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Regulatory Transformations: An Introduction

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I. THE RISE OF A SOCIAL SPHERE IN REGULATION

REGULATION IS NO longer the prerogative of either states or markets. Increasingly citizens in association with businesses catalyse regulation which marks the rise of a social sphere in regulation. Around the world,¹ in San Francisco, Melbourne, Munich and Mexico City, citizens have sought to transform how and to what end economic transactions are conducted. For instance, ‘carrot mob’ initiatives use positive economic incentives, not provided by a state legal system, but by a collective of civil society actors in order to change business behaviour.² In contrast to ‘negative’ consumer boycotts, ‘carrot mob’ events use ‘buycotts’.³ They harness competition between businesses as the lever for changing how and for what purpose business transactions are conducted. Through new social media ‘carrot mobs’ mobilize groups of citizens to purchase goods at a particular time in a specific shop. The business that promises to spend the greatest percentage of its takings on, for instance, environmental improvements,⁴ such as switching to a supplier of renewable energy, will be selected for an organized shopping spree and financially benefit from the extra income it receives from the ‘carrot mob’ event. ‘Carrot mob’ campaigns chime with other fundamental challenges to conventional economic activity, such as the shared use of consumer goods through citizens’ collective consumption which questions traditional conceptions of private property.⁵

¹ Originally developed in the US, but now also harnessed in a range of countries, including European states, such as Germany.

² See, for example, Caterina Lobenstein, ‘Zweiter Frankfurter Carrotmob: Ein Äppler für den Klimaschutz’, at: www.faz.net/s/RubBEFA4EA6A59441D98AC2EC7C392932A/Doc~E392C75A1CEE145A4BBB517423BC3D563~ATpl~Ecommon~Scontent.html.

³ www.carrotmob.org/.

⁴ ‘Carrot mob’ campaigns have pursued a range of objectives, including the protection of civil liberties and improvement of working conditions for employees.

⁵ Steven Pinch, *Cities and Services: The Geography of Collective Consumption* (London, Routledge, 2006).

But harnessing the regulatory capacity of a social sphere has many facets. What type of regulatory transformation is really at stake here? While ‘carrot mob’ events are informed by grass-roots and potentially democratic visions of consumer power, harnessing the regulatory capacity of a social sphere can also be informed by a government-imposed neo-conservative vision of citizens regulating where the state retreats. For instance, the ‘Big Society’ initiative⁶ of the current UK conservative-liberal government has sought to revive and expand the contribution of civil society to the running of public services, formerly provided by the welfare state.⁷ Here, harnessing the regulatory capacity of a social sphere is associated with an ideological program of ‘rolling back the frontiers of the state’ in the context of significant public sector spending cuts, imposed in the wake of the 2008 economic crisis. Some aspects of this ‘Big Society’ initiative turn citizens into regulators. For instance, citizens are offered choices between different service providers as part of ‘Big Society’ welfare state reforms. Such choices are intended to ‘empower’ citizens, and can also turn them into regulators.⁸ Exercising choices can involve regulation of services because preferences for services of a particular type and quality are expressed, not dissimilar to choice in a market. Moreover, volunteer citizens’ involvement in the delivery of public services in England, such as housing through community housing associations, can shade into regulatory activity because residents now can influence local council spending on housing.

Reflecting on the regulatory capacity of a social sphere is thus **timely**, because in the wake of the 2008 financial crisis debates about the limits of regulation either by markets or states have been re-invigorated. In the light of the failure of ‘self-regulatory’ financial markets and questions about the appropriate scope and political legitimacy of states regulating in a post-crisis period, the potential of a social sphere to contribute to regulation is again on the agenda. The effects of the 2008 economic crisis sparked by sub-prime lending in the US are still unfolding in Eurozone countries. There are interesting judicial responses to European Central Bank (ECB) policies which address the risk of sovereign debt default and bailouts conditional on government austerity budgets involving significant cuts to public sector service provision.⁹ These crises have thus raised questions about what states

⁶ Which involves also a new Minister for ‘Civil Society’ as part of the UK central government.

⁷ This forms part of a significant overhaul of public service provision under the banner of ‘Open Public Services’. The aim is to increase choice for users of welfare state services while reducing costs in the provision of these services. Services are to be delivered through a combination of public, private commercial and civil society organizations (HM Government, *Open Public Services 2014*, at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/291854/Open_Public_Services_Progress_Report_2014.pdf (site last visited 29.12.2014) 1.

⁸ For instance, from March 2014 onwards patients who are eligible for continuing health-care from the NHS can ask for a Personal Health Budget to purchase more individually tailored health care services (The National Health Service (Direct Payments) Regulations 2013).

⁹ Greece, for instance, is facing again the risk of a ‘disorderly’ debt default at the time of writing, at the beginning of 2015. *The Observer*, 28.12.2014, 17.

or markets can deliver when seeking to regulate risks created by and for business activity.

But this edited collection¹⁰ seeks to transcend dichotomies between ‘state and market, citizens and consumers, social movements and transnational corporations’ in its analysis of regulation. Such binaries have been enduring in regulation scholarship. They have been buttressed, for instance, by neo-classical economic analysis. From this perspective the distinction between state regulation and market activity underpins distinct state regulatory solutions that neo-classical economic analysis offers for market *failures*, such as information deficits, externalities and limited competition.¹¹ A market failure, such as information deficits about the environmental performance of electrical goods, can be addressed, for instance through a state law requirement for the labelling of products. Such state-market binaries are pervasive and thus have also informed regulation literature which does not explicitly rely on neo-classical economic analysis.¹²

In contrast to this, this edited collection argues that we are witnessing the rise of a social sphere that regulates at the interstices of states and markets. We therefore explore a distinct element of the wider change in regulation that John Braithwaite has captured through the notion of the ‘privatization of the public and the publicization of the private’ in the rise of ‘regulatory capitalism’.¹³

II. WHAT DO WE MEAN BY HARNESSING THE REGULATORY CAPACITY OF A SOCIAL SPHERE?

We explore in this edited collection the regulatory capacity of a social sphere as **it links to states and markets** because they are still key regulators of business behaviour.¹⁴ But we suggest that civil society is more important for the regulation of social and economic risks posed by and for business activity than sometimes recognized in the regulation literature.¹⁵ In contrast to some

¹⁰ This edited collection arises from papers first presented at an Oñati Workshop. The editors gratefully acknowledge financial and organizational support from the Oñati International Institute for the Sociology of Law for developing the work presented in this book.

¹¹ Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, Hart Publishing, 2004) Ch 2.

¹² See eg Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation* (Cheltenham, Edward Elgar, 2004) 2.

¹³ John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Cheltenham, Edward Elgar, 2008) 8.

¹⁴ Bridget Hutter, ‘The Role of Non-State Actors in Regulation’ in Gunnar Folke-Schuppert (ed), *Global Governance and the Role of Non-State Actors* (Baden-Baden, Nomos, 2006) 65.

¹⁵ Hutter, for instance, perceives a role in particular for non-state actors in relation to two key dimensions of regulation, the gathering of information and the setting of standards, *ibid*, 73.

contributions to the literature on non-state actors in governance, we define civil society as including all non-state actors involved in regulatory activity, including private, commercial actors,¹⁶ because individual and corporate citizens may be actually the same people or belong to shared local communities. We argue that in order to transform thinking about regulation, we need to recognize various interconnections between ‘state and market, citizens and consumers, transnational corporations and social movements’ that are not necessarily recognized in classical liberal or neo-liberal thought about regulation, or indeed some contemporary regulation scholarship. Accounts that perceive civil society as characterized by a distinct ‘institutional culture’ emphasize its organizational difference from ‘states’ and ‘markets’.¹⁷ A range of terminology is employed to capture the role of such a distinct organizational form of civil society in transnational risk regulation, reflecting various degrees of association between civil society, on the one hand, and ‘states’ and ‘markets’, on the other hand. Civil society is portrayed as **acting as an ‘intermediary between’** the market and changing states, as **building partnerships** between government and the ‘non-profit sector’,¹⁸ as **acting as an extension of public administration**,¹⁹ while sometimes also operating ‘**outside government**’.²⁰ This variation in accounts points to the need to develop a typology of interactions between civil society and markets as well as states. This edited collection argues that in doing so we should go beyond established binaries in the analysis of a social sphere in regulation. This entails the recognition of **hybrid approaches to regulation**, such as those that mobilize the ‘citizen-consumer’ in environmental regulation,²¹ strategies that recognize the power of social norms to inform the behaviour of a range of market actors, as well as approaches that recognize the symbiotic relationship between social movements and their ‘other’: transnational corporations. A critical examination of the regulatory capacity of a social sphere thus explores how social norms, practices, actors and institutions frame economic transactions, and thereby regulate economic and social risks generated by and for business, states and citizens.

¹⁶ Jeannette Hofman, ‘(Trans-) Formations of Civil Society in Global Governance Contexts—Two Case Studies on the Problem of Self-Organization’ in Folke Schuppert (n 14) 179.

¹⁷ Gunnar Folke Schuppert, ‘The Changing Role of the State Reflected in the Growing Importance of Non-State Actors’ in Folke Schuppert, *ibid*, 203, 209.

¹⁸ Folke Schuppert (n 17) 209, 210.

¹⁹ *ibid* 212.

²⁰ *ibid* 211.

²¹ Christer Berglund and Simon Matti, ‘Citizen and Consumer: The Dual Role of Individuals in Environmental Policy’ (2006) 15 *Environmental Politics*, 4, 550–71; Gert Spaargaren and Peter Oosterveer, ‘Citizen-Consumers as Agents of Change in Globalizing Modernity: The Case of Sustainable Consumption’ (2010) 2 *Sustainability* 1887–1908, Victoria Baltrusch, *Law and Consumerism: The Regulation of Green Marketing Practices*, MSt thesis (2015), Oxford University (forthcoming).

More specifically we use the term ‘social sphere’ in order to draw attention to **three key dimensions** of civil society’s involvement in the regulation of transnational risks. First, a social sphere has a spatial dimension. By this we mean that the spaces, including local places, in which regulatory activity of civil society actors can occur, matters. It matters in particular in the context of transnational risk regulation, the focus of this edited collection, because in this context the boundaries of the space in which civil society operates are less obvious than in the context of regulation by civil society within a nation state. Civil society activity within the transnational sphere can be located within particular transnational communities that stretch across international, national, regional and local levels of governance.²² This spatial dimension of a social sphere includes spaces in nature. It reflects the re-orientation of sociological thought away from a pure focus on social laws as distinct from natural laws²³ in order to explain how society works. As Ulrich Beck and his co-authors have put it, ‘nature is no longer perceived as an outside that can be adapted to one’s purposes, but increasingly as part and parcel of society’.²⁴ Nature creates spaces for the regulatory capacity of a social sphere, also because regulation is increasingly concerned with addressing the environmental consequences of production and consumption patterns engrained in contemporary societies.²⁵

A second key dimension of harnessing the regulatory capacity of a social sphere involves civil society’s involvement in **meaning making**. Meaning making involves changing the content of social norms that inform business practice in order to develop new understandings of what it means to trade in ethical and legitimate ways. One example of this is culture jamming which involves the ironic inversion of brand slogans and advertisement messages in order to criticize ‘value–action’ gaps²⁶ in corporate economic practice. A salient example of this is the exchange of e-mails between an anti-sweatshop campaigner and the NIKE corporation about working conditions for children in NIKE factories in Vietnam, also referred to as ‘discursive political

²² Marie-Laure Djelic and Kerstin Sahlin-Andersson, *Transnational Governance* (Cambridge, Cambridge University Press, 2006) 15, 22.

²³ Such as those invoked by biological explanations of human behavior, eg by Malthus and Darwin (Luke Martell, *Ecology and Society: An Introduction* (Cambridge, Polity Press, 1994) x).

²⁴ Ulrich Beck, Wolfgang Bonss and Christoph Lau, ‘The Theory of Reflexive Modernization’ (2003) 20 *Theory, Culture & Society* 1–33, 7.

²⁵ Also Karl Polanyi—ahead of sociological thinking during his time—recognized an interdependence between a social and natural world. He therefore criticized the commodification of land as a category mistake, and suggested that a host of social, beyond merely economic, relationships are an aspect of people’s relationship with land. Mitchell Bernard, ‘Ecology, Political Economy and the Counter-Movement: Karl Polanyi and the Second Great Transformation’ in Stephen Gill and James H Mittelman (eds), *Innovation and Transformation in International Studies* (Cambridge, Cambridge University Press, 1997) 83.

²⁶ Berglund and Matti (n 21) 553.

consumerism'.²⁷ Third, and linked to this second dimension, we also understand a social sphere to be constituted by the **social practices of civil society actors** involved in regulation. Examples of these are debating, critiquing, holding to account, naming and shaming, as well as building advocacy networks, often through interaction with market and state actors.²⁸

We explore these three dimensions of a social sphere in regulation in the specific context of **transnational²⁹ risk regulation**.³⁰ This engages risks that transcend nation state boundaries, specifically to prevent and reduce the likelihood of harm arising from such risks to citizens, public bodies and private companies. Transnational risks have proliferated in the context of globalization, ie the stretching of social relations across time and space, since both economic and regulatory activity have become increasingly denationalized and deterritorialized.³¹ Especially in the transnational sphere, private or hybrid state-private actors have taken over regulatory activities from public regulatory agencies.³² The chapters in this edited

²⁷ Michele Micheletti, Dietlind Stolle and Larua Nishikawa, and research assistance from Matthew Wright, 'A Case of Discursive Political Consumerism: The Nike E-mail Exchange', at: http://profs-polisci.mcgill.ca/stolle/Data_files/Micheletti%20och%20Stolle%20Diskursiv%20TemaNord.pdf (site last visited 29.12.2014).

²⁸ Christer Jönsson and Jonas Tallberg, 'Transnational Actor Participation in International Institutions: Where, Why, and With What Consequences?' in Christer Jönsson and Jonas Tallberg (eds), *Transnational Actors in Global Governance: Patterns, Explanations, and Implications* (Houndmills, Palgrave Macmillan, 2010) 1; see also Djelic and Sahlin-Andersson (n 22) 22.

²⁹ Financial and environmental risks, such as the failure of national or private debt securitizations or climate change are clear examples of this. Polanyi recognized in several ways an international dimension to economic risks in the 'The Great Transformation'. For instance, he recognized colonialism, as an aspect of nineteenth century international trade, as creating important export markets for colonizing countries. This provided an alternative outlet for goods, in light of the increasingly limited access of England to other industrializing countries' national markets due to protectionist tariffs that sought to reduce competition between industrializing countries.

³⁰ We also recognize that the transnationalization of risk regulation varies according to policy fields. While environmental policy and economic governance are examples of significant transnational risk regulation, other policy areas have been subject to greater continuing national controls over regulation.

³¹ Spaargaren and Oosterveer (n 21) 1887, 1892.

³² Jönsson and Tallberg (n 28) 4-5; James N Rosenau and Ernst Otto Czempiel, *Governance without Government: Order and Change in World Politics* (Cambridge, Cambridge University Press, 1992); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, Cambridge University Press, 1996). But evidence about a decline of the state in transnational risk regulation is inconclusive. Picciotto, for example, maintains that states are still important regulators also in a transnational sphere (Sol Picciotto, 'The Control of Transnational Capital and the Democratization of the International State' (1988) 15 *Journal of Law and Society* 1, 58). There has been, however, an increase in transnational non-governmental organizations. For instance, Jönsson and Tallberg report an increase in international NGOs for the period from 1956 to 2003 (in 1956 there were fewer than 1000 international NGOs, in 1985 there were 14,000 and in 2003 there were 21,000 (Yearbook of International Organizations, referred to in Jönsson and Tallberg (n 28) 5)). But this does not preclude that the regulatory powers of **both** state and private actors, including citizens, to have increased in a transnational sphere (Djelic & Sahlin-Andersson (n 22) 11; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000) 3).

collection explore this further in the context of risk regulation through the World Trade Organization (WTO) Agreement on Sanitary and Phytosanitary Measures, the transnational regime for controlling risks from blood products and the supranational risk regulatory regime for trading in greenhouse gas emissions in the European Union (EU), to name just a few. We work with a wide definition of regulation³³ that seeks to capture both legal and non-legal processes for changing the behaviour of economic actors according to specific standards, backed up by institutions and mechanisms of enforcement.³⁴ We include in this list of non-legal processes changes in mind sets and emotional dispositions. But what conceptual lens can frame this inquiry into the regulatory capacity of a social sphere? We argue that the work of the economic sociologist and anthropologist Karl Polanyi provides a valuable analytical starting point for exploring the regulatory capacity of a social sphere.

III. KARL POLANYI'S WORK AS A FRAME FOR ANALYZING THE REGULATORY CAPACITY OF A SOCIAL SPHERE

From a Polanyian perspective, harnessing the regulatory capacity of a social sphere involves embedding economic relationships in social ones in order to shape how and for what purpose economic exchange is conducted. This, in turn, helps to shed light on the wider theme of economy–society interactions which we consider to be at the heart of regulatory transformations. Karl Polanyi, an economic sociologist and anthropologist, argued that over the course of history we can observe different stages of embedding and disembedding of economic in and out of social relationships. In his book *The Great Transformation* (1944), he traced intersections between economy³⁵ and society from pre-industrial to twentieth century capitalist societies. Polanyi suggested that the increasing reliance on markets for the exchange of goods and services during eighteenth and nineteenth century capitalism generated its own momentum for a ‘counter-movement’ during which society

³³ In *The Great Transformation*, Polanyi works with a wide conception of regulation that includes two types of regulation. First, regulation that constitutes and maintains markets and, second, regulation that corrects the negative social and cultural side-effects of self-regulating markets (Gareth Dale, ‘Karl Polanyi’s *The Great Transformation*: Perverse Effects, Protectionism, and *Gemeinschaft*’ (2008) 37 *Economy and Society* 4, 495, 501).

³⁴ Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (Oxford, Oxford University Press, 1998) 3–4.

³⁵ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, 2nd edn, Boston, Beacon Press, 2001). Polanyi’s analysis of the economy was in contrast to Marx’s slanted towards an examination of systems of distribution rather than production (József Bognár, ‘Opening Address’ in Kari Polanyi-Levitt (ed), *The Life and Work of Karl Polanyi* (Montreal, Black Rose Books, 1990) 14).

became the source of regulation of the social and economic consequences of capitalist production, such as poverty and disease experienced by the poorest sections of the working classes, as well as loss of economic and political power for the landed gentry.³⁶ Regulation, including state legal regulation, became a key tool for re-embedding economic in social relationships, for instance through legislation limiting the length of the working day and stipulating safety standards in factories. Most importantly in the context of this edited collection, Polanyi's understanding of regulation was **not confined to state legal regulation**, but encompassed **a whole range of social actors and forces**, such as medieval guilds which restricted competition, twentieth century trade unions and the social mores of the household economy.³⁷

We build on Polanyi's work because his central metaphor of embedding economic in social relationships provides a critique of three key social-theoretical perspectives which have been influential in regulation scholarship: neo-classical economic perspectives, systems-theoretical and Marxist accounts. Firstly, Polanyi's empirically grounded economic sociology provides a radical departure from the abstract, mathematical modelling of economic activity by neo-classical economics which has underpinned some contemporary regulation scholarship, and more recently is being supplemented by behavioural and new institutionalist approaches that pay greater attention to the actual behaviour of economic actors.³⁸ Abstract neo-classical economic thinking informs a very specific, and potentially narrow understanding of markets which focuses on competition between economic actors as well as demand and supply equilibria as constituting markets.³⁹ From this perspective markets are governed **by their own laws**, and only in the exceptional cases of market failures will state intervention be necessary. In contrast to this, economic sociology draws attention to the many ways in which state and non-state regulation by social actors stabilizes and thus prevents the failure of markets,⁴⁰ for instance by creating and enforcing rules of economic exchange.⁴¹ For economic sociologists prices are thus not the starting point

³⁶ An example of a more recent regulatory counter-movement is the Fordist bargain struck between labour and capital in the post-World War II period in Northern-European states which was characterized by significant state involvement in economic management, including controls on financial capital, a developed social welfare system and institutionalized bargaining between management and workers resulting in high wages. A liberal capitalist economic order became thus 'embedded' (Bernard (n 25) 86).

³⁷ Polanyi (n 35) 73, 176, 56.

³⁸ See, for example, work by Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Caravanbooks, Padstow, 2008).

³⁹ Ogus (n 11).

⁴⁰ Mitchel Y Abolafia, 'Separate Spheres? The Cultural Contradictions of Markets' in B Lange, D Thomas and A Sarat (eds), *From Economy to Society? Perspectives on Transnational Risk Regulation* (Bingley, Emerald, 2013) 265, 266.

⁴¹ Neil Fligstein, 'Markets as Politics: A Political-Cultural Approach to Market Institutions' (1996) 61 *American Sociological Review* 4, 656, 658.

for understanding co-ordination of behaviour in markets, but how social relationships shape prices is the interesting question.

Secondly, Polanyi's ideas depart from the Parsonian functionalism of systems-theory in various ways. According to systems-theory, and its variants developed by Niklas Luhmann⁴² and Günther Teubner,⁴³ significant deficits in the implementation and enforcement of legal regulation is due to the autopoietic nature of sub-systems, such as 'law', 'economy' and 'politics', which can only influence each other to a limited extent.⁴⁴ But while functionalism differentiates between 'society' and its various sub-systems, such as the economy, Polanyi emphasizes interconnections between economy and society, by perceiving economic relationships as embedded in social ones. In the context of the 2008 financial crisis, systems-theoretical accounts have attracted further criticism, because they seem to buttress the idea of self-regulatory markets which function according to their own laws.⁴⁵ Moreover, the systems-theoretical idea of self-referential, normatively closed, but cognitively open social sub-systems seems to justify the failure of bankers and political elites to communicate with civil society about what risks economic actors should be allowed to create and who should bear the adverse consequences of these risks—eg from new financial products.

Thirdly, Polanyi's work departs from Marxist perspectives on regulation. Polanyi's economic sociology is based on the idea of the 'primacy of society' which suggests that all economic relationships, including those co-ordinated by markets, are embedded in social relationships. This departs from Marx's determinist base-superstructure model that accords primacy to economic relations of production in shaping state regulation.⁴⁶ While Marxism has been less influential than neo-classical economics and systems-theory in contemporary regulation scholarship, it has nevertheless provided an important critical lens for understanding whose economic interests are served by specific regulatory regimes. This has informed some accounts of health and safety, environmental as well as consumer regulation and taxation, also in

⁴² Niklas Luhmann, *Soziale Systeme* (Berlin, Suhrkamp, 1984).

⁴³ Günther Teubner, 'After Legal Instrumentalism?—Strategic Models of Post-Regulatory Law' in Günther Teubner (ed) *Dilemmas of Law in the Welfare State* (Berlin, Walter de Gruyter, 1986) 299–325.

⁴⁴ Teubner (n 43); Renate Mayntz, *Implementation Politischer Programme 1: Empirische Forschungsberichte* (Opladen, Westdeutscher Verlag, 1980); Renate Mayntz, *Vollzugsprobleme der Umweltpolitik* (Stuttgart, Kohlhammer, 1978); Carl-Fredrik Bergström, Henry Farrell and Adrienne Heritier, *Legislate or Delegate? Bargaining over Implementation and Legislative Authority in the European Union*, EUI Working Paper, RSCAS No 2006/42, at: http://cadmus.eui.eu/bitstream/handle/1814/6416/rscas_2006_42.pdf;jsessionid=7D6F1B8560A28E726CD E128CDB6F3FDB?sequence=4 (site last visited 29.12.2014).

⁴⁵ Günther Teubner, Paul Kjaer, and Alberto Febbrajo, *The Financial Crisis in Constitutional Perspective: the Dark Side of Functional Differentiation* (Oxford, Hart Publishing, 2011).

⁴⁶ Fred Block and Margaret Somers, 'Beyond the Economic Fallacy: The Holistic Social Science of Karl Polanyi in T Skocpol (ed), *Vision and Method in Historical Sociology* (Cambridge, Cambridge University Press, 1984) 48.

the context of unjust international divisions of labour between the developed and the developing world.⁴⁷ To summarize, while Polanyi's work about the embedding of economic in social relationships provides an important analytical framework for exploring the regulatory capacity of a social sphere, this edited collection also critiques and develops his work.

IV. BUILDING ON AND DEVELOPING POLANYI'S IDEAS

A. Economic Interests as Informed by a Variety of Social Norms and Values

Polanyi's work highlights that **economic interests** should be understood as **informed by social norms and values**. This becomes particularly clear from his discussion of forms of economic activity that he calls 'reciprocity', 'householding' and 'redistribution'. Here trade is not primarily co-ordinated through price-setting markets but through gift-like exchange relationships, through the social norms of household organization or through centrally administered redistribution of economic gain, for instance between town and countryside. Contemporary contributions to economic sociology have often further developed this theme of social norms and values framing economic activity by focusing on consensus rather than conflict as the defining feature of these social norms and values. The focus has been on collaborative forms of economic activity⁴⁸ or the pursuit of economic gain for a community or household rather than individual financial gain.⁴⁹ The chapters in this edited collection, however, illustrate that **a range of interests and values** are relevant for understanding how a social sphere can regulate business behaviour. Examples are support for 'local producers' (Fiona Haines and Samantha Balaton-Chrimes) or national industry sectors through protectionist trade barriers (Bettina Lange), the value of free trade as enshrined in legal principles of international trade law (Elizabeth Fisher), as well as the value of inter-creditor equity in sovereign debt markets (Dania Thomas). Hence, we argue that developing Polanyi's idea of embedding

⁴⁷ Sol Picciotto, 'Fragmented States and International Rules of Law' (1997) *Social and Legal Studies*, 2, 259–79; Steven Tombs and Frank Pearce, *Toxic Capitalism* (Aldershot, Ashgate, 1998); Lauren Snider, 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1987) 9 *Law & Policy* 1, 37–68.

⁴⁸ Giovanni Arrighi, 'Contribution to Discussion' in Greta Krippner, 'Polanyi Symposium: A Conversation on Embeddedness' (2004) *Socio-Economic Review* 2, 109, 126; Bernard (n 25), 73.

⁴⁹ Don Robotham, 'Market and Society: *The Great Transformation Today*' in Chris Hann and Keith Hart (eds), *Economic Anthropology: History, Ethnography, Critique* (Cambridge, Cambridge University Press, 2009) 273.

economic in social relationships involves an examination of a whole range of economic interests and values that intersect with social ones. This matters also in light of the fact that contemporary scholarship on the role of citizens and consumers in environmental protection has highlighted the greater influence of motivational values, such as achieving sustainability for a collective (the citizen role), in comparison to financial self-interests (the consumer role), on consumption practices.⁵⁰ Hence this edited collection raises interesting questions about the balance between conflict and consensus in the definition of ‘the social’ as informing an understanding of economic interests. Polanyi’s starting point is that the social norms that embed economic activity represent collective rather than ‘self-interests’. Polanyi emphasizes the ‘primacy of society’. He therefore suggests that a particular social group can only acquire agency if it can propose solutions that are in the interests of *society as a whole*.⁵¹ Hence, all human behaviour and the perception of interests that drives it are grounded in *social* conditions. Whether a social actor is pursuing economic gain or enlightenment, **the drivers for the action are social contexts** that render either goal ‘rational’ or desirable. Hence, according to a Polanyian perspective, seeking material gains and possessions occurs for a social, rather than *distinct* economic purpose.⁵² This Polanyian understanding of ‘the social’ as representing collective interests, and thus being informed by consensus rather than conflict is, however, nuanced. Polanyian analysis recognizes that social interests are not necessarily altruistic but can also serve individual **self-interests**, such as enhancing status in a family unit or standing in a community. Polanyi therefore does not draw a clear dividing line between economic and social interests.⁵³ If that, however, is the case it is not entirely clear what Polanyi meant by the ‘embedding’ of economic in social relationships. At first glance it seems that only if we can distinguish an economic from a social sphere does it make sense to talk about an embedding of economic in social relationships. These analytical challenges have given rise to an embeddedness paradox.

⁵⁰ In the context of Sweden, this point is made by Berglund and Matti (n 21) 550–71. In the context of the UK this point is made by Lucie Middlemiss, ‘Reframing Individual Responsibility for Sustainable Consumption: Lessons from Environmental Justice and Ecological Citizenship’ (2010) *Environmental Values* 19, 147, 149, 151.

⁵¹ Block and Somers (n 46) 66. Hence for Polanyi, classes flow from the structure of society, they don’t structure society (Block and Somers (n 46) 66).

⁵² Kurtuluş Gemicı, ‘Karl Polanyi and the Antinomies of Embeddedness’ (2008) 6 *Socio-Economic Review* 1, 20, 21.

⁵³ This move away from particularistic conceptions of interests is noticeable also in Polanyi’s rejection of a class based explanation of changing economy-society interactions in ‘The Great Transformation’. This is in contrast to other nineteenth century social theorists such as Marx. Bastiaan van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration* (Abingdon, Routledge, 2002) 160; Block and Somers (n 46) 57.

B. The Embeddedness Paradox

A central feature⁵⁴ of Polanyian thinking about regulation is the idea that business behaviour is facilitated and potentially regulated also by the embedding of economic into social relationships. The rise of market society during the eighteenth century in England in the context of industrialization and advancing capitalism led, however, to the disembedding of economic out of social relationships. Key examples of this are the creation of ‘fictitious’ commodities, such as labour, land and money, in eighteenth and nineteenth century capitalist Britain.⁵⁵ State law and regulation played some role in this process of disembedding.⁵⁶ For instance, private property rights enabled self-regulatory markets to develop. As Polanyi has pointed out it took quite a lot of regulation to establish *laissez-faire* economic practices. But Polanyi also suggested that the negative social and economic side-effects of the rise of capitalism generated a need for the re-embedding of economic into social relationships, for instance through state regulation, such as public health and factory laws, the creation of public utilities and through the activities of trade associations and unions.⁵⁷

This account of embedding economic in social relationships appears to be, however, paradoxical in two ways. First, there seem to be **contradictory empirical claims** about the embedding of economic in social relationships. On the one hand, Polanyi suggests that we can identify specific historical junctures at which a ‘regulatory countermovement’ lead to the ‘re-embedding’ of economic in social relationships.⁵⁸ On the other hand, Polanyi suggests that *all* economic relationships are *always* embedded in social ones.⁵⁹

⁵⁴ But Polanyi uses the term ‘embeddedness’ only twice in *The Great Transformation* (Gemici (n 52) 10, referring to Barker).

⁵⁵ Jens Beckert, ‘The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology’ 2007 MPiFG Discussion Paper 07/1, Max Planck Institute for the Study of Societies, at: www.mpifg.de/pu/mpifg_dp/dp07-1.pdf (site last visited 29.12.2014).

⁵⁶ National labour markets developed with the aid of state regulation, such as the subsidy of workers’ wages through the Speenhamland Act and finally the Poor Law Reform, through the Poor Law Amendment Act 1834 and the abolition of the Speenhamland Act (Block and Somers (n 46) 54; Fred Block, ‘Contradictions of Self-Regulating Markets’ in Marguerite Mendell and Daniel Salée (eds), *The Legacy of Karl Polanyi: Market, State and Society at the End of the Twentieth Century* (Houndmills, MacMillan, 1991) 86; Gemici (n 52) 13; Beverly J Silver and Giovanni Arrighi, ‘Polanyi’s Double Movement’ (2003) 31 *Politics and Society*, 325, 330).

⁵⁷ Vicki Birchfield, ‘Contesting the Hegemony Market Ideology: Gramsci’s “Good Sense” and Polanyi’s “Double Movement”’ (1999) 6 *Review of International Political Economy* 1, 27, 38; Block and Somers (n 46) 57.

⁵⁸ Gareth Dale, ‘Polanyian Meditations on Economy and Society: A Review of Market Society: The Great Transformation Today’ (2010) *Dialectical Anthropology* 34.

⁵⁹ Polanyi (n 35) 75; Fred Block, ‘Contribution to Discussion’ in Krippner (n 48) 117; Mark Granovetter, ‘Opening Remarks on Embeddedness’ in Krippner (n 48) 114. While the embeddedness metaphor is often considered as central to economic sociology, it is also worth noting that Adam Smith recognized a notion of ‘embeddedness’ of markets by acknowledging that the density and extent of markets depended on demographic and infrastructural conditions (Djelic & Sahlín-Andersson (n 22) 55).

Second, there seem to be **contradictory theoretical claims** about the embedding of economic in social relationships. In order for the economy to be embedded in society, economy and society need to be perceived of as two conceptually distinct and bounded spheres of social life, each with their own specific characteristics.⁶⁰ But ‘embedding’ also implies a withering away of clear distinctions between an economic and a social sphere. Hence, if embedding really works, an economic sphere—separate from society—would cease to exist and ‘embedding’ would thus no longer be possible. Hence, the idea of ‘embedding’ seems to unwittingly reintroduce a demarcation between economic and social phenomena that Polanyi sought to reject in the first place.⁶¹ This paradox at the heart of the embeddedness metaphor may be a result of the abstract language in which the metaphor is couched. Chapters 3 to 10 therefore further unpack and critique specific empirical instances of embedding, disembedding and re-embedding of economic relationships in social ones in order to develop the idea of a regulatory capacity of a social sphere. Finally, we conclude this section by drawing attention to two further limitations of Polanyi’s work for developing the idea of the regulatory capacity of a social sphere.

C. A Limited Discussion of Drivers of Regulation and the Role of Politics in Polanyi’s Work

Polanyi’s macro-level account of regulatory counter-movements does not say much about **specific drivers of regulation or the role of politics** in mediating the embedding of economic in social relationships. Polanyi adopts a functionalist approach that seems to suggest that the embedding or re-embedding of economic into social relationships happens **automatically**, as a ‘counter-movement’ that is **necessary** in order to maintain social order and integration within society. Also, contemporary interpretations of Polanyi’s work describe the ‘counter-movement’ as ‘spontaneous’ and ‘unplanned’.⁶² But in order to analyze the regulatory capacity of a social sphere it is necessary to unravel, at a **meso- and micro-level**, specific drivers of regulation, that is an **understanding of the specific conditions and constellations of interests**

⁶⁰ Krippner (n 48) 125. According to Krippner (n 48) 111, the influence of Talcott Parson’s functionalist sociology on contemporary economic sociology is one of the reasons for the idea that there is a clear distinction between an economic and a social sphere. Her own perspective (Krippner (n 48) 112) lessens the distinction between an economic and a social sphere and thus the embeddedness paradox by suggesting that each market is socially embedded in the wider sense that each market transaction reflects a history of political struggle that has generated social actors with a particular set of self-understandings which shape how they conduct economic activity.

⁶¹ Gemici (n 52) 27. Not just Polanyi’s but also Granovetter’s notion of embeddedness has been criticized for invoking a physical and thus reified imagery of an economic and a social sphere through the idea that economic action is embedded in social networks (Gemici (n 52) 27).

⁶² Block and Somers (n 46) 57.

that facilitate the development of particular forms of regulation. Hence, Polanyi's account of embedding economic in social relationships also raises the question where 'politics' and contestation fit into this idea of close relationships between 'economy' and 'society'. Some interpretations of Polanyi's work suggest that he merely distinguished a political from a social sphere.⁶³ Others suggest that he subordinated a political to a social sphere.⁶⁴ There are also accounts that simply see Polanyi as positing a close relationship between economics, politics and the state.⁶⁵ Hence, a further analysis of how 'politics' relate to 'society' and 'economy' is developed by Thomas, Haines and Balaton-Chrimes and Macdonald and Marshall in order to understand more about the embedding of economic in social relationships.

To summarize, this edited collection starts from the idea that rethinking economy-society interactions needs to be at the core of transforming approaches to regulation. We therefore explore the regulatory capacity of a social sphere as it relates to regulation by states and markets. We question the value of binary categories, such as 'state and market', 'citizen and consumer', 'social movement and transnational corporations'. Instead a key characteristic of contemporary regulation by civil society actors is the blurring of boundaries of these binaries through regulatory strategies, such as state constitution of markets, as in the case of 'cap and trade' emissions trading regimes, ethical and green consumerism, as well as social enterprise crossing the boundaries of social movement and corporation. Second, economic sociology provides an analytical framework for exploring this blurring of binary categories, because its central concern is to analyze the various ways in which economic activity is embedded in and regulated by social norms, institutions and practices. In the next section we summarize the contribution of each of the chapters to the enterprise of exploring the regulatory capacity of a social sphere.

V. HARNESSING THE REGULATORY CAPACITY OF A SOCIAL SPHERE IN TRANSNATIONAL RISK REGULATION

The collection begins with the insights of Alexander Ebner into a Polanyian reading of the current dynamics of transnational risk regulation. Ebner's analysis is pertinent to many of the questions raised above. It also sets the scene for the chapters that follow. His work emphasizes the importance of Polanyian scholarship for providing a different lens through which to understand regulation. He traces Polanyi's analysis of the disembedding and re-embedding of economic in social relationships, the double movement,

⁶³ Dale (n 33) 498; Birchfield (n 57) 33.

⁶⁴ Gemici (n 52) 11; see, eg Block (n 59) 118; Silver and Arrighi (n 56) 330.

⁶⁵ eg Block (n 59) 127.

in its historical context. Ebner highlights the way in which mercantilism and national regulation—which aimed at promoting international trade—developed simultaneously, a point of particular relevance for understanding transnational risk regulation. Indeed his chapter points to the interventionist regulatory nature of disembedding in the context of international trade. Yet, Ebner, drawing on Polanyi, also cautions against a notion of epochal change by highlighting the way historical events influence contemporary contexts. An example of this is the embedded nature of feudalism providing a defence against marketization. Ultimately, Ebner's chapter throws down a challenge for a Polanyian analysis of transnational risk regulation. He argues, following Polanyi, that the capacity for re-embedding the economic within the social is characterized by ongoing struggles, which historically have had a tendency to resolution by reference to change of a more revolutionary kind, either fascist or socialist in nature. International and transnational institutionalization of economic affairs, when considered separately from social considerations, he argues, lead to persistent and ongoing failure of regulatory attempts at re-embedding economic concerns within the social.

Christopher Decker's analysis in the second chapter also sets the scene for this edited collection by providing a critical gloss on Polanyi's take on economic activity. He argues that different strands of economic analysis can contribute to the development of the idea of a regulatory capacity of a social sphere. He begins by highlighting the changes that have occurred within the discipline of economics, particularly neo-classical economics, since Polanyi's critique of it. He argues that economic analysis has developed with institutional and behavioral economics moving away from the focus on abstract modelling of economic actors' behavior. Behavioral economics can thus help to develop the regulation of markets by taking account of the actual social practices of economic actors. More specifically, Christopher Decker also outlines limits to harnessing the regulatory capacity of a social sphere in the context of competition law and policy. Here harnessing the regulatory capacity of a social sphere could mean to include a range of objectives relating to social welfare into competition policy, such as national development and strategic interests, such as 'keeping jobs at home'. But Decker is skeptical about this option for embedding economic in social relationships because social objectives are often fairly general, can be politically driven and require resolution of tensions between different social objectives (such as employment protection and environmental aims).⁶⁶ Contra Ebner (and Polanyi), Decker argues for the continued institutional separation between economic objectives (specifically competition) and social objectives.

⁶⁶ For instance, where mergers between companies further environmental objectives, eg in order to enable the development of sustainable transport technologies, but would involve losses in jobs.

The following chapters present case studies of opportunities for and limits to harnessing the regulatory capacity of a social sphere in various regimes of transnational risk regulation. Fiona Haines and Samantha Balaton-Chrimes discuss export investment, with particular reference to export credit agencies (ECAs), ie government bodies that provide investment and insurance services for exporters. Their analysis sheds light on the complex nature of embeddedness. The social sphere—in the context of reducing risks for exporters—is multifaceted. Hence there are also various facets to harnessing the regulatory capacity of a social sphere here. Originally, ECAs developed their economic mandate by reference to ‘protecting jobs at home’. ‘Disembedded’ views of market competition and international ‘free trade’ then reshaped the regulation of (and by) ECAs, most specifically through the Organization for Economic Co-operation and Development (OECD). But most recently civil society concerns about multi-national company complicity in human rights abuse have also come to influence debates about the mandate of ECAs. Drawing on Polanyi’s work as well as more recent scholarship on nodal regulation, Fiona Haines’ and Samantha Balaton-Chrimes’ analysis traces the complex interaction between different visions of the economic and the social and the nature of the regulatory regime that results from this contestation. Ultimately, they point to the need to highlight and interrogate ‘the political’, such as the different actors’ conceptions of the interrelationships between ‘the economic’ and ‘the social’, as well as the ECAs’ need to be sensitive to their political legitimacy. They trace the significance of ‘the political’ in different spatial locations, specifically in the context of home and host countries.

Kate Macdonald’s and Shelley Marshall’s chapter continues with the theme of transnational business and the protection of human rights. Theirs is a comparative analysis of a national, Australian, regulatory framework aimed at the protection of homeworkers (Ethical Clothing Australia) and the Fair Trade initiative for coffee that seeks to develop a fair trading system internationally that supports those most marginalized in the supply chain in developing countries. They point to some successes for both initiatives. The Ethical Clothing Australia example shows the benefits, though also limits of drawing on state-based regulation for bolstering ethical production and consumption practices. Fair Trade highlights the potential for developing regulation that can engender international trade norms that extend well beyond conventional definitions of ‘the economic’ to include living wages, social support such as capacity building of smallholders and environmental controls. Yet, Kate Macdonald and Shelley Marshall argue that both examples remain niche domains of business practice with significant (yet different) challenges facing broader application.

The subsequent chapters by Liz Fisher and Bettina Lange focus on harnessing the regulatory capacity of a social sphere, and in particular its cognitive and discursive resources, in the context of transnational regulatory

institutions, such as the WTO and the EU. Liz Fisher's chapter highlights the importance of various types of expertise as key to framing interactions between an economic and a social sphere. Her analysis thus contributes a novel angle to understanding Polanyi's embeddedness metaphor. She examines the transnational risk regulation regime of the WTO Agreement on Sanitary and Phytosanitary Measures which seeks to control risks to food safety as well as animal and plant health. Her analysis challenges binary conceptions of 'state and market', because what constitutes states, markets and expertise is co-produced during the application of the WTO Agreement on Sanitary and Phytosanitary Measures, including through its dispute settlement procedures. This further develops Polanyian analysis by emphasizing cognitive resources, such as various forms of expertise, including legal expertise as relevant to understanding the 'embedding' of economic in social relationships.

Bettina Lange's chapter further elaborates the theme of cognitive resources and discourses as key to understanding the regulatory capacity of a social sphere. She argues that markets are performed through discourses of 'economy' which cannot be clearly demarcated from discourses of 'society'. Her chapter suggests that Polanyi's embeddedness paradox can be addressed by drawing on Laclau's and Mouffe's ideas about discourses as 'open' and 'relationally constructed'. Her chapter therefore also adds the specific method of critical discourse analysis as a tool for interrogating the contradictions raised by embedding economic in social relationships. From this perspective a social and an economic sphere cannot be clearly differentiated. This point is illustrated with reference to the legal constitution of the EU carbon market. On the one hand, a blurring of boundaries between an economic and a social sphere enhances the scope of the regulatory capacity of a social sphere. On the other hand, a social sphere becomes permeable to economic values, such as national economic interests, as well as the dynamics of energy markets which are distinguished in judicial decisions from environmental policy.

The subsequent chapters by Anne-Maree Farrell and Elen Stokes turn our attention to the embodied concerns with health and its intersection with economic interests, specifically around trade in blood and the development of nanotechnology. Their analyses highlight once again the critical role played by experts. Anne-Maree Farrell's fascinating analysis of the regulation of transnational trade in blood and blood products points to the limits of harnessing the regulatory capacity of a social sphere. She depicts a transnational risk regulatory regime which is characterized by an inherent tension between, on the one hand, blood donations being considered as an expression of a gift relationship that takes place outside market exchange, and, on the other hand, blood being considered as a commodity that is traded in a global market, including an unregulated black market that exploits donors from the developing world. Her analysis therefore challenges Polanyi's

idea that society will necessarily and automatically protect itself through a regulatory counter-movement. In the case of blood donations citizens simply fail to engage in social relationships expressed through voluntary blood donation. The persistence of a disembedded global market in blood products, replete with an institutional regulatory arrangement separate from that dealing with whole blood, is also partly the result of a lack of supply of unremunerated, voluntary, altruistic donations in blood. It is also promoted by the development of various treatments based on the supply of finely differentiated blood products that increase demand for blood.

Elen Stokes' chapter then moves on to the analysis of another transnational risk regulation regime that seeks to regulate trade in risky products. Here the tension between regulatory objectives relates to the promotion of technological innovation on the one hand, and uncertainty about risk on the other. In this context, Stokes argues, light touch approaches predominate since law is perceived to undermine innovation within a neoliberal view of the world. Self-regulation proliferates in the space left by state regimes that emphasize a 'light touch' approach, also because there is continuing public anxiety in relation to risks posed by nanotechnological products. Yet, Stokes' analysis points to some advantages of self-regulation, in particular when it is regulation that extends beyond minimum standards. Hence, harnessing the regulatory capacity of a social sphere includes close attention to these self-regulatory practices, as expressed in consumption patterns. Stokes' analysis also provides an important further development of Polanyian thinking because it suggests that a regulatory counter-movement may have to mobilize market ordering *rhetoric*, here the provision of information to consumers to enable their choices in the market place, in order for some regulation to be adopted.

The final chapter by Dania Thomas returns to the social impact of economic decisions, in this case decisions about legal and policy interventions to resolve sovereign debt crises. Thomas' chapter further develops an understanding of harnessing the regulatory capacity of a social sphere by unpacking—similar to Lange's and Stokes' chapters—the Polanyian idea that markets, in her case financial markets, are not self-regulatory. Thomas shows how European Central Bank (ECB) policy and some US courts have sought to meet the demands of private hold-out creditors in sovereign debt settlements by reinforcing a 'promissory narrative', ie for the sovereign to honor a 'promise to pay', to the detriment of a conventional narrative framed by a plurality of values such as inter-creditor equity, fairness, also to future generations and good faith. The promissory narrative makes sovereign debt risk-free for some creditors at a cost to other creditors and the debtor in crisis. This transfers the costs of adjusting to a crisis to citizens. Hence Dania Thomas' analysis adds further nuance to the idea of harnessing the regulatory capacity of a social sphere by showing that regulation of financial markets—and markets in sovereign debt in particular—can be informed by the social norms of market actors, such as 'fairness'. This further illustrates

the key theme of this edited collection: the regulatory capacity of a social sphere needs to be understood through its links to markets and states. What is fascinating to note is how the direction of this regulatory capacity of a social sphere is changing, as expressed in civil society activism, such as the petition of 35,000 German citizens questioning the legality of the Eurozone's Outright Monetary Transactions (OMT) policy, which underpins 'the promise to pay' of EU Member State sovereigns. Dania Thomas further notes a weakening of courts' commitment to enforce 'the promise to pay' in various jurisdictions by the widespread adoption of collective action provisions in sovereign bond contracts.

To summarize, each of the chapters show specific ways of how 'the social' and 'economic' become linked in transnational risk regimes that harness the regulatory capacity of a social sphere. Collectively the chapters point to the significance of firstly, political contestation as informing the process of embedding economic relationships in social ones, and secondly, the endurance of institutional histories for understanding how economic relationships become embedded in social ones. In the final section we link these explorations of the regulatory capacity of a social sphere back to academic debates about regulation, in order to show that reflections about interactions between 'economy' and 'society' matter not just in the context of classical economic sociology, such as that of Karl Polanyi, but are also central to contemporary regulation scholarship.

VI. HARNESSING THE REGULATORY CAPACITY OF A SOCIAL SPHERE: A CONTRIBUTION TO THREE CONTEMPORARY REGULATION DEBATES

To harness the regulatory capacity of a social sphere captures a specific shift in regulation. We suggest that understanding this shift also contributes to three contemporary regulation debates. These are, firstly, discussions about what drives self-regulation of corporate actors, secondly, how regulatory agency is achieved, and thirdly, what the role of state law is in harnessing the regulatory capacity of a social sphere.

In relation to the first regulation debate, self-regulation matters because the new regulatory state increasingly delegates some of its regulatory power back to corporations⁶⁷ which, in turn, has catalyzed civil society actors to influence corporate business practices. Moreover, 'marketization' of both private economic and public sector activities—a characteristic feature of contemporary neo-liberal governance—involves more reliance on self-regulation. Last but not least, self-regulation is particularly important

⁶⁷ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge, Cambridge University Press, 2002) 100; Braithwaite and Drahos (n 32) 484.

in transnational risk regulation, because global regulatory norms are often based on corporations' self-regulatory practices.⁶⁸

Hence, what is meant by 'self' is a key question in debates about self-regulation. Is self-regulation nothing more than corporations implementing regulation in pursuit of 'their' traditionally defined economic interests as suggested in criticisms of environmental self-regulation as a form of eg 'greenwashing'?⁶⁹ Or can wider social norms inform business self-regulation, as suggested by the 'carrot mob' story and Christine Parker's model of the 'open corporation'?⁷⁰ Parker outlines various ways in which the private corporation—focused on maximizing its returns—becomes permeable to wider social norms influencing its business activity, such as labour standards and environmental protection. She emphasizes, for instance, the key role that 'organized value carriers', such as epistemic communities, professions or organizational units, such as self-regulation professionals⁷¹ within a corporation can play in framing economic decision-making through 'social values'.⁷² A similar emphasis on **how** it is possible to change corporate economic activity can also be observed in regulation scholarship focused on sustainable production and consumption. Contributors to these debates have in particular explored hybrid types of agency in order to explain change in corporate economic activity. These arise from a combination of individual actors' agency and social structures, where social structures arise from social practices of consumption, and the rules and resources that constitute capitalist consumption and production ('lifestyles').⁷³ Others have added an emphasis on discourses, eg around climate change, as being a driver in their own right of continuity and change in consumption patterns.⁷⁴ But the idea of harnessing the regulatory capacity of a social sphere suggests, firstly, that debates about what drives self-regulation may have focused too much on the question of what procedures, mechanisms and tools enable the 'opening up' of business activity to wider social norms. Polanyi suggested that all economic activity is always embedded in social relationships. If that is the case, **then the key question is not so much how we can embed economic in social relationships, but what the meaning and content of these**

⁶⁸ Braithwaite and Drahos (n 32) 491.

⁶⁹ ie limited application of environmental standards to corporate activity and use of claims about adherence to such standards in corporate branding that may mislead consumers and investors.

⁷⁰ Parker (n 67).

⁷¹ *ibid* x.

⁷² *ibid* 73.

⁷³ Spaargaren and Oosterveer (n 21) 1894–95. Middlemiss (n 50) 19, 147. Carme Melo-Escrihuela, 'Promoting Ecological Citizenship: Rights, Duties and Political Agency' (2008) ACME, at: www.acme-journal.org/vol7/CM-E.pdf (site last accessed 9.1.2015).

⁷⁴ Stewart Barr, Andrew Gilg, Gareth Shaw, 'Citizens, Consumers and Sustainability: (Re)Framing Environmental Practice in an Age of Climate Change' (2011) 21 *Global Environmental Change* 1224–33.

social relationships is. Crucially, this raises the question whether these social relationships do not simply establish new systems of social stratification.⁷⁵ Hence, from a Polanyian perspective the relevant question to ask is: whether and how the corporation can—**from within itself**—develop ‘social’ norms for self-regulation and thus embed its economic relationships in social ones, rather than merely become open to external society’s social norms? In fact a clear-cut distinction between employees of the corporation and civil society actors outside it needs to be questioned. Sometimes a corporation’s employees may also be civil society activists, or civil society activists may determine the meaning of ‘social norms’ to which employees in the corporation respond. As the story about culture jamming at the beginning of this introduction shows, **subverting and creating new meanings for social norms** such as labour standards and environmental protection is crucial to self-regulation that occurs through the branding of a corporation. From a Polanyian perspective it also becomes important to ask what conceptions of equality and inequality are embedded in such social norms.

Moreover, a Polanyian perspective and the three examples of civil society activism discussed at the beginning of this introduction foreground a **collective understanding of ‘social norms’**, as discussed in Section IV above, which reflect the wider interest of society as a whole, not just the potentially competing interests of factional groups, such as customers, employees, management and shareholders of the corporation.⁷⁶ Various chapters in this edited collection develop these points through detailed analysis of specific regimes of transnational risk regulation. For instance, Elen Stokes’ chapter highlights some of the limits to ‘culture jamming’ in the context of new technologies, where consumers’ self-regulatory practices are based on information regulation underpinned by state law requirements for the labelling of risky nanotechnology products. Here consumers have limited opportunity to question the veracity of information provided by manufacturers. This therefore poses restraints on the regulatory agency of citizens, a point of wider significance also in light of the fact that citizen-consumers who respond to eco-labelling schemes are an important new figure in environmental regulation.⁷⁷ Anne-Maree Farrell’s chapter, too, points to the role of expertise in driving self-regulation by those involved in the commercial trade of blood products. Yet, public anxiety around HIV infection drives an enlightened form of self-interest in the businesses involved that blurs the line between economic and social norms in framing trade in blood

⁷⁵ For instance, in the context of the development of social norms by self-regulatory organizations, Hutter also with reference to Gunningham points to the fact that trade associations often set standards that favour the interests of large rather than small and medium-sized businesses (Hutter (n 14) 66).

⁷⁶ Parker (n 67) 5. Such factional groups are also referred to in Hutter (n 14) 72.

⁷⁷ Spaargaren and Oosterveer (n 21) 1887–1908.

products. Reflecting on what drives self-regulation of corporate actors links to a second important debate in contemporary regulation scholarship that addresses how can people, networks⁷⁸ or social forces become ‘regulatory actors’?

A. How is Regulatory Agency Achieved?

Harnessing the regulatory capacity of a social sphere involves reclaiming and enhancing the regulatory capacity of civil society actors in relation to corporate actors. This chimes with a Polanyian perspective because embedding economic in social relationships requires active social practices. This is different from the regulatory agency of the ‘invisible hand of the market’. Here prices simply co-ordinate and thereby regulate the economic exchange of goods and services. Contemporary accounts of ‘embedding’ economic in social relationships therefore focus on social practices, such as negotiation about the environmental credentials of products between market participants based on ‘conscious choices of those affected by economic transactions’.⁷⁹ In fact a burgeoning literature has developed in the field of sustainable consumption that discusses the opportunities for but also limits of individual consumers contributing to environmental protection through green purchase decisions. Consumers’ social practices can be facilitated or restrained by social structures, such as sustainable transport systems or public administration engaging in green procurement. Such ‘systems of provision’ can enable the sustainable production and consumption choices of individuals.⁸⁰

But what the contributions to this edited collection show is that Polanyi’s analysis needs to be developed further by **not assuming the existence of regulatory agency** but by probing what conditions facilitate or restrain regulatory agency in specific empirical contexts. The contemporary regulation literature points to the importance of legal mandates, coercion, rewards, capacity building and cognitive resources, such as modelling of regulatory regimes and scientific knowledge,⁸¹ as well as political resources, such

⁷⁸ Braithwaite and Drahos (n 32) 24 provide a list of regulatory actors in a transnational sphere which includes states, organizations of states, business organizations, corporations, NGOs (including trade unions, churches and the professions), mass public and epistemic communities of actors. They also discuss the work of individual regulators such as Ralph Nader (eg Braithwaite and Drahos (n 32) 32, 478, 494–97).

⁷⁹ Fikret Adaman, Pat Devine and Begum Ozkaynak, ‘Reinstituting the Economic Process: (Re)embedding the Economy in Society and Nature’ (2003) 13 *International Review of Sociology* 2, 357, 371.

⁸⁰ Gert Spaargaren, *Sustainable Consumption: A Theoretical and Environmental Policy Perspective* (2003) 16 *Society & Natural Resources: An International Journal* 8, 687, 688; Spaargaren and Oosterveer (n 21) 1887–1908.

⁸¹ Djelic and Sahlin-Andersson (n 22) 4; Braithwaite and Drahos (n 32) 9, 16–17.

as democratic legitimacy.⁸² An inquiry into the **specific conditions that facilitate and constrain regulatory agency** also matters because Polanyi's account of the regulatory counter-movement seems to invoke **technological determinism**. Polanyi considered industrialization—including its technological manifestations—in eighteenth century England as a key driver of the regulatory counter-movement, with social actors playing a secondary role,⁸³ and hence regulation occurring potentially 'behind the back' of social actors.⁸⁴

The chapters in this edited collection question such technological determinism (eg Farrell and Stokes), and identify further facilitators and constraints of regulatory agency, in particular **networks of regulatory actors** which can both limit and promote the regulatory agency of a social sphere. This chimes with accounts in the literature that have pointed to a proliferation of complex hybrid regulatory arrangements that involve both public and private, national and transnational regulatory actors, such as transnational corporations co-regulating with trade associations or national regulatory authorities.⁸⁵ By virtue of being enrolled in such networks, the agency of individual regulatory actors becomes more difficult to identify and instead it is the network as a whole that is 'the regulatory actor'.

This point is well illustrated by Anne-Maree Farrell's chapter. She discusses the significance of transnational risk governance networks, such as the Global Collaboration on Blood Safety (GCBS) which brings together a range of international organizations, non-governmental organizations (NGOs) and blood experts in order to harmonize regulation for global blood safety. Her chapter also discusses the role of civil society, in particular patient activist groups—well organized both at a national and supranational level—as contributors to transnational risk regulation. Farrell highlights that in a number of Western countries patient activism in the 1980s in relation to HIV contaminated blood products triggered in the 1990s new regulatory initiatives at both national and supranational levels.

Some accounts of regulatory agency in the contemporary regulation literature identify sources of regulatory agency in more abstract terms: as arising

⁸² Fiona Haines, 'Addressing the Risk, Reading the Landscape: The Role of Agency in Regulation' (2011) 5 *Regulation and Governance* 1; Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Network in International Politics* (Ithaca and London, Cornell University Press, 1998); Ernst Haas, 'Do Regimes Matter: Epistemic Communities and Mediterranean Pollution Control' (1989) 43 *International Organization* 377–403; Braithwaite and Drahos (n 32) 502.

⁸³ Birchfield (n 57) 40.

⁸⁴ Block and Somers (n 46) 58. But see Bernard (n 25) 81, who argues that Polanyi's analysis allows for a degree of political agency of social actors.

⁸⁵ Braithwaite and Drahos (n 32) 7, 491; Braithwaite (n 13) 1; Djelic and Sahlin-Andersson (n 22) 11; Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183, 195.

from a set of discourses, such as ‘centres of calculation’ which can govern at a distance,⁸⁶ or interaction between human actors and technological artefacts. Hence, from this perspective regulatory agency cannot be located in individual actors or organizations.⁸⁷ Accounts of regulatory regimes influenced by governmentality as well as science and technology studies have particularly clearly expressed such an understanding of regulatory agency as the result of discourses or the association of actors and technological artefacts in networks. A variation of such an approach is developed in Liz Fisher’s chapter. She develops a nuanced understanding of regulatory agency through her account of the cognitive foundations of the risk regulatory regime of the WTO Agreement for Sanitary and Phytosanitary Measures. Regulatory agency is here the outcome of a precarious process of communication between different regulatory actors, such as the WTO panel, different disciplinary discourses as well as various types of expertise, including that of trade, administrative and environmental lawyers.

Fiona Haines’ and Samantha Balaton-Chrimes’ chapter introduces a new point into the debate—echoing Christopher Decker’s concern about combining ‘economic’ and ‘social’ objectives in competition policy—by highlighting the unresolved tensions within networks that push and pull regulatory agency in different directions. Fiona Haines’ and Samantha Balaton-Chrimes’ chapter highlights the way the Australian export credit agency EFIC was enrolled in three separate networks, one with a focus on the public interests of the state in job creation, the second focused on competition and transparency, while the third was concerned with business respect for human rights.

Hence, collectively the chapters show that regulatory agency in transnational risk regulation is achieved through networks, with an analysis of the **variety of these networks** enhancing our understanding of the conditions that constrain and facilitate ‘regulatory agency’. Finally, the analytical framework for the chapters in this edited collection is economic sociology, and more specifically economic sociology of law, that is sociological inquiry into business behavior within the context of specific state legal systems. This brings us to the third key contemporary regulation debate to which inquiry into the regulatory capacity of a social sphere contributes. This is concerned with understanding the relationship between state law and the regulatory capacity of a social sphere.

⁸⁶ David Garland, ‘Governmentality and the Problem of Crime: Foucault, Criminology, Sociology’ (1997) 1 *Theoretical Criminology* 173, 182; Peter Miller and Nikolas Rose, ‘Governing Economic Life’ (1990) 19 *Economy and Society* 1, 1–31.

⁸⁷ Emily Cloatre, ‘TRIPS and Pharmaceutical Patents in Djibouti: An ANT Analysis of Socio-Legal Objects’ (2008) 17 *Social and Legal Studies* 2, 263–81.

B. What is the Role of State Law in Harnessing the Regulatory Capacity of a Social Sphere?

As pointed out in Section II, the key theme of this edited collection is to analyse the regulatory capacity of a social sphere as it relates to regulation by markets and states, with states defined as historically specific political institutions for the exercise of public powers.⁸⁸ An important aspect of this analysis is to inquire into how **state law** facilitates or restrains the regulatory capacity of a social sphere in the context of transnational risk regulation. This requires addressing a prior but linked question. Does state law still matter in transnational risk regulation? How do norms of civil society influence the content of state law? Three perspectives can be identified. First, some contributors to regulation debates consider state law to be still at the core of the post-regulatory state.⁸⁹ Second, others suggest that transnational risk regulation involves a distinct shift from state to soft law⁹⁰ or at least an increase in soft law standards, such as the rules of international standard setting organizations, or regulatory initiatives of NGOs,⁹¹ including direct action, as well as self-regulatory standards developed by corporate actors themselves.⁹² Third, others see the role of *national state law* declining in favour of the development of a new form of public *transnational risk regulatory law*. The challenge for transnational law, however, is to accommodate diversity arising from various national risk regulatory regimes. ‘Ordered pluralism’ has been advocated as one solution to this problem.⁹³ It maintains a degree of hierarchy—as in the relationship between EU supranational and Member State law—between a patchwork of different legal orders, by retaining a ‘margin of appreciation’ for states in the application of supranational law.⁹⁴

⁸⁸ We consider the state as composed of various political factions, but, like Polanyi, perceive it as distinct from civil society and thus a ‘social sphere’ which has its own relative autonomy and operates according to its own social dynamics (Kari Polanyi-Levitt, ‘Introduction’ in Kari Polanyi-Levitt (ed) (n 35) 4.

⁸⁹ Scott (n 12) 8.

⁹⁰ Djelic and Sahlin-Andersson (n 22) 17.

⁹¹ Folke-Schuppert (n 17) 217, 221, 229 highlights the capacity of non-governmental and international organizations to promote juridification either through soft law standard setting or calls for institutionalizing standards in formal law, such as the development of rules in transnational commercial contracts.

⁹² Parker (n 67) 16–17.

⁹³ Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Oxford, Hart Publishing, 2009).

⁹⁴ *ibid* 17. ‘Unification through hybridization’ is another route to develop transnational law that conforms to Delmas-Marty’s vision of ‘ordered pluralism’. Hybridization involves combining different elements from various legal orders, for instance through reference to legal provisions from various national jurisdictions, from a comparative perspective and sometimes from outside a specific jurisdiction, eg by the Court of Justice in the EU and the International Criminal Court (Delmas-Marty (n 93) 60).

‘Ordered pluralism’ does not strive for complete unification of legal orders. It also seeks to avoid legal universalism based on political hegemony, in particular the imposition of US regulatory law on other countries. But it also rejects complete relativism and therefore aims to enshrine a commitment to values—a point that chimes with Polanyian analysis—even in a transnational sphere. In the context of exploring the regulatory capacity of a social sphere, the key challenge then is whether transnational law can also reflect the social norms of civil society or is even more removed from these than national risk regulatory law.

In the context of the EU carbon market Lange’s chapter points to the endurance of national economic and related social interests, such as supporting economic development in Eastern and Central European Member States in the EU through low energy costs. Also, Fiona Haines’ and Samantha Balaton-Chrimes’ chapter highlights the significance of national economic interests as one of the values that embed the activity of ECAs. Indeed, regional controls around export finance such as those promulgated by the OECD are often premised on the need to control national self-interest albeit whilst recognising the enduring nature of that interest. ‘National Interest Accounts’ in export finance are but one example of that enduring nature. Further, their work points to the importance of understanding the institutional-political imperatives of the state—the enduring concerns around balancing capital accumulation with legitimation that shapes whether and how socio-political demands, for example in relation to human rights, will be met.

Kate Macdonald’s and Shelley Marshall’s chapter, in contrast, documents the limited significance of nation-states, in regulating the social and economic risks of poor labour conditions and exploitative trade relationships faced by marginalized producers and workers in the global economy. They point to the lack of a co-ordinated inter-governmental response and therefore emphasize the importance of private risk regulatory regimes, such as fair trade and corporate social responsibility labour governance schemes. They also argue for a stronger embedding of private risk governance in state-based institutions at national and local levels, and therefore clearly envisage the possibility for transnational risk regulation regimes to reflect social norms of civil society, such as those of the Homeworkers Code of Practice. This can entail the institutionalization of private risk governance through a constitutional and hierarchical structure, such as mandatory codes of practice applied by Australian state legislation, leading to a regulatory regime that is similar to ‘ordered pluralism’.⁹⁵

⁹⁵ Delmas-Marty (n 93).

VII. HARNESSING THE REGULATORY CAPACITY OF
A SOCIAL SPHERE: A NEW RESEARCH AGENDA

This edited collection argues that developing the idea of harnessing the regulatory capacity of a social sphere with reference to economic sociology,⁹⁶ and in particular the notion of **embedding** economic in social relationships, constitutes a significant new research agenda. This agenda therefore charts alternatives to established **binaries**, such as ‘state and market’, ‘citizen and consumer’ as well as ‘social movement and transnational corporation’, by exploring the regulatory capacity of a social sphere **as it relates** to regulation by states and markets. This agenda aims to contribute to regulatory reform and transformations by providing critical reflection upon key regulatory initiatives by civil society actors in light of knowledge generated by contemporary regulation scholarship. Particularly relevant here is scholarship that addresses questions such as what drives self-regulation, how do networks constrain and facilitate regulatory agency in the transnational sphere, and how can state or transnational law incorporate the social norms of civil society actors?

This research agenda raises a range of interesting, analytical challenges, such as whether and how we can distinguish between economic and social objectives of regulatory regimes and what organizational forms facilitate the involvement of civil society in regulation in a transnational sphere. What role does state law play in harnessing the regulatory capacity of a social sphere and what is the reach of the regulatory capacity of a social sphere? Is it to promote existing regulatory projects also pursued by the state, such as environmental protection as depicted in the ‘carrot mob’ story? Or does the regulatory capacity of a social sphere reach further by questioning and subverting major brands and ultimately the production and consumption patterns that they represent, as in the NIKE culture jamming story? The following chapters present fascinating new insights gained from the pursuit of this research agenda.

⁹⁶ Including economic sociology of law. Legal sociology can enhance economic sociology since what legal constraints on business activity actually involve, how they work and often fail is under-conceptualized in some of the economic sociology literature.