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DIALOGUE AND DEBATE: SYMPOSIUM ON LAW, CONFLICT AND TRANSFORMATION - THE WORK OF CHRISTIAN JOERGES

Europe's unheeded vocation: from reconstructive vision to counterfactual critique

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Abstract

This review essay forms a contribution to the Dialogue & Debate symposium on Christian Joerges's volume *Conflict and Transformation* (Hart 2022). The specific angle of this article is an interdisciplinary one that conceives of Joerges's work as a boundary-crossing exercise between law and the social sciences. Aspects highlighted are the inspiration that his work finds in responding to Europe's vocation, or realising the latter's normative potential; the law-in-context quality of the approach, which combines inside and outside perspectives on what the law is and does, how it motivates and what it means; and the two-pronged ambition to take the law seriously as a legitimating force and to question, at the same time, the power of economic 'facts' and arguments, which sometimes overrule what seems legitimate. Moreover, this article considers the relevance and implications of two intellectual influences on Joerges's work, one a more formative one (Habermas) and one resonating with recent experiences of crisis (Polanyi), and it follows the journey of Joerges's reconstructive approach within European studies: between integration theory, governance approaches, and rethinking democracy in postnational constellations. As Joerges himself concedes, the normative vision that this yielded for European law and politics was overtaken by actual developments in the context of the monetary union, and conflicts-law constitutionalism became more of a counterfactual appeal. This article outlines how the critical edge of this approach could be enhanced by taking perspectives from critical political economy on board, which would also facilitate countering economic arguments.

Keywords: European law; law in context; political economy; sociology; monetary integration

1. Introduction: Europe's vocation

This sizeable volume collects a number of representative writings (20 articles and book chapters, grouped in seven sections) of Christian Joerges's still much bigger oeuvre on the European condition.[1] It presents them in a coherent way, with brief introductions and conclusions in all parts, a biographic contextualisation at the beginning and an epilogue on 'Europe's crisis and vocation' at the end.[2] Hence, the book starts and ends with remarks on callings: the author's calling to writing on Europe and Europe's calling as interpreted by the author.

The idea of a 'vocation' is spiritually charged. The concept is not the most prominent one in Joerges's writings, but one of the more peculiar ones which are recurrently used, next to key

[1]C Joerges, *Conflict and Transformation: Essays on European Law and Polity* (Hart Publishing 2022).
[2]Ibid., 583.

theoretical concepts, such as conflicts-law constitutionalism. I think that the term vocation captures something characteristic about Joerges's work and approach, which is informed by a social theory centring on communicative action. This implies talking and listening to each other, arguing and appealing in a discursive space.

Joerges holds that it is the 'prime vocation' of European politics 'to correct the democracy deficits of national politics',[3] that a 'second vocation' is the 'constitutionalisation of co-operation' between Member States by European law,[4] and, above all, that '"United in Diversity" is ... Europe's true vocation'.[5] Moreover, he also speaks of the vocation of lawyers, like himself, 'to offer legal conceptualisations' that are responsive to the changing conditions of the European project: 'law's context', broadly understood.[6] With his reconstruction of what Europe is meant to be or become, he pleads to fellow lawyers, the wider professional and scholarly community, and the constituency of Europe at large. For the addressees, his arguments and value commitments may be both appealing and convincing, and the Europe invoked may become the subject of further speech acts in European law and politics.

This review essay aims to highlight certain aspects of Joerges's work (like the vocational undertone), which make it stand out as a scholarly contribution, and to put it in the larger context of social and legal theorising, European integration studies and governance research, which it developed from and responds to. After briefly relating Joerges's approach to inside and outside perspectives in socio-legal research (Section 2), this essay introduces two important reference points of his work, albeit in different phases: Habermas provides conceptual foundations, Polanyi a critical vocabulary for conflicts dynamics (Section 3), while Joerges lets both also speak for themselves. Turning to the law and economics of Joerges's approach, this essay suggests that, as important as it is to take law seriously, coming to terms with the economic formatting of European law and politics remains a challenge in interdisciplinary discourse (Section 4). Subsequently, the essay retraces Joerges's search for a new paradigm within and between European scholarship on integration, governance, and democracy (Section 5), before outlining where his approach fails, on its own terms, as a communicative exercise reconstructing European law and policymaking from within (Section 6). It is argued that the critical ambition of Joerges's approach would gain strength by drawing on political-economic perspectives, which appear to have been sidelined so far.

2. Inside out and outside in: putting law in its social context

Joerges is a scholar of European law in context *par excellence*,[7] who situates 'law in the interplay between politics, the economy and society'.[8] This requires opening up to other social science disciplines and specialisations, such as political science, sociological theory, political economy or economic sociology.[9] In a nutshell, Joerges calls legal scholars to take the economy seriously and social scientists to take the law seriously. This implies two things: that scholars overcome a division of labour which puts different disciplines in charge of different spheres of reality (eg economic, political, legal, social), and that they develop a better understanding of what is positive and what is normative about studying subject matters imbued with value-relations.[10]

[3]Ibid., 130; see also 392.
[4]Ibid., 392.
[5]Ibid., 263; see also 401.
[6]Ibid., 232; see also 567.
[7]F Snyder, 'Editorial' 1 (1) (1995) European Law Journal 1–4, at 1.
[8]M Goldmann, 'The Great Recurrence: Karl Polanyi and the Crises of the European Union' 23 (3–4) (2017) European Law Journal 272–89, at 273.
[9]Joerges (n 1), 483, 584.
[10]M Weber, 'Objectivity in Social Science and Social Policy' in M Weber (ed), *The Methodology of Social Sciences* (Free Press 1949) 49–112.

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Methodologically speaking, Joerges's approach straddles questions of 'Is' and 'Ought'.[11] Based on this distinction, Kelsen once drew a line between legal and sociological method, and normative and explanatory disciplines.[12] A related distinction, between 'internal' and 'external' points of view was promoted by Hart (1961).[13] The internal point of view is that of participants, who make sense of the law from within, whereas the external point of view is that of an observer who studies the effects of the law from the outside. For many, this implies that '[s]ociology remains an outsider to law and its point of view an external one'.[14] However, in Hart's terms, 'the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view'.[15]

Similarly, Weber separated the normative validity of legal propositions, as the subject of legal dogmatics, from their empirical validity, which would be the subject of sociological analysis. Accordingly, law's empirical validity can be found in the degree to which legal norms are accepted, acted upon, and enforced.[16] This includes actors' motivations to follow the law: be it by the threat of sanctions or a belief in the legitimacy of the legal order in place.[17] This position is reflected in interpretive sociology, an approach that can likewise go to the inside of law, or its (inter-) subjective meaning.

Relatedly, Cotterrell rejects the insider–outsider distinction and puts forward an understanding of law as ideas and practices that are both shared and contested. More specifically, he makes a case for the sociological interpretation of law as an *extension* of participant perspectives by analytical and empirical means. This 'radical broadening of perspective' would enrich legal discourse as such by providing 'critical' and 'constructive' insights into its potential shortcomings.[18]

One can argue that, for sociologists, an outside–in approach to law, as it is perceived by laypeople and argued in legal discourse, given the prevailing circumstances and challenges of the time, is more typical. In contrast, the emphasis of legal theorists would still be on how the law ought to be understood in changing constellations and contexts, or the inside–out dimension. This is the case in Joerges' vision of conflicts law, or a 'law of norm-collisions',[19] which is a legal theory that takes law's social context into account and explicitly engages in social theorising.

3. Astride an unruly horse: intellectual benchmarks for social theorising

As to the value commitments underlying Joerges's work, one finds an intrinsic interest and consistent effort in linking law with (social) democracy, which is combined with a commitment to the 'social', and 'social Europe' in particular.[20] Mirroring older concerns with the vagaries of public policy, Joerges at one point refers to the 'social' as 'an unruly horse'.[21] The theoretical legs he uses to stay on top of such a difficult matter are Habermas's discourse theory on the one hand and

[11]See for the following already S Frerichs and F Losada, 'Europeanization and Law: Integration Through Law and Its Limits' in S Büttner et al (eds) *Sociology of Europeanization* (De Gruyter Oldenbourg) 191–213.

[12]H Kelsen, 'On the Borders Between Legal and Sociological Method', in A Jacobsen and B Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2002) 57–63.

[13]HLA Hart, *The Concept of Law* (Clarendon Press 1961).

[14]K Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law* (Routledge 2010) 20.

[15]Hart (n 13) 89, original emphasis.

[16]M Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 311–12.

[17]Weber (n 16), 213.

[18]R Cotterrell, 'Why must legal ideas be interpreted sociologically?' 25 (2) (1998) Journal of Law and Society 171–92, at 188–9.

[19]Joerges (n 1), 399.

[20]See especially Joerges (n 1), Part IV on the European social model.

[21]Joerges (n 1), 280. For the full phrase, see Richardson v Mellish, (1824) 2 Bing 229 (original citation)/130 E.R. 294 (English Reports citation): '[public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you'. See also R Cotterrell, 'Law's Community: Legal Theory and the Image of Legality' 19 (4) (1992) Journal of Law and Society 405–22, at 411.

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Polanyi's economic sociology on the other,[22] which, arguably, meet in the 'social democratisation of economy and society'.[23] Another value commitment, which accounts for the inherent limits of Joerges's approach in taking analytical frameworks and insights from critical political economy on board, can be found in 'the rule of law and the idea of law-mediated legitimisation of the exercise of public power', which features as a constitutive premise and normative belief.[24] This aspect becomes evident in his assessment of crisis management within the Economic and Monetary Union (EMU).

A. Habermas' discourse theory of law: developing a reconstructive approach

An important contribution at the interface of legal and social theory is Habermas's discourse theory of law. In *Between Facts and Norms*, Habermas spells out relations between 'facticity' and 'validity' relevant to the law, one of which is 'the familiar tension between norm and reality that again and again provokes a normative response'.[25] Following Weber, the empirical validity of law depends not only on the effectiveness of enforcement powers but also on the prevalence of a belief in its legitimacy. This is accentuated in Habermas's approach, according to which legality and legitimacy are intrinsically connected. It is a 'reconstructive approach to law',[26] which engages with the intellectual history, structure, and principles of modern law in order to distil normative and procedural requirements for law to be regarded as legitimate. More specifically, the discourse theory of law points to the democratic ideals from which modern law derives its legitimacy and specifies the preconditions of deliberative practices in social reality. In a nutshell, the addressees of legal measures should always be able to perceive themselves as authors of the underlying political decisions.

Joerges's conflicts-law constitutionalism 'provides an adaptation of the discourse theory of law to the postnational constellation' and, more specifically, to conflict constellations in the European polity.[27] This is also described as 'an exercise in critical theory with normative perspectives'.[28] His emphasis is on the 'socio-economic, institutional, political and cultural diversity' within the EU, which comes along with different collective interests and value commitments.[29] These are taken seriously as a factual and normative premise for deliberative processes in the EU, which the conflicts-law approach aims to promote. The latter is presented 'as the proper constitutional form of law-mediated transnational democratic governance', which is, given its deliberative and coordinative orientation, 'not dependent on the establishment of a European state or a world republic'.[30]

Similar to Habermas, Joerges describes his adaptation of discourse theory to the European polity as reconstructive in its ambition,[31] which means that it extrapolates from actual empirical and normative developments in the integration process. For Joerges, this implies 'a re-conceptualisation of European law which would, to a considerable degree, be compatible with European law as it stood, and be able to orient its further development'.[32] It is a

[22]Eg Joerges (n 1), 382 (Habermas), 584–585 (Polanyi).

[23]Ibid., 515.

[24]Ibid., 193.

[25]J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 39.

[26]Ibid., 82, 132.

[27]C Joerges, 'Legitimacy without Democracy in the EU? Perspectives on the Constitutionalization of Europe through Law' in M Maduro et al (eds) *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) 248–268, at 251.

[28]C Joerges, 'Conflicts-Law Constitutionalism: Ambitions and Problems' in M Cremona et al (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber amicorum for Ernst-Ulrich Petersmann* (Martinus Nijhoff 2014) 111–37, at 127.

[29]Joerges (n 1), 266; see also Ibid., 416.

[30]Ibid., 448.

[31]Ibid., 1, 423–4, 584.

[32]Ibid., 393. See also Joerges (n 28), 127.

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reconceptualisation also with regard to other legal conceptions, their respective 'meta-positive assumptions', and the 'normative guidance' they offer for the future.[33] Going beyond legal perspectives as such, Joerges explicitly addresses the 'sociological premises' which the conflicts-law approach is based upon and which would 'reflect the European constellation more adequately than the orthodoxy of European law'.[34] At the centre of his argument is Europe's socio-economic diversity, an empirical fact with normative implications.[35] In addition, one can also think in terms of actual achievements of the integration process, including 'institutional innovations' (like the committee system or new governance procedures) and 'the ingenuity of so many committed actors' engaged in what can ultimately be seen as a democratic experiment.[36]

However, in recent writings, Joerges shows concern with the increasing gap between the empirical premises and the normative promises of conflicts-law constitutionalism in Europe. Given the latest developments in European integration and governance, especially in the context of the EMU, Joerges considers that the 're-constructive side of [conflicts-law constitutionalism] has been seriously damaged'.[37]

B. Polanyi's economic sociology: strengthening the counterfactual critique

What remains is a counterfactual critique.[38] The normative vision of conflicts-law constitutionalism is not given up, but it is no longer claimed that this duly reflects the evolutionary trajectory of European law and policy: there are now too many and too significant exceptions to this ideal in reality. With regard to the EMU Joerges adds:

> What can nevertheless be explored are the conflict constellations which the new modes of economic governance and the imposition of austerity politics on a large part of the Union generate – together with the space for counter-movements which the unfortunate state of the Union may generate.[39]

The notion of counter-movements in this context already reveals a Polanyian influence, as do repeated references to the social embedding, or dis-embedding, of markets and the respective function of economic law.

This is not coincidental but the result of Joerges' consistent efforts to bring Polanyi's economic sociology in 'as a sociological basis' of conflicts-law constitutionalism in the last one or two decades.[40] The unruly horse of the 'social' shows in the 'unruliness of the post-national constellation'[41]: Polanyi's terminology of disembedding (liberalising) movements and re-embedding (protective) counter-movements provides a simplifying language for the dynamics of socio-economic, political, and cultural conflicts, involving different governance levels and groups of Member States within the European polity[42]: a lens that conventional legal and political theories seem to be missing.

[33]Ibid., 407.

[34]Ibid., 393. See also Ibid., 442–3.

[35]Ibid., 391–3.

[36]Joerges (n 28), 127.

[37]Ibid., 127–8.

[38]Joerges (n 1), 393; Joerges (n 28), 128.

[39]Ibid., 393.

[40]Ibid., 448; see also Ibid., 584–5. A Polanyian framing is already evident in the following volumes: C Joerges et al (eds), *Economy as a Polity: The Political Constitution of Contemporary Capitalism* (UCL Press 2005); C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing 2011). For a recent review essay, see C Joerges, 'Why European legal scholarship should become aware of Karl Polanyi: *The Great Transformation* and the Integration Project' 1 (4) (2022) European Law Open 1067–79.

[41]Joerges (n 1), 448.

[42]See, for a respective description of diversity, Ibid., 266.

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While it may, at first, look odd to combine elements of Habermas's discourse theory with insights from Polanyi's economic sociology, the two approaches are not that far from each other on the continuum of social theories dealing with law, economy, and society.[43] What may be regarded as another added value in bringing Polanyi in is that his approach, while giving relatively little attention to the law as such, helps exploring the role of another powerful institution in the European market- and polity-building project: money. However, Joerges does not follow Polanyi, or Polanyi-inspired scholarship, as far as to complement his social theory of law with a sociological understanding of money, which would allow further exploring this medium of integration next to the law: as a means of societal integration in general and of European integration in particular.

Polanyi pictures money both as an 'embedding institution' and a 'fictitious commodity'.[44] The global (or: North Atlantic) financial crisis brought the commodification of debt relations to the fore, including their securitisation and financialisation, first focusing on private debt.[45] When the contagious loss of credit also became a problem of governments and triggered the Euro crisis, the focus shifted to the 'commodification of public finance',[46] which is a logical precondition and factual consequence of monetary integration under conditions of full capital mobility within and beyond the Eurozone.

Writing about the liberalising market economy and its first globalisation under the classical gold standard, Polanyi invoked the 'powerful social instrumentality' of international finance.[47] This 're-emerged' after the demise of Bretton Woods,[48] and some scholars interpret the Euro as a 'new gold standard' on the European level[49]: a self-regulating mechanism to adjust credit and debt. It seems that, with financial and monetary integration, international creditors and financial investors have become a powerful constituency behind European economic governance.[50] The social reaction is strong and often anti-European.[51]

Against this pathway of monetary integration, a legal theory of money is emerging that, in line with a normative conception of money as socially and democratically embedded, argues for the democratisation of money.[52] One can easily imagine Joerges nodding to this, but his references to Polanyi's conception of money and monetary policy remain a placeholder for contemporary strands of legal and political-economic theorising on money and finance that conflicts-law constitutionalism could not fully absorb. This limitation will be further substantiated below.

[43]For this argument, see S Frerichs and F Losada, 'The Role of Law in European Monetary Integration: A Critical Reconstruction and a Response to Klein' 2 (1) (2021) Global Perspectives 1–2 (Art No 24131).

[44]S Frerichs, 'The Law of Market Society: A Sociology of International Economic Law and Beyond' 23 (2016) Finnish Yearbook of International Law 173–237. See also S Frerichs, 'Karl Polanyi and the Law of Market Society' 44 (2) (2019) Österreichische Zeitschrift für Soziologie 197–208.

[45]T Juutilainen, 'Law-Based Commodification of Private Debt' 22 (6) (2016) European Law Journal 743–57.

[46]Goldmann (n 8), 278.

[47]K Polanyi. *The Great Transformation* (Beacon Press 1957) 9.

[48]E Helleiner, *States and the Reemergence of Global Finance: From Bretton Woods to the 1990s* (Cornell University Press 1994).

[49]D Wilsher, 'Law and the Financial Crisis: Searching for Europe's New Gold Standard' 20 (2) (2014) European Law Journal 241–83.

[50]W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014) 80–1. See also A Chadwick, 'Rethinking the EU's "Monetary Constitution": Legal Theories of Money, the Euro, and Transnational Law' 1 (3) (2022) European Law Open 468–509.

[51]Eg K Dörre, '"Take Back Control!": Marx, Polanyi and Right-Wing Populist Revolt' 44 (2) (2019) Österreichische Zeitschrift für Soziologie 225–43.

[52]Chadwick (n 50), 486–90; see also S Klein, 'European Law and the Dilemmas of Democratic Capitalism' 1 (1) Global Perspectives 13378; Frerichs and Losada (n 43).

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4. Interdisciplinary ambitions: going inside law and behind economics

For a legal scholar interested in law's context, interdisciplinary discourse is an important resource.[53] Joerges's work bears witness to his engagement, first of all, with political science approaches (in international relations, comparative politics, and European studies), and their articulation with legal scholarship. Part I of the book opens with a short section on 'The Contest of Disciplines in the Study of European Integration'.[54] This is motivated by Habermas's observation that legal scholarship and political science 'each deals with the constitutional state in its own way – jurisprudence in normative terms, political science from an empirical standpoint',[55] while Habermas himself emphasises the intrinsic link between (rule of) law and democracy. Following on this line, Joerges criticises 'the disciplinary schism' between political science and legal scholarship, or empirical and normative approaches to European law and politics,[56] which has also been addressed by other scholars in 'EU legal studies'.[57] Joerges's aim is to 'overcome the age-old dichotomy between *Sein* (being) and *Sollen* (ought)' by taking a reconstructive approach that considers factual and normative conditions of law- and policy-making in the European Union (EU).[58]

Chapters 3 and 4 of the book, as well as related work, take issue with how the mainstream of political science, on the one hand, and of legal scholarship, on the other, have dealt with the 'law of European integration'.[59] One core message, aimed at political and other social scientists, but also legal scholars with a formalist, functionalist, or technocratic understanding of the integration process,[60] is to 'take the law seriously'.[61] This argument builds on tensions between legality and legitimacy, or the positive and normative validity of the law. Applied to the European context, this reads as follows:

> The validity claims of European Law … depend on its 'normative quality'. … [P]olitical science ought to recognise these 'normative properties' of law – its integrity and its legitimacy – as a pre-condition of the effectiveness of Community law; it needs to integrate this normative dimension of law into its theoretical re-constructions.[62]

For Joerges, taking the law seriously implies turning to the processes of law generation. These should reflect a communicative rationality, rather than an instrumentalist rationality, which credits the law with legitimacy.[63] In other words, his plea is to 'pay tribute to the "*proprium*" of the law, that is, the "facticity of the normative"',[64] which is grounded in justification practices. If these are perceived as deficient, this would lead to an 'erosion of legitimacy of the integration project'.[65]

Taking account of law's social context, without losing sight of the intrinsic quality of the law, is a challenge in socio-legal discourse. However, this is not the only issue in developing a truly interdisciplinary understanding of the EU. Joerges's work is also driven by a concern with the

[53]Joerges (n 1), 6 and 12.

[54]Ibid., 11–12.

[55]J Habermas, 'On the Internal Relation between the Rule of Law and Democracy' in J Habermas (ed), *The Inclusion of the Other: Studies in Political Theory* (MIT Press 1998) 253–64, at 253.

[56]C Joerges and C Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science between Critique and Complacency' 23 (1–2) (2017) European Law Journal 118–39, at 121 and 137; see also Joerges (n 1), 162.

[57]K Alter et al, 'Law, Political Science and EU Legal Studies: An Interdisciplinary Project?' 3 (1) (2002) European Union Politics 113–36.

[58]Joerges (n 1), 163.

[59]Ibid., 11.

[60]Joerges and Kreuder-Sonnen (n 56), at 121, 138.

[61]Joerges (n 1), 12 and 46.

[62]Ibid., 14.

[63]Ibid., 169–70.

[64]Ibid., 12.

[65]Joerges and Kreuder-Sonnen (n 56), at 126.

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economic dimension of the integration process, which is addressed in different forms: as economic law, economic governance, and economic expertise.

Thus, it is highlighted that the 'law of European integration' is, to large extent, the 'law of economic integration'.[66] From the outset this has been market integration, followed only later by monetary integration. As Joerges argues with reference to Polanyi: 'Markets are not autonomously functioning but "socially embedded" entities. Economic law is concerned with the configuration of their institutional framing.'[67] Joerges' normative signpost for the postnational constellation is that markets remain socially embedded or are re-embedded in democratically legitimate ways. European integration, which characteristically involves the 'Europeanisation of the economy', is accomplished, first and foremost, in the medium of 'economic law', be this private or public.[68] National economic law is superimposed by supranational economic law, which changes what is 'positively valid' and, in doing so, challenges existing normative principles and traditions, for example, to what extent economic law is informed by 'the efficiency demands of economic analysts' or 'the realisation of distributive concerns and/or paternalistic motives'.[69] Here, economics comes in as an area of expertise and scholarly discipline, and one with distinctive value commitments, which in neoliberal times are no longer in sync with the social democratisation of Europe.

Hence, Joerges's subject matter is actually 'the interdependence between economics, politics and law'.[70] Without clearly distinguishing the different dimensions, his concern is with how European studies relate to the economy as a subject matter and economics as a discipline, or economic expertise as a reference point of economic governance. He observes a 'neglect of "the economic"' and its 'inherently political dimensions' in legal scholarship,[71] and an uncritical acceptance of the 'rule of economics' and the 'normativity of "the economic"' in economic constitutionalism.[72] In response, his own writings expose 'the factual primacy of the economic within integration processes'.[73]

Indeed, economics is sometimes mentioned as a third relevant scholarly discipline in European studies, whose functionalist reasoning would increasingly be resorted to in European politics.[74] This 'meta-economic' dimension would require unpacking, or going behind.[75] However, it is also acknowledged that arguing with economics would be outside the core expertise of the author(s) of the conflicts-law approach.[76] This is where political-economic approaches could come in, which include a critique of the neoclassical and neoliberal premises of much of economics today.

5. Integration, governance, and democracy: moving between paradigms

One way in which Joerges presents his book is that it retraces the conceptual history of the European project,[77] and a constant concern is that the latter 'lacks theoretical foundations which would back its legitimacy';[78] hence, the 'search for a new paradigm'.[79] Conflicts-law

[66]Joerges (n 1), 11.
[67]Ibid., 286.
[68]Ibid., 22–23.
[69]Ibid., 23.
[70]Ibid., 584.
[71]Ibid., 46 and 355, respectively.
[72]Ibid., 12; J Hien and C Joerges 'Introduction: Objectives and Contents of the Volume' in J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017) 1–10, at 4.
[73]Ibid., 584.
[74]Ibid., 43; Joerges and Kreuder-Sonnen (n 56), at 118, n 1.
[75]Ibid., 394.
[76]Joerges and Kreuder-Sonnen (n 56), at 118, n 1.
[77]Joerges (n 1), 11 and 583.
[78]Joerges and Kreuder-Sonnen (n 56), at 134. See also Joerges (n 1), 390.
[79]Joerges (n 1), 247. see also Ibid., 405–6, 416 and 421; C Joerges, '"Brother, Can You Paradigm"' 12 (3) (2014) International Journal of Constitutional Law 769–85.

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constitutionalism is presented as such a new paradigm,[80] which claims its place among other schools of thought and between the prevailing paradigms in European studies. Having long been equated with 'integration studies', the field has later taken a 'governance turn'.[81] Part III of Joerges's book, on 'Social Regulation and the Turn to Governance', bears witness of his involvement in and contribution to the debate.[82] Rosamond introduces the paradigm change as follows: 'The politics of European integration are not just about whether there should be more or less *integration*. [. . .] Much (perhaps most) of what goes on in the EU game is about day-to-day technical, regulatory policymaking.'[83] Joerges and his co-authors were well aware of this shift to 'the functioning of the EU as a legal and political system', which had an influence not only on political science but also on legal scholarship.[84]

The integration and governance paradigms both have their background in political science, albeit in different areas of specialisation. Classical integration theories, such as intergovernmentalism and neo-functionalism, have their roots in the subfield of international relations, where the emergence of the European polity was to be explained. In contrast, governance approaches draw on the sub-field of comparative politics, where the institutional setting is already taken as given and studied in its own right. While the integration paradigm and the governance paradigm in European studies are, in the first place, empirical in orientation, a third paradigm, the democracy/legitimacy paradigm, is more explicitly normative.[85] This third paradigm obviously also intersects with the other two when the process of European integration and the practices of European governance are studied from the viewpoint of democratic legitimacy. This latter angle is of transversal relevance in Joerges's work.

A. Integration paradigm: integration through law and its discontents

In the integration paradigm, European integration was largely conceived as integration through law. Whereas intergovernmentalist approaches emphasised the gate-keeping role of the EU Member States in European legislation, neo-functionalist approaches highlighted the pro-active role of the European Court of Justice (ECJ) and its case law as a driver of European integration. The former approaches focus on the central role of state governments; the latter also take supra- and subnational actors 'above and below the nation-state' into account.[86] In this context, the 'dynamic of legal integration' was emphasised.[87]

To locate Joerges's approach between other theories of integration in the field of European studies, it makes sense to start from the 'integration through law' paradigm.[88] Dehousse and Weiler famously described law as 'both the object and agent of integration'.[89] When national law is Europeanised, law is the object of integration; but it is also the agent of integration in that this is largely a 'law-making exercise'.[90] In other words, law is not only a 'dependent variable' of

[80]Eg Joerges (n 1), 571. See generally Ibid., Part VI.

[81]B Rosamond, *Theories of European Integration* (Palgrave Macmillan 2000); A Wiener and T Diez (eds), *European Integration Theory* (Oxford University Press 2009).

[82]Joerges (n 1), 129–218.

[83]Rosamond (n 81), 106–7; original emphasis.

[84]Joerges and Kreuder-Sonnen (n 56), at 120. As another co-author Jürgen Neyer deserves mentioning.

[85]P Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (Oxford University Press 1999) 1–54.

[86]A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' 47 (1) (1993) International Organization 41–76, at 54.

[87]Burley and Mattli (n 86), at 42 (emphasis omitted). See also W Mattli and A-M Slaughter, 'Revisiting the European Court of Justice' 52 (1) (1998) International Organization 177–209.

[88]D Augenstein (ed), *'Integration Through Law' Revisited: The Making of the European Polity* (Ashgate 2011).

[89]R Dehousse and JHH Weiler, 'The Legal Dimension' in W Wallace (ed) *The Dynamics of European Integration* (Pinter Publishers 1990) 242–60, at 243.

[90]Dehousse and Weiler (n 89), at 243.

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(economic and political) integration, implying 'integration *of* law', but also an 'independent variable' shaping the integration process, which is 'integration *through* law' properly understood.[91] Integration through law is, or was, as much a political strategy as an academic project.[92] There is a 'politics of de-politicization' at work, according to which law fulfils a political function in the integration process but is itself perceived to be neutral.[93] This resonates with a legal positivist concept of law, which draws a line between the formal validity of the law as such and its legitimacy on moral or political grounds.[94]

However, law's quality as an agent of integration can also be interpreted in terms of law's inherent link with questions of legitimacy,[95] that is 'its integral and legitimising character, or its ability to translate fact into norm'.[96] This aspect is emphasised in discourse-theoretical approaches, which anchor law in communicative rationality. As Joerges outlines at the beginning of his book, '[t]he essays in this volume focus on "the law of European integration" in an understanding that departs not only from the "integration through law" paradigm, but also from the instrumentalist analyses prevailing in political science,' with his own approach being closer to the latter's 'constructivist strand', which takes the motivating power of norms seriously.[97] This is important to locate Joerges as an inside critic, a participant in legal and political discourse, whose reconstructive work is in the world of ideas, rather than as an outside critic, who might take a more cynical stance towards the norms of the powerful and the workings of ideas as ideologies.

When Joerges describes the alternative approach that he offers as 'integration through conflicts law',[98] this still reveals the influence of mainstream terminology, while changing an important nuance. However, in substance, he considers research on European integration, or rather, economic law, as too much rooted in the integration paradigm, and the integration-through-law paradigm, more specifically.[99] This first applies to the observation of 'emerging European structures of governance' in the context of market integration, which seemed to evolve as coordinative and deliberative practices 'beyond intergovernmentalism and below orthodox supranationalism'.[100] For this, a new theory combining analytical as well as normative aspects was sought, with the vision being 'a law of transnational governance'.[101] Later on, his critique of the integration paradigm also extends to how scholars rationalise the workings of new (and successively 'hardened') modes of economic governance in the context of monetary integration and the Euro crisis. Joerges notes 'a principled enthusiasm for the fostering of integration' and a prevalence of 'implicitly or explicitly apologetic approaches' in this context, which would make the measures taken, ultimately, appear as appropriate.[102] By this time he has lost confidence in the power of his alternative vision, as this no longer seems sufficiently grounded in reality.

[91]G de Búrca, 'Rethinking Law in Neofunctionalist Theory' 12 (2) (2005) Journal of European Public Policy 310–26, at 313–14, original emphasis.

[92]M Avbelj, 'The Legal Viability of European Integration in the Absence of Constitutional Hierarchy' in Augenstein (n 88) 29–46, at 30–2.

[93]D Augenstein and M Dawson, 'Introduction: What Law for What Polity? "Integration through Law" in the European Union Revisited' in Augenstein (n 88) 1–8, at 2.

[94]C Mac Amhlaigh, 'Concepts of Law in Integration Through Law' in Augenstein (n 88) 69–84, at 72–6.

[95]A Gibbs, 'Taking Agency Seriously: An Examination of Legal Integration and Constitutionalism' in Augenstein (n 88) 47–60, at 49–50.

[96]M Everson and J Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (Routledge 2007), at 44.

[97]Joerges (n 1), 11 and 163, respectively.

[98]C Joerges, 'Integration through Conflicts Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation' in R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification* (Intersentia 2010) 377–400.

[99]Joerges (n 1), 11–2.

[100]Ibid., 156 and 160, respectively.

[101]Ibid., 176. See the following section for more details.

[102]Joerges and Kreuder-Sonnen (n 56), 119 and 121, respectively. see also Ibid., 126. See the following section for more details.

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B. Governance paradigm: law and new governance and a bold vision

In the governance paradigm, scholars turned from the bigger questions of European integration to the day-to-day functioning of the already established European polity. Old and new forms of governance are studied from a comparative-institutionalist point of view, which is not premised on the uniqueness of the European setting. As others, Joerges speaks of a multilevel governance system with 'a strong interdependence of national and supranational institutions, as well as national and transnational non-governmental actors' and a 'turn to cooperative modes of coordination', eg in regulatory networks.[103] For a number of scholars, these governance practices also raise normative questions, and some aim to move from 'a general descriptive theory of European governance' to 'a normative theory suitable for the post-national European constellation'.[104] In Joerges's reconstructive approach, both ambitions go hand in hand.

In principle, governance can refer to very different modes of governing, which include hierarchical forms of order in a state (command-and-control) as well as heterarchical arrangements involving different types of actors (coordination in networks). In practice, 'governance' is often contrasted with 'government', and 'new' modes of governance are contrasted with 'old' ones. Related phrases include 'governance with government' (eg public-private partnerships) and 'governance without government' (eg private codes of conduct). With regard to the European polity, Joerges also speaks of 'governance beyond the state'.[105]

In political science, the governance debate relates to the changing role of the state in governing the economy and society at large. Transformations of the state, as observed in times of neoliberalism and globalisation, yield an interest in alternative forms of governance, with or without government. With legal scholars entering the debate, the emphasis shifts to *law and* (new) governance.[106] Whereas old forms of governance may be justified by conventional settings of the rule of law and constitutional democracy, new governance arrangements raise questions as to their legitimacy and accountability. Joerges follows the law-and-new-governance debate with doubts, suggesting that governance scholars would too easily do away with the rule of law as a foundational value.[107] With hindsight, his verdict regarding new modes of governance is that '[t]he weakening of the discipline of the rule of law is much too high a price to pay for the new flexibility'.[108] This shows Joerges relatively conservative with respect to the role of law in new governance.

However, in terms of how new governance may be endowed with legitimacy, there is also agreement regarding the expected deliberative quality of the procedures. Drawing on the theory of deliberative democracy and democratic experimentalism, Korkea-aho identifies three constitutive elements qualifying governance as a deliberative and iterative process: the requirement to give reasons (reflexivity as practical reasoning), a problem-solving orientation (implying a public-policy dimension), and responsive participation (by relevant stakeholders/civil society).[109] Accordingly, new modes of governance that are in line with these criteria could generate their own legitimacy. While these criteria may be applied to different governance arrangements on a case-by-case basis, Joerges formulates a more comprehensive normative vision for Europe as a polity: deliberative supranationalism.

[103]Joerges (n 1), 137 and 32, respectively.

[104]PF Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-National Constellation* (Hart Publishing 2010) 12; emphasis omitted.

[105]Joerges (n 1), 156.

[106]Eg G de Búrca and J Scott (eds) 'Narrowing the Gap: Law and New Approaches to Governance in the European Union' 13 (3) (2007) Columbia Journal of European Law (Special Issue) 513–731.

[107]Joerges (n 1), 193.

[108]Ibid., 131.

[109]E Korkea-Aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Routledge 2015), ch 3.

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The governance structures that Joerges and his team originally studied were emerging from the committee system (comitology),[110] referred to as the 'oldest form of "new" governance' in the European context, and from the principle of mutual recognition as interpreted by the ECJ. The latter is likewise presented as a 'governance practice', which inspired the so-called new approach to harmonisation.[111] Substantively, Joerges's interest is in the 'mediation between the economic logic of market integration and the normative logic of social regulation' in the European single market.[112] The so-called open method of coordination (OMC) and newly established European regulatory agencies were not at his focus, and he remains sceptical about their development. It is in the previous context that Joerges put 'a law of conflict of laws interpretation of European governance practices' forward, which highlights 'coordination efforts [that] aim at a solution which is acceptable to a Union of relatively autonomous states'.[113]

What is outside the purview of legal scholars and many political scientists engaged in the governance debate is that alternative governance arrangements are also discussed in new institutional economics.[114] As a leading figure in the field, Williamson compares different governance structures available to economic actors from the viewpoint of transaction costs economics. On the micro-level, alternative choices are, for example, producing in a firm hierarchy or procuring from spot markets, with relational contracts, or cooperation in networks, as a third option in-between.[115] On a macro-level, Komesar's comparative institutional analysis studies more comprehensive institutional choices, or governance alternatives, relevant to law and politics. This includes various 'large-scale social decision-making processes', such as 'markets, communities, political processes, and courts'.[116] This way of thinking in institutional alternatives, which is informed by economic analysis, is also useful to understand what is at stake in conflicts-law constitutionalism.

The institutional alternatives to Joerges' ideal of legitimate governance practices are, indirectly, clarified by Maduro, whose analytical framework is inspired by Komesar's work.[117] Maduro distinguishes between three 'alternative models' of Europe's economic constitution, which differ by 'allocating regulatory decisions to different institutions':[118] the 'competitive model' (putting markets and regulatory competition first), the 'centralised model' (accentuating harmonisation at the supranational level) and the 'de-centralised model' (emphasising administrative cooperation and policy coordination). In judicial practice, neither the centralised model nor the competitive model had become dominant but features of a more decentralised model could persist. Joerges infers from this 'the ECJ's readiness to accept and to promote de-nationalised governance structures'.[119] At this stage, his 'vision of a law of transnational governance' was thus still anchored in reality.[120] Hard core regulatory competition was kept in check by reasonable regulatory standards, while the de-centralised model seemed to preserve transnational democratic legitimacy.

[110]This research was part of a collaborative project including Jürgen Neyer, who co-authored key outputs. See Joerges (n 1), 161, n *.

[111]Joerges (n 1), 200–1. see also Ibid., 202 and 303–9.

[112]Ibid., 320; see also Ibid., 310–13.

[113]Ibid., 208–9.

[114]For this argument, see already S Frerichs, 'Taking Governance to Court: Politics, Economics, and a New Legal Realism' in E Hartmann and PF Kjaer (eds) *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Palgrave Macmillan 2015) 157–73.

[115]OE Williamson 'Transaction Cost Economics' in C Ménard and MM Shirley (eds), *Handbook of New Institutional Economics* (Springer 2008) 41–65.

[116]NK Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge University Press 2001) 31.

[117]See already Frerichs (n 114) for the following.

[118]M Poiares Maduro, *We the Court – The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998) 104. See generally on the idea, realities, and transformations of the European economic constitution Joerges (n 1), Part V.

[119]Joerges (n 1), 138; see generally Ibid., 135–44.

[120]Ibid., 176.

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C. Democracy paradigm: deliberation and law-mediated legitimacy

Following Habermas, Joerges's work is informed by a broader vision of overcoming the democratic malfunction of nation states in postnational constellations. Against the backdrop of conflict constellations in which national democratic decisions would create externalities for other nation states, including between EU Member States, Joerges stipulates that 'the building up of de-nationalised governance structures should ... aim at the strengthening of deliberative processes dealing with the interests and concerns of those who are affected by, but not represented in, decision-making processes'.[121] His normative vision is an economic constitution that embeds markets in rules emerging from 'deliberatively structured cooperative arrangements', which address 'the implications of [EU Member States'] economic and social interdependencies'.[122]

As originally developed, deliberative supranationalism refers to a procedural substitute for a democratically legitimated 'European state or federation', which otherwise seems not in sight.[123] It would imply 'a new division of labour between political actors and civil society, and a more democratic form of partnership between the different layers of governance'.[124] Ideally, Joerges would have seen this supported by a 'legal supranationalism', which enhances the deliberative quality of old and new governance arrangements by way of procedural criteria that may become juridified or constitutionalised[125]: in other words, by preserving the rule of law. In practice, governance and regulation took a different turn, which makes parts of Joerges' argument and analysis 'obsolete'.[126]

Interestingly, his concern is as much with the democratic or deliberative quality of European governance as it is with the role of the law in preserving and consolidating this quality. Governance beyond the state is welcome, but governance without the law is not. With regard to the OMC, Joerges is concerned that this amounts to 'integration through de-legalisation' and the 'de-formalisation' of governance arrangements.[127] A similar heuristic is applied to the new modes of economic governance in Europe, which are taken up in the following. Here, Joerges criticises the 'de-legalisation' that is effectuated by moving outside existing legal and constitutional frameworks.[128] At the same time, he observes 'a resort to legal formalism' in justifying extraordinary measures of crisis management after the fact.[129] However, in the latter case, the form of law does not support deliberative procedures, but rather codifies what has already been enforced.

6. From reconstruction to critique: towards law and political economy

As indicated above, Joerges saw deliberative supranationalism and the conflicts-law approach develop against the grain in the last few decades: from a reconstructive vision meant to give normative orientation to the institutionalisation of transnational governance arrangements to a counterfactual critique, which cannot dwell on the conditions of progress towards a more legitimate Union only but also has to provide explanations for the actual development of the European project throughout recent challenges and crises. While the normative reconstruction can be formulated to a good extent from within the world of ideas, the explanation of how and

[121] Ibid., 160. see also Ibid., 130 and 205–6.
[122] Ibid., 218.
[123] Ibid., 130.
[124] Joerges and Kreuder-Sonnen (n 56), 120.
[125] Joerges (n 1), 32; see also Ibid., 208–10 and 570–1.
[126] Ibid., 130.
[127] Ibid., 193 and 214, respectively. See also 342–50 and 371–2, n 80.
[128] C Joerges, 'Integration Through Law and the Crisis of Law' in D Chalmers et al (eds) *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 299–338, at 317.
[129] Joerges (n 1), 370.

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why European integration and governance came to take a different trajectory requires a stronger matter-of-fact account of constellations and circumstances from the outside.

A. Monetary integration: continuation of governance with harder means

Whereas research in the governance paradigm originally referred to market integration, governance, and regulation in the European single market, similar terminology is also used in the context of the European monetary union, where monetary integration is complemented with economic governance as a framework for economic and fiscal policy coordination. Accordingly, Joerges's concern turns to the 'new modes of economic governance' or, in short, to 'new economic governance' in the EMU.[130] Notwithstanding substantive differences between the respective policy fields or layers of the economic constitution (single market and monetary union), his aim was to identify and apply similar principles of deliberative supranationalism or conflicts-law constitutionalism, subject to the necessary adaptations.[131] However, Joerges became quite disenchanted with how European integration evolved in this dimension. The ratification of the Maastricht Treaty and the establishment of the EMU are '[w]ith hindsight' depicted as an 'unfortunate turning-point in the history of the integration project'.[132]

The introduction of a common currency required the integration of monetary policies and heightened the need for economic and fiscal policy coordination: European economic governance in a nutshell. To increase budgetary discipline in the Member States, 'market-induced discipline was, from the outset, complemented by institutional, Union-level means'.[133] The respective measures of economic governance were successively strengthened, first by complementing the Maastricht Treaty with the Stability and Growth Pact, which was later amended, and then in the course of the Euro crisis, which led to a number of legislative measures, including the so-called Six Pack, the Fiscal Compact as part of the Treaty on Stability, Coordination and Governance in the EMU, and the so-called Two Pack. Economic and fiscal policy coordination now takes place in the context of the European Semester, an annual review mechanism resulting in Country-Specific Recommendations.

The crisis-induced overhaul of the economic governance regime changed the institutional balance in the European polity. To capture this development, scholars speak of 'a shift from the Community method to the Union method',[134] which points to a selective return to intergovernmental agreements, and a generalisation and re-specification of the 'coordinative method',[135] which considerably 'hardened' the soft-law approach originally connected with the OMC.[136] Joerges refers to the strengthening of supranational enforcement powers in the monetary union as 'the straitjacket of new economic governance', which had serious social repercussions in Member States where austerity was imposed.[137] For him, the institutional set up of the crisis-struck EMU 'abolishes the ideal of a legal ordering of the European economy, while [. . .] the Union's political legitimacy becomes precarious'.[138]

[130]Ibid., 34, 117, 274–5, 371, 390 and 393.

[131]C Joerges, '"Deliberative Political Processes" Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making' 44 (4) (2006) Journal of Common Market Studies 779–802, at 781–2.

[132]Joerges (n 1), 285.

[133]K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) 48.

[134]K van Duin and F Amtenbrink, 'New Dynamics in EMU Decision-Making in the Wake of the European Financial and Sovereign Debt Crisis' in A Łazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 88–113, at 110. See Joerges (n 1), 369.

[135]M Dawson, 'The Euro Crisis and Its Transformation of EU Law and Politics' in Hertie School of Governance (ed), *The Governance Report 2015* (Oxford University Press 2015) 41–68, at 50–3.

[136]F Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' 21 (1) (2015) European Law Journal 68–96, at 91–2. See also DM Trubek et al, '"Soft Law", "Hard Law" and EU Integration' in G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 65–94.

[137]Joerges (n 1), 390; see also Ibid., 371.

[138]Ibid., 354.

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Accordingly, Joerges sees 'Europe's economic constitution in crisis' and even speaks of a 'crisis of the law'.[139] More precisely, he considers 'not only democracy but also the rule of law in its core transnational function ... at stake' in the given constellation.[140] As to the legitimacy of the new modes of economic governance, he even misses a 'theoretical framework' aimed at defending their normative appropriateness.[141] This suggests that in the context of monetary integration the governance approach eventually boiled down to a political strategy to promote monetary stability and manage the Euro crisis, while sacrificing the normative potential that law and governance scholars had found in new modes of governance in other contexts.

B. A more critical edge: leveraging political-economic approaches

I take the frequent references to Polanyi in Joerges' recent work also as a placeholder for political–economic approaches that could explain and contextualise some of the developments, or 'deviations', of the European project, and deepen the analysis. By extension, this includes Polanyi-inspired scholars like Ruggie ('embedded liberalism') and Rodrik ('globalization paradox'), who are cited in similar contexts.[142] Arguably, following this path would involve moving from European integration to international political economy as a conceptual and empirical backdrop of the analysis, and it may also imply complementing the theory of law with a theory of money in the postnational constellation.[143] To illustrate this, I will refer to a neglected perspective in the context of both the integration and the governance paradigm, which also seems little considered by Joerges and his co-authors, but speaks to the questions raised here.

A shortcoming of integration theory, or integration studies more generally, that was noticed by Joerges, is the critique of economic expertise and rationalities. However, there are also critical political–economic approaches to European integration,[144] sometimes referred to as 'critical integration theory'.[145] These draw on Marxist scholarship, which is known for its heterodox perspective on economics and its emphasis on power relations, while it shows relatively little interest in the intrinsic quality of law.[146] For this reason, critical political–economic approaches may have fallen outside the purview of Joerges's scholarship, despite his heightened interest in economic factors.

With regard to the development of European integration in the last few decades, the distinctive contribution of critical integration theory is to bring in the international political economy. It takes as its starting point 'that the social forces underpinning European order are not necessarily internal to the EU, or to its member states, but are rather located within a global political economy in which capitalist production and finance are undergoing a sustained transnationalisation and globalisation'.[147] This includes the 'transition to finance-dominated accumulation'.[148] Arguably,

[139]Ibid., 354; Joerges (n 128).

[140]Ibid., 369, n 72; see also Ibid., 114.

[141]Ibid., 371; see also Ibid., 378.

[142]Ibid., 487–491, see also Ibid., 121 and 516.

[143]Chadwick (n 50).

[144]AW Cafruny and JM Ryner, 'The Global Financial Crisis and the European Union: The Irrelevance of Integration Theory and the Pertinence of Critical Political Economy' in P Nousios et al (eds), *Globalisation and European Integration: Critical Approaches to Regional Order and International Relations* (Routledge 2012) 32–50.

[145]H-J Bieling and J Steinhilber (eds), *Die Konfiguration Europas: Dimensionen einer kritischen Integrationstheorie* (Westfälisches Dampfboot 2000).

[146]See R Fine, 'Marxism and the Social Theory of Law' in R Banakar and M Travers (eds) *An Introduction to Law and Social Theory* (Hart Publishing 2002) 95–109.

[147]B van Apeldoorn, 'The Struggle over European Order: Transnational Class Agency in the Making of "Embedded Neo-Liberalism"' in A Bieler and AD Morton (eds) *Social Forces in the Making of the New Europe: The Restructuring of European Social Relations in the Global Political Economy* (Palgrave 2001) 70–89, at 73.

[148]H-J Bieling, 'Shattered Expectations: The Defeat of European Ambitions of Global Financial Reform' 21 (3) (2014) Journal of European Public Policy 346–66, at 347–8. See also Van Apeldoorn (n 147), at 73.

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the factual removal, or functional obsolescence, of capital controls also changed the logic of the integration process.[149] All this matters as a backdrop for explaining developments in monetary integration, the Euro crisis as well as related crisis management. One could claim that integration through (European) law is now conditioned or superseded by integration through (global) finance. In other words, monetary integration can be seen as a response to financial integration, or the integration of financial markets as furthered by the free movement of capital.

While this is a dynamic perspective explaining the changing trajectory of the *integration* process, critical political–economic approaches can also inform comparative-institutional perspectives within the *governance* paradigm. This can be illustrated by comparing how decision-making works in different EU policy fields, such as the Community method in market integration, the intergovernmental method in matters of foreign policy, and the monetary and coordinative methods in the context of monetary integration and economic governance.[150] The explanatory power of critical-political economy shows in contrasting Joerges's reconstructive idea of policy coordination, as developed in the context of market integration, and what the coordinative method turned out to be in the context of monetary integration.

In the conflicts-law approach, Joerges argues for deliberative procedures that would facilitate coordination between divergent national regulatory concerns. The coordinative method of 'hardened' economic governance has little in common with this normative ideal. It involves a 'form of coercion' that can be described as 'largely financial':[151] it is financial not only because the focus is on fiscal surveillance and financial sanctions, but also because the function of this regime is to complement and reinforce the disciplining forces of (imperfect) financial markets.[152] In constructing and sanctioning (lacking) sovereign creditworthiness,[153] it emulates and performs the 'law' of international finance. The latter is applied as an economic matter-of-fact without ensuring that it 'deserves recognition' from an internal point of view.[154] To put it differently, if the law encoding the principles and results of European economic governance is a translation of (the anticipated requirements of) market discipline into supranational budgetary rules, related monitoring, and an excessive deficit procedure, it does not necessarily reflect the will and reason of the political communities, or interdependent democracies, making up the E(M)U.[155]

Critical political economy is informed by Marxist scholarship, which comes with a social theory of law that rather conceives of the power of ideas in terms of ideology only, and its instrumental functions in prevailing power relations.[156] For those who consider such views of law as too cynical or bleak, literature in the (re)emerging field of law and political economy may have more on offer.[157] Broadly understood, this also includes scholarship in old economic institutionalism,[158] legal institutionalism,[159] institutional law

[149]C Sifakis-Kapetanakis, 'The European Monetary Integration Process and Financial Globalization: The Rationale of the "Creative Imbalance" Model' 36 (1) (2007) International Journal of Political Economy 75–90, at 83.

[150]Frerichs and Losada (n 11).

[151]Dawson (n 135), at 54.

[152]C Rommerskirchen, 'Debt and Punishment: Market Discipline in the Eurozone', 20 (5) (2015) New Political Economy 752–782.

[153]See K Dyson, *States, Debt, and Power: 'Saints' and 'Sinners' in European History and Integration* (Oxford University Press 2014).

[154]Eg Joerges (n 1), 279. see also Ibid., 387–9.

[155]See also Streeck (n 50), 80–81.

[156]Fine (n 146).

[157]J Britton-Purdy et al, 'Building a law-and-political-economy framework: Beyond the twentieth-century synthesis' 129 (6) (2020) Yale Law Journal 1784–835.

[158]JR Commons, *Institutional Economics: Its Place in Political Economy* (University of Wisconsin Press 1959).

[159]S Deakin et al, 'Legal institutionalism: Capitalism and the Constitutive Role of Law' 45 (1) (2017) Journal of Comparative Economics 188–200.

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and economics,[160] and economic sociology of law.[161] The field combines different ways to analyse the political-economic contexts in which law is embedded and to acknowledge the normative power of law in its own right.[162] This means that law is not conflated with political economy, nor is it studied as independent of the latter.

7. Conclusion: make Europe better

Joerges is not only a European law-in-context scholar *par excellence*; he is also, and in the first place, a paradigmatic European scholar. His consistent engagement with and commitment to Europe's vocation could be summarised as a plea to save Europe by making it better.[163] His inclination is to invoke the Europe that could be, and not to denounce the project as a whole for what it has become. For him, the European polity is there to stay, as anything else would likely be worse. Moreover, notwithstanding his deep concern with law's context, Joerges remains a legal scholar whose theories call for recognition in the academic and professional community. Moving from a reconstructive vision to a counterfactual critique of Europe's condition, he stops short from following critical political economy to a place where it would abandon the belief in the 'potential of the law to contribute to the social embedding of transnational markets',[164] to reinstate the power of 'the political' over 'the economic', and thus create legitimacy. A way forward that would not require giving up all normative commitments would be to venture more into the field of law and political economy in Europe and beyond.

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[162]S Frerichs, 'The Place of Law in Political Economy. J.R. Commons' *Legal Foundations of Capitalism* at 100: A Retrospective Article' 43 (2024) Contributions to Political Economy 37. See also Frerichs (n 44).

[163]See Commons, *Myself* (Macmillan Company 1934), 143, for his often-cited statement to 'save capitalism by making it good'.

[164]Joerges (n 1), 448.

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