future expansion by actual competitors, entry by actual potential competitors, and countervailing purchasing power. The structural harm that the companies of the center, with more rights, privileges to harm, powers, and immunities, can inflict on those of the periphery does not register with antitrust lawyers. This mindset reflects the current normalcy of injury to the hierarchically subordinate.

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<sup>211</sup> The Council on the Future of Europe, gathering together a small group of Europe’s most eminent political figures, argues that supporting European integration is a matter of enlightened self-interest and that it is time to address the big questions in order to preserve the unique European balance of individual freedoms, market economy and systems of social protection. See Council for the Future of Europe, *Europe Is The Solution, Not The Problem* (Sept. 5, 2011), available at [http://blogs.ft.com/brusselsblog/files/2011/09/Future-of-Europe-Statement\\_Brussels\\_September-5-2011.pdf](http://blogs.ft.com/brusselsblog/files/2011/09/Future-of-Europe-Statement_Brussels_September-5-2011.pdf); The European leaders need to remind the public that the absence of war, the freedom of mobility and the rising prosperity has been due to the path toward unity and that changing the course now would mean putting all of that at risk. That is why more European integration is the only solution. See Nouriel Roubini & Nicolas Berggruen, *Stop Dithering. Only Full Integration Can Save Europe*, GUARDIAN, Sept. 7, 2011, <http://www.theguardian.com/commentisfree/2011/sep/07/only-full-integration-save-europe>. Germany’s new foreign minister, Frank-Walter Steinmeier, argues that we need to make Europe more functional and more efficient, and the state of integration we have achieved is, from a German point of view, an advantage and we should not backtrack on it. See Kiran Stacey, *Germany Warns UK Not to Pull Back from European Integration*, FIN. TIMES, Feb. 3, 2014, <http://www.ft.com/intl/cms/s/0/fe78fb9e-8cea-11e3-8b82-00144feab7de.html#axzz2uS2Zc8iO>; The IMF says that the key to success is the strength of the economic union and that the single market of the EU should be deepened and capital markets should be integrated. See Mr. IMF Says: *More Europe, Please*, ECONOMIST BLOGS: CHARLEMAGNE (June 21, 2011), <http://www.economist.com/blogs/charlemagne/2011/06/euro-crisis>.

<sup>212</sup> See *infra* Section III.C. (“Social Understanding of Injury”).

The problem to be addressed in this constant hierarchical struggle is the existing selectivity of the hierarchies that we actually challenge. Rather than being concerned with building an internal market or a free trade regime, we should be concerned with the regularity of a particular angle of our work and decisions, with a pattern of denial and exclusion that perpetuates domination and reproduces the existing set of injuries. The question is whose injury, or whose ideology in the global hierarchical structure, is denied and whose economic and social interests are furthered. Whose far-off decisions will be contested and whose ignored? Whose need for solidarity will be considered and whose ignored and postponed?

#### v. Joining and Leaving a Legal Order: the Question of Brexit

The discussion of integration is equally misleading in the context of a country joining or leaving a legal system like the EU. The discussion about inclusion in the Union as framed by Kennedy also risks portraying a distorted picture of the benefits and perils of joining the Union, or of a potential exit, such as the potential exit of the United Kingdom (the “Brexit”). The discussion of the Brexit today is conducted on the same terms as Kennedy’s consideration of Switzerland within the EU legal structure. It reduces an order to its character and the potential benefits of the internal market. It frames the debate in terms of formal participation in the system. In this thinking, the hierarchical structure of society is ignored and power relationships are misrepresented and obscured. In the existing discussion about social relations, it is not only the subordinate but also the privileged that misread their position in the legal hierarchy.

The main qualms of United Kingdom leaders who are considering an exit from the Union center on the little power that the United Kingdom exerts over European law and decision-making, along with some substantive disagreements, such as the Working time directive.<sup>213</sup> The principle of subsidiarity, introduced into the Amsterdam Treaty in order to placate the Tory party, seems not to have played its intended role of decentralization. These frames of argument are structured with the EU institutions as the center and member states as the periphery, or the reverse. When institutions in Brussels are characterized as the center and those in Berlin, Paris, or Athens as the periphery, the question of “who decides” frames the discussion about power relationships.<sup>214</sup> Taking Brussels as the center and member states as the periphery, and centering on the division of material competences as in Joseph Weiler’s portrayal of the Union, demands for greater regulatory autonomy and subsidiarity in light of competence building by EU institutions seems like a natural reflex. In this debate, the United Kingdom sees itself as peripheral in the Union and strives for an empowering exit.

A retreat to sovereign powers, however, like desire for a full participation in a system, can prove to be an illusion. EU institutions form an important cluster of regulatory power, so the British objection that their Parliament merely ratifies whatever is sent from Brussels might be the experience of those who are not Member States just as well.<sup>215</sup> The regulatory power of the Union inevitably extends both formally and informally far beyond the borders of the European Union in merger law and countless other legal domains.<sup>216</sup> In other words, the United Kingdom, even after

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<sup>213</sup> See, e.g., David Cameron, *EU Speech at Bloomberg*, Gov. UK (Jan. 23, 2013), available at <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>.

<sup>214</sup> For the difficulties of distributional analysis in subsidiarity analysis, see Gráinne de Búrca, *Reappraising Subsidiarity’s Significance after Amsterdam*, (7 Harv. Jean Monnet Working Paper, 1999).

<sup>215</sup> See Cameron, *supra* note 213.

<sup>216</sup> For the argument of EU’s regulatory power beyond its border in merger control, see Damjan Kukovec, *International Antitrust, What Law in Action?* 15 IND. INT’L & COMP. L. REV. 1 (2004).

For an argument about EU’s regulatory power in several legal domains, see Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2013).

having left the Union, might inevitably find itself under the influence of the regulatory machinery of the Union.

Moreover, and most importantly for the present analysis, both Kennedy and UK leaders arguing for the Brexit miss an analysis of the hierarchical structure of the European Union. Kennedy's analysis of Switzerland's position in the European legal structure is based on their alleged combination of public policies at home and international free trade regime with the European Union. In this view, Switzerland has learned to turn the legislative freedom of the outsider of the Union to its own advantage.<sup>217</sup>

Is the privileged hierarchical position of Swiss actors in the legal structure of the European continent due only to the will, agency, knowledge, or ingenuity of Swiss politicians and lawyers who know exactly what benefits their economy? Certainly, those with more experience and better education usually know how to play any game, such as the legal game, better than novices or those with inferior education. However, none of us knows exactly what decision in every moment in time is best for us. The difference between privileged and subordinate is not that the privileged know what is best for them and the subordinated do not. The difference is that the former have more privileges with which to abuse the subordinate and are thus consenting to the structure that generally perpetuates their superiority.

Kennedy's account is, like constitutional scholarship, based on an assumption of an important difference between participation in and being outside of EU decision-making.<sup>218</sup> He contrasts the participation in the development of regulatory structure of the European Union by countries such as Switzerland with the complete exclusion of the actors of Central and Eastern Europe, who have no input and are excluded from the legislation of the internal market.<sup>219</sup> However, a situation of formal participation and representation in the system and the formal lack of it may not be as different as both constitutional scholarship and Kennedy portray.<sup>220</sup> People of Eastern Europe, the United Kingdom, or Switzerland will not obtain general political or legal capacity by joining the Union. They will be able to use a very limited set of tools differently and in different social settings.

Those in a superior position have more legal entitlements. They have more power to decide about the change or allocation of their own and others' legal entitlements. In countless aspects of this ubiquitous regulatory framework, actors in both Switzerland and in the United Kingdom are in a privileged position compared with the actors of the European periphery and have more power to affect their own and others' legal situation. Seen through this lens, the structurally privileged have fewer obstacles to trade than those who are less privileged. In this sense, Swiss actors may have far fewer obstacles to trade than Latvian or Greek actors, despite the fact that they may, as relative outsider to the legal order of the Union, have more obstacles in terms of ability to move across the border.

Both United Kingdom and Switzerland have significant clusters of hierarchically privileged actors who find themselves, what could in many respects be interpreted as higher in the hierarchies of production in the global structure of nearly any human activity—production of goods, services, dreams, and intellectual activity—than actors from a random peripheral country. CEOs, lawyers, bankers, professors, pop stars, and athletes are part of these. Hierarchies in both countries are certainly different due to the differences in, for instance, the services and industry located in those countries or in the nature of intellectual and aesthetic domination of these two societies. Moreover, there are hierarchies within the United Kingdom and Swiss societies, as there are in the periphery, but the former could be interpreted as

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<sup>217</sup> See DAVID KENNEDY, *supra* note 32, at 173.

<sup>218</sup> See DAVID KENNEDY, *supra* note 32, at 194-196.

<sup>219</sup> See *id.* at 195.

<sup>220</sup> See *infra* Section IV.C.i. (“Order and Universalism in Constitutional Thinking”).

hierarchies of hierarchies. The hierarchically privileged actors have many associated rights, privileges to harm others, powers and immunities, and thus have significant possibilities to injure others and get away with it, regardless of the fact whether Switzerland or United Kingdom are members of the Union or not.

Being inside or outside of the Union might be very important to some specific hierarchical situations, but these specificities are lost in the large ideological categories about inside and outside, free trade regime and internal market regime, public and private and in the question of formal participation in the system.<sup>221</sup> A detailed evaluation of the existing set of hierarchical relationships that structure the position of various actors and our ideology could thus reveal that the current legal position of many actors in the United Kingdom, Switzerland, or Norway is more similar in the legal structure of the European continent than the position of many of the insiders in the Union who find themselves on the opposite sides of the center-periphery poles, despite the fact that all insiders are European citizens, that they are fully represented at every level of EU decision-making and seemingly have all the institutional avenues for the realization of their interest at their disposal.

This reveals the weakness of the debate when framed as joining or not-joining a legal order. Legal orders are tools, which one can use to one's advantage even if not an official "member" of it, regardless of participation in its creation. The opposite is also true—participation in the creation does not mean that the order does not perpetuate subordination of those who are participating in its creation. The advantageous position of Switzerland in the European legal structure is not due to either public or private policies or due to representation, as per Kennedy's analysis, but due to the existing hierarchical position of Swiss actors in the European hierarchical structure and to the fact that these hierarchies can be and have been reproduced by either public or private regimes.

The fundamental question, both for insiders and outsiders of the Union, is thus whose social and autonomy considerations are being pursued and what kind of integration is being constructed, in what kind of hierarchical social structure. Nor is a discussion of power and policy relationship between EU and member state institutions apposite to the understanding and management of the hierarchical structure of society—a hierarchical structure among people rather than between legal orders. For the same reason, the central policy question for both leaders of the periphery as well as of the center should not be whether we should have a stronger, deeper, extended single market,<sup>222</sup> or, as an alternative, economic nationalism, or whether we should have the common currency,<sup>223</sup> or not, but rather *what kind of* internal market, what kind of a euro, and what kind of a Union is being built.

#### *D. Democracy and Inclusion of the Other as a Tool for Addressing the Hierarchical Struggle*

The toolbox of democracy is often invoked to address social transformation and concerns of the unprivileged. The rhetoric of democracy, however, does not

<sup>221</sup> David Kennedy contrasts the participation in the development of regulatory structure of the European Union (European Community) by the Member states and EFTA countries with the complete exclusion of the East, who has no input and is excluded from the legislation of the internal market. See DAVID KENNEDY, *supra* note 32, at 194–96.

<sup>222</sup> This is the approach of policymakers in the EU today. See, e.g., *Commission Communication for Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final (Mar. 3, 2010) ("A stronger, deeper, extended single market is vital for growth and job creation. However, current trends show signs of integration fatigue and disenchantment regarding the single market. The crisis has [sic] added temptations of economic nationalism.").

<sup>223</sup> See, e.g., Interview by Max Tholl with Jean-Claude Juncker, First President of the Eurogroup, EUR. MAGAZINE (July 7, 2013), available at [http://www.theeuropean-magazine.com/jean-claude-juncker-2/7184-the-importance-of-european-integration\\_](http://www.theeuropean-magazine.com/jean-claude-juncker-2/7184-the-importance-of-european-integration_)

adequately address selective perception of injury and reproduction of hierarchies.

According to David Kennedy, the European Union has transcended the necessity for democratic self-organization, replacing democratic institutions with the rhetoric of continuing democratization.<sup>224</sup> However, the European legal system is not just rhetoric of continuing democratization, the European Union *is* a democracy, albeit without a single demos, informed by and built on the pillars of most sophisticated democratic and constitutional theory we have ever known. It is far from mere rhetoric. The problem is that the EU is a victim of its own democratic success.

Immense efforts have been made to make the work of European institutions transparent, and to observe equality and the rule of law at every instance of decision-making. The European Parliament and national parliaments have been gradually given an increased role in decision-making. Moreover, citizens have, in principle, so many rights as never before in history and unprecedented avenues for law-suits, complaints, petitions, initiatives, voting, and forums to express their concerns or disagreement. To be sure, there is no agreement within constitutional theory as to which way the EU should further democratize itself—towards more or less decentralization,<sup>225</sup> towards more or less judicial control,<sup>226</sup> towards a stronger role of the European parliament and/or national parliaments<sup>227</sup> and so on. But existing constellations of judicial review, judicial powers of both the ECJ and national courts, institutional representation by both national parliaments and the European Parliament, by Committees and so on attest to the fact that the European Union is a stellar example of a liberal democracy and of liberal governance. All this is of course not to say that European democracy needs no improvement. Rather, it is to argue the limits of the argument that European Union is not a democracy and at the same time, that there are important limits as to how to transform society, let alone address hierarchical relationships between people, with the existing toolbox of democracy.

Moreover, it is the internal contradictions of constitutional and democratic theory that the European Union legal structure is struggling with. For example, the institutional law-making and decision-making is so democratic and so balanced between so many European institutions and actors and services within them and with an involvement of so many European and national actors<sup>228</sup> that accountability inevitably suffers. Furthermore, every layer of democratic governance, committee, requirement of a report, and inclusion of stakeholders we add to European government risks adding to a citizen's sentiment that he does not know where to turn and that every move he makes is a wrong one. The European Union is so inclusive of everyone's opinion in its law-making and decision-making and generally aims at such transparency that this visibly complex system feels oppressive.

However, it is not only in sentiment that the European Union struggles to deliver. Taking everyone's opinion into account either in the mode of reasoning of balancing or in the institutional setup struggles with ensuring promised full inclusion. The more inclusive the discourse and institutional structure, the more difficult it is to destabilize it and show and contest injury.

Frank Michelman highlights the importance of each community member's ability to engage regularly in "a process of personal self-revision under social-

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<sup>224</sup> See DAVID KENNEDY, *supra* note 32, at 184.

<sup>225</sup> See Alec Stone Sweet, *The Structure of Constitutional Pluralism*, (Faculty Scholarship Series, Paper 4624 2013).

<sup>226</sup> See ALICIA HINAREJOS PARGA, JUDICIAL CONTROL IN THE EUROPEAN UNION: REFORMING JURISDICTION IN THE INTERGOVERNMENTAL PILLARS (2009); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

<sup>227</sup> See PHILIPP KIIVER, THE NATIONAL PARLIAMENTS IN THE EUROPEAN UNION: A CRITICAL VIEW ON EU CONSTITUTION-BUILDING (2006); Stephen C. Sieberson, *The Proposed European Union Constitution Will It Eliminate the EU's Democratic Deficit?* 10 COLUM. J. EUR. L. 173 (2004); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5 (1998).

<sup>228</sup> See e.g., THE EUROPEAN COURTS AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE (A. Slaughter, A. Stone Sweet & J. H. H. Weiler eds., 1998).

dialogic stimulation.”<sup>229</sup> Participation as an equal in public affairs, in pursuit of a common good appears as primary, indeed, constitutive, interest of the person.<sup>230</sup> Participation and dialogue ensure the law’s self-revisionary aspect, echoing the critical dimension and political freedom. Self-revision through debate and participation as equal in public affairs is central to a good society, because the self is understood as partially constituted by, or as coming to itself through, such engagement.<sup>231</sup>

The EU academy, like the legal academy in general,<sup>232</sup> has indeed been preoccupied with the question of representation in EU institutions, with the question of potential under-representation of the interests of other Member States’ nationals in each other’s national political processes<sup>233</sup> or with greater participation of the populace in decision-making of European institutions in general.<sup>234</sup> Although conflict is brought to the fore in the constitutional debate, some interests are discounted in the existing ideology, notably the interests of the European periphery.<sup>235</sup> These do not enter the legal analysis or the discourse of rights. If the point of constitutional representation is the constant value of foundation and renewal, renovation itself,<sup>236</sup> how can the actors of the periphery pursue self-realization through active participation in deliberative politics? Or participate in the constant political “jurisgenesis”<sup>237</sup> in a legal discourse that forecloses their concerns from operating powerfully, in which harm is understood from the structural perspective of the center, and in which certain doctrines are provided for and others are not?

According to Joseph Weiler, the current European constitutional architecture represents an alternative, civilizing strategy of dealing with the “other.” It is a remarkable instance of civic tolerance for one people to accept being bound by precepts articulated not by “my people” but by a community composed of distinct political communities: a people of others. The daily practices of the EU and national governance are thus supposed to take the interests of others, the interest of Europe, into consideration.<sup>238</sup> While Joseph Weiler, Anne-Marie Slaughter, and Miguel

<sup>229</sup> See Michelman, *supra* note 5, at 1528.

<sup>230</sup> For the general importance of representation, see JOHN STUART MILL, ON LIBERTY 7–8 (1869).

<sup>231</sup> See Michelman, *supra* note 5, at 1503.

<sup>232</sup> See NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY (2006); JEREMY WALDRON, LAW AND DISAGREEMENT (2001); HANNA PITKIN, THE CONCEPT OF REPRESENTATION (1967); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1995); Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335 (2009).

<sup>233</sup> See, e.g., Joerges & Rödl, *supra* note 70. For the question of representation, see, e.g., Stijn Smismans, *Institutional Balance as Interest Representation: Some Reflections on Lenaerts and Verhoeven Good Governance*, in GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET 89 (C. Joerges and R. Dehousse eds., 2012).

<sup>234</sup> See, e.g., JAN ZIELONKA, EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION 189 (2007); Luigi Malferrari, *The Functional Representation of the Individual’s Interests Before the EC Courts: The Evolution of the Remedies System and the Pluralistic Deficit in the EC*, 12 IND. J. GLOBAL LEGAL STUD. 667 (2005), available at <http://www.repository.law.indiana.edu/ijgls/vol12/iss2/15/>; Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L.J. 451, 514 (1999); Adam Cygan, *Protecting the Interests of Civil Society in Community Decision-Making - The Limits of Article 230 EC*, 52 INT’L & COMP. L.Q. 995, 1012 (2003); R. Bellamy, *Still in Deficit: Rights, Regulation, and Democracy in the EU*, 12 EUR. L.J. 725 (2006); Mark Bovens, *New Forms of Accountability and EU-Governance*, 5 COMP. EUR. POL. 104 (2007).

<sup>235</sup> According to Martha Minow, the use of rights discourse affirms a community that acknowledges and admits historic uses of power to exclude, deny, silence – and commits itself to enabling suppressed points of view to be heard, to make cover conflict overt. Martha Minow, *Interpreting Rights: An Essay For Robert Cover*, 96 YALE L. J. 1860 (1987); Martha Minow, *The Supreme Court 1986 Term – Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

<sup>236</sup> See Michelman, *supra* note 5, at 1536.

<sup>237</sup> See *id.* at 1505.

<sup>238</sup> See Weiler, *supra* note 63.

Maduro find the realization of this ideal of inclusion in their own work<sup>239</sup> or in the existing legal system,<sup>240</sup> some scholars search for sources of social exclusion in particular modes of legal reasoning, in legal categories, lack of legal institutions,<sup>241</sup> techniques, or in exclusion from law.<sup>242</sup> Yet, many concerns of the periphery are foreclosed from operating powerfully in the legal discourse. The perception of injury in the pre-enlargement period seems to have continued after the enlargement despite all the constitutional instruments ensuring participation in the legal order. So how can there be exclusion in a seemingly exhaustively inclusive society such as the European Union, which has, according to Joseph Weiler, at least in terms of nationality, in its quotidian practices managed to include “the other”?<sup>243</sup>

The hierarchical structure of society and the plight of subordinate actors would caution against thinking in terms of full inclusion of the other. Hierarchies *among people* are ontological and constant, thus injury is an inevitable component of our daily work and life. Following the Hegelian analysis of master-slave relationship, how do I fully include the other if I inevitably constantly simultaneously exclude them and injure them when I constitute my individuality? Inclusion of the other in my interpretation should thus be understood as a constant management of the hierarchical struggle rather than a state of being we could claim to achieve or indefinitely construct.

There is an ineradicable selection in the hierarchies that will be addressed in this struggle. Even a constant, ceaseless revolution would always be partial in every moment in time and the ideal of equal representation would not be fulfilled. In this sense, the experience of dialogic engagement<sup>244</sup>, as Frank Michelman understands it, would always be partial. Yet my critique of the partiality and selectivity of contestation, a critique that not all interests are taken into account and represented, should not be understood as a critique of the current institutional and political arrangements that prevent the fulfillment of the ideal of political freedom. According to David Kennedy, politics is characterized by technical consolidation of expertise, and institutional representation is situated in a world of political division that does not reflect the flows of the economy.<sup>245</sup> His critiques of the lack of actual representation or political capacity are based on liberal political theory—on factual reasons that prevent the realization of this ideal of everyone being represented.

Even the freest political representation can reproduce existing ideology and risk contributing to the reproduction of existing hierarchies. Any new institution building and institutional balance cannot avoid existing ideology. In this latter picture, the ideal of full representation and everyone’s equal political freedom manifests itself as an impossibility that cannot be remedied by a political discourse replacing expert knowledge nor by any other factual circumstance that could contribute to its realization.

An institutional construction that could finally reflect all the interests or the real interests or the will of the people or at least take all of them into account cannot be understood as an alternative to the existing situation of subordination. The alternative is not such an entity, mode of reasoning, or legal thinking that would embody a

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<sup>239</sup> See Slaughter, *supra* note 64; Anne-Marie Slaughter, *International Law and International Relations*, in 285 RECUEIL DES COURS: COLLECTED COURSES/COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 204–11 (Academie de Droit International ed., 2000); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 205 (1993); See Maduro, *supra* note 187.

<sup>240</sup> See Weiler, *supra* note 63.

<sup>241</sup> See DAVID Kennedy, *supra* note 9, at 25.

<sup>242</sup> As argued above, Antony Anghie’s account misses that social exclusion and domination cannot be attributed to exceptional dynamics of difference, to orientalism or exclusion from law. See ANGHIE, *supra* note 37; Anghie, *supra* note 157.

<sup>243</sup> Weiler, *supra* note 63, at 11.

<sup>244</sup> Michelman, *supra* note 5, at 1541.

<sup>245</sup> See David Kennedy, *supra* note 9, at 48.

perfect form of political life to which we should aspire or that would connect the political and economic.<sup>246</sup> Similarly, rethinking a legal structure in terms of administrative law and accountability does not solve the problem of hierarchical subordination,<sup>247</sup> as no one can be held accountable for the harms not recognized in existing consciousness. No doctrines and procedures of administrative law such as transparency, legality or effective review will address the harms that are dismissed as unreasonable in the existing ideology.

Exclusion and injury occur, even in the brightest of democracies and with every optimization in legal reasoning and with the best possible interpretations,<sup>248</sup> irrespective of the dynamics of difference, orientalism, capitalism, neoliberalism, or other legal technique. This does not reduce the ideal of everyone's participation and representation to a mere formal predisposition in which people can only speak but are not heard. Instead, it reduces it to a hierarchical construction subject to a constant struggle.

### *E. Political Freedom and Political Incapacity*

Challenging political incapacity has been suggested as a remedy to the questions raised by center-periphery relationship as well as to the difficult questions raised by *Laval* and *Viking* judgments. The claim of the people's political incapacity is, however, incorrect. Political freedom is the central ideal of a liberal society. The concern about political incapacity and remaking the possibilities for global political life, the liberal goal of political freedom,<sup>249</sup> is indeed a central concern of many lawyers in contemporary legal thought, throughout the political and legal intellectual spectrum.<sup>250</sup> It is understood as the redemption or achievement of personal freedom from or through institutionalized social power, opening oneself to the experience of "dilemma" and dialogic engagement<sup>251</sup> In this understanding, the self-transformative possibility of the constitutional discourse through normative tinkering and ongoing revision of the normative histories<sup>252</sup> and the space for contestation allowed by the pluralist and constitutional legal discourse are aims of the analysis.<sup>253</sup>

David Kennedy reduces several problems—of the center-periphery relationship, law and economic development, or the study of legal expertise—to the goal of

<sup>246</sup> See *infra* Section V.C. ("Karl Polanyi and Contemporary Legal Thought").

<sup>247</sup> See, e.g., Mark Bovens, *New Forms of Accountability and EU-Governance*, 5 COMP. EUR. POL. 104 (2007); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 24 (2006); Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism: Thomas M. Franck's Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the 21st Century*, 35 NYU J. INT'L L. & POL. 291 (2003).

<sup>248</sup> DWORKIN, *supra* note 7.

<sup>249</sup> See Michelman, *supra* note 5, at 1495.

<sup>250</sup> This is not surprising, given that, according to Duncan Kennedy, the relationship between law and politics is paradigmatic in contemporary legal thought. See Duncan Kennedy, *supra* note 36, at 19. The variety of the argument against political incapacity is particularly frequent in the sense of the need of placing politics above economic freedom. See ROBERT HOWSE & KALYPSO NICOLAIDIS, *ENHANCING WTO LEGITIMACY: CONSTITUTIONALIZATION OR GLOBAL SUBSIDIARITY* 16, 73 (2003); Somek, *supra* note 67, at 711.

<sup>251</sup> See Michelman, *supra* note 5, at 1541.

<sup>252</sup> According to Michelman, reconsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities, by inclusion of those who have been excluded, enhances everyone's political freedom. It involves a kind of normative tinkering. It involves an ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members. This tinkering entails not only the recognition but also the kind of recognition—reconception—of those histories that will always be needed to extend political community to persons in our midst who have as yet no stakes in our "past" because they had no access to it. See Michelman, *supra* note 5, at 1495.

<sup>253</sup> See Krisch, *supra* note 28.

political capacity and contestation.<sup>254</sup> For David Kennedy, the problem to be overcome for remaking the possibilities for global political life is technical management and legal expertise,<sup>255</sup> arguing in terms of orientalism, progress,<sup>256</sup> and technical language.<sup>257</sup> According to Kennedy, “International lawyers have much to contribute to such a project, particularly if they grasp . . . the significance of their professional routines in the reproduction of political incapacity.”<sup>258</sup> He thus argues for a need to “find new institutional channels to integrate transnational interests and new levers to contest faraway decisions which affect their interests.”<sup>259</sup> He argues that:

The global political-economic regime will need to make policy space for alternative national and local experiments and strategies designed to manage the internal distribution of growth between leading and lagging sectors or regions and improve the national capacity to capture gains from trade and structure its own insertion into the global economy.<sup>260</sup>

This sensibility is in line with Somek’s and de Witte’s, who argue that there is political incapacity of the population faced with negative integration of the law in the European Union. In fact, the claim of political incapacity is a renewal of a claim of a democratic deficit, one of the central leitmotifs of EU legal studies.<sup>261</sup>

The proposition that people are not politically capable or that they are not deciding, however, is a misrepresentation of power, authority, law, and governance. When we see law as hierarchical and as a constant interplay of injuries and recognitions, as well as a synthesized memory of those injuries, rather than as legal

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<sup>254</sup> See David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827 (2008); David Kennedy, *supra* note 9, at 31; DAVID KENNEDY, LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE 21ST CENTURY, 19 70 (David Kennedy, Joseph E. Stiglitz eds., 2013).

<sup>255</sup> See David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY J. INT’L L. 5, 24 (2005) (“Although our world is densely governed, we have only the thinnest experience of participating in global politics. We remain subjects of an invisible hand—not that of the market, but of expertise which denies its politics. The more difficult job lies ahead—remaking the possibilities for global political life.”); see also David Kennedy, *The “Rule of Law,” Political Choices and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 173 (David M. Trubek & Alvaro Santos eds., 2006) (“The emergence of the rule of law as a development strategy has become an unfortunate substitute for engagement with the politics and economics of development policy making.”); see also LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE 21ST CENTURY 70 (David Kennedy & Joseph E. Stiglitz eds., 2013) (“As a result, the politics of law in the neo-institutionalist era has so far largely been the politics of politics denied.”).

<sup>256</sup> See DAVID KENNEDY, *supra* note 32, at 29.

<sup>257</sup> See David Kennedy, *supra* note 9. For further work addressing the work of legal expertise as a problem to be solved, see, e.g., David Kennedy, *Challenging Expert Rule*, *supra* note 255, at 5; DAVID KENNEDY, *supra* note 32; DAVID KENNEDY, OF WAR AND LAW (2006); David Kennedy, *The Politics and Methods of Comparative Law*, in THE COMMON CORE OF EUROPEAN PRIVATE LAW: ESSAYS ON THE PROJECT 345 (Mauro Bussani & Ugo Mattei eds., 2003); David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 UTAH L. REV. 545 (1997); David Kennedy, *Laws and Developments*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY 17 (Amanda Perry-Kessaris & John Hatchard eds., 2003); David Kennedy, *The International Style in Postwar Law and Policy*, 1 UTAH L. REV. 7 (1994).

<sup>258</sup> David Kennedy, *supra* note 9, at 48.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* David Kennedy’s institutional proposals are an interesting renewal, given his position about building of the League of Nations. See David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

<sup>261</sup> See J.H.H. Weiler, *Editorial, 60 Years Since the First European Community: Reflections on Political Messianism*, 22 EUR. J. INT’L L. 303, 304 (2011) (“The Political Deficit, to use the felicitous phrase of Renaud Dehousse, is at the core of the Democracy Deficit. The Commission, by necessity, cannot be ‘partisan’, neither can the Council, by virtue of the haphazard political nature of its composition. So where does that leave us? Democracy without Politics? Is that not an oxymoron?”).

doctrines and concepts, it becomes clear that law is not just what lawyers do,<sup>262</sup> but what all of us do all of the time. We are too often used to thinking that we have conferred regulatory power to either political institutions or to legal expertise.<sup>263</sup>

We lawyers and advocates are powerful,<sup>264</sup> but an emphasis on the power of legal expertise could suffer from under-inclusion and over-inclusion at the same time. First, lawyers across the globe find themselves in radically different structural situations, with immense power differences. Second, we are all deciding. Each of us forms and conforms to authority all the time. Constant authoritative syntheses are not made by institutions, nor only by legal experts, but by all people, all the time. If we understand the legal system as a patchwork of constant injuries and recognitions, we should rather explore how not just us, lawyers, but every person, no matter in what institutional, vocational and daily setting they find themselves acts legally and politically. In this sense, all of us - people from every domain in every social setting - are legal actors. We are not led by the invisible hand of expertise<sup>265</sup>, but by an invisible hand of the ideology of all of us.

All of us already have “regulatory power”. People are not passively constituted by abstract legal entitlements, but themselves impose injuries on themselves and others all the time and in every social setting. Decision-making power of each of us goes far beyond voting, representation, litigation and what is usually understood as participation in or exercise of governance.

The idea that there is no space for political contestation is contradicted by the fact that everyday all of us contest, or fail to contest, countless hierarchies. We are all constantly deciding and creating our social and legal life in every social setting. All of us in our daily work and lives respond to or do not respond to the concerns of others. All of us keep making or not making a difference in the normative situation of others. Thus, it is not just lawyers, but each of us constantly performing legal acts. In this sense, each person already has “regulatory” and political power.

The problem is not that we do not have the power and need to claim it from “the market”<sup>266</sup> or, in David Kennedy’s terms, that people are only informed, consulted, our polling data serving as base line for expert management and that citizens are not actually deciding.<sup>267</sup> Nor is it that people are not participating in global governance and that the possibility for global political life needs to be remade.<sup>268</sup> Global governance, just like authority, does not need to be “claimed.”<sup>269</sup> It is already here. Citizens already have political power and are already deciding. We are governing all the time. We are already politically capable.

<sup>262</sup> MAX WEBER, *ECONOMY AND SOCIETY*, VOLUME 1 (1954).

<sup>263</sup> David Kennedy, for example, argues, “We have substituted the forms of politics for the experience of political life. Too often we have opted for electoral form over participation and popular engagement.” DAVID KENNEDY, *supra* note 32, at 350.

<sup>264</sup> *See id.* at 327–357.

<sup>265</sup> According to David Kennedy, “Although our world is densely governed, we have only the thinnest experience of participating in global politics. We remain subjects of an invisible hand — not that of the market, but of expertise which denies its politics. The more difficult job lies ahead — remaking the possibilities for global political life.” David Kennedy, *Challenging Expert Rule supra* note 255, at 5, 24.

<sup>266</sup> Somek, *supra* note 67, at 711, 716, 717 (2012).

<sup>267</sup> David Kennedy, *The Mystery of Global Governance supra* note 254, at 860. One of David Kennedy’s random examples or proposals for remaking of global political life shares Somek’s and Christopolous’ worry about the lack of political participation. “If the new politics is to be about *empowerment*, we might imagine citizens not only informed, consulted, their polling data serving as base line for expert management, but actually *deciding*.”

<sup>268</sup> *See* David Kennedy, *Challenging Expert Rule, supra* note 255, at 5, 24 (“Although our world is densely governed, we have only the thinnest experience of participating in global politics. We remain subjects of an invisible hand — not that of the market, but of expertise which denies its politics. The more difficult job lies ahead — remaking the possibilities for global political life.”).

<sup>269</sup> *See* David Kennedy, *supra* note 9, at 40.

*F. Reproduction of the Public–Private Distinction*

The claim of political incapacity reproduces the public-private distinction of liberal political theory, which, while challenged in legal thought,<sup>270</sup> nonetheless persists to this day. Karl Marx maintained that the universal, abstract categories of the public or private sphere are not adequately grounded in social conditions and the forms through which social life is conducted. The public private distinction tends to legitimate and mystify structures of power through which individual autonomy, social institutions, and legal action are accomplished.<sup>271</sup>

The liberal ideal of people as political beings pursuing political freedom can be traced at least as far back as Aristotle. Political society and political capacity in the liberal tradition are seen as something outside of our daily existence, something that needs to be achieved. In the words of Aristotle, people are “zoon politicon,” social and political beings, and a political society is necessary for the full perfection of our existence. The recipe of the good life lies in our self-realization that we can achieve in a public entity such as a polis.<sup>272</sup> Virtue in this sense consists partly of a willingness to subordinate one’s private desires and interests to the common good. Only through active participation in the deliberative politics of a republic can a person fully realize himself.

According to Aquinas, political society is not given to us by nature. It is an achievement to which human beings aspire and is necessary for the full perfection of our existence.<sup>273</sup> Similarly, according to social contract theorists, political community is achieved by human ingenuity—by a social contract.<sup>274</sup> While a particular form of political society certainly needs a human creating hand, society is never outside our daily existence. We do not need to create a public hand, a polis, an institution, a political contestation, or any other entity or activity to create society or our political capacity. Only if we see politics as divine, something we cannot attain until some “public” intervention or “public hand” actually occurs,<sup>275</sup> can we think that we are politically incapable. In such a picture, politics is divided from the quotidian, separate from our daily existence. There is a need for creation of something—a lever, institution, or contestation—that will make us politically capable.<sup>276</sup>

Reproduction of the public-private distinction is thus reproduced in thinking about governance. David Kennedy constantly refers to the quotidian,<sup>277</sup> but at the same time constantly negates governance in the quotidian. In David Kennedy’s portrayal, despite an explicit rejection of the public-private distinction,<sup>278</sup> governance

<sup>270</sup> See Hale, *supra* note 23, at 470. Duncan Kennedy’s critique of the public/private dichotomy is based on the view that the range of distinctions that characterize liberal legality, “state/society, individual/group, right/power, contract/tort, law/policy, legislative/judiciary, objective/subjective, reason/fiat, freedom/coercion” are all going through “similar processes of decline” He argues that the public/private distinction has increasingly lost its capacity to plausibly capture features of reality and specify differences that are consistent and relevant for legal decision-making. Duncan Kennedy provides a critique of the public/private distinction that is “localized” to legal categories, legal consciousness, and the sphere of legal social relations. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

<sup>271</sup> See Gerald Turkel, *The Public/Private Distinction: Approaches To The Critique Of Legal Ideology*, 22 LAW & SOC’Y REV. 801, 802 (1988); Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER (Robert C. Tucker ed., 1978).

<sup>272</sup> ARISTOTLE, POLITICS (Benjamin Jowett trans., 1885).

<sup>273</sup> See SAINT THOMAS AQUINAS, 1 COMMENTARY ON ARISTOTLE’S POLITICS (Richard J. Regan trans., 2007).

<sup>274</sup> See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1689); THOMAS HOBBS, LEVIATHAN (1651); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

<sup>275</sup> David Kennedy, *The Mystery of Global Governance* *supra* note 254, at 827; David Kennedy, *supra* note 9 at 40.

<sup>276</sup> See David Kennedy, *supra* note 9, at 39.

<sup>277</sup> See *id.* at 9, 28, 33, 34.

<sup>278</sup> See *id.* at 40.

is understood as public, somewhere other than in our daily lives, detached from our daily work and decisions. It is something that needs to be “created,” “claimed,” and “brought to our attention.”<sup>279</sup> Governance, however, is a daily hierarchical struggle and it does not need to be claimed or created.

The search for political capacity seeks governance outside of the already existing quotidian or institutional form. De Witte, Somek, and Kennedy are waiting for “an adequate political process,”<sup>280</sup> for “a perfect transnational political space,”<sup>281</sup> and putting “an enormous scholarly premium on being able to see how things will turn out and how they should turn out.”<sup>282</sup>

Despite rejecting the idea that governance may one day add up to a coherent, constituted legal order,<sup>283</sup> David Kennedy believes that a new regime, an *order* of global governance is being built: “Like constitutional orders before it, a new global governance regime will be imagined and built through collective hope, struggle and disappointment. It will be an order made and known through processes we can only dimly see.”<sup>284</sup> Kennedy describes governance “as program for a world in transition,”<sup>285</sup> “as a dynamic process, in which legal, political and economic arrangements unleash interests, change the balance of forces, and lead to further reinvention of the governance scheme itself.”<sup>286</sup> He speaks about international law as a site of struggle, yet sees the world as a remarkably homogeneous global political order of fragmented government and local politics, operating against the background of an economy organized to link things together by detaching them from the very spatial and communal identifications with which government struggles to intensify its connection.<sup>287</sup>

An expectation or a description of global governance as an order or as a regime, however, is a partial description of reality that risks its misrepresentation. Likewise, “the intuition—and perhaps the hope—that as the world is re-ordered, law will be there, imagining it, making it, writing it down, consolidating and contesting the new arrangements” is a misrepresentation of reality.<sup>288</sup> Law already is here, all the time, it injures and it injures many people gravely. More importantly, Kennedy’s approach leads to thinking about the world in terms of reconnection, linking, completion and polishing of mental maps and orders. In other words, global governance is not “a result of” a struggle, it *is* a struggle and should not be understood in terms of reconnection, linkage, and construction of mental maps. Rather, governance is a constant, ontological hierarchical struggle between people in which each of us is politically capable.

The question “How are we governed?”<sup>289</sup> should not even be the goal of our work. The “how things will turn out,” the political process, the “institution with real powers,” “the process,” “the scheme,” “the order”—will merely be partial, *ex post facto* descriptions of reality. The answer to the question “How are we governed?” depends on the position of the person who is asking. One person’s experience of how

<sup>279</sup> According to David Kennedy, global governance must be claimed, through an assertion that this or that military deployment or human rights denunciation is the act of the global public hand—the “international community” in action. The rhetorical dimension of global power is equally significant for those who would resist. Whether one aspires to bring global governance into being or fears its power, one must name it, assert it, and identify it, before it becomes something to build or destroy. Indeed, in a sense, “global governance” is simply the sum of what those who wish to manage and to resist globally have jointly drawn to our attention as governance. See David Kennedy, *supra* note 9, at 40.

<sup>280</sup> Somek, *supra* note 67, at 711, 716, 717.

<sup>281</sup> de Witte, *supra* note 15.

<sup>282</sup> David Kennedy, *supra* note 254, at 832.

<sup>283</sup> See David Kennedy, *supra* note 9, at 26.

<sup>284</sup> David Kennedy, *supra* note 254, at 832.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See David Kennedy, *supra* note 9.

<sup>288</sup> David Kennedy, *supra* note 254, at 832.

<sup>289</sup> *Id.* at 827.

the world is governed is very different from that of someone in the center of the center or from someone who is right now dying from a curable disease.

Reproduction of the status quo<sup>290</sup> and global governance<sup>291</sup> have been called a mystery. As Holmes noted, when we study law we are not studying a mystery but a well-known profession.<sup>292</sup> A study of law, of global governance, and the reproduction of hierarchies only appears as a mystery when a public hand or a rationalized mechanics of its functioning is sought and the quotidian exercise of law, reproduction of hierarchies, and governance is overlooked.

Moreover, our life and global governance are chaotic and unpredictable, and things never repeat exactly as they happened in the past. Hence, we will never know exactly how the world “works,”<sup>293</sup> its “mechanics,”<sup>294</sup> or how the world “is legally organized.”<sup>295</sup> As Hume has taught us, our knowledge will always be partial.<sup>296</sup> As Wittgenstein said, we will never have a total grasp.<sup>297</sup> But the inevitable partiality of our vision does not mean that we should delight in “not knowing”<sup>298</sup> and in the “ubiquity of unknowing”<sup>299</sup> and in the unforeseen circumstances of our work. We know injury, abuse, and exploitation, at least when we consciously see it and feel it. We see a part of the hierarchical global structure every day, yet we fail to challenge it and prefer to reproduce our own hierarchical position and to live off the labor and lives of the subordinate.

Injury is not a mystery; to the victim, it is real. Violence and injury have a distinct meaning to the victim.<sup>300</sup> For the victim, the justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear suffered.<sup>301</sup> There is no lack of “knowing” there. Domination cannot be understood as mere performance.<sup>302</sup> Injury, appropriation, and exploitation are real, and they need to be contested and destabilized. The pursuit of the question of how the world works can only lead to partial explanations on the one hand and to an

<sup>290</sup> See KOSKENNIEMI, *supra* note 11, at 606–07 (citing DAVID KENNEDY, *supra* note 32).

<sup>291</sup> See David Kennedy, *The Mystery of Global Governance*, *supra* note 254.

<sup>292</sup> Oliver Wendell Holmes, *supra* note 25, at 460.

<sup>293</sup> David Kennedy, *supra* note 9, at 23 (“Moreover, it is one thing to assert that there is a system and quite another to explain how it works. This requires spelling out with some specificity just what renders the one thing peripheral to the other.”); David Kennedy, *supra* note 254, at 858 (“Thinking about global governance, we ought not try to constitute the world anew. There is too much work we still need to do simply to understand how it works, how the forces and factors we have overlooked might be brought into the analysis. We will need to collaborate with many who are not here, place ourselves in a far more global network of research and inquiry, to map the modes of global power and right. Going forward, our most significant contribution to global order may simply be spreading that knowledge, sharing it more evenly, building an academy outside the elite institutions of the North and West where these things are seen as we can see them and encouraging us also to see what can be seen there.”).

<sup>294</sup> David Kennedy, *supra* note 9, at 26 (“That did not eliminate the potential for dualism, for linkages, for spillovers, for the capture of rents and the reinforcement of bargaining power, for vicious – or virtuous – cycles. Far from it. It just makes them harder to find, the mechanics of their operation harder to isolate. The critical and heterogeneous traditions in legal thought give us a place to look for those mechanics.”).

<sup>295</sup> David Kennedy, *supra* note 254 at 835.

<sup>296</sup> See generally DAVID HUME, A TREATISE OF HUMAN NATURE (1738).

<sup>297</sup> See generally WITTGENSTEIN, *supra* note 21..

<sup>298</sup> DAVID KENNEDY, *supra* note 32, at 354–57 (arguing that not knowing we must decide and take responsibility for our decisions).

<sup>299</sup> David Kennedy, *Law in Development Economics: Toward a New Alliance*, in DAVID KENNEDY, JOSEPH E. STIGLITZ EDs. LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE 21ST CENTURY 19, 68 (2013).

<sup>300</sup> See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1629 (1986) (“While our Social decision rules cannot guarantee coherence and rationality of meaning, they can and do generate violent action which may well have a distinct coherent meaning for at least one of the relevant actors. We are left, then, in this actual world of the organization of law as violence with decisions whose meaning is not likely to be coherent if it is common and not likely to be common if it is coherent.”).

<sup>301</sup> See *id.*

<sup>302</sup> See David Kennedy, *supra* note 9, at 27 (“Indeed, we might think of domination or hegemony as a performance or assertion of centrality – or an ascription of peripherality – which gives rise, in a significant audience, to the effect of centrality or peripherality.”).

intellectual indulgence in not knowing our faith on the other, both approaches implicated in the reproduction of existing hierarchies.

Moreover, according to Kennedy, center-periphery analytics are deployed more often to criticize than to focus on policy proposals. In his view, the impetus is less reform than diagnosis, to raise awareness of contestation.<sup>303</sup> These are false alternatives. The aim of our work should not be a mere critique, diagnosis of problems, a search for policy proposals, or mere political contestation. The goal is destabilization of the unjust hierarchical structure of society.

## V. SWITCHING DOMAINS OF THOUGHT

Instead of destabilizing perceptions of injury and hierarchies, the legal profession too often relies on conceptual oppositions: on politics instead of law, on critique, or on re-embedding of economic life by the political. Such thinking, when hierarchical ideology is ignored, risks leaving existing injuries unchallenged.

### *A. Law and Politics*

Law is often understood as the problem, and political capacity and contestation are the solution. “There is law at every corner, but no way to contest it.”<sup>304</sup> In this view, law is seen as regress and politics as progress. Politicization of legal argument and taking all the interests into consideration is indeed one of the central traits of contemporary legal thought. For Anne-Marie Slaughter, for instance, the problem that the legal profession needs to overcome is sovereignty and state interest. According to Slaughter, it is “important to push beyond a posited or even asserted concept of state interest to examine the actual interests of individuals and groups as represented by the state.”<sup>305</sup> David Kennedy’s hope of strengthening the perception that legal arrangements involve choices and political struggles more than natural transitions<sup>306</sup> is a further example of this thinking. Kennedy’s proposed substitute for the regime of two tracks in the process of the Eastern enlargement of the European Union is progressive and humanitarian politics and working with awareness that the work of legal expertise is a matter of decisions and choices and not denying the politics of our work.<sup>307</sup> Issues should be discussed pragmatically.<sup>308</sup> His pragmatism, rejecting the existing language and thinking of legal expertise and calling for an accommodation between regulatory regimes and economic interests in the East and the West,<sup>309</sup> is, like Anne-Marie Slaughter’s, based on the assumption that all interests should be taken into account.<sup>310</sup> Kennedy’s claim that that the process of Eastern enlargement was a one-way development of the adaptation of the East<sup>311</sup> restates the need for relational accommodation of diversity. The latter is a typical concern of the international legal profession in contemporary legal thought, that aims

<sup>303</sup> See *id.* at 28.

<sup>304</sup> *Id.* at 8; David Kennedy, *supra* note 254, at 2 (“There is law at every turn — and only the most marginal opportunities for engaged political contestation.”).

<sup>305</sup> Slaughter, *Interdisciplinary Approaches to International Economic Law*, *supra* note 64, at 717, 730–36; Anne-Marie Slaughter, *International Law and International Relations*, *supra* note 239.

<sup>306</sup> See generally DAVID KENNEDY, *supra* note 32. .

<sup>307</sup> See *id.*

<sup>308</sup> *Id.* at xiv, 176, 196. While David Kennedy does focus his attention to the dark sides of legal work, he focuses on consequences, turning attention away from structure and ideology. See DAVID KENNEDY, *supra* note 32, at 350 and David Kennedy *infra* note 314. See also Slaughter, *supra* note 64, at 736.

<sup>309</sup> See DAVID KENNEDY, *supra* note 32, at 169–97.

<sup>310</sup> For the critique of Anne Marie Slaughter’s argument see Kukovec, *supra* note 216.

<sup>311</sup> See DAVID KENNEDY, *supra* note 32, at 184–97.

at politicizing legal work but fails to address structural injury and to challenge subordination.<sup>312</sup>

Acknowledgment of one's existence and interest does not mean that harm has not been done. Participation and accommodation of everyone in the discourse gives the existing outlook and existing pattern of decisions legitimacy and authority. Just as Slaughter's argument that everyone's interests need to be included in decision-making risks legitimizing the existing state of affairs and power,<sup>313</sup> raising awareness of politics, choices, and decisions risks legitimizing decisions in a particular framework of interpretation. Those who must be sacrificed for the good of Rome will have little reason to resort to democratic, pragmatic, and critical *ex post facto* explanations for the need of their subordination. Awareness of decisions and choices of legal expertise helps little when a decision-maker is not aware of their situation in a particular structural situation, deciding in a particular consciousness about an issue that is both structural and inevitably exceptional. Only if one does not acknowledge these limitations and our inevitable partiality, can one assume that a free expert or ruler undetermined by ideology and released from expertise exists.<sup>314</sup> This sense of freedom is a denial of social forces that have shaped us and continue to shape us. We are a function of decisions and injuries of others all the time, nodes in a field of forces, not sovereign decision-makers. Being determined by interest, ideology, by our life experience of body<sup>315</sup> and soul is our condition. In other words, an expert or ruler as portrayed by Kennedy would be "a fantastical being, living in the pure being of abstraction."<sup>316</sup>

The danger of such thinking is that ideological battles are conducted only within a particular mindset, both in the sphere of law and politics that take countless unjust social hierarchies for granted. The "invisible hand of ideology" will operate regardless of whether issues are discussed in courts or by new representative institutions, regardless of the existence of new institutional levers.

### *B. Critique as a Goal of Our Work*

David Kennedy offers yet another abstraction as the goal of our work—critique. According to Kennedy, criticism is supposed to be our objective rather than our tool;

<sup>312</sup> For accommodation of diversity, see Kalypto Nicolaidis & Joyce Tong, *Diversity or Cacophony? The Continuing Debate Over New Sources of International Law*, 25 MICH. J. INT'L L. 1349 (2004); Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism: Thomas M. Franck's Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the 21st Century*, 35 N.Y.U. J. INT'L L. & POL. 291 (2003); James Gathii, *supra* note 157; Bhupinder S. Chimni, *supra* note 38, at 3; Christa Rautenbach, *Cultural Diversity and International Law*, in INTERNATIONAL LAW AND INSTITUTIONS (Aaron Schwabach & Arthur John Cockfield eds., 2011), available at <http://ssrn.com/abstract=1788139>. For the understanding of accommodation of diversity in constitutional and pluralist discourses, see e.g., Krisch, *supra* note 28.

<sup>313</sup> See Kukovec, *supra* note 216.

<sup>314</sup> See David Kennedy, *Challenging Expert Rule* *supra* note 255, at 23 ("It urges us to see the expert as free — rather than as determined by interest or ideology. In this tradition, politics is the experience of deciding in the exception — in the freedom of not knowing, released from expertise, but not from responsibility."); see also DAVID KENNEDY, *supra* note 32, at 355 ("Ruling, deciding for others when we do not know — there is a freedom which comes when we realize that we are in power but that our expertise no longer guides us. It is the freedom of discretion, of deciding in the exception — a human freedom of the will.").

<sup>315</sup> For the insight that our own body is a permanent condition of our experience, a constituent of our perceptual openness to the life-world, see MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 440 (1962).

<sup>316</sup> MIGUEL DE UNAMUNO, THE TRAGIC SENSE OF LIFE 109–10 (1921) ("An abstract thinker, who refuses to disclose and admit the relation that exists between his abstract thought and the fact that he is an existing being, produces a comic impression upon us, however accomplished and distinguished he may be, for he runs the risk of ceasing to be a man.").

critique should be our knowledge.<sup>317</sup> Criticism cannot be our end.<sup>318</sup> It is only a tool without imminent benevolence.

Constant critique for the sake of critique risks perpetuating existing ideology and existing hierarchies, even more so if we are to follow David Kennedy's conception of legal experts as free from ideology.<sup>319</sup> A critique of the structurally privileged may just as well be performed to reproduce their dominant position. The question to be asked is what critique and whose critique is being considered. As Joseph Weiler argued, there is no inherent benevolence to democracy.<sup>320</sup> Likewise, there is no inherent benevolence to critique. Critiques by vile people will be vile. If usage of a particular tool, including critique, becomes the goal of our action, enchantment with our tools becomes a substitute for a lack of visions and for practice of social transformation.

To give an example, the plight of the Indians in the Spanish conquest has been attributed to the "dynamic of difference"<sup>321</sup> or to "dominium—private rights and capitalism."<sup>322</sup> Equipping the Spanish conquistadors with critique offers little hope for a belief that history would have taken a very different course. Likewise, equipping the conquistadors of today, lawyers, politicians, economists, and others who are engaged in as brutal a struggle as our counterparts in the sixteenth century with critique, can have a legitimizing function. The danger of critique as a goal in itself and without a standpoint, as Kennedy advocates it, is that it is performed within the existing ideology of understanding of injury or by those in structurally superior situations justifying their own abuse. Critique as a goal in itself, as an intellectual endeavor, risks numbing the intellectual platform and contradicts a posture of responsibility. Particularly when undertaken by intellectuals of the center, it can contribute to the reproduction of hierarchies. Such a critique leaves hegemonic interpretations untouched. It does not sound worthy of its name. But it is critique. Thus, any narrative, including overtly political and critical self-narration, can provide a cloak for domination and brutality, reinforce existing thinking, and contribute to the reproduction of the existing hierarchies.

### *C. Karl Polanyi and Contemporary Legal Thought*

Working on the assumption of the separation of the political and economic life again exemplifies the search for solutions and alternatives in conceptual oppositions, rather than in reconstructions of doctrines and subjects as bearers of injuries and recognitions. The distinction between politics and economics in contemporary legal thinking also reflects Karl Polanyi's idea of "economism,"<sup>323</sup> the idea that under capitalism and modernity, the economy trumps society and polity. For Polanyi, the articulation of markets in the commodities of land, labor, and money created the market system whose effect was the "disembedding" of the economy from society. The institutional separation of the political from the economic sphere as constitutive

<sup>317</sup> See DAVID KENNEDY, *supra* note 32, at 353-354.

<sup>318</sup> According to David Kennedy, critique should be our end: "Imagine instead a humanitarianism whose end was criticism, whose knowledge was critique." *Id.* at 353; *see also id.* at 354 ("With criticism as our objective rather than our tool, we might imagine international humanitarianism—or a human rights movement—as an anti-establishment establishment, invigorating our political life for heterodoxy.")

<sup>319</sup> See David Kennedy, *Challenging Expert Rule* *supra* note 255, at 23.

<sup>320</sup> See Weiler, *supra* note 63, at 10 ("A democracy of vile persons will be vile.")

<sup>321</sup> ANGHIE, *supra* note 37.

<sup>322</sup> Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1 (2011).

<sup>323</sup> Richard Walker, *The Two Karls, or Reflections on Karl Polanyi's The Great Transformation*, 45 ENV'T & PLANNING A 1662, 1665 (2013).

of market society, Polanyi insisted, was at the root of the “great transformation” of capitalist modernity.<sup>324</sup>

According to one interpreter of Polanyi, the market has been disembedded, and is hardly anymore playing the part of adjunct.<sup>325</sup> Another way of saying the same thing is that the market is now self-regulated. Neither the manor nor the guild is anymore in a position to control the dynamics of economic exchange. No longer do custom and tradition define the color and shape of the market. The market defines itself, and in so doing, pretends to establish what was not there before: a separation of an economic from a political sphere.<sup>326</sup>

Karl Polanyi’s disembedding and consequential double movement of economy and society has been in the forefront of critiques of the European Union’s alleged market and neoliberal bias today. According to Walker, the theory of the double movement appeals to so many people today, because the neoliberal revolution has turned the clock back to the 19th century, back before the social protections of the New Deal and social democracy. However, Walker continues, even absent neoliberalism we have to account for the spreading dominance of markets and capitalism around the world and the inability of reform in the name of social protection to halt their expansion or usher in true democracy.<sup>327</sup> According to the proponents of “Social Europe” it is this same separation that we witness in the massive strategic intervention in the social field to create and sustain the European market. It is the same continuing story of establishing the conditions for the operation of capital that Polanyi described.<sup>328</sup>

Christian Joerges, referring to Karl Polanyi’s *The Great Transformation* where Polanyi stressed the social embeddedness of economy and criticized the subjection to market discipline, critiques the predominant role of economy in the architecture of the European Union.<sup>329</sup> Joerges reconstructs a “social deficit” in the original design of the European Economic Community, arguing that a credible response to this deficit would be a pre-condition for the democratic legitimacy of the intensified integration project; alternatively, he underlines the need to link the rule of law with democracy and social justice. He outlines constitutional forms through which such linkages can be institutionalised and contrasts them with Social Europe as envisaged in the draft Constitutional Treaty and with the principles established in *Viking* and *Laval*.<sup>330</sup> In the context of *Laval* and *Viking* judgments, Emiliios Christodoulidis suggested that the demand and argument for the “un-protecting” of labor as comparative advantage marks a departure that could not have been previously possible, under a different conception of constitutionalism. It is the circulation of “social protection” or the “dignity of labor” as only one among many constitutional goods that makes it possible. They are circulated alongside and on par with other constitutional goods like property rights and economic security, the coordinates of their competition undone from any overall framework.<sup>331</sup> According to

<sup>324</sup> See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944); Emiliios Christodoulidis, *The European Court Of Justice And “Total Market” Thinking*, 14 GER. L.J. 2005, 2019 (2013).

<sup>325</sup> See Fred Block, *Introduction*, in *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* xviii, xxiv (1944) (“Polanyi does say that the classical economists wanted to create a society in which the economy had been effectively disembedded, and they encouraged politicians to pursue this objective. Yet he also insists that they did not and could not achieve this goal.”). For contemporary uses of Polanyi’s concept of embeddedness, see Jens Beckert, *The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology* (Max Planck Inst. Study Societies Discussion Paper 07/1, 2007); see also Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 404 (2012).

<sup>326</sup> See POLANYI, *supra* note 324; Christodoulidis, *supra* note 324.

<sup>327</sup> Walker, *supra* note 323, at 1669.

<sup>328</sup> See Christodoulidis, *supra* note 324.

<sup>329</sup> See Joerges & Rödl, *supra* note 70, at 1, 6.

<sup>330</sup> See *id.* at 1, 2.

<sup>331</sup> See Christodoulidis, *supra* note 324.

Christodoulidis, in the long run, the “one-sided ‘neo-liberal’ reduction of global constitutionalism to its constitutive function cannot be sustained. It is only a matter of time before the systemic energies released trigger disastrous consequences. This is the moment when Polanyi’s ‘double movement’ makes its presence felt.” Polanyi, as is well known, does indeed identify a reactive double movement at what Teubner calls the “tipping point,” with social forces storming the market to reverse the radical disembedding of the economy from society.<sup>332</sup>

In this context, Christodoulidis’ analysis of *Laval* and *Viking* diagnoses a form of European “total market thinking” where everything is for sale but nothing of value. He argues that under the “harmonic” and “harmonizing” guise of proportionality and subsidiarity, European integration progressively demolishes Europe’s national welfare traditions. Social protection becomes redefined as regulatory competition, and the clash between social inclusion and neo-liberal economics is cast in terms of different constituencies seeking market access. He contends that European economic integration driven by the fundamental market freedoms subverts constituent political power by delivering the political distinction between public and private goods to the market, and the protection of workers’ collective rights to the logic of price.<sup>333</sup>

Christodoulidis suggests that the court in *Laval* and *Viking* re-conceptualized the social in a way that “market access” is seen as its very fulfillment and overriding priority. At no point do the judges in *Laval* or *Viking* concede a sacrifice, or even the yielding of the social to the economic. Instead they undo the opposition. It is not coincidental, in this vein, that those who are to gain “market access” from the decisions are the first to challenge an understanding of decisions over the clash of social “rights” and economic “freedoms” as privileging the economic against the social. That is why he argues that there is something profoundly disturbing about “the merit” of an argument that suggests a mutual substitution that *pivots* on market access, understood in its functionality of sustaining a downward spiral of lowering wages (social dumping); of an argument that assumes “market access” in this modality as *sole* guarantor of both social and economic rights. Social rights depend on political decisions. To hand them over to the market in this way, and assume that the social costs of the erosion of standards, conditions, and wages are inevitable, folds political thinking into the most reductive form of what Alain Supiot calls “total market” thinking.<sup>334</sup> Likewise, Alexander Somek believes that in reasoning about *Laval* and *Viking* judgments, the only distributive mechanism considered is the market and proposes a new political institution of tax and transfer.<sup>335</sup>

One might wish to reduce hierarchical struggle and competition to categories such as the market or economics and to aspire to solve the problem by building new political institutions;<sup>336</sup> or by resorting to particular legal categories such as anti-neoliberalism, social considerations, anti-capitalism,<sup>337</sup> and public policies, or to “critique.”<sup>338</sup> Instead, hierarchical struggle and the entailing distribution of material and spiritual values—the realization of peoples’ desires, fears or frustrations—is present in every interstice of social reality and in every social system. It was omnipresent before Karl Polanyi’s great transformation,<sup>339</sup> as it is now.

<sup>332</sup> See Christodoulidis, ON THE POLITICS OF SOCIETAL CONSTITUTIONALISM, 20 IND. J. GLOBAL LEGAL STUD. 629, 636 (2013).

<sup>333</sup> See Daniel Augenstein & Bert van Roermund, “Lisbon vs. Lisbon”: Fundamental Rights And Fundamental Freedoms 14 GER. L.J. 1909, 1912 (2013).

<sup>334</sup> Christodoulidis, *supra* note 324, at 2016.

<sup>335</sup> See Somek, *supra* note 67, at 716.

<sup>336</sup> Alexander Somek proposes a new institution for tax and transfer. See *id.* at 717 (“Effecting such compensation would require, of course, a centralized authority with the ability to levy taxes and to effect transfers.”).

<sup>337</sup> Wolfgang Streeck, *How to Study Contemporary Capitalism?*, 53 EUR. J. SOCIOLOGY 1 (2012).

<sup>338</sup> DAVID KENNEDY, *supra* note 32; see Somek, *supra* note 67; Christodoulidis, *supra* note 324, at 2005.

<sup>339</sup> See generally POLANYI, *supra* note 324.

Disciplines of social life are an ex post facto rationalization of reality that is then interpreted as either economic or social, as law or as politics. We are thrown into the world of ontological hierarchies and every move we make in life is already political, legal, and economic. As with the duck-rabbit picture, economic and political realms of society are not separated. All of us lawyers, economists, and laymen construct the "market" and our economies in our daily work. We are all constantly deciding and distributing material and spiritual values—income, wealth, knowledge, respect, generosity, mercy, kindness, pleasure, compassion, envy, greed, arrogance, and suffering all the time in every social setting—factory, restaurant, home or office. Harm—injury—is *ubiquitous* in a social system.

In this constant daily distribution, the "social" anesthetizes. Barnard's, Somek's, Christodoulidis', Joerges' and others' argument is that they "have" to protect the welfare state against the advances of efficiency and neoliberalism.<sup>340</sup> In their view, set in the tradition of Karl Polanyi's double movement, once the free market attempts to separate itself from the fabric of society, social protectionism is society's natural response.<sup>341</sup> In fact, the discussion is not a choice between efficiency and social protectionism nor between the discipline or discourse of either economics or law and politics, but between competing patterns of distribution and between competing constructions of the social system.

David Kennedy appears to agree with the critique of the difference between economic and social/political considerations. Indeed, buying a T-shirt in Ghana could be regarded as either economic or political.<sup>342</sup> But, at the same time, he reproduces Karl Polanyi's argument of double movement, of the separation of economic and political:

Politics has everywhere become a diminished shadow of economics as political institutions and elites have been instrumentalized by economic interests. It is not surprising that they find themselves deadlocked—or simply disengaged—when it comes to addressing issues 'in the public interest.'<sup>343</sup>

This is a restatement of the conceptual premise of a hierarchy between ideas and abstractions. Political institutions or elites have not been instrumentalized by "economic interests," but rather by the interests of the already hierarchically privileged, supported by any narrative—economic, social, political, religious, critical, or other.

David Kennedy shares the imagery of disembeddedness, the primacy of economics over politics,<sup>344</sup> and the resulting instability of contemporary political and economic life.<sup>345</sup> He shares Polanyi's concept of the subordination of society to the economy. The imagery is that law and economics are everywhere, but politics is not, or that politics cannot master economic life. David Kennedy's critical project is

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<sup>340</sup> See Catherine Barnard, *A Proportionate Response to Proportionality in the field of collective action*, 37 EUR. L. REV. 117-135 (2012); Christodoulidis, *supra* note 324, at 2005; Somek, *supra* note 67, at 711; Joerges, *Re-conceptualising European Law as Conflicts Law, the ECJ's Labour Law Jurisprudence and Germany's Federal Constitutional Court*, in INTERDISCIPLINARY STUDIES OF COMPARATIVE AND PRIVATE INTERNATIONAL LAW 7-18 (Bea Verschraegen ed., 2010); Joerges & Rödl, *supra* note 70, at 1, 13.

<sup>341</sup> KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944), cited by Floris De Witte, *EU Law, Politics And The Social Question*, 14 GERMAN L. J. 581 (2013), at 583; Christodoulidis, *supra* note 324, at 2016.

<sup>342</sup> See David Kennedy, *supra* note 9, at 14.

<sup>343</sup> See *id.* at 10.

<sup>344</sup> Arguments of primacy of economics over politics were pervasive in the debate surrounding the Laval and Viking judgments. For the argument of primacy of economics over politics, see, e.g., Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT'L L. 679 (1999); Alain Supiot, *Under the Eastern Eyes*, 73 NEW LEFT L. REV. (2012).

<sup>345</sup> See David Kennedy, *supra* note 9, at 19.

based on the recollection of how long it took to disentangle politics and economics<sup>346</sup> and on the imagination of the daily management of political and economic life aimed in broad terms to reconnect the political and the economic by revising the sinews of legal, institutional, and intellectual life through which they were separated.<sup>347</sup> “Economics has everywhere been disentangled from politics and economic life disembedded from political contestation.”<sup>348</sup> Kennedy’s, like Polanyi’s typical move of contemporary legal thought, is based on the artificiality of intellectual boundaries between economics, politics, and law. Political life, economic life, and the life of law cannot be disentangled, except by a rationalization of social life that is constructed along hierarchies of ideas, legal systems, domains, or disciplines of social life rather along the hierarchies among people. It is *ex post facto* interpretation of the same phenomena that makes them look separate and disentangled.

Paradoxically, by aiming at a reconnection of the economic and the political, the idea of the separation between the economic and the political is reinforced, not diminished. Indeed, Polanyi’s followers, are looking for a separation of political freedom from the brutality of our daily lives and our own daily actions—in their understanding, a separation from economics. In other words, they are looking for a liberal ideal of political freedom outside power, coercion, and struggle. As with the duck-rabbit picture, the political is economic. Political activity cannot be understood as separate from our daily existence or from economics, as something we need to achieve and strive for rather than something that we have already.

In reality, political freedom and our economic life are merely two interpretations of one and the same phenomenon of daily hierarchies and injury. Once a complete overlap between the economic and the political is identified, this picture will emerge: a picture of constant hierarchies and injuries. An ideal will be lost along the way that there is a political institution or mode of speaking that will really represent everyone’s interests, and political freedom that will enable us to challenge “economic” abuse.

#### *D. Domination and Center-Periphery as an On-Off Relationship*

When all the idealistic language, conceptualism, public-private distinction, and other analytical errors are set aside, we are left only with daily hierarchical struggle of each of us—with a structure of injuries and recognitions. The center-periphery relationship is a macro perspective of the global hierarchical structure. The center-periphery relationship is an assemblage or patchwork of micro hierarchical relationships. This view counters the understanding of center-periphery relationship as structured by economic theory.

David Kennedy uses Gunnar Myrdal’s theory for thinking about “the macro-side” of the relationship between center and periphery. His description of the macro picture replaces the imagery of international law as a relationship between states with an imagery of legal rules and institutions as sinews of connection and distribution among subsystems—between two systems sufficiently differentiated from one another to operate somewhat independently.<sup>349</sup> In this account, the mechanics of operation and of dualism of the subsystems lie in the salutary and perverse links, paradoxical or unexpected effects, linkages, spillovers, the capture of rents and the reinforcement of bargaining power, vicious (or virtuous) cycles.<sup>350</sup>

<sup>346</sup> See *id.* at 48 (“If we undertake such a critical project, we will want to recall how long it took to disentangle politics and economics.”).

<sup>347</sup> See *id.* at 20.

<sup>348</sup> See *id.* at 11.

<sup>349</sup> See *id.* at 24.

<sup>350</sup> See *id.* at 26.

Picturing the center-periphery relationship in terms of Myrdal's economic theory leaves us with a theory of causation or with lists of possible effects and links. However, no economic theory can explain daily domination. The relationship between centers and peripheries is not one of economic causation, but rather a relationship of hierarchy and domination. Injury and recognition structures and explains domination. This understanding of the center-periphery relationship also leads to a mistaken differentiation between macro and micro processes. According to Kennedy, "On the macro-side, there is dualism. And then there are linkages, sinews of interaction which can strengthen and weaken. These micro-processes develop dynamics of their own."<sup>351</sup>

As the relationships between us are constituted by injuries and recognitions, however, they structure "macro" social relationships such as the relationship between center and periphery. In other words, the macro picture, just like our legal system, is a constantly fluid patchwork of injuries and recognitions, of countless hierarchies in our lives. Thus, the "macro"-picture is merely a patchwork of "micro" hierarchies. Hence, there are no separate macro and micro dynamics. There is a single dynamics of the countless hierarchies between people—one of constant injuries and recognitions — manifesting itself in innumerable forms.

Moreover, articulation of resistance to domination can easily be understood as counter-causality, and as Myrdal explains, as countering the "market." According to Myrdal, it is market forces that produce upward spirals for prosperous regions and downward spirals for poorer regions.<sup>352</sup> In law, this could mean giving preference for "anti-market" social claims, to counter the backwash effects, akin to what the orchestra of interpretation of the *Laval* and *Viking* judgments claimed. This understanding could again lead to a conceptual, default interpretation of what the market actually "is" and what needs to be resisted. This approach would be mistaken.

Resisting abstract vicious and virtuous circles is as difficult and as analytically problematic as resisting capitalism. In other words, Myrdal's economic theory can be as any other theory and crucially, *no more than any other economic theory*, a part of the argumentative practice of the center-periphery relationship. But as a partial causal explanation, it cannot explain domination or resistance to it. In Kennedy's analysis, the daily struggle, conflict, and injury are obscured rather than revealed. They are limited to mechanics of operation of cycles, spillovers, and linkages. Hence, his analysis of the center-periphery relationship cannot offer a roadmap of resistance that would go beyond building political capacity and new abstractions such as institutional channels and levers.

In order to avoid the danger of false necessity that plagues theories of causation, David Kennedy concludes that Myrdal's causation and effects do not always happen. "Although centers sometimes impoverish or oppress peripheries, sometimes they do not. Sometimes they may lift them up. And sometimes their relative positions are a function of something else entirely—some other system or interest or force that keeps them in such a relationship."<sup>353</sup> To boot, "Nor is there a persuasive model or compelling analytic reason for thinking that centers will always oppress peripheries. Sometimes all boats do rise."<sup>354</sup>

We are left with a description of the relationship between the center and periphery as a theory of causation, with law in the background as structuring the conditions of bargaining, a causation and list of effects that sometimes occur and sometimes do not. Such a portrayal of the relationship between centers and peripheries in terms of virtuous and vicious circles misses a fundamental element of the explanation and reproduction of hierarchies. The center-periphery relationship

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<sup>351</sup> *Id.* at 24.

<sup>352</sup> See GUNNAR MYRDAL, *ECONOMIC THEORY AND UNDERDEVELOPED REGIONS* (1957).

<sup>353</sup> David Kennedy, *supra* note 9, at 23.

<sup>354</sup> *Id.* at 28–29.

and hierarchical relationships are not exceptional. They do not only occur when Myrdal's vicious cycle is "switched on."<sup>355</sup> David Kennedy's conclusion that centers do not always oppress peripheries would exclude (what he otherwise concedes) that the center-periphery relationship is structured by law and that people are constituted by law. In other words, the structuring of individuals, of hierarchies, and of the legal system cannot be understood as an on-off process. We are constantly structured. Struggle, injury, recognition, and domination are constant and inevitable. Moreover, oppression never goes only in one direction. Injuries and recognitions flow from every person to another constantly and, in the macro picture, from the periphery to the center just as well.

In Kennedy's analysis of the relationship of domination between centers and peripheries, the phenomenon of law, hierarchies and domination is analytically confused with the phenomenon of economic development or economic growth. According to Kennedy, sometimes centers impoverish or oppress peripheries, sometimes they do not. Sometimes they may lift them up. Centers do not always oppress peripheries, sometimes there are virtuous cycles and all boats do rise.<sup>356</sup>

Economic growth could be understood as the increase in the value of goods and services produced by an economy over time. But injuries are the static picture of the legal system in every particular moment. Though they can do so, injuries do not necessarily automatically translate into economic growth or stagnation. Even more, boats are rising and falling irrespective of the constant injuries we are inflicting on ourselves and others, despite constant domination. In other words, economic growth happens irrespective of these constant injuries and sometimes even precisely because of some injuries. Injury, suppression, and pain can be the vehicle of innovation and growth. On the other hand, constant injuries of particular types can be detrimental to economic development. But they are not synonymous with it.

The fact that law and domination are constantly present in structuring the relationship between center and periphery also contradicts David Kennedy's hypothesis that law offers an index of tools and stakes for interaction between centers and peripheries in the world political economic system. While there are specific structures that contribute to the perpetuation of domination (for example the social-economic dichotomy, selective understanding of harm, and lack of a goods dumping doctrine) in free movement law, state aid law, or antitrust law, these are just manifestations of countless instances of domination. The relationship of domination of the center over the periphery is one of specific and constant injuries manifesting themselves through infinite varieties of doctrines and tools, forming the web of hierarchies in every moment in time. The hierarchical relationship is nested throughout the system in every moment, relationship, dispute, doctrine, tool, or situation in every domain of law.<sup>357</sup> Injuries constantly structure the center-periphery relationship and can be rationalized by any tool or stake. No closed index of tools or stakes that structure domination could ever be assembled. In other words, hierarchies and injury are inevitable and ubiquitous in the legal and social system and cannot be confined to any index, tool, or stake.

In a perception of the center-periphery relationship as a causal picture and list of possible effects, with law as a mere element of bargaining in the foreground of political economy interpreted in a relationship of dualism, one can indeed come to David Kennedy's conclusion:

To claim that *this* is peripheral to *that* requires a suspension of awareness of life's complexity, irrationality and unpredictability. Even then, it can be

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<sup>355</sup> David Kennedy, *supra* note 9, at 24.

<sup>356</sup> See David Kennedy, *supra* note 9, at 39.

<sup>357</sup> For the idea of nesting, see DUNCAN KENNEDY, LEGAL REASONING, COLLECTED ESSAYS 132 (2008).

difficult to tell just who is in the center and who is the periphery. There are centers in the periphery, peripheries in the center.<sup>358</sup>

True, there are centers in the periphery and peripheries in the center, but this is a result of the fact that our global society is hierarchical through and through. Macro pictures are simply patchworks of reinforced micro hierarchies. Hierarchy and injury are daily ontological occurrences. This is why there are hierarchies in the center, in the periphery, and everywhere. Hierarchies and injury, as everything in life, require interpretation, but this does not mean they do not exist.

On the other hand, David Kennedy's portrayal of the center and periphery relationship as a causal relationship of political economy coupled with an understanding of law as a bargaining chip requires a suspension of awareness of life's complexity, irrationality, and unpredictability. The relationship and the reproduction of the relationship between the center and periphery is, in this latter picture, left to an economic theory of causation—of vicious and virtuous circles—and to a list of effects that sometimes happen and sometimes do not, to being structured by abstract legal entitlements as bargaining chips and by the golden cage of modernity. In this picture, when the glue of society and the center-periphery relationship are understood as legal entitlements as a background to bargaining and the political economy, the gold standard for critique can indeed, as in Kennedy's analysis, appear as an iron cage.<sup>359</sup>

However, the center-periphery relationship is neither an "iron cage," an "accident," nor "anything in between."<sup>360</sup> It is not a rational or rationalized control of one "system" by another. The iron cage is a rationalization that cannot portray reality, domination, or the center-periphery relationship. Domination is not a question of economic development, economic theory, or political economy, of mechanics of governance, but a question of our daily existential struggle. The center-periphery relationship is, like our legal system as a whole, a patchwork of constantly shifting and reinforcing hierarchies and injuries.

Finally, David Kennedy sees the relationship of center and periphery as a dualism of relative positions,<sup>361</sup> as a loose dualism of inside and outside, a loose vernacular between an "outside" and "inside" that seems amenable to interpretation in dualist terms in a number of international doctrinal worlds, including international humanitarian law.<sup>362</sup> Kennedy's loose dualism is the staple of contemporary legal thought. In contemporary legal thought, relational dualism is the norm, as portrayed by the principle of balancing or proportionality.<sup>363</sup> The principle of proportionality reflects the conflict and interplay of individualist claims of autonomy and altruist claims of protection.<sup>364</sup> Legal relationships are thus understood in terms of juridical correlatives,<sup>365</sup> in terms of the reciprocal and relational nature of legal problems<sup>366</sup> in terms of cooperative/competitive groups, such as men/women, employer/employee, landlord/tenant, first world/third world, or in terms of center-periphery.<sup>367</sup>

With the deconstructed picture of workers and businesses in the *Laval* and *Viking* judgments, the center-periphery relationship like any legal conflict cannot be

<sup>358</sup> See David Kennedy, *supra* note 9, at 29.

<sup>359</sup> See *id.* at 25. According to David Kennedy, the gold standard for criticism is the iron cage. *Id.* at 28.

<sup>360</sup> *Id.* at 22.

<sup>361</sup> See *id.* at 23, 25, 46.

<sup>362</sup> *Id.* at 46.

<sup>363</sup> See, e.g., Robert Alexy, *Constitutional Rights, Balancing and Rationality*, 16 *RATIO JURIS* 131 (2003); Duncan Kennedy, *The Disenchantment of Logic Rationality*, 55 *HASTINGS L. J.* 1074 (2004).

<sup>364</sup> See Duncan Kennedy, *supra* note 36.

<sup>365</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16 (1913).

<sup>366</sup> See Coase, *supra* note 26.

<sup>367</sup> David Kennedy follows such dualism.. See David Kennedy, *supra* note 9, at 46.

understood in merely dualist or bilateral terms.<sup>368</sup> Rather, every conflict should be understood in terms of multiplicity of parties, which urges us to rethink the imagery and analysis in terms of “stronger” and “weaker” parties, and in terms of the conventional dualism in proportionality in contemporary legal thought. Every legal problem is bound to affect a larger structure than what is presented by opposing parties in the consciousness of thinking in terms of the reconstruction of legal conflicts in terms of two opposing theories. Only with the acknowledgment of this multilateral nature do we see which injuries are privileged in legal analysis and which ones are obstructed from view.

*E. Life of Law is Experience: a Vision of Subordination*

As Oliver Wendell Holmes noted, the life of the law is experience<sup>369</sup> and life itself is nothing but experience. Legal method is just as much produced by experience. Rather than focusing on theories, lawyers should focus on their own experience of injury. Every person, no matter where in the hierarchical structure they find themselves, has a story of subordination to tell. This is what gives us grounding, vision and an *angle* of critique and enables lawyers to identify structural injury and construct doctrines to counter it.

Changing the world entails visions of one’s subordination. Vision exceeds and predates method, method adjusts retrospectively to suit vision.<sup>370</sup> We can only employ theories and critique to articulate and pursue our visions. Switching particular angles of critique is essential, and thinking, stories, and critiques of the subordinate need to be told. But it is the subordinate themselves who need to tell them. Without a vision, a critique is inevitably blunted. Work without a vision can express disagreement with a particular state of affairs or with a theory, but offers little promise to develop serious alternatives either of action or of legal thought.

We would hope to present a constant challenge to instances of abuse and reverse hierarchies we believe are unjust. However, the haves might keep coming out ahead<sup>371</sup> simply because the community recognizes some constellations of legal entitlements as “just” and others as “unreasonable.”<sup>372</sup> To give an example, Catherine Barnard, despite acknowledging and agreeing with my portrayal of the duck-rabbit picture of social and economic considerations, considers my argument as distractive. It distracts from her general thesis, namely that in terms of preserving the integrity of national social systems, the *Viking* judgment is severely damaging to rules developed by the states in the social field.<sup>373</sup>

The lawyers of the European center are not expected to feel the pain of the actors of the periphery. As Robert Cover reminds us, pain is unshareable.<sup>374</sup> However, a universalization of understanding of the pain of the subordinate by universalization of the master-slave relationship is possible. The latter is reproduced throughout the social system, and countless hierarchies form the global legal structure. Our society is a constantly fluid patchwork of recognitions and injuries. The center-periphery macro picture is an assemblage of innumerable injuries and recognitions on a micro level. The socioeconomic data are only a static economic description, an emanation of these constantly changing and transitory relationships. In this picture, decision and denial, hierarchy and injury are inevitable and

<sup>368</sup> David Kennedy analyses the center-periphery relationship in terms of dualism of relative positions which reinforces the binary imagery and dualism of contemporary legal thought. See David Kennedy, *supra* note 9, at 46.

<sup>369</sup> See Holmes, *supra* note 25, at 457.

<sup>370</sup> ROBERTO MANGABEIRA UNGER, *THE RELIGION OF THE FUTURE* 4–5 (2014).

<sup>371</sup> See Galanter, *supra* note 1, at 95.

<sup>372</sup> See Somek, *supra* note 67, at 711.

<sup>373</sup> See Barnard, *supra* note 340.

<sup>374</sup> See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

constitutive of law itself. In other words, hierarchies between people, not between tools and ideas, institute actual normative statuses.

Where is the apex of the hierarchical structure? Günther Teubner is right in saying that society has no center and no apex.<sup>375</sup> Clearly, anyone embarking on a mission of finding the center or apex of the world is bound to discover a large Nothing. There is no absolute lord, just like there is no absolute bondsman. We constantly are both at the same time as we all depend on each other and everyone is hierarchically subordinated in one way or another. But this does not mean that hierarchies do not exist. As long as injury of one conscious being by another one exists, hierarchy exists. And so do law, power, and authority. Constant authoritative syntheses are not made by institutions, but by people all the time. In other words, all of us decide and govern all the time by our particular consents and contestations, by our recognitions and injuries.

Alleviating one instance of subordination breeds another one, and every hierarchical situation is multifaceted. Tolstoy's thought that everyone is thinking about changing the world but no one thinks about changing himself, comes to mind here. A constant attempt to switch perspectives and evaluations of the costs of our actions, while being fully grounded in our own perspective and vision, appears to be important for a leader or any social actor, as we will never see the full picture of subordination and thus of global society.

As always in law, issues are a matter of interpretation and as always in life, things are a matter of belief. The more people believe that the euro will not survive, the more likely it is that it will not survive. A loss of belief is probably the most pertinent definition of what we generally understand as a personal or social crisis. A social crisis occurs when we collectively know that we do not know how to act. It is a shared experience, limited in time until a belief in existing or new practices is restored, with all its negative and positive consequences. But crisis, understood as an abusive pattern of material, spiritual, intellectual, or physical exploitation, is with us daily<sup>376</sup> and is bound to repeat itself. The question is only in what specific form of injury. It is this daily and never-ending crisis we need to continuously address.

## VI. CONCLUSION

A quest for social transformation through law requires a more accurate analytical depiction of the phenomenon of law than the current legal repository offers. In this account, the static component of law is the hierarchical structure of society as formed in any moment in time. Law in action is the way each of us is constructed in every moment in time. The dynamic component is a constant hierarchical struggle that not only tears society apart, but forms it and connects people in a global web of hierarchies.

In hierarchy we find decision, injury, denial, authority, power, and law. The structure in which lawyers operate is a hierarchical structure of decisions – injuries – not interplay of altruist and individualist considerations. When all the idealistic language, conceptualism of contemporary legal thought, public-private distinction and other analytical errors are set aside, we are left only with daily existential struggle of each of us—with a structure of hierarchies – decisions implying injuries and recognitions – that form the lowest common denominators of the legal system and of global governance.

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<sup>375</sup> See Günther Teubner, *Societal Constitutionalism and the Politics of the Common*, 21 FINNISH Y. B. INT'L L. 2, 12 (2012).

<sup>376</sup> For the failure to perceive structural subordination of women, for example, and the daily crisis, see Catherine MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L. J. 1 (2006).

Law is also not “the rules of the game of economic struggle,” as law cannot be considered as separate from the daily struggle that constitutes us. Struggle and in this sense, violence, cannot be dissociated from the phenomenon of law in any moment. “Law in action” is us: the way each of us is (hierarchically) constituted and constitutes others in every moment. Law is the way we decide and constitute ourselves in every moment; therefore each of us is politically capable. Socially relevant decisions are made at any level of society at every moment.

Hierarchies and hierarchical struggle are ineradicable. In this sense, Third World legal scholarship does not adequately address domination and power. No “gap” needs to be established for the exclusion and subordination to take place. Certain interests are excluded in a constant hierarchical struggle throughout the system, regardless of the establishment of a gap, capitalism, imperialism, neo-liberalism or “exclusion from law.” Likewise, no particular subordination in terms of identity needs to take place in order for hierarchies to exist. The center-periphery relationship is a macro picture of the hierarchical structure of society, of countless micro hierarchical struggles, and it should be analytically addressed as such.

The aim of the modernist sensibility was to restrain the passions of the people by reason and law.<sup>377</sup> The sensibility of lawyers in contemporary legal thought is either a continuation of this approach or its mirror image, liberating the passions and politics from the grip of reason, legal expertise, law or economics. Domains of social thought, such as law, economics and politics depict social reality, but do not in themselves construct it. As such, an abstract switch of thinking in terms of one domain of social thought or paradigm to another cannot be a recipe for resistance to the existing hierarchical structure and ideology. Furthermore, political contestation and democracy do not necessarily ensure that the voice of hierarchically subordinate is heard when the discourse is inevitably shaped in a specific framework of interpretation that forecloses some concerns from operating powerfully.

Portraying the hierarchical structure of society also unravels alternative ways of thinking about its construction - legal reasoning that balances social and autonomy considerations through a dualism of left and right politics, constitutional analysis and the economic theory of integration that demands stages of legal and economic regimes. These approaches, just as the separation between economy and politics, fail in their conceptual emphasis on hierarchies between ideas, missing the ineradicable and constant struggle among people in different positions in society.

Legal work should not be a pursuit of building conceptual maps, such as “reconnecting the political and the economic by revising the sinews of legal institutional and intellectual life through which they have been separated.”<sup>378</sup> This is abstract work based on untenable distinctions that can merely reproduce existing ideology and understanding of injury. Who in the hierarchical structure will be given preference in such work? Whose injury will be acknowledged and whose suppressed?

Rather than thinking about social change in terms of conceptual oppositions, paradigms and other abstractions, legal work should be based on a reconfiguration of existing perceptions of injury and reconfiguration of particular doctrines and tools that reflect them. Certainly, identification of structural injury may not be enough to bring enough change. There are always competing national, transnational and international structures at play and there are always unintended consequences of our actions. Yet, analytic clarity about hierarchical structures is needed.

Analytical clarity about law and governance is indeed vital for thinking about social change and for the articulation of resistance. But given the infinite points of reconstruction and resistance, as well as an inevitable lack of a guiding theory or

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<sup>377</sup> See Berman, *supra* note 34.

<sup>378</sup> See David Kennedy, *supra* note 9, at 19.

paradigm, a vision of subordination is also needed for the articulation of strategy and reconstruction of the hierarchical society.

Without a vision, we are likely to find ourselves sailing on the wind of existing sensibility, ideology, and legal analysis. Lack of vision or lack of courage to pursue them also results in a discourse of public and private legal orders, of more or less integration and risks perpetuating existing instances of abuse, exploitation, and legal thinking. If the goal of social transformation is to be taken seriously, the hierarchical allocations, along with ideologies and tools, need to be transformed and rearranged. In the face of inevitable adversity and countless obstacles, it is hope, vision, courage, and tenacity<sup>379</sup> that we will need along the way.

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<sup>379</sup> According to Roberto Unger, these are the four necessary virtues for leadership. Podcast Interview by Stephen Backur with Roberto Unger, political philosopher, in BBC World Service (Nov. 14, 2013), available at <http://www.bbc.co.uk/podcasts/series/ht/all>.