



BOOKS AND CLASSICS

Why European legal scholarship should become aware of Karl Polanyi: *The Great Transformation* and the integration project

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Abstract

As the Second World War was drawing to a close in 1944, two great works of political economy were published. One of them was Friedrich August von Hayek's *The Road to Serfdom*,¹ inspiring the defenders of free market movements ever since and up to the present. The other was Karl Polanyi's *The Great Transformation*.² This essay will focus on Polanyi but also pay tribute to Hayek. Contrasting the two helps to understand both of them better. Of the two, Hayek, the Nobel prize winner, is of course more widely known and by far more influential. But Polanyi's work, too, has achieved and has been attracting as of recently such attention that one of the Directors of the Max Planck Institute for the Study of Societies in Cologne proclaimed that 'we are all Polyanian now',³ not only in economic sociology, but also in related disciplines, including, of course, political economy and political theory. A plethora of aspects of *The Great Transformation* are very widely discussed. This essay will be concerned with the not-so-well explored importance of Polanyi's work for European Law and legal scholarship in general, including his theorems on the 'embedded economy', his conceptualisation of labour as a 'fictitious commodity' as well as the notion of counter-movements. It will then juxtapose Polanyi's expectation of a new international order with the development of the European integration project and sketch out the contours of the democracy-enhancing conflicts law and its affinities with Polyanian core normative principles.

Keywords: embeddedness; market utopia; fictitious commodities; counter-movements; post-war regionalism; democracy-enhancing conflicts law

1. Introduction

This is a belated review. Karl Polanyi laid the grounds for his one – and pleasantly short – monograph in the late 1930s, saw it first published in 1944 and had to wait for a good number

¹FA von Hayek, *The Road to Serfdom* (Routledge 1944).

²First published with Farrar & Rinehart, 1944 (originally titled *The Origins of Our Time*), then as a paper back with Beacon Press 1957; references in the text go to the 2nd ed. 1961 with a Foreword by J Stiglitz and an Introduction by F Block; this 2nd edition is available online at <https://inctped.ieufri.br/spiderweb/pdf_4/Great_Transformation.pdf>. The coincidence of these dates has been celebrated around the world, see eg, <<https://www.ppesydney.net/polanyi-hayek-workshop-final-programme/>>; recently, eg, Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 7–13, PF Kjaer, 'The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law' 2 (1) (2021) *Global Perspectives* 23669 (section 4).

³J Beckert, 'The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology' MPIfG Discussion Paper 2007/7 at 7.

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of years until it reached the wider academic world.⁴ Polanyi had obtained the degree of *Doctor juris* in 1909 in Budapest and practiced law thereafter.⁵ No traces of this legal background are visible in *The Great Transformation*, which analyses the destruction of the old liberal order by Fascism and National Socialism and sketches out only vaguely in its concluding chapter where ‘cornerstones of the New’ might emerge ‘out of the ruins of the Old World’.⁶ This envisaged Second Transformation is the bridge to Europe, on which we will focus. It is not a far-fetched exercise in view of another publication in 1944, namely Friedrich A von Hayek’s *The Road to Serfdom*.⁷ In fact, Hayek had written back in 1939 a short essay, which was re-discovered by Fritz W Scharpf⁸ and since then much cited; the essay spelled out Hayek’s vision of a federal Europe.⁹ Polanyi had, during his years in ‘Red Vienna,’ defended conceptual positions, which contrasted strikingly with the economic liberalism of the likes of von Mises and von Hayek.¹⁰

A substantiated Polanyian view on the integration project is, of course, unavailable. What is nevertheless possible is to shed light, with the help of Polanyi’s insights and theorems, on the integration process, its accomplishments, and its failings. In this theoretical endeavour, we are going to undertake the following deliberations: juxtaposing mainstream views of the understanding and justification of the development, as well as the turning points of, the European project integration with the core concepts of Polanyi’s economic sociology. In line with JHH Weiler’s seminal narrative,¹¹ the first phase of this so to speak fictitious debate will concern what Weiler has called the ‘foundational period’ (section 2). The assumption undergirding this narrative will then be contrasted with the Polanyian theorems and concerns: the notion of the (socially) embedded market and dis-embedding marketisation (commodification) processes; Polanyi’s conceptualisation of land, labour and money as ‘fictitious commodities’;¹² as well as his assumptions about the ‘counter-movements,’ – which may be provoked by the commodification of the ‘fictitious commodities’ (section 3). Polanyi’s theorising seems to suggest that the following phase of integration – the post-foundational period of ‘mutation of jurisdiction and competences’ – will have to cope with irritating countermoves (section 4). What emerged is a new ‘planning,’ which modified and promoted Jacques Delors’ internal market initiative (section 4A). The Treaty of

⁴See n 2 and, for an instructive collection of Polanyi’s essays in German, M Canigiani and C Thomasberger (eds), *Karl Polanyi. Chronik der großen Transformation (Aufsätze 1920–1947)* 3 Volumes (Metropolis 2002–2005; Vol 1: *Wirtschaftliche Transformation, Gegenbewegungen und der Kampf um die Demokratie*; Vol 2: *Die internationale Politik zwischen den beiden Weltkriegen*; Vol 3: *Menschliche Freiheit, politische Demokratie und die Auseinandersetzung zwischen Sozialismus und Faschismus*); the English edition is less complete: *Karl Polanyi. Economy and Society. Selected Writings* (Polity Press 2018).

⁵For analyses of Polanyi’s neglect and understanding of law see D Ashiagbor, P Kotiswaran and A Perry-Kessaris (guest eds), *Continuing Towards an Economic Sociology of Law*, *Journal of Law and Society* (Special issue 2013); S Frerichs, ‘Karl Polanyi and the Law of Market Society’ 44 (2019) *Österreichische Zeitschrift für Soziologie* 197–208 <<https://doi.org/10.1007/s11614-019-00328-5>>; S Frerichs, ‘Re-embedding neo-liberal constitutionalism: a Polanyian case for the economic sociology of law’ in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing 2011) 65–84; S Frerichs, ‘The law of market society: a sociology of international economic law and beyond’ 23 (2012–2013) *Finnish Yearbook of International Law* 173–237; S Frerichs, ‘Transnational Law and Economic Sociology’ in P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021) 67–88; S Klein, *The Power of Money: Critical Theory, Democracy, and Capitalism* (2018) <<https://ssrn.com/abstract=3254451>>.

⁶*The Great Transformation* (n 2) 253–54.

⁷University of Chicago Press 1944.

⁸FW Scharpf, ‘The Asymmetry of European Integration or Why the EU cannot be a ‘Social Market Economy’ 8 (2010) *Socio-Economic Review* 211–50.

⁹FA von Hayek, ‘The Economic Conditions of Intestate Federalism’ (1939), cited after the reprint in FA von Hayek, *Individualism and Economic Order* (Chicago University Press 1949) 255–72.

¹⁰The contrast between *The Great Transformation* and *The Road to Serfdom* can be traced back to the debates in ‘Red Vienna’; see Block (n 2) xix–xxi and G Dale, *Karl Polanyi. A Life on the Left* (Columbia University Press 2016) 73 ff.

¹¹JHH Weiler, ‘The Transformation of Europe’ 100 (1991) *Yale Law Journal* 2403–83 at 2410–53.

¹²The pertinent chapter 6 (pp 71–80) of *The Great Transformation* is entitled ‘The Self-Regulating Market and the Fictitious Commodities: Labor, Land, and Money’.

Maastricht, because the establishment of the EMU and the subsequent financial crisis, however, meant a disruption rather than a consummation of the previous developments (section 4B). The concluding section will thence outline the alternative of ‘democracy-enhancing conflicts law’ (section 5).

2. The foundational period and the integration-through-law paradigm

The mid-1960s generated the most famous of all accounts of European law. Its legal architecture is fascinating: direct effect of economic freedoms, supremacy of European law, pre-emption, the empowerment of citizens of the Community to bring their home states to the forum of the Court of Justice (ECJ), the guardianship of the ECJ over the uniform interpretation, crowned by the understanding of this doctrinal complex as the Community’s ‘constitutional charter’.¹³ Law is the ‘object’ of integration politics, and operates as its ‘agent’ – this is how JHH Weiler and R Dehousse summarised the message of ‘Integration Through Law’ (ITL) in a much-cited essay,¹⁴ – a rather daring assumption, to put it mildly.¹⁵ And yet, it took two researchers of the European University Institute¹⁶ and a visiting French sociologist,¹⁷ to demystify ITL: the paradigm, they argued, owed its success to its promotion by a cooperative compound of lawyers, European and national officials.

These reconstructions are certainly valuable. The attractiveness of ITL for the promoters of the integration project deserves and requires further explanation. Who benefited? Some trivial economic considerations and reasons impose themselves: integration proceeds through the elimination of legal differences; harmonisation of law creates better law, and it establishes, by the same token, ‘ever more Europe’. For what reasons? Why should we assume that harmonised law is a better law? What does the lessening of legal diversity improve? It helps to overcome barriers to trade. It seems therefore a command of economic reason to overcome legal diversity. There is hence an economic rationality in the ITL agenda: uniformity is a good in itself because it will promote cross-border trade; diversity is a bad in itself however, since it is an obstacle to free trade. The ITL orthodoxy provided, to cite Katharina Pistor’s notion,¹⁸ the legal coding of European integration as market building and market governance. ITL imposed the straitjacket of *unity via uniformity* on the integration project. The supremacy doctrine ensured the enforceability of this conceptual framework.¹⁹

¹³See, eg, the instructive collection of essays in D Augenstein, *Integration through Law Revisited. The Making of the European Polity* (Routledge 2012); more recently R Byberg, ‘The History of the Integration through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe’ 18 (2017) *German Law Journal* 1531–56; M Rasmussen and D Sindbjerg Martinsen, ‘EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies’ 25 (2019) *European Law Journal* 227–348.

¹⁴R Dehousse and JHH Weiler, ‘The legal dimension’ in W Wallace (ed) *The Dynamics of European Integration* (Pinter 1990) 242–60.

¹⁵Three years prior to the publication of the ‘Integration through Law’ essay, F Snyder had published a kind of manifesto. His ‘New Directions in European Community Law’ 14 (1987) *Journal of Law and Society* 167–82, elaborated further in his *New Directions in European Community Law* (Weidenfeld & Nicolson 1990) – was accompanied by a study of a field of utmost importance which academic scholarship had entirely neglected, namely the *Law of the Common Agricultural Policy* (Sweet & Maxwell 1985); on Snyder’s importance see recently C Harlow, ‘The EU and Law in Context: The Context’ 1 (2022) *European Law Open* 209–15.

¹⁶H Schepel and R Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’ 3 (1997) *European Law Journal* 165–88.

¹⁷A Vauchez, ‘Integration-through-Law. A Sociohistory of EU Political Commonsense’ EUI Working Paper RSCAS 2008/10; Vauchez has pursued this agenda much further; see eg, ‘The transnational politics of judicialization. Van Gend en Loos and the Making of EU Polity’ 16 (2010) *European Law Journal* 1–28 and his classic *Brokering Europe Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

¹⁸K Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton University Press 2019); for an authentic summary see K Pistor, ‘The Code of Capital: Core Themes’ 11 (2021) *Accounting, Economics, and Law* 2–7.

¹⁹It may be worth noting that this legal coding has an equivalent in the project of economic constitutionalism promoted from early on, but hardly noticed outside the Federal Republic by Germany’s Ordoliberalism (I have underlined this ad

3. Karl Polanyi's concerns with market governance

The economic underpinnings of the ITL paradigm did not, of course, go unnoticed. Fritz W Scharpf and his colleagues from the Max Planck Institute for the Study of Societies in Cologne have consistently and stringently underlined and criticised the implicit conceptual biases of the integration process.²⁰ Polanyi's economic sociology entered the scene through a backdoor. While Scharpf had become aware of von Hayek's theory of European Federalism,²¹ two renowned American political scientists suggested that the ECJ had taken the lead in a countermove to the marketisation of Europe.²² Scharpf's colleagues suggested the contrary.²³ This controversy is instructive. Polanyi's theorems help us to decipher it. Three of them deserve consideration: the first is Polanyi's insistence on the '(social) embeddedness' of the economy and markets (see section 3A); the second is his awareness of the fragility of market governance (see section 3B), the third, ensuing from the former, is the awareness and respect of socio-economic diversity, which will be discussed in the final section (see section 5)

A. Embeddedness

'Embeddedness' is Polanyi's counter-concept to the understanding of market governance as a self-regulating autonomous machinery. The notion seeks to characterise the relationship between economic institutions and the social order and its fabric. This is a complex issue. Polanyi has repeatedly sought to clarify its meaning. His readers were impressed but remained puzzled.²⁴ The queries do not affect the sociological dimension of his thesis claiming that the idea of a 'self-adjusting market' contains a 'a stark Utopia'.²⁵ Markets are, instead, as Lisa Herzog summarises it, 'carefully legally and socially constructed entities'.²⁶ This latter formula seems incontestable. It is in line with what we by now know about the dependence of the functioning of markets and the framing of their functioning. Polanyi's account is more critical and fundamental. '[T]he control of the economic system by the market... means no less than the running of society as an adjunct to the market.' And famously: 'Instead of economy being embedded in social relations, social relations are embedded in the economic system'.²⁷ This insight embodies a powerful critique of the effort of legal scholarship to insulate law and its operations from its social and political context. The embeddedness thesis entails a sociological deepening of the standard critique of ITL. It draws our attention to the societal infrastructure and social norms of the functioning

nauseam, see eg, C Joerges, 'The Market Without the State? States without a Market? Two Essays on the Law of the European Economy' EUI Working Paper No. 90/02, 6–7.

²⁰See eg, FW Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks, FW Scharpf, PC Schmitter and W Streeck (eds), *Governance in the European Union* (SAGE 1996) 15–39; FW Scharpf, *Regieren in Europa: effektiv und demokratisch?* (Campus 1999) 47 ff; FW Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' 40 (2002) *Journal of Common Market Studies* 645–70; M Höpner and A Schäfer, *Die Politische Ökonomie der europäischen Integration* (Campus 2008).

²¹n 9.

²²J Caporaso and S Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' 63 (2009) *International Organization* 593–620.

²³M Höpner and A Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' 66 (2012) *International Organization* 429–55.

²⁴See eg, the subtle reconstruction by R Cotterell, 'Rethinking "Embeddedness": Law, Economy, Community' 40 (2013) *Journal of Law and Society* 49–67 at 54.

²⁵*The Great Transformation* (n 2) at 3; see further, eg, *ibid.* at 45: 'Market economy implies a self-regulating system of markets; in slightly more technical terms, it is an economy directed by market prices and nothing but market prices. Such a system capable of organizing the whole of economic life without outside help or interference would certainly deserve to be called self-regulating. These rough indications should suffice to show the entirely unprecedented nature of such a venture in the history of the race'.

²⁶L Herzog, *Citizen Knowledge. Markets, Experts, and the Infrastructure of Democracy* (forthcoming (available at <<https://www.rug.nl/staff/l.m.herzog/citizen-knowledge.pdf>>)) 140 n 56.

²⁷*The Great Transformation* (n 2) 57.

of the economy. It explains quite stringently many implementation deficits of the European legislation.²⁸ Putting it in Steven Klein's adequately strong language: '[T]he formation of a market system – one in which all economic activities would be determined by prices – required a massive disruption of society, one which provoked counter-demands for protection from the ravages of the market. The idea that all of society could be organised along the lines of the self-regulating market was, Polanyi avers, a 'stark Utopia', one with destructive social and political consequences'.²⁹ One does not need to subscribe to Klein's strong language to become aware of the tension in Polanyi's critique of the self-regulating market utopia. His famous insight – that 'laissez-faire' economics did not emerge in evolutionary processes, but were 'planned' by theoretical conceptualisations, promoted by bourgeois interests³⁰ and implemented with the help of state power – is challenging enough. The economy can hence be called a 'polity'.³¹ The functioning of markets requires the support of a host of supportive measures, the control of externalities, which are then fine-tuned in controversial political processes. A neat separation between the European promotion of market freedoms, on the one hand, and their control by Europe's enumerated powers and residual national prerogatives, on the other, is simply inconceivable.³²

B. Fictitious commodities

Polanyi's characterisation and critique of the idea of the self-regulated market society as a 'stark Utopia', implies hence a further strong caveat, namely: marketisation (commodification) will never fully succeed.³³ Marketisation will instead provoke counter-movements, in particular, with regard to the three false (fictitious) commodities: land, labour and money. It is the simultaneity of marketisation moves and countermoves for the self-protection of society that constitutes the political dimension of the market economy. The permanent struggle between commodification (the 'disembedding' from social relations), on the one hand, and 're-embedding' and social reconstruction, on the other, characterise the development of capitalism.³⁴

²⁸See famously G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' 61 (1998) *The Modern Law Review* 11–32. Teubner does not mention Polanyi but shares his insights.

²⁹See the passage from *The Great Transformation* (n 2) at 57 and S Klein, 'Socialism and Freedom: Karl Polanyi's Early Writings' (2019) *Los Angeles Review of Books*, reviewing K Polanyi, *Economy and Society: Selected Writings* <<https://lareviewofbooks.org/article/socialism-and-freedom-karl-polanyis-early-writings/>>.

³⁰*The Great Transformation* (n 2) 103.

³¹See C Joerges, B Str ath and P Wagner, *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (University College London Press 2005).

³²For an elaboration see C Joerges, 'The Challenges of Europeanization in the Realm of Private Law' 24 (2004) *Duke Journal of Comparative and International Law* 149–96 <<http://www.iue.it/PUB/law04-12.pdf>>.

³³Our thesis is that the idea of a self-adjusting market implied a stark Utopia. Such an institution could not exist for any length of time without annihilating the human and natural substance of society; it would have physically destroyed man and transformed his surroundings into a wilderness. Inevitably, society took measures to protect itself ...' *The Great Transformation* (n 2) at 3.

³⁴Social history in the nineteenth century was thus the result of a double movement: the extension of the market organization in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones', *The Great Transformation* (n 2) 79; see further eg, 138: the double movement

'can be personified as the action of two organizing principles in society, each of them setting itself specific institutional aims, having the support of definite social forces and using its own distinctive methods. The one was the principle of economic liberalism, aiming at the establishment of a self-regulating market, relying on the support of the trading classes, and using largely laissez-faire and free trade as its methods; the other was the principle of social protection aiming at the conservation of man and nature as well as productive organization, relying on the varying support of those most immediately affected by the deleterious action of the market – primarily, but not exclusively, the working and the landed classes ...'

Out of the extensive discussion of this passage see, eg, G Dale, 'Double Movements and Pendular Forces: Polyanian Perspectives on the Neoliberal Age' 60 (2012) *Current Sociology* 3–27.

Students of European law know about the ‘post-foundational’ phase of European integration and should hence appreciate the topicality of Polanyi’s categories: ‘land’ (environment) has required many protectionist responses, ‘labour’ has continuously been an unruly if unfortunate concern, ‘money’ has provided a worst-case scenario.³⁵ There is a rich discussion of all this within and beyond the community of Polanyi scholars.³⁶ Our concern here is to explore the implications of Polanyi’s assumptions about the societal reaction to marketisation (commodification) processes. The deepening of the integration process provides a challenging example.

4. Jacques Delors’ internal market project and the turn to social regulation

Jacques Delors’ Single Market initiative is of legendary importance. The ‘White Paper on the Completion of the Internal Market’, submitted in 1985,³⁷ which detailed with great precision what was to be done, confirms and illustrates perfectly well Polanyi’s famous theorems: market building has to be politically planned; it requires the enactment of legal rules and the establishment of implementing institutions. What about the counter-movements, however, which Polanyi expected to respond to this kind of planning? The Caporaso/Tarrow thesis³⁸ with its characterisation of European law as a countermove led by the ECJ is, to put it mildly, not plausible, in particular with respect to the commodification of labour and the weakness of European policies in the spheres of labour law.³⁹ There is nevertheless more than a kernel of truth in that thesis. ‘Laissez-faire was planned’, but, so Polanyi added, ‘planning was not’.⁴⁰ The patterns of the law of the integration process do not fit neatly into the narratives of the political scientists from the Cologne Institute.⁴¹ ‘Countermeasures’ will remain selective and legal developments idiosyncratic.⁴² Such contingencies seem irreconcilable with the orthodoxy of Marxist accounts of capitalist developments, yet unsurprising in Polanyian perspectives. Polanyi has indeed insisted that the free-market system was ‘planned’ and its functioning dependent upon continuous managerial activities.⁴³ Precisely this dependence implies that states have the potential to shape and re-orient market governance, to open gates for societal concerns. Even though Europe did not reproduce equivalents to the protective schemes which the welfare states of Western Europe established after the Second World War, the Commission has nevertheless been very active with the promotion of another type of market governance. Its move towards ‘social regulation’ was innovative and effective.⁴⁴

³⁵M Everson and C Joerges, ‘Reconfiguring the Politics – Law Relationship in the Integration Project through Conflicts – Law Constitutionalism’ 18 (2012) *European Law Journal* 644–66, at 645 ff.

³⁶For a brief summary see B Jessop, ‘Knowledge as a Fictitious Commodity: Insights and Limits of a Polanyian Perspective’ in A Bugra and K Agartan (eds), *Reading Karl Polanyi for the Twenty-First Century* (Palgrave Macmillan 2007) 115–34; K Pistor has complemented her objection against Polanyi’s conceptualisation of false commodities as goods which were not produced for sale on the market (*The Great Transformation* (n 2) 78) as too one-dimensional fixated on the production process and neglecting the importance of legal coding; her critique is not meant to downplay the merits of Polanyi’s embeddedness theorem (see Pistor (n 18) at 2); see also Klein (n 29) at 4.

³⁷European Commission, ‘Completing the Internal Market’ COM(85) 310 fin of 14.06.1985.

³⁸n 22 above. The thesis had forerunners; see the works of B Hettne.

³⁹Suffice it here to point to the spectacular judgements of the ECJ handed down in 2007: Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti* ECLI: EU:C:2007:772 Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetaref örbundet* ECLI:EU:C:2007:809.

⁴⁰*The Great Transformation* (n 2) 147.

⁴¹References in n 20 above.

⁴²C Möllers, ‘Denn wir wissen nicht, was wir wollen: Krisenzurechnung und Legitimationsprobleme im europäischen Integrationsdiskurs’ 43 (2015) *Leviathan* 339–64; J Germann, *Unwitting Architect: German Primacy and the Origins of Neoliberalism* (Stanford University Press 2021) and its review by P Roufos, 1 (2021) *Journal of Law and Political Economy* 493–97.

⁴³F Block, ‘Karl Polanyi and the Writing of *The Great Transformation*’ 32 (2003) *Theory and Society* 1–32.

⁴⁴See, among the works of G Majone, his ‘The European Community Between Social Policy and Social Regulation’ 31 (1993) *Journal of Common Market Studies* 153–70; G. Majone, ‘The European Community: An Independent Fourth

This development was a response to the ever more obvious dependence of the functioning of markets on continuous governmental management, often characterised as a politicisation of markets in the age of the risk society.⁴⁵ All Member States were concerned with these problems. Their responses varied very considerably. European market building was hence confronted with differences of national regulatory cultures, techniques, and standards. These were inextricably linked with normative and political preferences. The internal market could not move ahead without a Europeanisation of such divergencies. These were, furthermore, not just normative; they were always linked with economic interests, which sought the support of protective policies. The European response to these challenges had a touch of genius. Rather than trying to harmonise the difference between the Member States, the Delors Commission promoted a new type of market governance with its turn to ‘social regulation,’ the protection of consumer health and safety, enhancing safety at work and environmental protection. Can this be characterised as a Polanyian countermove? Polanyi, writing in the 1940s, was concerned with distributional justice: ‘working lives against the *short-termism* of labour markets.’⁴⁶ He could not foresee the problems of the risk society and envision a notion of social justice which would ‘respond to the current technological and environmental challenges.’⁴⁷ His core argument about the need to protect society against unfettered marketisation processes remains nevertheless powerful. It proved to exert its power in the development of the post-war welfare state during *Les Trente Glorieuses*.⁴⁸ At European level the impact of quests for equivalent initiatives remained weak. If Europe respected the primacy of national powers in these domains, this seemed reasonable. This changed very visibly with the Laval/Viking jurisprudence and the advent of the financial crisis.⁴⁹ Further caveats must be added in the evaluation of Europe’s turn to social regulation. Giandomenico Majone, who has theorised and influenced this turn like nobody else,⁵⁰ has again and again underlined two characteristics of this innovative move. The first one: ‘social regulation’ was not constraining but rather was promoting market functioning. Non-majoritarian institutions, preferably agencies, had to be entrusted with these regulatory tasks. They had to understand their mission as an essentially epistemological (technocratic) exercise dedicated to promoting a modernised notion of economic efficiency. The second one: Europe’s ‘social regulation’ had to be insulated against distributional politics and hence was to be distinguished strictly from social politics of welfare states. Such politics, Majone insisted, would require majoritarian democratic backing, which was beyond the legitimacy of the European Union.⁵¹

A. A Hayekian turn: from the control of markets by law and politics to the control of states and legislation by markets

With these observations on the constellation of the integration project at the dawn of the foundational period, we are moving closer to the next step of the marketisation process, its problematic

Branch of Government?’ in G Brüggemeier (ed) *Verfassungen für ein ziviles Europa* (Nomos 1994) 23–44; G. Majone, *Regulating Europe* (Routledge 1996).

⁴⁵N Stehr, *Moral Markets: How Knowledge and Affluence Change Consumers and Products* (Paradigm Publishers 2008); see, also, N Stehr, C Henning and B Weiler (eds), *The Moralization of the Markets* (Transaction Publishers 2009).

⁴⁶A Supiot, ‘Labour Is not a Commodity: The Content and Meaning of Work’ 160 (2021) *International Labour Review* 1–20, at 6; see, also J Fudge, ‘Labour as a “Fictive Commodity”’: Radically Reconceptualizing Labour Law’ in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 120–35 <<https://ssrn.com/abstract=1721265>>.

⁴⁷*Ibid.*, at 9.

⁴⁸J Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order’ 36 (1982) *International Organization* 379–415.

⁴⁹See references in n 39 above.

⁵⁰References in n 44 above.

⁵¹G Majone, *Regulating Europe* (Routledge 1996).

implications, and conceptual fallacies. It is therefore instructive to recall a by-now somewhat forgotten, preparatory stage of these developments.⁵²

In the shadow of the Court's jurisprudence and of the subsequent Commission initiatives, the Council of Economic Advisors of the German Ministry of Economics submitted a bold proposal. The Council read, if wishfully, the Cassis judgement as a move towards 'regulatory competition'.⁵³ With this suggestion, the marketisation of the integration project reached a stage of theoretical perfection: the control of markets by law was replaced by a control of law and legislation by markets, whereas political contestation over the course of public policy became a competitive process. The head of the Advisory Council and author of its memorandum was nobody else than the mastermind or the Second Generation of the German Ordoliberal School, namely Ernst-Joachim Mestmäcker, who had initiated the abandonment of the ideas of Europe's founding fathers and the turn to Hayek's conceptualisation of 'competition as a discovery procedure', first published in 1968.⁵⁴

The fallacies of the conceptual background of these ideas have been lucidly elaborated in the works of the philosopher and economist Lisa Herzog.⁵⁵ She has apparently never discussed the concept of 'regulatory competition'. Therefore, it is even more remarkable how well her discussion of Hayek, on whose work Mestmäcker and the entire 2nd generation of Ordoliberals had built, hits the nail on the head. In his seminal essay on 'The use of knowledge in society' Hayek has tried to make us believe that markets are unique in their capacity to collect, process, and co-ordinate knowledge that is dispersed in society.⁵⁶ Herzog's objection in this regard is the following: the knowledge which markets can discover and communicate is not the knowledge that courts and other public authorities need and actually make use of when they have to assess the performance of complex economic orders and evaluate competing arguments. She has substantiated this critique in her recent monograph '*Citizen Knowledge. Markets, Experts, and the Infrastructure of Democracy*'.⁵⁷ Economic ordering in a democratic polity needs to, and does, rely on three distinct varieties of knowledge: the knowledge provided by the 'discoveries' generated in market processes, the debates within expert communities, and the evaluation of pertinent deliberations. In my view, the irresistible strength of the critique stems from its synthesising of theoretical reflections with empirical observations. Her take on the factual dimension is explicitly rooted in Polanyi's economic sociology and his objections against the 'stark Utopia' of an autonomous economy. Markets are instead, to cite Herzog's reading of Polanyi, 'carefully legally and socially constructed entities'.⁵⁸ The argument implies that 'regulatory competition' is an unworkable and normatively deficient idea. It is hence unsurprising that the really existing world of European legal policy has never mirrored the design of regulatory competition. That idea remained nothing else than a 'stark Utopia' at the time of its birth. However, its conceptual design has left a strong imprint on the construction of the EMU in the Maastricht Treaty of 1992.

⁵²See on the following in more detail A Menéndez, 'The False Commodity in the European Game of Legal Chairs: Between the Ideal of Regulatory Competition and the Practice of Capitalism Triumphant' 4 (2019) *European Papers* 127–155; C Joerges, 'Sociological Shortcomings and Normative Deficits of Regulatory Competition', both in F Costamagna (ed), *Regulatory Competition in the EU: Foundations, Tools and Implications* 4 (2019) 4 *European Papers* 127–55 and 157–68 respectively.

⁵³Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft, *Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt* (Schriften-Reihe 51) Bonn 1986.

⁵⁴Hayek's essay 'Competition as a Discovery Procedure' was published in English only in 5 (2002) *The Quarterly Journal of Austrian Economics* 9–23; the German original 'Wettbewerb als Entdeckungsverfahren' (Institut für Weltwirtschaft, Kiel 1968) was soon after its publication widely referred to in ordoliberal circles; it was reprinted in FA von Hayek, *Freiburger Studien* (Mohr Siebeck 1969), 249–65.

⁵⁵See her 'Markt oder Profession? Die Politik zweier Wissenslogiken' 46 (2018) *Leviathan* 189–211.

⁵⁶FA von Hayek, 'The Use of Knowledge in Society' 35 (1945) *American Economic Review* 519–30.

⁵⁷Herzog (n 26) in particular ch. III and ch. VII.

⁵⁸*Ibid.*, ch. V.4 n 58.

B. Not a neoliberal economic constitution, let alone a Polanyian counter-move: the EMU of the Maastricht treaty and Europe's new modes of economic governance

The Maastricht Treaty with its establishment of the EMU was a turning point of the integration project, welcomed by the Commission's President, Europe's political leaders and the majority in European legal scholarship as the consummation of the integration project, but characterised as a frivolous experiment by its opponents.⁵⁹ The controversies are common knowledge and are not to be reconstructed here.⁶⁰ However, in view of contrasting the Polanyian legacy with the prevailing understanding throughout this essay, this aspect should again be underlined here. A particularly stringing understanding of the EMU as a market governance regime has been defended by Armin Steinbach: '[T]he principal rules – the no-bailout principle and the ban on monetary state financing – aim to maintain budgetary pressure on states and subject them to market discipline'.⁶¹ This is pure market governance in a nutshell. Many of the warnings made 'on the road to Maastricht' have raised Polanyian concerns. A noteworthy example is the historian Tony Judt: 'Melding the economies of countries as different as Austria and Britain, France and Portugal, Sweden and Greece (not to mention Poland or Hungary) is both impossible and unwise: contrasting social and economic practices are born of longstanding political and cultural differences that cannot be obliterated with the wave of a magic monetary wand'.⁶² He was not alone.⁶³ History cannot be undone. It is nevertheless useful to search for explanations of failures. Lisa Herzog is worth citing again. If there is a kernel of validity in her critique on the limited epistemic potential of market processes, it is fully unsurprising that the market governance theorems of the EMU did not work and had to be set aside.⁶⁴ What Mario Draghi proclaimed in his legendary London Speech of 26 July 2012 is to be put more drastically: The markets can err in their assessment of the performance of the economies of the southern Eurozone. 'We the bank' have then to step in and correct the markets.⁶⁵

What does all of this tell us about the significance of Polanyi's economic sociology for the understanding of the integration process and its law? Our observations on the responses of Europe to the financial and sovereign debt crises are anything but encouraging. Instead of promoting an economic constitutionalism committed to *ordo-* or neoliberal prescripts and the rule of law, the new modes of economic governance have replaced the logic of market governance

⁵⁹W Streeck, *Buying Time* (Verso 2017) 91–2; W Streeck, 'Why the Euro Divides Europe' 95 (2015) *New Left Review* 5–26 and Streeck's 'Reply' in a Symposium on his *Re-Forming Capitalism: Institutional Change in the German Political* (Oxford University Press 2009) which appeared in 8 (2010) *Socio-Economic Review* 559–80 at 579.

⁶⁰Out of my own writings see C Joerges, 'Integration through law and the crisis of law in Europe's emergency' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream. Adjusting to European Diversity* (Cambridge University Press 2016) 299–338. 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' 15 (5) (2014) *German Law Journal* 985–1027.

⁶¹A Steinbach, 'EU economic governance after the crisis: revisiting the accountability shift in EU economic governance' 26 (2019) *Journal of European Public Policy* 1354–72, at 1359.

⁶²Continental Rift' *Op Ed* (*New York Times*, 5 June 1997).

⁶³A Mody, in his *Eurotragedy: A Drama in Nine Acts* (Oxford University Press 2018) 7 has recalled the earlier warnings of N Kaldor, 'The Dynamic Effects of the Common Market' in id, *Further Essays on Applied Economics* (Holmes and Meier 1978) who suggested that a single currency, with its single monetary policy and uniform fiscal policy, would amplify differences between the stronger and weaker member nations.

⁶⁴Remarkable in this context are the observations of LP Feld, the former head of the German Council of Economic Advisors (*Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*) and by now the Director of the Walter Eucken Institut in Freiburg: core provisions of the EMU were disregarded by the German government with the blessing of its *Beirat*; see his 'Ordo-liberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe' *CESifo Working Paper Series No. 5368*, 2015 (co-authored by EA Köhler and D Nientedt) <<https://ssrn.com/abstract=2613901>>.

⁶⁵https://www.kfw.de/About-KfW/Newsroom/Latest-News/News-Details_426753.html.

by an illiberal authoritarian managerialism.⁶⁶ It may be conceivable that these discretionary practices will be disciplined within a more comprehensive regulatory framework. Pedro Teixeira, in his recent monograph on ‘The Legal History of the Banking Union’,⁶⁷ has outlined and defended a further curtailment of all national policies that might threaten the insulation of the ECB’s efforts to ensure financial stability. He has added, however, that such an accomplishment will have as its downside ‘the ongoing exemption of public rule from democratic legitimacy’.⁶⁸ Teixeira’s vision is clearly technocratic. As such, his analysis rephrases the often-noticed technocratic DNA of the European project.⁶⁹ Does the apparent realism in such accounts mean that Polanyi’s expectation of countermeasures reacting to an ongoing social dis-embedding of the economy is nothing better than a ‘stark Utopia’?

The scholarly reading of Polanyi and his political perspectives during his *Life on the Left*,⁷⁰ is anything but uniform or coherent. It can hardly be otherwise, as he had experienced many turning points at which he had to reconsider the viability of his theoretical premises and political commitments. The life in ‘Red Vienna’ was different from that in the late 1930s in England during his work on *The Great Transformation* as well as his later years in the US and Canada.⁷¹ Fred Block, one of his most committed readers, argues that Polanyi’s encounters with non-orthodox Marxism were of crucial importance.⁷² Jürgen Habermas, in a pertinent passage of his *Postnational Constellation* reads Polanyi as an advocate of a radical social democracy.⁷³ Gareth Dale wonders whether *The Great Transformation* should be read as an ‘anti-capitalist manifesto or as a social-democratic bedtime story’.⁷⁴ In the context of a discussion of the state of the integration project and the EU, it is suggested to start from a page in the concluding chapter of *The Great Transformation* where Polanyi considers that

...with the disappearance of the automatic mechanism of the gold standard, governments will find it possible to [...] tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious nineteenth century dogma of the necessary uniformity of domestic regimes within the orbit of world economy. Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments and the liberty to organize national life at will.⁷⁵

⁶⁶On this term see C Joerges and M Weimer, ‘A Crisis of Executive Managerialism in the EU: No Alternative?’ Maastricht Faculty of Law Working Paper No. 2012/7 <<http://ssrn.com/abstract>>; revised version in G de Búrca, C Kilpatrick and J Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum for David M Trubek*, (Hart Publishing 2014) 295–322.

⁶⁷P Teixeira, *The Legal History of the European Banking Union. How European Law Led to the Supranational Integration of the Single Financial Market* (Hart Publishing 2020).

⁶⁸*Ibid.*, at 230.

⁶⁹T Isiksel, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016), *passim*; J Habermas, ‘The Lure of Technocracy: A Plea for European Solidarity’, in J Habermas, *The Lure of Technocracy* (Polity Press 2015) 3–26.

⁷⁰Dale (n 10).

⁷¹Polanyi’s move to the US in 1947 was from a political world to an academic one’, observes G Dale, ‘In Search of Polanyi’s International Relations Theory’ 42 (2016) *Review of International Studies* 401–24, at 421, citing in n 125 S Humphreys, ‘History, Economics, and Anthropology: The Work of Karl Polanyi’ 8 (1969) *History and Theory* 165–212; see also on Polanyi’s research interests in his later age C Hann, ‘The Economistic Fallacy and Forms of Integration Under and after Socialism’ 43 (2014) *Economy and Society* 626–49.

⁷²F Block, ‘Karl Polanyi and the writing of *The Great Transformation*’ 32 (2003) *Theory and Society* 275–306, at 276–8.

⁷³In a similar vein, albeit more cautiously, J Habermas, *The Post-national Constellation. Political Essays* (Polity 2001) 85: ‘We may once again be standing at the brink of a “great transformation” ...’.

⁷⁴Dale (n 10) at 286.

⁷⁵*The Great Transformation* (n 2) 253–4.

Was this just wishful thinking? The passage was written at a time when, Keynes, like-minded American economists and the politician Harry Dexter White were working towards the post-war settlement of Bretton Woods. There were reasons to envisage a better future. Polanyi's considerations deserve attention for three additional and interrelated reasons. For one, he re-states his foundational argument that the capitalist market economy requires institutional backing and continuous political management. A second insight of topical importance follows from this: capitalist market economies will exhibit varieties which mirror a diversity of political preferences, historical experiences, and socio-economic configurations. This is indeed what we can expect, and should respect once our societies have gained the 'liberty to organise national life at will.' The third point is only alluded to, in half a sentence. It is an implication of the new freedom. Polanyi predicts and advocates 'collaboration'; diversity, so we read this brief manifesto, is here to stay.

5. Outlook: Polanyi as an instigator of democracy-enhancing conflicts law?

Polanyi's expectations and visions from the end of the second world-must not be understood as recipes for a post war ordering, let alone the project of European integration. During his time at Columbia University from 1947–1953 Polanyi did not pursue them further.⁷⁶ G Dale assumes that this silence was due to Polanyi's disappointment with the post-war developments.⁷⁷

Be that as it may; we argue that the two core principles in the concluding chapter of *The Great Transformation*, to which we referred above, namely democratic autonomy and international cooperation, have retained their validity; what we then seek to explain is their affinities with the idea of 'democracy enhancing conflicts-law' as Europe's political form. To anticipate the argument in a nutshell: Polanyi's defence of the right of states 'to shape their domestic institutions according to their inclinations' pays tribute to the legitimacy of democratic will-formation; his plea for cooperation implies that democracies have to pay tribute to economic and social inter-dependences without the imposition of uniformity and the establishment of hierarchical political structures. Translated into the parlance of conflicts-law constitutionalism: (1) 'Conflict of laws' as a legal discipline is properly understood, concerned with the elaboration of responses to the ideational tensions and conflicts of interests that have to be resolved where formerly autonomous states enter into a community. It would be unwise and it is inconceivable anyway to obliterate the diversity and conflicts between 'countries as different as Austria and Britain, France and Portugal, Sweden and Greece (not to mention Poland or Hungary).'⁷⁸ 'Horizontal conflicts' among the member states, 'vertical conflicts' between the Union and its Member States and, last but not least, 'diagonal conflicts' (constellations in which European law covers only one aspect of a controversy, whereas other aspects remain a national competence) are bound to persist.⁷⁹ (3) This is why the constitutional form of the EU has to be conceptualised as a European 'conflicts law'. 'Democracy enhancement' is the vocation of this type of conflicts law.

These arguments have been developed step by step. The just named refinements, however, did not affect the foundational premisses of the concept of 'deliberative supranationalism' as they have been submitted a long time ago.⁸⁰ The laws and policies of nation states in general and likewise of

⁷⁶He had published a restatement in a short essay published in 1945 (K Polanyi, 'Universal capitalism or regional planning?' 10 (1945) *The London Quarterly of World Affairs* 1–6; reprinted in M Canigiani and C Thomasberger, *Karl Polanyi. Economy and Society* [n 4 above] at 231–40). On later references to this essay see G Dale, 'In Search of Polanyi's International Relations Theory' 42 (2016) 401–24, at 402, nn 4–6. Recently, W Streeck has Underlined his indebtedness to Polanyi's Theorising on Regionalism Quite Emphatically; see his *Globalismus und Demokratie* (Suhrkamp 2021) 9, 215 ff.

⁷⁷Dale *Ibid.*

⁷⁸Judt (n 62).

⁷⁹See C Joerges, 'The Idea of a Three-dimensional Conflicts Law as Constitutional Form' in C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing 2011) 413–56.

⁸⁰C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' 3 (1997) *European Law Journal* 273–99; C Joerges, 'United in Diversity as Europe's Vocation and Conflicts

the Member States of the EU have restraining impacts on non-nationals. These ‘external effects’ of national activities are unavoidable and ever more important with the increase of the interdependence of Europe’s *Volkswirtschaften* (national economies). No other than Jürgen Habermas has defended this insight in his analysis of the ‘post-national constellation’:

Nation states (. . .) encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level.⁸¹

In view of the structural deficits of nation-state democracies, the quest for establishment of a transnational authority tasked with a control of these effects seems normatively irrefutable. The constitutional implication of all this has been articulated most stringently by Ulrich K. Preuß: only through transnational cooperation, ‘can under conditions of interdependency the domination of others be transformed into legitimated rule. In that understanding the integration project, if properly institutionalized, is not democratically deficient but a necessary precondition of democratic rule within constitutional democracies’.⁸²

All of this reads like a blueprint of the argument Jürgen Neyer and I have submitted back in 1997.⁸³ We subscribed to the Habermasian theorem that the citizens of democracies must be able to interpret themselves as the political co-authors of the law with which they are expected to comply. The constitutional dilemma of the European project is then not the democratic deficit of the Union – as a homogeneous polity –, but the inability of its Member States to ensure democratic accountability. Our conclusion, hence, was the following:

We must conceptualize supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state’s constitutional legitimacy but at the same time clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimized states and with the supranational prerogatives that an institutionalization of this interdependence requires. . . [S]upranationalism does convey *political* rights and not just economic freedoms to Community citizens. Supranationalism is therefore to be understood as a fundamentally *democratic* concept. ‘Supremacy’ of European law can and should be read as giving voice to ‘foreign’ concerns and imposing corresponding constraints upon Member States. What supremacy requires, then, is the identification of rules and principles ensuring the co-existence of different constituencies and the compatibility of these constituencies’ objectives with the common concerns they share.⁸⁴

The detailed elaboration and, even more, a realisation of this concept, are, of course, complex exercises. Can they be more than another ‘stark Utopia’? Democracy-enhancing conflicts law can build on the work of the Harvard political economist Dani Rodrik. Rodrik questions the

Law as Europe’s Constitutional Form’ in R Nickel and A Greppi (eds) *The Changing Role of Law in the Age of Supra- and Transnational Governance* (Nomos 2014) 125–76 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723249>; C Joerges, ‘Responding to Socioeconomic Diversity in the European Union (and to Steven Klein’s Essay) with Democracy-Enhancing Conflicts Law’ 2 (1) (2021) *Global Perspectives* 18788.

⁸¹J Habermas, ‘Does the Constitutionalization of International Law Still Have a Chance?’ in id, *The Divided West* (Polity Press 2007) 113–93, esp. at 176. In his preceding essay ‘Die postnationale Konstellation und die Zukunft der Demokratie’ in id, *Die postnationale Konstellation. Politische Essays* (Suhrkamp 1996) 91–169, he refers to Polanyi’s argument at 129 f.

⁸²UK Preuß, ‘Gibt es eine völkerrechtliche Demokratietheorie?’ in H Heinig an J Terhechte (eds) *Postnationale Demokratie, Postdemokratie, Neoetatismus* (Mohr Siebeck 2013) 169–78 (my translation); in a similar vein M Kumm ‘Kosmopolitischer Staat und konstitutionelle Autorität. Eine integrative Konzeption Öffentlichen Rechts’ 52 (2013) *Der Staat* 245–66.

⁸³Joerges and Neyer (n 80).

⁸⁴*Ibid.*, 294–5.

viability of widely shared confidence in the problem-solving potential of transnational governance arrangements. His critique has been inspired by a group of renowned political scientists.⁸⁵ His suggestions can be understood against the background of his famous ‘trilemma thesis’, developed back in 2011.⁸⁶ Rodrik asserted the impossibility of simultaneous pursuit of economic globalisation, democratic politics, and national determination (autonomy), highlighting a trilemma in which only two goals can be paired: economic globalisation and democratic politics, or democracy and national autonomy. For Rodrik, the European Union furnishes dramatic illustration of this thesis. On the one hand, the European Union could ‘transnationalise’ democracy through federalisation and thus defend the advantages of the internal market; it would then, however, be forced to establish a common European polity to legitimise its necessary assumption of fiscal and social policy powers, with negative consequences for national sovereignty. In the absence of such a denationalising assault on the ‘power of the purse’ of its member states, the European Union would have to give up the common currency and accept economic disintegration.⁸⁷ This is at first sight an utterly pessimistic scenario. It can, however, be understood as a case for the toleration of diversity.⁸⁸ In the passage already cited, Rodrik submits that ‘the policy failures that exist arise not from weaknesses of global governance, but from distortions of domestic governance.’ He adds: ‘Governance failures must be corrected where they occur. In view of their manifold causes and forms, they cannot simply be expunged by transnational fiat’. What the supranational level should do instead is to encourage self-corrections at the national level with supranational ‘oversight restricted to procedural safeguards – such as transparency, accountability, use of scientific/economic evidence – intended to reinforce democratic deliberation’. It should not come as a surprise that Rodrik has underlined his indebtedness to Karl Polanyi quite emphatically.⁸⁹

Competing interests. The author has no conflicts of interest to declare.

⁸⁵R Keohane, S Macedo and A Moravcsik, ‘Democracy-Enhancing Multilateralism’ 63 (2009) *International Organization* 1–31.

⁸⁶D Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton 2011) 184–206.

⁸⁷D Rodrik, ‘The Future of European Democracy’ in L van Middelaar and Ph van Parijs (eds), *After the Storm. How to Save Democracy in Europe* (Lannoo Publishers 2015) 53–66.

⁸⁸Precisely this asset of the European project is betrayed and engendered by the ‘one-size-fits-all’ strategies in monetary policy and the ‘authoritarian managerialism’ of the new modes of economic governance (see Joerges and Weimer, (n 66)). In the presentation of his project on the impact of the ‘new modes of economic governance’ on European labour politics (see ‘Labour Politics and the EU’s New Economic Governance Regime (European Unions)’ 24 (2018) *Transfer* 237–47), R Erne submits that the so far ‘horizontal market integration through the free movement of goods, capital, services and people’ has after the financial crisis ‘been complemented by vertical integration effected through the direct surveillance of member states’ (*Ibid.*, at 237). If this is so, European conflicts law would rather than promoting democracy give way to a centralising top-down regime with European supremacy. Under European law, conflicts between European policies and national labour law or social policy have often generated ‘diagonal conflicts’. Such conflicts were often successfully resolved by mitigating between ‘community and autonomy’ (see on this dual FW Scharpf, ‘Problem-solving effectiveness and democratic accountability in the EU’ *MPIfG Working Paper No. 03/1*), elaborated in a selection of his essays: *Community and Autonomy Institutions, Policies and Legitimacy in Multilevel Europe* (Campus 2010). Following Polanyi and observing so many failings of European one-size-fits-all endeavours, it seems safe to assume that diversity will not be overcome. G Teubner has very recently pointed The implications conceptualised here in conflicts-law notions can indeed, as G Teubner observes, be reconstructed as regime collisions since ‘the colliding entities are not identified in autonomous national legal systems, not in hierarchic levels of federal orders, but in semi-autonomous levels of European multi-level governance. The solution is thus the development of substantial norms at one level while observing the *altera pars* of other levels’; see his *Critical Theory and Legal Autopoiesis. The Case for Societal Constitutionalism* (edited by D Göbel) (Manchester University Press 2019) L 272 n 83.

⁸⁹Ever since I read *The Great Transformation* as a college student my thinking on questions of economics and international economy has been shaped by the key ideas in that book, and I think it wouldn’t be an exaggeration to say that I spent all my career essentially engaged in an act of intellectual arbitrage which is to try to explain Polanyi to economists in terms that they could understand’, Opening address on ‘Karl Polanyi and Globalization’s Wrong Turn’ on the Vienna part of the International Karl Polanyi Conference 2019, hosted at *Radiokulturhaus* Vienna, on May 3rd, 2019 <https://www.karlpolyanisociety.com/wp-content/uploads/2019/12/Dani-Rodrik_Transcript.pdf>.

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