



A transnational double movement? Polanyian reflections on conflicts law constitutionalism

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Abstract

Few issues remain as fraught as the relationship between European integration and national welfare states. For too long, Social Europe was an afterthought, relegated to the soft domain of the open method of coordination, while the formation of the single market proceeded with the full force of European law and institutions. Since the 2008 financial crisis, the social has returned—not just in Europe, but in all regions grappling with what comes after neo-liberalism. In this response, I turn to Christian Joerges's seminal articulation of the conflict of laws as Europe's constitutional form as a contribution to this current theoretical task. Central here has been how Joerges has staged a dialogue between theories of European law and the critique of the market order developed by the Hungarian philosopher and social theorist Karl Polanyi. I argue that Joerges picks up on democratic undercurrents in Polanyi's theory that move beyond the opposition between nationally bounded welfare states and transnational private economic rights. Rather, we can see the social as a domain of multi-level democratic conflict mediation. While Joerges respects the ordoliberal vision of an economic constitution, he draws attention to their democratic deficits. Indeed, both the ordoliberals and Polanyi would reject the EU's technocratic instrumentalisation of the market as a device for restructuring national social systems in a way that both deformalises European law and undermines its democratic legitimacy. I conclude with some speculative remarks about how the EU could be seen as introducing new dimensions of conflict into an emerging post-neoliberal order.

Keywords: Christian Joerges; Karl Polanyi; European law; conflicts of law; double movement

Few issues remain as fraught as the relationship between European integration and national welfare states. For too long, Social Europe was an afterthought, relegated to the soft domain of the open method of coordination, while the formation of the single market proceeded with the full force of European law and institutions. Since the 2008 financial crisis, the social has returned – not just in Europe, but in all regions grappling with what comes after neo-liberalism. On the defensive after the painful structural adjustments of the Troika and increasing populist revolts against European institutions, the EU has increasingly attempted to address the social deficits of European integration. Under the Junker Commission, this manifested as the formulation of the European Pillar on Social Rights and the revision of the posted workers directive.¹ This effort has continued under Von der Leyden, accelerated both by COVID-19 and the recovery funds as well as the recent effort to implant a just climate change transition within EU institutions.

¹V Bogoeski, 'The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe' 2 (1) (2021) Global Perspectives 18740; C Kilpatrick, 'The Roaring 20s for Social Europe. The European Pillar of Social Rights and Burgeoning EU legislation' 29 (2) (2023) Transfer: European Review of Labour and Research 203.

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To be sure, a sceptic could view these as so many more efforts to dress up the EU's neoliberal market order in the rhetoric of a social market economy. But increasing evidence points to a general social turn in European politics and institutions. Yet if neo-liberalism is in eclipse, it is not yet clear what comes next. With Paolo Gerbaudo, I have proposed the term neo-statism to name what could be a new political and economic formation.² No doubt the EU is being pressured in part by the increasing state action that was taken by President Biden's administration in the United States, which has brought back industrial policy to assist with the green transition. But what the difficulty in identifying a post-neoliberal order points to is also a failure of theory and conceptualisations. In this response, I turn to Christian Joerges's seminal articulation of the conflict of laws as Europe's constitutional form as a contribution to this theoretical task.³ I will examine, in particular, how Joerges has connected conflicts of law constitutionalism, which seeks 'the construction and institutionalisation of a "third way" between or beyond the defence of the nation state, on the one hand, and federalist ambitions, on the other,' with debates about Social Europe and the relationship between European integration and political economy.⁴ Central here has been the dialogue Joerges has staged between theories of European law and the Hungarian philosopher and social theorist Karl Polanyi's critique of the market society.⁵ Joerges found in Polanyi an ally in theorising the economic as a political order to which one can apply normative-democratic legal concepts. I argue that Joerges picks up on democratic undercurrents in Polanyi's theory that move beyond the opposition between nationally bounded welfare states and transnational private economic rights. Rather, we can see the social as a domain of multilevel democratic conflict mediation. While Joerges respects the ordoliberal vision of an economic constitution, he draws attention to their democratic deficits. Yet both the ordoliberals and Polanyi would reject the EU's technocratic instrumentalisation of the market as a device for restructuring national social systems in a way that both deformalises European law and undermines its democratic normative legitimacy.

I begin (I) by situating Joerges's analysis of the social within what I take to be the two dominant narratives about European integration and the welfare state: one that posits functional complementarity between European and national competencies, and one that sees the EU as embodying the tension between individual rights and social cohesion. I then argue (II) that Joerges's implicit notion of the social as a legally mediated conflict constellation where actors try to democratically address common economic problems provides a welcome alternative to both. I next (III) turn to analyse how Joerges develops this concept in dialogue with Polanyi and in so doing fills a lacuna in Polanyi's thought: a theory of law. Finally (IV), I end with some speculative remarks about how the EU could be seen as introducing new dimensions of conflict into an emerging post-neoliberal order.

1. Two narratives about social Europe

What is the relationship between European integration and national social welfare state systems? Our answer to this question depends, in part, on our background conceptualisation of the welfare state and the social itself. Here, in political theory and political science, there are two dominant narratives. According to the first, the function of welfare institutions is to compensate for market failures. The welfare state provides forms of collective social insurance that can help coordinate and buffer capitalist production. In the second narrative, the welfare state represents an assertion of equal status against contractual freedom. Here, there is a central tension between national

²P Gerbaudo and S Klein, 'A Missed Opportunity? Social Democracy and the Neo-Statist Moment' 30 (4) (2022) *Renewal: A Journal of Social Democracy* 11.

³C Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart 2023).

⁴*Ibid.*, 262.

⁵C Joerges and K Falk (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart 2011); K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001).

closure, which is prerequisite for the social solidarity underpinning welfare, and market openness. According to the first view, European integration not only is compatible with social welfare systems – it can enable it by providing a more competitive capitalist backdrop for national social insurance schemes in the context of globalisation and international competition. In contrast, for the second, European integration is primarily a mechanism of ‘negative integration’, one that marks a swing of the pendulum back towards marketisation and away from social protection.⁶ Let me first expand on the logic of each position before delineating how they have structured debates about Social Europe.

Within political science and political theory, a variety of scholars argue that social welfare institutions are characteristically collective insurance schemes designed to compensate for market failures. This perspective has been advanced by the Varieties of Capitalism school. Varieties of Capitalism scholars have argued that welfare institutions arise to enable workers to invest in the specialised skills necessary for high-value production.⁷ Workers will be less likely to so invest if they worry that sickness, injury, or unemployment will render their skills useless. Welfare states and active market policies compensate for these market failures. Unions and other corporatist institutions provide job security that ensures that they will receive adequate returns for their skill investment. Unemployment insurance and retraining also reduces the risk of high-skilled labour. In these cases, then, welfare institutions are a form of market-enabling collective insurance against risks that are not accounted for within market exchanges. Some normative theorists of the welfare state emphasise how they can enable market-based freedom by, for example, empowering exits from workplace relationships.

These research traditions in social science echo the idea of the social market economy – an ideal which has been central to the formation of the European single market. As Alex Ebner has shown, the idea of the social market economy can be traced back to the German historical school.⁸ For Gustav von Schmoller, the development of capitalist market orders was intertwined with the specific cultural resources of national histories. While Max Weber challenged Schmoller’s evolutionary narrative with his pessimistic philosophy of values, he nonetheless agreed with Schmoller that the state and market were complementary orders in capitalist societies. For Weber, both the market and the state were systems of instrumental rational action. To emphasise these affinities, Weber often referred to the state as a *Betrieb*. The state would thus intervene in the social sphere to meet the material needs of workers and compensate for the dangerous side-effects of industrialisation and competition. Weber envisioned that, over time, unions would abandon revolutionary socialism and become functionally integrated into capitalism and help ameliorate marketisation. In the post-war period, these ideas then filtered into the (often misunderstood) concept of the social market economy. While Weber emphasised irreducible value conflict, advocates of the social market economy hoped that the market price system could be compatible with social integration if it drew on the resources of shared European (Christian) values.

From this perspective, European integration does not necessarily upset the balance of the social and the economic. Indeed, many scholars have observed how high degrees of social welfare spending enable openness to global economic competition. Elmar Rieger and Stephen Leibfried applied this argument to the European Union and saw it as increasing demand for various forms of social insurance.⁹ Within political theory, Andreas Sangiovanni argues that European integration functions to produce collective goods and should have a principle of collective

⁶FW Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy”’ 8 (2) (2010) *Socio-Economic Review* 211.

⁷The classic account is PA Hall and D Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001).

⁸A Ebner, ‘The Intellectual Foundations of the Social Market Economy: Theory, Policy, and Implications for European Integration’ 33 (3) (2006) *Journal of Economic Studies* 206.

⁹E Rieger and S Leibfried, *Limits to Globalization: Welfare States and the World Economy* (Polity 2003).

insurance against the macroeconomic risks created by the production of those goods.¹⁰ When one examines the dominant portrayal of Social Europe by the Commission, one sees this perspective. Social Europe stands for access to employment, skills retraining, and social protection that compensates for the risks of contemporary market societies. In sum, they posit Social Europe as a necessary response to the dangers of the market society, one that enables capitalism by overcoming various market failures.

The traditional counterpoint to this market failure approach is scholarship that emphasises the tension between two social orders in modern societies – one grounded in a principle of solidarity and status, the other in a principle of freedom and contract. In this narrative, the rise of the welfare state marks a return of *Gemeinschaft* in the context of 19th-century market *Gesellschaft*. Émile Durkheim, for example, argued that the modern division of labour would give rise to a need for solidarity that could not be produced through market freedom.¹¹ Later, T. H. Marshall, in his seminal essay on social citizenship, analysed the welfare state as a demand for equal status as opposed to contractual rights.¹² As the promise of civic and political rights were undermined by class divisions and market outcomes, workers demanded social rights that would be based on status rather than contract. Their equal social standing would be embodied in material entitlements divorced from market outcomes. In the background for these views was an implicit notion that the nation-state would be the vehicle for social solidarity. Markets represent a deracinating force that undermines the ‘community of fate’ necessary for individuals to be willing to provide solidarity to others. While market freedoms imply a denationalised, individual freedom of choice and exchange, solidarity required a territorially-defined democratic order that would generate obligations as well as rights.

In contemporary political theory and political science, this tradition is carried forward by scholars who emphasise the decommodifying aspects of welfare institutions as the outcome of a democratic class struggle. For so-called ‘power resource’ theorists such as Walter Korpi and Gøsta Esping-Andersen, welfare institutions are the outcome of working-class mobilisation.¹³ Workers and unions benefit from the higher reserve wage created by social insurance schemes, and such schemes come into existence where workers can use national democratic systems to constrain the power of capital. By disconnecting wages from market mechanisms, the welfare state implants a principle of social justice within the economic sphere. Normatively, the welfare state presupposes a principle of distributive justice that structures solidarity and ground equal status. In Rawlsian terms, the view represents society as a system of social cooperation, with market rights and freedoms only justified insofar as society as a whole realises principles of justice.¹⁴ Or in the terms of democratic theory, welfare institutions follow from mutual recognition of equal citizenship and so the requirement to give every citizen the necessary material support to exercise their political capacities.¹⁵

In contrast to the first view, then, this perspective presupposes a tension between market freedom and social solidarity, one that plays out via the nation-state. According to this narrative, while the early formation of the European Economic Community did indeed enact a ‘rescue’ of the nation-state, protecting and indeed enabling national systems of social solidarity, since the 1970s the principle of solidarity has been in crisis. Fritz Scharpf observed the bias of European law towards so-called ‘negative integration’, whereby market freedoms could be used to erode national social protection systems, but the European Union lacked the competencies to replace those national systems with positive, supranational schemes. With its turn to neoliberalism,

¹⁰A Sangiovanni, ‘Solidarity in the European Union’ 33 (2) (2013) Oxford Journal of Legal Studies 213.

¹¹E Durkheim, *The Division of Labor in Society* (Free Press 1997).

¹²TH Marshall (T Bottomore ed.), *Citizenship and Social Class* (Pluto Press 1987).

¹³G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton 1990); W Korpi, *The Democratic Class Struggle* (Routledge 1983).

¹⁴J Rawls, *A Theory of Justice, Revised Edition* (Harvard University Press 1999).

¹⁵K Olson, *Reflexive Democracy: Political Equality and the Welfare State* (MIT Press 2006).

competitiveness, and supply-side adjustments, the European Union has become a representative of market freedom *against* national solidarity. Such freedoms can only be negative – corroding national institutional structures without replacing them at the supranational level. The solution is to return competencies to the national level, either through increased intergovernmentalism or indeed a more radical restriction of EU competencies overall.

2. Law, democracy, and the social as a conflict constellation

Notably, both of the above approaches accept an image of markets as outside politics. In the first case, market failures require state intervention. In the second, the market is an order of contractual freedom that stands against the political and democratic principles of social solidarity. The EU thus either represents an expansion of markets that can be compensated for by social insurance schemes or else an attack on solidarity via the principle of contractual freedom. The divide between markets and politics thus reinforces a further dichotomy: between supranationalism and intergovernmentalism, as the question becomes where the appropriate site of political order resides vis-à-vis market orders.

In dialogue with Karl Polanyi, on the one hand, and deploying the idea of conflict of laws, on the other, Joerges challenges both dichotomies – between markets and politics, on the one hand, and between liberal federalism and democratic nationalism, on the other. By approaching the social, as well as the economic, as conflict constellation mediated by law, he searches for principles that could guide the construction of democratically legitimate economic and social systems when such systems have transnational effects on outsiders that must also be justified.¹⁶ At the heart of this is a rethinking of the idea of ‘the economic as a polity’, one which arises from Karl Polanyi’s image of the economy as an instituted process rather than a domain of discrete contractual exchanges. The core insight is that ‘the social’ represents an effort to resolve conflicts deliberatively and inclusively through cooperation and mutual negotiation. Rather than a uniform principle of solidarity that arises from shared citizenship, the social field, ranging from welfare institutions to corporatist bargaining arrangements, are efforts to realise democratic principles within the institutionalisation of economic processes.

Law must play a delicate role in such processes. On the one hand, legal frameworks empower societal actors to engage in deliberative problem-solving. On the other hand, law can pre-empt such processes when it becomes a recourse, especially of more powerful parties, that want to withdraw from deliberation. In Joerges’s vision of social law as an enabler of deliberative conflict resolution, we can see the persistent traces of his teacher Rudolf Wiethölter and the call for a societal constitutionalism.¹⁷ Such a delicate balance becomes even more challenging when you introduce a federal legal system, as we shall see.

Once we see the social as a domain of conflict mediation – rather than just either market compensation or social solidarity—then there is no reason to identify it with either the level of the nation-state or the supranational. The social, then, in a way, is already a federated legal regime – a core idea within corporatist and pluralist theories. Rather than resting on shared national belonging, cooperative economic institutions provide a basis for democratically negotiating economic production at multiple levels. Thus, we can extend the idea of conflicts of law from a theory of legal federalism to a theory of the economy as a (federated, or multilevel) polity. Social conflicts will cut across such geographic levels in complex ways, insofar as they require both conflict mediation amongst the direct parties as well as mechanisms that compensate for potential

¹⁶A Somek, ‘The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement’ 16 (3) (2010) *European Law Journal* 315; A Somek, ‘The Argument from Transnational Effects II: Establishing Transnational Democracy’ 16 (4) (2010) *European Law Journal* 375–94.

¹⁷D Siciliano, ‘“Would any of them have suffered from a guilty conscience if they had won?”: Rudolf Wiethölter and post-Second World War German law’ 50 (4) (2023) *Journal of Law and Society* 500.

downsides to outsiders. Thus, as Joerges argues, the normative foundations of European integration are not abstract, market rights that conflict with democratic belonging. Rather, it is grounded in the need for democracies to take account of the transnational effects of their democratic decisions.

Joerges argues for conflict of laws as Europe's constitutional form. At first sight, it may seem odd to try to rescue the social vocation of European integration with categories drawn from international private law. At its most technical, conflict of laws jurisprudence is designed to resolve jurisdictional disputes in the context of international economic law. But Joerges vision of conflict of laws harkens back to legal realist conceptions that emphasise the limits of judicial resolution of such conflicts. Rather, judges can recognise when legal conflicts represent tension between competing principles of democratic legitimacy, thus enabling the democratic resolution of legal conflicts through a process of collective democratic problem-solving.¹⁸ Conflicts-of-laws constitutionalism rejects the vision of European legal supremacy that inform the mainstream of European law. In this tradition, the EJC must act as a guardian of a treaties because individual states will typically use differentiation to advance their own interests at the expense of the community. But once we abandon this logic of distrust, we can see differentiation as potentially, under certain conditions, enabling democratic self-determination in the context of a single European political order.¹⁹

Thus, rather than viewing uniformity as the telos of European law, Joerges calls for European legal institutions to engage in a delicate balance of the different democratic interests underpinning transnational conflicts. The European legal order can facilitate democratic politics by drawing attention to horizontal, vertical and diagonal conflict constellations. This could mean deference to local actors, or it could mean encouraging dialogical resolution of conflicts. Either way, the approach assigns 'primacy to the resolution of conflicts arising out of Europe's diversity rather than the establishment of a unitary legal regime. Equally important, the approach takes account of the ongoing contestation about the kind of polity which the integration process is to generate'.²⁰ Law thus does not simply have to be a mechanism of commodification and marketisation. Rather, European legal institutions can foster political deliberation without the presumption of a hierarchical legal relationship.

From this perspective, the ECJ has overstepped in viewing market freedoms as a set of principles that override existing systems of democratic problem-solving in the economy, rather than as mechanisms that can help balance different levels of democratic conflict resolution. In his scathing critique of the EJC's *Laval* quartet, Joerges argues that the EJC unwarrantedly represented economic freedoms as trumping 'the labour and social constitution (*Arbeits- und Sozialverfassung*) of a Member State'.²¹ This is because it interprets market freedoms as hierarchical legal principles rather than as accompanying democratic self-determination. Rather, the court should both accept 'European diversity' and exercise 'judicial self-restraint whenever European economic freedoms come into conflict with national welfare state traditions'.²² The goal should be to ensure member states account for the cross-border effects of their national traditions through a deliberative process of mutual adjustment.

While of course the legitimisation potential of national democratic institutions is vital to Joerges's conflict of laws constitutionalism, his perspective helps us escape from the dual binaries of market/society and federal/national. The idea of the economy as a polity implies that there will be both diversity of legal norms between nations and within nations, as societal actors resolve

¹⁸B Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963).

¹⁹R Bellamy, S Kröger and M Lorimer, *Flexible Europe: Differentiated Integration, Fairness, and Democracy* (Policy Press 2022).

²⁰Joerges (n 3) 406.

²¹Joerges (n 3) 245.

²²*Ibid.*

conflicts amongst themselves at different levels depending on the nature and scope of the problem. Legal pluralism and conflicts of laws go together as both view legal orders as uneven responses to concentric circles of conflict problems. But to see this, we must also reject the idea of a single market order that stands outside of politics and society. Karl Polanyi's economic sociology helps Joerges articulate the idea of the economy as a polity: a domain of political conflict that occurs through normative claim-making and not simply negative contractual freedom. Market systems are always mediated by political coordinating institutions that operate according to political, and not market, logics.²³ Thus, Polanyi contributes to conflict of laws constitutionalism a political account of the economy. Yet law is never explicitly addressed in Polanyi's theory. Joerges thus can provide additional resources for thinking about the role of legal norms and democratic legitimacy in a Polanyian framework.

3. Polanyi in Europe

Joerges is distinctive among European law scholars in drawing on economic sociology, and particularly the critique of the market society articulated by Karl Polanyi, as a resource for evaluating the fate of European integration. For Joerges, Polanyi provides theoretical resources for conceptualising the economy as a polity and so challenging the increasing tendency of European law to treat marketisation as a telos in and of itself.²⁴ Polanyi's analysis of the self-protection of society from the market in *The Great Transformation* has become a touchstone for the contemporary study of capitalism and European integration. Most centrally, Polanyi argues that efforts to construct a seamless capitalist market order provokes a counter-reaction for self-protection: the double movement. Yet very often Polanyi's thought is associated with the first theory of the social discussed above. This version sees him as endorsing the welfare state of the mid-20th century. According to this perspective, Polanyi's central idea revolves around the oscillation between market destabilisation and society's call for market reintegration. This interpretation portrays the 'market society' as an anomaly in a history mostly characterised by nationally bounded non-market economic systems, giving Polanyi's thought a nostalgic air. Thus, Axel Honneth argues that Polanyi has a 'normative functionalism' that renders his thinking unnecessarily conservative.²⁵ And Wolfgang Streeck affiliates Polanyi with his defence of mid-century national welfare states and democratic self-determination as against marketising European integration.²⁶

Yet I want to propose this is a misreading of Polanyi, and indeed that Polanyi's theoretical reflections on freedom, democracy and regional integration can further expand Joerges's conflict of laws perspective. At the same time, Joerges's theory provides a role for legal normativity that is missing in Polanyi's theory, insofar as Polanyi tends to associate law primarily with negative rights and liberal constitutionalism. Polanyi's concept of freedom points to a political horizon well beyond the re-embedding of markets in society and the mid-century welfare state. Rather, for Polanyi, the realisation of freedom requires a democratic reordering of the economy. In this light, I then turn to Polanyi's understanding of democracy. I argue that Polanyi's vision of democracy is marked by a rejection of the nation-state as the vehicle of freedom. Rather, he turns to a corporatist model of economic democracy, on the one hand, and a regionalist vision of

²³S Klein, 'European Law and the Dilemmas of Democratic Capitalism' 1 (2020) *Global Perspectives* 13378, as well as the critical responses that follow.

²⁴For a contrary effort to defend European law as embedding the market through the principle of non-discrimination, see JA Caporaso and S Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' 63 (4) (2009) *International Organization* 593, and the response in M Höpner and A Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' 66 (3) (2012) *International Organization* 429.

²⁵A Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (Columbia University Press 2016).

²⁶W Streeck, 'The International State System after Neoliberalism: Europe Between National Democracy and Supranational Centralization' 6 (1) (2020) *Crisis & Critique* 215.

transnational democracy, on the other, as the potential institutional foundations for social freedom.

Polanyi ends his seminal work, *The Great Transformation*, with a call for a new ideal of freedom, one compatible with what he calls a complex society. Polanyi believed that the evident need, during and after World War II, for increasing need for ‘intervention’ within supposedly autonomous market orders renders obsolete a simple ideal of freedom as non-interference. These new modes of coordination and planning do not mark, for him, a replacement of freedom with some other ideal, such as equality or security, but a further development of the meaning of freedom. ‘Juridical and actual freedom can be made wider and more general than ever before’, Polanyi writes, as ‘regulation and control can achieve freedom not only for the few, but for all’.²⁷ Yet the way to this realisation is blocked by the liberal assumption that ‘power and compulsion are evil, that freedom demands their absence from a human community’.²⁸ As a result, individuals denied their responsibility for shared social reality and the products of market forces, such as the ‘brutal restrictions of freedom as were involved in the occurrence of unemployment and destitution’.²⁹ Yet in this discussion in *The Great Transformation*, Polanyi does not explain the concept of freedom that informs his analysis. Rather, he remains programmatic, focusing on the need to combine new forms of planning with a strengthening of individual rights against the state. What grounds his argument that these new forms of coercive intervention in the economy further freedom?

Indeed, the question of freedom in a complex industrial society was a recurrent theme in Polanyi’s thought. In his 1927 essay ‘On Freedom’ Polanyi begins with Marx’s assertion that socialism would replace the realm of necessity with the realm of freedom. He argues that the core of socialism is the movement from the ‘struggle for economic justice’, which is impossible under capitalism, to the ‘struggle to overcome social necessity as such in favour of a new freedom, the social freedom of man’.³⁰ Thus, for Polanyi, Marx’s theory points to a specific dialectic of freedom and responsibility. Bourgeois freedom, or freedom as non-interference, is premised on being ‘accountable to my conscious and only to my conscious’.³¹ It was a negative reaction against the moral claims of feudal institutions like the church, an assertion of a space of individual free belief: ‘as long as the citizen is found as an isolated foreign element within a corporative society in the course of dissolution, he can believe that an extra-social existence is real’.³² Yet this stance is impossible vis-à-vis bourgeois society, as the individual’s actions also constitute that society. This tension, Polanyi argues, finds expression in Kant’s categorical imperative, which asserts an unconditional duty to society but dissolves society into abstract moral wills.

In place of bourgeois freedom, social freedom asserts that freedom requires institutions that enable individuals to take responsibility for the social consequences of their actions. The ideal of social freedom, Polanyi writes, is based on the ‘insight that *there is . . . no human behavior that is completely without social consequences*’.³³ Polanyi thus argues that a socialist society would be one in which the organisation of economic life enables everyone to take full responsibility for the total consequences of their actions. A demanding vision, no doubt, as he argues that individuals must recognise that ‘each workplace accident has occurred for our own well-being, and that the coal we have just thrown into a stove, the light with which we now see, contains a part of a human life’.³⁴ Genuine freedom, then, is only possible in a context in which individuals can take responsibility

²⁷Polanyi (n 5) 265.

²⁸*Ibid.*, 265–66.

²⁹*Ibid.*, 266.

³⁰K Polanyi, ‘On Freedom’ in K Polanyi, *Economy and Society: Selected Writings* (C Thomasberger and M Cangiani (eds), Polity 2018) 19.

³¹*Ibid.*, 20.

³²*Ibid.*, 21.

³³*Ibid.*, 22, emphasis in original.

³⁴*Ibid.*, 28.

for the broad, unintended consequences of their actions. And this requires an institutional context in which individuals can recognise the social order as both a product of their actions and as something for which they can take individual responsibility.

In his post-war writing, Polanyi argues that the realisation of freedom requires both a democratic reordering of the economy as well as regional economic and political integration. With these two ideals in mind, we can see that his vision goes well beyond a territorially bounded welfare state. Indeed, it provides resources for seeing regional integration as a precondition for social freedom. But first his democratic vision for reordering the economy. Polanyi argues that social freedom can only be realised if economic activities are reorganised to enable all individuals to collectively incorporate the full consequences of economic decisions into their actions. In line with this, he sharply critiques centralised models of planning. Such 'managerial overview' perceives 'the human elements of the economy' from an external perspective, only 'in so far as this can be apprehended by a quantifying and measuring administrative apparatus through statistics'.³⁵ Even if it abolishes class distinctions, such central planning cannot realise freedom in Polanyi's sense. And this is because it fails to provide institutional mechanisms through which individuals can recognise the moral consequences of their actions on other moral agents, as such administrative planning must by necessity abstract from these evaluative questions in quantifying economic activity.

Polanyi rather wants a democratic model of planning, one based on the idea of 'functional democracy'.³⁶ Polanyi borrows the idea of functional democracy from guild socialism. According to the guild socialist idea of functional democracy, the economy should be organised so that individuals have democratic bodies that represent their different functional roles, such as consumer or producer, bodies that will together negotiate an economic plan. In Polanyi's vision, the two main organisations are the commune, which mainly represents individuals as consumers, and then a producers' association that would represent a variety of different producers, ranging from cooperatives to individual artisans. These bodies will together negotiate an economic plan that will include things like wages and the prices of the different goods to be produced. With this overall plan in place, there would then be markets for consumer goods which would shape the production decisions of different producers. The existence of markets would ensure that economic production maximised productivity as well as realising social justice, as producers would be able to separate their costs of production from the costs imposed by the justice-based requirements of the economic plan produced through negotiation.

The key point is that the markets exist within a context where the commune owns the means of production, basically franchising out productive decision-making to different actors who would then compete on the market. But since all prices would incorporate a 'social justice' element based on democratic deliberation and negotiation, individuals would see that their economic choices always incorporate a collective mechanism for ensuring responsibility for the consequences of actions. As a result, the existence of markets in consumer goods does not, within the context of functional democracy, impede the realisation of freedom. While markets would be used to indicate what goods producers should make, prices are not entirely left to the free play of market forces. Furthermore, major decisions such as investment would remain in the hands of the commune.

As a result, Polanyi's vision of economic democracy would remove the antagonism central to the idea of negative freedom, that created by a sphere of sovereign individual discretion, within which one is not accountable to others. Such a sphere presupposes a potentially antagonistic relationship between individuals. Interestingly, Polanyi then also rejects the principle of sovereign power in the political sphere. This is evident in an exchange between Ludwig von Mises and Polanyi about Polanyi's intervention in the socialist calculation debate. Mises criticises Polanyi's

³⁵ *Ibid.*, 32.

³⁶ J Bockman and A Fischer, "Socialist Accounting" by Karl Polanyi, with preface 'Socialism and the embedded economy' 45 (5) (2016) *Theory and Society* 385.

proposal as an unstable halfway house between socialism and syndicalism, one that would fail because no mechanism exists that could resolve antagonisms between the different negotiation parties, Polanyi rejects the idea that ‘a constitutional order cannot be viable unless decision-making powers rest with *one* of the two constitutionally recognised actors’.³⁷ Mises’s critique, Polanyi argues, conflates a constitutional order as a relationship of power with a constitutional order as a system of mutual recognition. Put differently, the first assumes that a constitutional order is a domain of antagonism, while Polanyi’s vision assumes a non-antagonistic relationship of mutual recognition. Here, we could say that the principle of sovereignty in the political sphere mirrors the idea of sovereignty in the economic sphere—in both cases, the assumption of potentially antagonistic relationships grounds a notion of individual rights, on the one hand, and a supreme power that could enforce those rights, on the other.

Finally, in an insufficiently recognised analysis, Polanyi firmly ties together the principles of market antagonism, political sovereignty, and the nation-state—a set of associations that informs his call for regional economic and political integration. At the end of *The Great Transformation*, Polanyi argues that a consequence of the rise of the market society was the creation of a system of ‘anarchistic sovereignty’ in the international sphere.³⁸ This came into existence because states had to be sovereign entities that could be responsible for upholding the gold standard system. Thus, states were also threatened with intervention if they failed to honour their obligations and promise to repay their debt—behind the apparent anarchistic sovereignty was the hegemony of Great Britain and its willingness to enforce the political preconditions of the gold standard.

Thus, Polanyi identifies a threefold principle of antagonistic sovereignty behind the market order: the economic sovereignty of the individual with their market freedoms; the political sovereignty of the state who enforces those freedoms domestically; and the international sovereignty of the state that grounds the ‘refusal to collaborate on international economics’.³⁹ In place of each, Polanyi argues for a vision of freedom that places the possibility of non-antagonistic cooperation at the heart of the economic, political, and international spheres, respectively. The cosmopolitan implications of Polanyi’s concept of social freedom are clear in ‘On Freedom’, where he asserts that freedom is an ‘asymptomatic goal’ that points to a state and economy ‘embracing the whole of humanity’.⁴⁰ At the same time, he recognises the functional need for the state ‘as a territorial entity and thus not a free association but a compulsory organisation’.⁴¹ This leads directly to Polanyi’s endorsement of regionalism. Writing in 1945, Polanyi argued that ‘the permanent pattern of world affairs is one of regional systems co-existing side by side’.⁴² While he never fully developed his vision of regional economic planning, Polanyi put his hopes in the emergence of new regional blocks that would be able to overcome nationalism and better coordinate their economic affairs and provide latitude for domestic economic planning.⁴³ Thus, just as antagonism would be overcome at the individual and domestic level, so too, through regionalism, could it be overcome at the international level.

In sum, Polanyi argues that, as a normative concept, freedom presupposes moral agents who can take responsibility for the consequences of their actions. Bourgeois freedom delineated a sphere of individual responsibility, but as an extra-social ideal, negative freedom only made sense in the context of the emancipation of the individual from the corporatist feudal world of organic obligations. Social freedom accepts that social reality is a product of our individual actions, rather

³⁷K Polanyi, ‘The Functionalist Theory of Society and the Problem of Socialist Economic Accounting’ in Polanyi (n 30) 54, emphasis in the original.

³⁸Polanyi (n 5) 261.

³⁹*Ibid.*, 262.

⁴⁰Polanyi (n 30) 25, 36.

⁴¹*Ibid.*, 35.

⁴²K Polanyi, ‘Universal Capitalism or Regional Planning?’ in Polanyi (n 30) 232.

⁴³See also G Dale, ‘In Search of Karl Polanyi’s International Relations Theory’ 42 (3) (2015) *Review of International Studies* 1.

than a nature-like background condition for our choices. Yet in contrast to recognition-based views of freedom, Polanyi argues that the realisation of freedom requires institutional mechanisms to enable individuals to directly take responsibility for the consequences of their actions. This leads Polanyi to an ambitious vision of regional economic democracy, one that rejects the fictions of sovereignty at the individual and collective levels.

Polanyi's vision of economic democracy and regionalism provides additional theoretical resources for conceptualising the polity as an economy. While he is associated with the society/nation-state side of the markets vs. society and nation-state vs. cosmopolitanism divides, his theory challenges both binaries. In this respect, he provides a useful ally for conflict of laws constitutionalism, which likewise rejects the binary of federalism and intergovernmentalism in favour of a multi-directional theory of conflict constellations. Polanyi's theory helps conflicts constitutionalism articulate the economy as a political domain in which law can enable democratic conflict negotiation. Instead, though, accepting the market as a telos, European law has increasingly been deformed by its inability to accept the political dimension of the economy. This was most evident in the wake of the 2008 financial crisis, when European institutions became complicit in a neoliberal marketisation agenda that operated according to discretionary executive decree and political negotiation. Few critics of this development have been as trenchant as Joerges. Rather than starting from formal private law categories, Polanyi's theory positions law as a mediator in a broader societal conflict constellation about the relationship between capitalist markets and democratic forms of legitimacy. And especially in the wake of the formation of the common market and then the Euro, European institutions have embraced marketisation as a substantive policy goal and not just a juridical principle.

Yet Polanyi himself never developed a theory of the normative structure of democracy and the relationship between law and democracy. He alludes to the possibility of democratically resolving conflicts without a principle of sovereignty, and so without a necessary legal hierarchy. Similarly, he positions law as both enabling commodification and the vehicle of decommodification. As a result, his political horizon often relies on an overly concrete vision of planning that fails to show how democratic ideal could be combined with economic self-direction in a complex, multi-level polity. Together with Polanyi's theory of the economy as a polity, conflict laws constitutionalism can then provide resources for theorising democracy beyond the market/society and nation-state/cosmopolitanism dichotomies.

4. A transnational double movement?

Today, we have entered a new phase on the debate about Social Europe. During the post-Maastricht period, the focus was on the increasingly aggressive moves of the ECJ to enforce market freedoms throughout Europe. After the 2008 financial crisis, the Troika and fiscal supervision mechanism embodied an extra-constitutional, ad hoc effort to enforce marketisation as a condition for bailouts. Here, the market was no longer represented through legal principles that actors from within society could deploy to achieve their goals. Rather, it was a political and legal rationale for unpopular and constitutionally dubious bailouts. The ECJ took conditionality and structural adjustments as a necessary mechanism to avoid violating Article 125 of the TFEU. All of this was not without embarrassment and indeed political consequences of exactly the kind Polanyi would have predicted. Can we see today a transnational double movement? If so, to what extent are there tendencies that correct for the asymmetries within the European project?

My concluding reflections will by their nature be speculative. But between the COVID shock and climate change, the European Union, as with other states, is increasingly addressing phenomena that resist market mechanisms. As Polanyi argued, both life and nature are not commodities and therefore efforts at their marketisation will be limited by their distinctive features. States today are confronting the large-scale systemic risks that marketisation processes

generate and undertaking non-market coordinating tasks by ‘derisking’ investment that will contribute to decarbonisation.⁴⁴ Most notable here has been the increasing fiscal capacity of the EU, and particularly its willingness to issue bonds directly. Money and debt are political, not economic, and they represent a common commitment to a shared future – a community of fate.

Yet what we see is a politicisation of production without democratisation, one being driven by interstate competition for technological capabilities and critical resources. Due to institutional constraints on European modes of action, Europe has had to focus more on tax incentives and other forms of derisking than American industrial policy. States are thus confronting the limits of marketisation, but this shows that re-embedding of economic processes through non-market coordinating mechanisms is not necessarily democratic. For Polanyi, fascism was also a form of re-embedding although it abolished society as an autonomous sphere. But the turn towards industrial policy and the state as a coordinating economic actor reveals that capitalist states are increasingly turning against market deregulation as a political solution. They may be insufficient, but such modes of non-market coordination of investment decisions are a precondition for the democratic legitimisation of the governance of new social and economic risk.

At the same time, the European Commission has increasingly recognised that the social deficit of European integration is harming the legitimacy of the integration project. Brexit as well as the rise of the populist right showed that Europe depends on inclusive and equitable economic outcomes in Member States. This impulse has clearly informed the formation of the European Pillar of Social Rights. But the jury is out on how far this goes. Yet despite extensive worries that the Pillar would remain largely symbolic – a heir to the open method of coordination and other relatively weak aspects of European policy formation – there is evidence it has sparked an increasing regulatory embedding of market processes at the European level. Observers note the with surprise ‘that, despite its non-binding, Member State-oriented nature, and its origins as a Juncker initiative, the Pillar process is turning out to have unexpectedly strong and broad-based momentum at EU level.’⁴⁵

In particular, the Pillar has broadened the notion of labour rights from discrimination to issues including precarity, inclusion, minimum wages, and collective bargaining. Along with the revision of the posted workers’ directive, European institutions have increasingly recognised that market freedoms can become a tool of labour exploitation. The Commission has advanced a Directive on Adequate Minimum Wages that focus on coverage of minimum wage laws in the face of precarious work, thus not interfering in national competences for wage policy, as well as promoting collective bargaining, with a target for 80% coverage in member states.⁴⁶

Yet sceptics still identify an asymmetry in the structure of social Europe. Observing the post-Pillar social Europe landscape, Maarten Keune and Philippe Pochet argue that ‘these regulations and forms of financing do not, however, substantially question or affect the market-based, growth-oriented and inequality creating nature of the EU’s economic model. Therefore, they do not address the root causes of the negative social effects of this model. Rather, they aim to soften these effects stemming from the model in general and of economic restructuring processes, such as the green transition.’⁴⁷ Furthermore, they see a continued emphasis on supply-side measures, such as skills training, and social investment as the paradigm through which the social is interpreted – thus in keeping with the first image noted above. Similarly, the growth of European financing

⁴⁴D Gabor, ‘The (European) derisking state’ 127 (1) (2023) *Stato e mercato* 53.

⁴⁵C Kilpatrick, ‘The Roaring 20s for Social Europe. The European Pillar of Social Rights and burgeoning EU legislation’ 29 (2) (2023) *Transfer: European Review of Labour and Research* 203–17.

⁴⁶Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275, 25.10.2022, 33, <<http://data.europa.eu/eli/dir/2022/2041/oj>> accessed 15 November 2024.

⁴⁷M Keune and P Pochet, ‘The Revival of Social Europe: Is This Time Different?’ 29 (2) (2023) *Transfer: European Review of Labour and Research* 173.

mechanisms has been accompanied by increases in fiscal monitoring and strengthening of the Stability and Growth Pact.

Even as the post-2008 landscape has vindicated the Polanyi/Joerges position, the legal and political structures of the EU have not fully caught up. There is a double movement, with social actors successfully advancing their claims for the EU to enable certain degrees of decommodification of labour, but it is constrained by the institutional legacies of Europe's asymmetrical model of pro-market integration. Perhaps a more fundamental constitutional reimagining is necessary, one that posits democratic conflict resolution, rather than market freedoms or economic growth through competition, as the core vocation of European integration.