

INTERNATIONAL LEGAL THEORY

International Law and the Turn to Political Economy

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Abstract

An increasing number of international law scholars over the last few years have started to turn their attention to the study of political economy. To what extent can this trend be considered an indication of an underlying ‘disciplinary turn’? How should one understand the phenomenon of disciplinary turns? The answer we propose to this question in this article proceeds from the assumption that not all disciplinary shifts follow the same logic. Unlike the linguistic or the historical turn, the turn to political economy in contemporary international law does not represent an exercise in inter-disciplinary exploration. The concept of political economy used in international law has very little to do with the actual discipline of political economy. It is much more diffuse and unfocused in theoretical terms. What gives it its essential sense of identity is not any form of distinct methodological orientation, but rather its basic usefulness as a potential marker of critical self-distancing vis-à-vis the mainstream international law tradition and its ideological function as a mediating device for the expression of a deep-seated concern about the structural injustices of modern capitalism.

Keywords

critical legal theory; international economic law; international legal theory; political economy

Akbar There has been an interesting shift within international law in recent years. A lot of projects have started to emerge that all seem to proceed from the same basic assumption, which is that international lawyers ought to start paying more attention to questions of political economy, reflect more consciously about all the different ways in which global economic processes and international law intersect, and explore more systematically the relationship between law and international economic governance.¹ As someone who works in the area of international economic law, I find this trend very curious.

John There has, indeed, been a lot of talk lately among international lawyers about political economy. Going to conferences, hearing people talk about their work, you

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¹ See, e.g., G. Baars, ‘Reform or Revolution? Polyanyian v. Marxian Perspectives on the Regulation of “the Economic”’, (2011) 62 *Northern Ireland Legal Quarterly* 415; M. Fakhri, *Sugar and the Making of International Trade Law* (2014); A. Lang, *World Trade Law after Neoliberalism* (2011); S. Ranganathan, ‘Global Commons’, (2016) 3 *EJIL* 693; J. Salacuse, ‘Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries’, (2017) 58 *HILJ* 127; G. Sarfaty, ‘Shining Light on Global Supply Chains’, (2015) 56 *HILJ* 419; D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006).

certainly do get the feel that more and more international lawyers are beginning to think that political economy is an important topic for international law to address. But is that enough to say that there has been a *turn* to political economy?

Disciplinary turns are notoriously complex phenomena.² There is nothing simple or self-evident about them. Is a 'turn' something that takes place in the minds of people or in the institutional realities that surround them? Is it a purely theoretical event or is it more an act of disciplinary contestation?

I think it is very important for us to be clear just what exactly we have in mind here. It is evident that international lawyers today invoke the language of political economy more readily than they used to. But does that in itself show or prove anything? Surely, whether or not a disciplinary turn has taken place cannot be resolved by just tracking what language is 'trending' in international law conversations.

Akbar Exactly. There is an obvious temptation in this kind of situation to look for some kind of easy metric: the number of times a certain word or phrase is mentioned in the literature, the number of times a given concept is referenced, etc. I can see why one may want to go down that route – it gives you the satisfying illusion of certainty – but I think this way of approaching the problem takes us in the wrong direction. What we are dealing with when it comes to disciplinary turns is, essentially, the evolution of a *disciplinary sensibility*, a transformation, if you will, in the structure of a *collective consciousness*. How do you evidence what is happening at the level of collective consciousness? Certainly, not just by tracking the number of times a certain word or concept gets name-checked.

John But let me ask this then: what exactly does the concept of 'political economy' represent here? I think most of us have a more or less clear idea what we have in mind when we speak about 'the linguistic turn' or 'the historical turn'. Both history and linguistics are relatively well-established disciplines with a long track record of inter-disciplinary crossovers. I am not sure we can put political economy in the same class, however. It is not really a discipline, at least not the way it seems to be experienced in international law today.

Akbar No, it is not, and I think that is an important point. Political economy *has* been historically constructed as a discipline – some may argue it is the parent discipline of all economic sciences – but that is certainly not the way international lawyers today relate to it. The turn to political economy that we are witnessing today in international law is *not* a turn towards some kind of defined theoretical field, discipline, or methodology.

John Right, and more often than not it seems to me political economy for international lawyers is just a tactical buzzword. If we look at the way international lawyers typically invoke the theme of political economy, the move seems to be just a form of critical self-distancing, of posture. On the surface, the argument focuses on politics and economics but once you scratch that surface the basic idea behind it is simply that there is something wrong about the way mainstream international law scholarship is developing and we need to change that. There is not really anything

² See AHR Forum: 'Historiographic "Turns" in Critical Perspective', (2012) 117 *American Historical Review* 698.

interdisciplinary or even very programmatic here. The theme of political economy is basically just a stand-in for some kind of intellectual and political protest against conservative, simplistic ways of imagining global governance mixed with the old Enlightenment belief that a cognitive revolution leads historical change.

Akbar When we talk about disciplinary turns we need to shift the emphasis from the word ‘disciplinary’ to the word ‘turn’. The key to that is we should move from thinking of history, linguistics, anthropology, political economy – you name it – as universal theoretical constants, as projections of some pre-existing intellectual essences. There isn’t one single ‘correct’ or ‘naturally given’ concept of political economy that is valid for all disciplines. How international lawyers interpret the concept of political economy does not need to be synonymous or equivalent to how any other discipline or profession treats it.

Let us not deceive ourselves: what international lawyers do under the rubrics of anthropology or history is also very different from what professional anthropologists and historians usually do. And that, of course, is perfectly fine. Historians do not have any monopoly over the idea of the historical method, just like economists do not have any monopoly over the idea of political economy.

John I agree, they don’t. But I think also we are running two different lines of argument here. The first argument is that the turn to political economy is not really an exercise in inter-disciplinarity but something else entirely. The second argument is that the practice of joining or initiating a disciplinary turn is actually a form of performative activity. It is something like an invocation of a trope, rather than a truth-statement that involves a reflection on some pre-existing disciplinary formations. My interest lies mainly with the latter theme.

Speaking about disciplinary turns typically evokes the notion of some quasi-territorialized field of interdisciplinary linkages: linguistics is here, international law is there, history and anthropology way over to that side, and so on. I find this kind of mental imagery deeply misleading. It misrepresents how blurry and unstable the ‘external’ boundaries between different fields are, and it also obscures the enormous diversity of epistemologies and traditions we can find *within* each of these fields.

Akbar Yes, these are two fairly different lines of argument, and in my case, it is the first one that I find more interesting. When they perform their turn to political economy today, international lawyers do not come to political economy as though it were a distinct discipline.

As a disciplinary project, political economy has always had a fairly distinct theoretical profile. Its main themes, aesthetically and ideologically, have been the concept of social physics – the assumption that there exist ‘iron laws’ of social life that work in a way similar to Newton’s law of gravity – and the idea of what you might call ‘finding the public within the private’.

A large part of it goes back to its origins in the early Enlightenment period, when scholars such as Antoine de Montchretien started converging around the idea that one of the main functions of government was not only to bring peace and to protect *l’ordre public*, but also to encourage economic activity. As Ellen Meiksins Wood notes, Montchretien’s basic presumption here was that the government essentially

performs the same function vis-à-vis the rest of the society as the *pater familias* does vis-à-vis his household: its main task is to ‘rule benevolently . . . with an eye to the well-being, harmony, and prosperity of [all]’.³ The crucial difference here, of course, is that most people in the wider society are ultimately motivated more by narrow self-interest than any kind of familial sentiment. But that, Montchretien remarks immediately, is not actually a problem, since ‘selfish passions and the appetite for gain, far from threatening the common good, can [actually become] its foundation’.⁴

John It is this last bit that I think provides us with the theoretical crux: the open acknowledgement that private vice can give rise to public virtue. This is the same logic that we see in many segments of the international law literature, this idea that the universal can emerge from the particular, the substantive from the formal. To my mind, all this evokes a deeply Christian motif in a distinctly American register. It is the logic of the ‘Field of Dreams’, of Noah’s Ark, the notion that if you follow your particular dream, it will somehow result in the greatest good possible for all.

Akbar I agree that the key conceptual theme operating here is this idea that private vice can be converted to public virtue. Aesthetically and ideologically, it is the main tipping point, if you will. Once you have accepted it, then it only becomes a matter of time before you ask yourself: how does this mechanism of conversion work? How can all these ‘selfish passions’ and ‘private vices’ be best harnessed and controlled, as opposed to, say, resisted, repressed, or educated-away? Hence, incidentally, the typical emphasis in the political economy tradition on the ideas of ‘management’ and ‘promotion’, as opposed to prescription and sanction (as in Hobbes or Austin), and hence also the traditional concept of political economy as the discipline that studies the public management of private rationalities.

In one way or another, we can trace this vision of political economy all the way from Montchretien and the Scottish Enlightenment, down to Karl Polanyi and Douglass North. Marx adds a few unusual wrinkles, but even he under certain conditions can be subsumed within this broader tradition. In any event, the important point here is that *this* concept of political economy – the idea of the public management of private rationalities – has ultimately nothing to do with what political economy means to international lawyers today.

For international lawyers, political economy is basically a ‘what’, not a ‘how’; it is something that is just ‘out there’, not something that you ‘do’. There is no sense of any kind of fixed reasoning protocol or the use of a special epistemological apparatus.

John If you ask international lawyers what they mean by political economy, I think what you are going to find is that with most of them it simply stands for some vague idea that economic structures and political power are fused together; that economic processes are not really autonomous or self-sustaining; that they are heavily infused with political struggles and conflict, etc. And this, of course, goes back to our earlier point, how should we then understand this idea of a ‘turn’ to political economy? What is it we are actually ‘turning’ towards? Earlier you mentioned the idea of

³ E. Meiksins Wood, *Liberty and Property*, (2012), 167.

⁴ *Ibid.*, at 168.

disciplinary sensibility. Are you using it in the same way Martti Koskenniemi does at the start of *The Gentle Civilizer of Nations*?⁵

Akbar Yes, but I prefer to think of it in slightly more structuralist terms. Every discipline has a certain sensibility at its core. This sensibility is organized around a certain *langue*-like structure, something like what Duncan Kennedy calls a ‘mode of legal consciousness’.⁶ When the building blocks of this structure shift or transform, we experience a disciplinary turn. A disciplinary turn is an event in the history of disciplinary sensibility, and the history of disciplinary sensibility is the history of its structural transformations.

John I am not sure I share your enthusiasm for the concept of sensibility. I think it is too woolly and it also has the unfortunate tendency to encourage precisely the kind of homogenizing assumptions about disciplinary fields that we should resist.

I am interested in exploring the idea of disciplinary turns in a slightly different context: the practice of participating in disciplinary turns, to my mind, is essentially a kind of performative activity as well as an act of disciplinary politics. What I mean by this is that there is a certain kind of legitimation/de-legitimation dynamic that immediately sets in the moment we invoke the narrative of turns. And in order to understand how this dynamic plays out in any given case, we have to look at things in a historical perspective. A lot of this new scholarship that we are talking about has been produced by scholars who ‘came of age’ professionally in the last ten or fifteen years.

Akbar That is true. But if we start approaching the phenomenon of disciplinary turns in historical perspective, we need to identify the mechanics of their temporal production. What sort of factors can typically trigger a disciplinary turn? Under what institutional and demographic conditions? By highlighting the fact that it is primarily the scholars who ‘came of age’ professionally in the last fifteen years, you seem to be suggesting that the turn to political economy has a relatively clear inter-generational profile. Why do you think that may be the case?

John Without getting into the sociological gristle of our current disciplinary milieu, I think the answer, at least to a significant extent, has to be sought outside the immediate field of legal academia. It is difficult not to see the 2008 crisis as one of those important triggering moments. This is not to say, of course, that there haven’t been other contributing factors. The boogeyman of ‘neoliberalism’, for instance, started circulating ages ago, and critical legal scholars have been engaged in a rearguard fight against rightwing ‘law and economics’ for several decades.⁷ To some extent, these struggles have drawn inspiration from postcolonial studies and poststructuralist theory, but it has also been deeply influenced by the broader ethos of old-school liberal humanitarian movements, the kind one would associate historically with the idea of social democracy. What all of these movements share, at their core, is

⁵ M. Koskenniemi, *The Gentle Civilizer of Nations* 2 (2002).

⁶ For further discussion see D. Kennedy, *Legal Reasoning: Collected Essays* (2008), 201–3.

⁷ See P. Mirowski, ‘The Political Movement that Dared not Speak its own Name: The Neoliberal Thought Collective Under Erasure’, (2014) Institute For New Economic Thinking Working Paper No. 23.

a profound concern about what I tend to think of as the *visceral scale of inequality* locally and abroad.

So, in a nutshell, what has been different about this new generation of scholars, is that this visceral sense of inequality nowadays is far more commonly associated with the idea of capitalism, especially whether it is sustainable and what other alternative systems could potentially take its place. And this, if you will, almost logically takes you in the direction of that kind of thinking that feeds interest in political economy.

Akbar So, the turn to political economy in your reading is basically a new generation of international law scholars waking up to the visceral realities of capitalism?

John Yes, and them doing so as international law scholars, rather than ‘simply’ as concerned citizens. And not that it was necessarily a case of awakening, but it seems the confluence of the intellectual and ideological legacies and the historical experience of the 2008 crisis have enabled a renewal of interest in topics that had not been there before. Take, for instance, Anne Saab’s article; the idea that international lawyers can have something to say about world hunger that goes beyond the concept of a human right to food, and to link this, moreover, to questions of economic governance and security, this would have seemed fundamentally out of place not all that long ago.

Akbar You say ‘capitalism’. But is it any specific idea of capitalism we are dealing with? Marx’s concept of capitalism, for example, is very different from Polanyi’s, and there is of course a lot more than just Marx’s own writings when it comes to the Marxist tradition. If you follow the analytical framework Althusser outlines,⁸ you can find yourself moving in a very different direction from where you would go if you followed Lukacs.⁹ Even when it comes to theorizing the relationship between capitalism and international law – for instance, with Mieville and Chimni – there is a lot more than one Marxism to choose from. And then there are also all those ‘international political economy’ scholars who have their own Marxist-style take on these questions.¹⁰

John There are several different traditions of thinking about capitalism that we can detect in contemporary international law scholarship, and Marxism, I would say, is not the most dominant one. Broadly speaking, most of this scholarship, as I see it, converges around the idea that every socio-economic situation in which international law is implicated is the result, ultimately, of political decisions that are made in an unequal fashion and that bear an unequal distributive impact. The general goal for international lawyers is to learn how to think about this pragmatically but also work towards a more deliberative and egalitarian regime of governance, and moving beyond traditional economic dogmas is the first step on this journey.

Take the concept of money, for instance; once you realize that money – unlike what mainstream economics suggests – does not arise naturally out of exchange but is a legally constituted device generated and backed up by the state, your policy

⁸ L. Althusser, *On the Reproduction of Capitalism* (2014).

⁹ G. Lukacs, *History and Class Consciousness* (1971).

¹⁰ B. Hettne (ed.), *International Political Economy* (1995).

options are suddenly broadened.¹¹ And the politics of this move mean the struggle over the distribution of resources and control comes to the fore. This is not to say one can just appropriate the means of production and everything else follows suit. As Nikolas Rajkovic shows in this issue, the structures of geographical imagination you work with can be a very important constraining factor in terms of deciding what you can and cannot achieve. A structuralist Marxism, like we see in Althusser, would remind us that change and understanding resist any easy prescription. So I think there is not really any one tradition to think through our understanding of capitalism and it is all quite fraught.

Akbar But very few Marxists have ever suggested that it would be enough just to appropriate the means of production and everything else will follow suit, and no one has ever argued that the structures of geographic consciousness do not play an important role in politics. To an extent, you've set up a straw man here. Just think of all those writings by David Harvey, Giovanni Arrighi, and others.¹² The same goes for the idea that institutional constructs like money are, ultimately, generated and backed up by the state. Indeed, if anything, the one tradition that has always insisted that you cannot understand the workings of economic institutions in separation from the state is Marxism.¹³

John That may be true, but Marxism may also come with significant baggage for thinking through things. I think, for instance, there is a tendency in Marxist thought to ultimately see 'law' as part of an active 'superstructure' and to pair that with a relatively under-theorized notion of the 'economy in the last instance'. And it remains marginal, because if you are writing within the international law vernacular, you ultimately have to accept, on some level, that law is more captivating than one might otherwise admit. Now, once we put this idea together with the idea I alluded to earlier, that it a visceral kind of reaction that lies at the root of this newly established interest in capitalism, the intellectual figure that comes closest to capturing the spirit of things here, I would suggest, is certainly not just Marx, but Carl Schmitt.

In the second appendix to *The Nomos of the Earth*, Schmitt argues that the fundamental problem with liberalism – I mean, the mainstream tradition of thinking about international economic governance – is that it ignores that every human ordering is ultimately premised on a 'primitive law' of 'appropriation-distribution-production'.¹⁴ This is what Schmitt calls the 'lie of production ... the Beehive formula, of things governing themselves'.¹⁵ He takes this into dark territory by naming the Fuhrer as the inescapable 'great appropriator' and lamenting the 'last great heroic act' of Europe to be the conquest of North America – but, naturally, we don't need to follow him to such insidious conclusions. What seems important to me in his

¹¹ See C. Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2015); R. Kreitner, 'Toward a political economy of money', in U. Mattei and J. Haskell (eds.), *Research Handbook on Political Economy and Law* (2014), 2.

¹² See D. Harvey, *The New Imperialism* (2003); G. Arrighi, *Adam Smith in Beijing* (2007).

¹³ See N. Poulantzas, *State, Power, Socialism* (1978); C. Barrow, *Towards a Critical Theory of States* (2016).

¹⁴ C. Schmitt, 'Appropriation/Distribution/Production: Toward a Proper Formulation of Basic Questions of any Social and Economic Order', (1993) 95 *Telos* 52, at 60–1.

¹⁵ C. Schmitt, *Nomos of the Earth in the International Law of the Jus Publicum Europium* (2003), 347.

argument, at any rate, is the emphasis he puts on the idea of violent appropriation: every system of distribution and production is built on a logic of appropriation, and you cannot fundamentally shape the world anew without revisiting this initial appropriation logic.

Akbar I disagree about Schmitt being closer to the spirit of times than Marxism, but it is interesting that you phrase it like that. If you look at the articles that follow, this theme of the original sin of appropriation seems to feature quite prominently in each of them, but especially in Saab's essay, which is about the complex role international law plays in the maintenance and reproduction not only of the general regime of food security, but also, as a logical corollary, of scarcity and famine. There is an interesting parallel here with Scott Veitch's book on law and irresponsibility.¹⁶

John I guess I can accept your idea of sensibility here, because there is something that we can feel tying together this literature, which gravitates around these themes we are discussing. The spectre of Schumpeterian constant creative destruction hovers very prominently over Rajkovic's reimagination of jurisdiction. Moudud writes primarily as an economist who seeks to marry Modern Money Theory¹⁷ with the critical legal studies tradition, but also, what one immediately sees behind his narrative is the argument about the centrality of law and finance as instituted regimes of coercion.

Akbar You mention instituted regimes of coercion, and before that you also spoke how it is a certain sense of disenchantment that animates this new wave of scholarship, a disenchantment towards the traditional protocols of reason adopted in mainstream international law scholarship and towards the global political compact that's formed in the aftermath of the 2008 crisis. It sounds to me that what you are saying is that the real elephant in the room here is not so much Carl Schmitt as Max Weber.

John That is certainly possible, but I think this is a conversation we should leave for another occasion.

¹⁶ S. Veitch, *Law and Irresponsibility* (2007).

¹⁷ On modern money theory see R. Wray, *Modern Money Theory: A Primer on Macroeconomics for Sovereign Monetary Systems* (2012).