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

An interview with Christian Joerges

Christian Joerges[1], Agustín J. Menéndez[2] and Harm Schepel[3]

[1]Hertie School of Governance, Germany, [2]Departamento de Filosofia y Sociedad, Universidad Complutense de Madrid, Madrid, Spain and [3]Università degli Studi di Torino, Italy
Corresponding author: Christian Joerges; Email: joerges@hertie-school.org

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Abstract
In this interview Christian Joerges reconstructs his intellectual biography. A childhood marked, like that of his entire generation, by the Second World War, a harsh post-war period and, from an early age, a complex relationship with German identity on the shadow of Nazi crimes. A high school and university education in a Frankfurt where intellectual life is thriving amidst the ruins. And where a young Joerges discovers the beauty of theory thanks to Wiethölter. The experience in the United States where a pluralistic student movement is energised by the opposition to the Vietnam war. The construction of a law faculty in Bremen, with the almost impossible goal of transforming the teaching of law in Germany. The almost 20 years of Florentine experience, in the shadow of history and with the determination to imagine a Europe capable of being progressive. And without omitting reflections on the dark legacies of European law and on ordoliberalism, two phenomena that many European scholars have discovered thanks to Joerges.

Keywords: European integration; legal education; European darker legacies; economic law; conflicts of law

Since the launch of the European Law Open we have flagged our commitment to experiment with formats which are unconventional in academic journals. In particular, with what we like to define as the "biographical interview". It was only natural that the celebration of a deeply inspiring scholar such as Christian Joerges would be the occasion to renew such commitment. This is why next to the superb collection of articles reflecting on the many dimensions of his research and magisterio *which make up this issue, we publish this interview. It is based on two long sessions which took place in spring 2024. Thanks to the wonders of videocalls we could meet in an environmentally friendly way. And yet, despite the physical distance, this was truly a remarkable experience for us as interviewers. We hope that we have managed to project over the final text all that we learnt in those two magical mornings. The reader is offered a portrait of Joerges the scholar, but also of Joerges the man. This portrait is interesting not so much in purely subjective terms, but as a moral story of a whole generation.*

1. Origins

ELO: Tell us about your origins and your family.

CJ: A trivial question which in my case leads into a labyrinth. The protestant part of the family (males first) came from Rostock in Mecklenburg, where Grandfather Joerges had climbed up to the position of a judge at the *Reichswirtschaftsgericht*.[1] I regret very much not to have known

[1]This is perhaps best translated as the 'Imperial Economic Court'.

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him- he died in 1926. He left a nice collection of copper engravings. His doctoral dissertation on '*Miteigentum'* is cited in Martin Wolf's seminal *Sachenrecht*[2]; there is a less admirable dimension, however, namely his extensive work on the history and prospects of Judaism in Germany, with clear anti-Semitic undertones.[3] The female—Catholic—branch with a villa in Dahlem was very wealthy[4]; they came from Düsseldorf in the Rhineland. My mother Maria Luise was the most interesting among them with a doctorate in physics taken in 1937, numerous publications thereafter; she served as assistant to Werner Heisenberg during his work on *Die Physik der Atomkerne*.[5] The announcement of the marriage in June 1939 between Dr. Maria Luise Heyden and Dr. jur. Harald Joerges raised the concerns of the Catholic church. Not because Harald Joerges had become a member of the Nazi party, but rather because of his protestant religion. My family was also exposed to Nazi scrutiny, in particular proof of Aryan descent. I do not know of any concern in my bourgeois family about such interventions; the allegiance to their religion was obviously of minor significance. But I am confident that my second grandfather was immune against Nazi honours. The man was 'Wehrwirtschaftsführer' (defence economist), and as such badly needed by the Allies after the war. In due course he became head of PreussenElektra.

ELO: And that is the time when Christian Joerges comes to the world?

CJ: Yes. My parents had two children: my wonderful sister Franziska, born in 1942. And me, Christian, born in 1943. What was experienced by many as the 'happy thirties', however, ended very soon with the war and later the constant bombing of Berlin. Christian, however, made a difference. Women pregnant with a future soldier were allowed to leave Berlin. The family found shelter with relatives in Weißenfels, Sachsen-Anhalt – for a short period until mother and children moved ahead to Schwarzenfeld where my mother continued with her research in physics.

ELO: So, yours was a childhood marked by the Second World War and the immediate aftermath.

CJ: It was certainly an extremely tough time for my mother with her husband in Hitler's army, professional commitments and the care for two children. My memory of Schwarzenfeld, however, is bright. The kindergarten was at a stone's throw down the street. So many children were with us playing. The sisters running the kindergarten advised us that playing should not happen without a shirt on my 5-year-old body. They also coloured the naked little angels in a book my sister and I brought to the kindergarten.

ELO: Catholic Bavaria had its rules even under tyranny and war, it seems.

CJ: And still the years in Schwarzenfeld were the happiest years of our life, my parents later told us. On Sundays, they took us on their bicycles to the nearby woods to collect mushrooms. My sister and me, too, have lively recollections of the Schwarzenfeld years. My only recollection of Weißenfels, however, dates from a visit many years later as a professor during a summer school in Wittenberg. I took the occasion to visit my birthplace. I remember a very clean city and a little old lady who somehow realised that I was a *Wessi* and exploded with anger about the treatment of East Germany.[6] The house of my relatives still existed. It had been transformed into the 'Schuh-Fabrik Roter Banner'.[7] The head the of the family of our relatives had committed suicide. Two of

[2]M Wolf, *Sachenrecht* (Beck 2003) 19th edition.

[3]Wikipedia is short and clear: Ernst Joerges, 'Was a German Reich judge and anti-Semitic politician' <https://de.wikipedia.org/wiki/Ernst_Joerges>. Indeed, his book *Die weltgeschichtliche Bedeutung des Judentums und seine Zukunft* (Karl Curtius 1927), concludes that the only possible solution to the Jewish question was the 'Germanisation of the Jews' (see p 4).

[4]Dahlem is an affluent, leafy residential district of Berlin.

[5](Springer 1949).

[6]*Wessi* is the term for former West Germans employed by former East Germans. It is almost as derogatory as the reverse, *Ossi*.

[7]Literally, the Red Banner shoe factory.

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his sons had been killed in the war. I stepped into the one and only available Taxi and left my birthplace for good.

ELO: We guess childhood was bound to end rather soon in a Germany left by the war full of physical and psychological scars.

The Schwarzenfeld years of my family came to a seemingly good end, when my father in 1948 was offered a position in the *Bank Deutscher Länder*, the precursor of the *Bundesbank*. The family followed two years later. The school in Frankfurt was so impressed by the level of my Bavarian school education that they let me skip half a year. My mother continued with her physics studies at home until my father decided that she should stop – German law at the time gave him this right.

2. Frankfurt: Gymnasium and University

ELO: So, in Frankfurt you wake up to full consciousness. Was it difficult to grow as a German at such a peculiar time?

CJ: Upon our arrival, Frankfurt was still deeply affected by the war with its badly destructed quarters, so many war-wounded men in the streets and an invasive new language brought to us via the AFN (American Forces Network) with its unforgettable super star for the Rhein/Main Weather Forecast, Werner Lamb.

The institution which had survived everything was the German Gymnasium. I got there after passing the 'Aufnahmeprüfung'[8] and found myself in a class of 70 'Sextaner'.[9] I did there my eight years with German, Latin, Mathematics and all that up to the Abitur.[10]

ELO: What was then the relationship with the Nazi past? How did that influence educational institutions?

CJ: I still wonder how could our Gymnasium, which proudly called itself 'Musterschule'[11] live with Germany's recent past. The question is relevant because a good number of our teachers had been in the party. It is also true that a few were radical socialists. At any rate, we never heard of political conflicts among them. How did they get along? Via 'beschweigen'.[12] This is the term coined later by Professor Gesine Schwan from Berlin, expert in Polish philosophy and deeply concerned with German history. My EUI colleague Wojciech Sadurski and I proposed her for an honorary doctorate from the EUI, which she received.

ELO: What did they teach you about the recent past?

CJ: We learned what they told us. The way out for our teacher of German history was to focus entirely and exclusively on revolutionary moments and periods. And one of his colleagues offered a working group in which he exposed us (a group of six) to Nazi-propaganda talks with an intonation as unforgettable as Werner Lamb.

ELO: How was the atmosphere and ambiance in Frankfurt?

CJ: Frankfurt was in many respects a unique place. It had its monuments, some of which stood witness to democratic moments, such as the Paulskirche. The labour movement remained alive. The city, thanks to the activities of the jurist Fritz Bauer, had become the capital of the country when it came to the exposure of its past. The Auschwitz trial commenced there in 1963.

[8]It can be translated as entrance examination.
[9]This refers to the students of the first year in the Gymnasium.
[10]This applies to the German title that opens access to university studies.
[11]Or a Model School.
[12]Perhaps best translated as 'to cover in silence'.

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The university was revitalised with the return of Horkheimer and Adorno in 1949. We could say now that this marked the Frankfurt's School Critical Theory coming back home.

ELO: What role did religion play in all that?

CJ: You could say that religion, in a sociological sense, seems not to be irrelevant. As everybody knows, Bavaria and the Rhineland are the strongholds of German Catholicism. In the rest, especially in Baden-Württemberg and in Eastern Germany, Protestantism was always dominant since Luther. The split was relevant at many points in German history. Also, in the 20th century. Now postwar German governments were very interested in getting the approval, so to speak, of all powerful German churches. People still went to church and listened to their priests, and that mattered in terms of forging a consensus. At the same time, for us young Germans, both 'branches' had a certain interest. Both were intellectually demanding. And even if there were powerful connections of protestant and Catholic circles with the Nazis, there were very important pockets of resistance. For example, if you can talk of a resistance against Hitler (if there was ever one) the protagonists were protestants. So, the different religious groupings were attractive to us to the extent that they were untainted by the Nazi period.

ELO: But were you influenced by both sides or were you in a way taking sides?

CJ: If *Linkskatholizismus* was the progressive movement within the Catholic cultural side, Loccum was the progressive branch of German Protestantism. Jean Amery pointed out that the interesting intellectuals at German universities were usually protestants. Wiethölter is a great example. He sought allies for his reformist political ideas and especially for a change of legal education. And the Academy of Loccum was the place to do it. Loccum had already the reputation of a forum for intellectual debates and for progressive politics. This is where he went to in order to prepare the program for the reform of legal education. We would not have the Bremen faculty without Loccum. It was thought through in Loccum, and this was also the reason why I always returned to Loccum.

ELO: Did you read any Horkheimer or Adorno at that time?

CJ: I did not try out *Dialektik der Aufklärung*,[13] but sought orientation via historical studies and public lectures, twice to thrice a week. One memorable event was a lecture Franz Böhm gave in the Frankfurt Synagogue. I was really impressed – so deeply that I have never taken the recent polemics against Ordoliberalism seriously (I am sure we will go back to the ordos). Two more memories have stayed with me. One is a Lecture by Wolfgang Abendroth in Frankfurt's 'Haus am Zoo'. Abendroth was not only clinging very much to the left, on the communist side of the equation, so to speak, but was also the person who made it possible that Habermas got his *Habilitation* in Marburg after Horkheimer opposed that he be granted it in Frankfurt.[14] The second is the electoral campaign of Willy Brandt against Adenauer in 1961. Brandt was defeated, but his standing initiated a new era in German politics.

ELO: Did you spend lots of time in the library or were you exploring in depth Frankfurt's cultural life?

CJ: My main interests were anything but academic. Once I had learnt of the disasters Germany had caused and experienced, I more or less instinctively began a search for untainted German traditions. This did not mean looking back to our 'glorious' 18th century, but rather learning about our more recent past times. It was German guilt which motivated the search for untainted elements in the German legacy. This is also the background of my Catholic inclination, as Harm

[13]T Adorno and M Horkheimer, *Dialektik der Aufklärung* (New York Institute of Social Research 1944); this mimeographed version was turned into a 'real' book edition in 1947, published by the mythical Querido Verlag of Amsterdam.

[14]The thesis was published as *Strukturwandel der Öffentlichkeit* (Luchterhand 1962).

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has correctly surmised. Our countries have much in common in that respect, so it is natural for him to be alert to it. During my youth, '*Linkskatholizismus'*, left-wing Catholicism, was a widely respected movement of public intellectuals such as Walter Dierks or Jean Amery. Theologians such as Johann Paptist Metz or Romano Guardini were also Catholics in that sense. There were many more. A lecture by the Jesuit Karl Rahner ensured that the Cathedral of Frankfurt was packed with attentive listeners. Displaying catholic inclinations was not yet embarrassing, as it was to become.

ELO: So, all in all, you are describing to us an extremely rich and nurturing milieu in which to come of age.

CJ: Frankfurt was a great place to grow up – so it seemed to me until I took up my law studies in the fall of 1962 when I was admitted to the Goethe Universität. What I expected to be a great moment proved just the contrary. Hermann Hesse is wrong I had to realise! There is by no means something magic in every new beginning. Fortunately enough, the faculty experienced changes. The *Lichtgestalt*, the shining light for us law students, was Rudolf Wiethölter,[15] appointed in 1963 as Franz Böhm's successor. The second magical figure was Jürgen Habermas. He was even more difficult to comprehend and make sense of, for us students, but he wielded an admirable authority. With the benefit of hindsight, the transformation of the boring Frankfurt Law Faculty into the top German law school was simply phenomenal: Erhard Deninger, Fiedrich Kübler, Spiros Simitis. Those were the great names who made us understand that law can be a fascinating topic. At the beginning of each week, Wiethölter summarised what he had read and learnt over the weekend – a pity that we did not yet know how to tape and preserve what he told us.

ELO: But we imagine you were also doing some traditional doctrinal work.

CJ: We had 'doctrinal exercises' with Schiedermaier on Saturday mornings from 9 to 12. They were very interesting. But they were not where my heart was. Slowly, I became aware of what Wiethölter was doing there. I remember sitting in his classes, while he was at the at the board drawing incomprehensible stuff. And yet we were all fascinated. It was a different way of teaching law. He taught us about the production of law, the social influences on law. And he also talked about the Nazi past of Larenz, for example.[16] So slowly and steadily, you learned about what he was interested in and grew into that.

ELO: We have not yet made Europe part of the equation. When and where was your first trip abroad?

CJ: Montpellier was my first encounter with a non-German culture. France was important for us because the French culture had a big influence these days. Jean Godard was the hero of my friends. We had a group of people who did nothing else than go to the movies and discuss Godard. And we had the wonderful French chansons. After that, during the school years, we visited Amsterdam and Rome. Prior to my studies, I was in the United Kingdom, but just driving around, just for fun, doing nothing, and waiting for the beginning of university. I had a good time.

ELO: So, at that time, from the perspective of a young German student, France stood almost for Europe.

CJ: Close to it. It was France that was great. I wanted to go Montpellier because I wanted to live a bit in that culture. It was not very rational, but it turned out very nicely. You could even say that the best months of my studies in Frankfurt were in Montpellier.

[15]The key book by Wiethölter is *Rechtswissenschaf* (Fischer 1968). The book has only been translated into Italian: *Le formule magiche della scienza giuridica* (Laterza 1975); and Spanish: *Las fórmulas mágicas de la ciencia jurídica* (Editorial de Derecho Privado 1991).

[16]K Larenz, 1903–1993, a towering figure in German private law.

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ELO: How did these exchanges work at the time? I mean, did Professor X write just to a colleague in Montpellier to say 'I have this Joerges student who's lovely'?

CJ: No. You could apply to a university in France, and they would decide whether they took you or not. In my case, they took me, and I had a small scholarship from the *Cusanuswerk*.[17] In Montpellier I did a wonderful movie. It was called *Papa's vampire cinema is dead*, and it was about a vampire driving around in Montpellier. It took a couple of months, but I didn't lose anything in terms of my studies. When I came back, I was all the more eager to prepare for the exams.

ELO: This brings us into a final question about the 60s: the exiled academics, many of whom were Jewish. Take Otto Kahn Freund. In progressive British circles, he is a sort of semigod. Were the many Kahn Freunds of any influence in Germany?

CJ: We have a Sinzheimer institute in Frankfurt. And Spiros Simitis and other labour lawyers were all praising Kahn Freund. And still there are not enough of specialists of these kind of writings. The Weimar constitution was unique in the world. A constitution that was imposing considerations of justice on the economy. Totally out of the mindset of the normal economists and economic lawyers.

3. Joerges goes to America

ELO: You have been telling us about your undergraduate studies, deeply marked by Wiethölter as a teacher, but also as the key figure in the transformation of the Frankfurt Law School. Were you thinking about what to do after you took your final exams?

CJ: Of course, the question popped up. Well, half-jokingly, we could say that the natural thing for a gentleman at that time was to do a doctorate. Again, Wiethölter played an important role in coming to that decision. He gave wonderful seminars, most particularly a series in private international law. I discovered this was a fascinating field. At some point Wiethölter planned to write a textbook on the matter. But politics, including academic politics, became so important that he never pursued this project, at least not that I know of. For me, what was important is that his seminars kept private international law alive on Friday afternoons from 2 pm to 6 pm. And this is how I suddenly learned about legal realism and the legal and political debates in Germany in the twenties. That sparked a flame that led me to thinking about a doctorate.

ELO: And we imagine this is the point at which you decided to spend a year in the US?

CJ: My state exam was in August 1967. I had received an invitation to the Georgetown Law School just before that. The man who invited me was Heinrich Kronstein. He was the son of a Jewish family originally from Mannheim. He studied law and wrote a very interesting habilitation, but as a Jew in the 1920s he had few real chances of getting his academic career to take off. Although he managed to keep on practising as a lawyer in Germany after 1933, by 1935 he had no option left but to leave the country. He remade his life in the US. As was the case with many other exiles, he was forced to get his law degree again. From 1941 he was a professor in Georgetown. He wrote a wonderful book on the transnational governance of cartels.[18] For some reason, which we will never exactly find out, he kept a very, very close connection to Germany. So much so that after the war he also got a part time professorship in Frankfurt. By that time, he had converted to Catholicism. This was a scandal in his milieu. And not only that, he was also keen to establish links between Georgetown and Frankfurt. I didn't know anything about American law, but the United States were somehow glamorous, and at any rate, who could reject such an offer? By the late 1960s

[17]A state-supported Catholic foundation which offers grants to gifted students.
[18]HD Kronstein, *The Law of International Cartels*, (Cornell University Press 1973).

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it was already the case that young German academics tended to spend at least a year in the United States. A way to learn about American law, American legal reasoning, American legal thinking, and come back with fresh ideas. My stay in the US was part of that.

ELO: How was Georgetown then? Who were your fellow students?

CJ: Then (as now) the Jesuits were at the helm of the institution. I guess that approximately one third of the students were Catholics, one third Jewish and the last third were African-American. I felt quite rapidly that the institution was keen not to be inward-looking. This explains perhaps why Kronstein ended up there after he became a Catholic. I remember also a philosopher, Father Joseph Snee, who taught contract law and was in all respects a radical Catholic. Otherwise, the faculty was not very impressive. My recollection is that of a good law school, but certainly not a top law school.

ELO: But perhaps more importantly, Georgetown was at the centre of US political life given its location on Washington. And this was the time when protest against the Vietnam war was gaining steam.

CJ: The students were out in the streets. They had incredible amounts of stamina. My fellow students read and studied until 2 o'clock at night, were in the streets and gave a hand to the politicians who were in line with their political views. There was no equivalent in Germany to these American students.

ELO: Did you join them? Did you go to the street with your peers?

CJ: Not as an activist. I was still a very happy young man who read books and went to the movies and so on. But one could feel the electricity in the air. I was energised by a richly diverse social milieu, a massive contrast to the still homogeneous Frankfurt. And yet, all these people were living and working together. Many of my friends were Jews, and I was surprised how interested and sensitive they were regarding my German identity. They understood the difficulties I had. Perhaps the best way I can render that is with a small story. I was sitting in the class of civil procedure, taught by Ernest Jacoby. Jacoby stepped down one day from his desk, walked down the classroom, and said, 'Ja, Joerges. Are you the son of Harald Joerges from Berlin? We were both assistants to Martin Wolf'. This is how you realise that you are part of a history. I was relieved that Jacoby did not say anything nasty about my father. Even if I would have accepted it, you do not want to hear it. At any rate, it was quite interesting to see that the presence of Germans in Washington was of interest to lots of people.

ELO: Were your studies in Georgetown part of your doctoral research, of your *Doktorarbeit*?

CJ: Kronstein wanted me to do an LLB to become a real American lawyer. That should enable me to do something for German-American relations. I was not that interested. I studied the legal materials and came to the conclusion that it was really the same thing, the same I already knew. So, at the end of the first semester, I stepped out of the law school and focused exclusively on my PhD. Which at that time was totally unstructured. I was reading Brainerd Curry on the advice of Wiethölter. I was fascinated. And I had two wonderful colleagues by my side. One was Eckhart Rehbinder. The other was Jörg Gentinetta, a Swiss. Both of them understood conflicts law! And the third friend was Peter Eigen, later the head of Transparency International in Berlin. These people worked in Kronstein's institute! And there was a lot to talk about all the time.

ELO: So, did you head back to Frankfurt after that?

CJ: Yes. I was about to discover that the very subdued city I had left had turned into something like an academic battlefield.

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4. Back to Germany

ELO: Did you get to the writing of the PhD when you were back from the US?

CJ: Not really. First, I read. Starting with Habermas' *Structural Transformation of the Public Sphere* which inspired my critique of German private international law. I had really begun to understand the relationship between German jurisprudence and German politics. Habermas was of essence. My whole generation was reading it line by line. My contribution was to link it to private international law. It seemed so obvious. When the ideas became clear, it was easy to write. Habermas opened the door to many new things and people. Suddenly, I was sitting next to Streeck in a seminar listening to Offe talk about his *Staatstheorie*. So, I read all sorts of leftist stuff. I didn't understand too much, but it was nevertheless interesting. Streeck made me aware of many things. He was assistant to Wiethölther, who had become 'Protector' of the University. Through him, I discovered Wolfgang Zapf, who was on his way to become head of the Berlin Wissenschaftskolleg, and then Amitai Ezioni, the famous communitarian.

ELO: There are all kinds of legends about the high tech you used to produce the thesis.

CJ: I dictated the dissertation, which was transcribed then by Wiethölter's secretary. She had observed me with my intensive work on the dissertation, and she was ready to do that just for the sake of helping me. Out of sympathy for a young man who was eager to deliver. It helped that she adored Wiethölter.

ELO: Who was, we have heard, enthusiastic about the thesis.

CJ: Then I handed the text over to Wiethölter. It took him quite a while to respond. But his assessment was straightforward: 'The first thesis I evaluate as "summa cum laude"'.

ELO: So, were you thinking of a career in academia at this point? What did young doctor Joerges want to become?

CJ: At first, I was just proud. I even got a prize for the dissertation. Then I said to myself that I could dare starting an academic career. Still, I had some reservations. I experienced first hand the hatred towards Wiethölter. As any fresh doctor, I looked for a publisher form my dissertation. So, I sent the manuscript to Giseking, a Bielefeld publisher specialising in private international law. The response was devatasting: 'a dissertation written under the supervision of Wiethölter will never be published by our house'. Basta! So, I guess I realised I needed to be a bit cautious. Wiethölter suggested I sent it to the Max Planck Institute in Hamburg, the one specialised in private international law. This caused another scandal, but this time the ending was a happy one. In Hamburg, there was already a well-established tradition in comparative work, so they were more open-minded than in the rest of the German academia. Konrad Zweigert, a Social Democrat, was the director. He had introduced many dissenting views in German jurisprudence. His co-directors were Paul Heinrich Neuhaus, a radical Catholic conservative, and Herbert Bernstein, Jewish as his name reveals. Bernstein liked my work. Paul Neuhaus, in turn, hated it, so the decision was left in the hands of Zweigert. They could not know that Konrad Zweigert had been skiing with my mother in the thirties and was a regular guest in Dahlem! Zweigert liked my work. 'This Joerges is a promising young man. We will publish this'. And this was a great event for me, of course.[19]

ELO: So, the publication finally made up your mind to go into academia?

CJ: Yes and no. I realised things were not too easy. So, I tried to establish some links with the legal profession, in particular with the Flad and Schlosshan firm in Frankfurt. But I didn't like it at all.

[19]C Joerges, *Zum Funktionswandel des Kollisionsrecht* (Mohr Siebeck 1971).

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It was a good firm, with very nice people. And they made lots of money. But, once you have started to think seriously about law, it is hard to go into that kind of practice.

ELO: So, you moved to Bremen . . .

CJ: The 'normal' faculties were not an option. But again, I was lucky. Wiethölter was about to establish the faculty in Bremen. This is where I applied. There would have been no academic career for me had it not been for Bremen. For me, it was the place to go. There was no alternative!

5. Bremen

ELO: So, you arrive at a University that was literally being established . . .

CJ: I checked it up! The University opened its doors in 1971! The plan was to make the law school the harbinger of change in legal education in Germany. The buildings may have been ugly, but the university was wisely located. Wiethölter had a very difficult time. He had to persuade the politicians to establish a new faculty, which was not something social democrats would easily do. And to make the problem even more acute, we were leftists, although in different shades of red. That was interesting. It is no exaggeration to say that Bremen was the Mecca for Marxists all over Germany. And still he managed to put a faculty together. In a couple of years, the Bremen faculty became really an interesting place. Preuss, Ladeur, Teubner. Really excellent people. The reputation in the outside world was perhaps terrible, but we felt okay.

ELO: What kind of students did you have? Who was keen to study in the law school under such circumstances?

CJ: One thing is clear. The Bremen bourgeoisie did not send their offspring to us. They were all sent to places like Göttingen. Or what is the same, to universities with a 'good' reputation. So, we got people from the social democratic families. Often very interesting young people. But then we got also some mediocre applications. We accepted people from the *Zweiter Bildungsweg* for the sake of ensuring the faculty contributed to a social cause.[20] We always had a group of former seafarers, our 'captains'. However, these were not particularly 'dangerous' from a political perspective. We also got some social democrats, and, in addition, some crazy radicals.

ELO: And still we heard that the running joke was that professors came to Bremen to end their academic careers. Because once in Bremen, you will never get out. Did you have that feeling at the time?

CJ: It was very clear. I was invited once to a seminar in Munich on legal education. It turned out I was the target of all sorts of accusations addressed to the Bremen educational system. A nice occasion. So, it was clear that you did not have much of a choice to leave Bremen. I had only one chance, perhaps even a really good one, immediately after I had written a little booklet on unjust enrichment. For some reason, Jutta Limbach, professor in Berlin of sociology of law, had read it. At the same time, there was an academic battle going on in Berlin, so they were ready (with a minority vote) to appoint somebody from Bremen. This happened under the direction of Peter Glotz, an important politician in Berlin. Unfortunately, the day before Glotz could call me he was thrown out of office.

ELO: So, Bremen it was for the seventies and early eighties. What kind of profile did you develop? How was the intellectual atmosphere? Was it it all law and society stuff? Were you reading the Americans? Were you developing as a critical law school?

[20]Literally a 'second path to education', this was a way for people with non-traditional academic backgrounds, mostly adults, to enter university education.

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CJ: I recall that three of Wiethölter's assistants, Dieter Hart, Gert Brüggemeier and myself, formed a kind of group. Once or twice a week we were all sitting together discussing pre-selected texts in the cellar of my little house in Bremen, Heymelstrasse 4. A colleague I must mention here is Eike Schmidt. A brilliant doctrinal mind. We were of course doing legal theory and sociology of law. I think it was a common search for our political identity as postwar Germans reflecting on German history. Of outstanding importance was Gunther Teubner with his profound intellectual knowledge – and his interest in Germany's identity. A very important influence on the group was his future wife Enrica. In fact, she motivated their move to Bremen. When he accepted to come to Bremen, we felt our faculty had became important.

ELO: What did you teach there? Were you still teaching tort and contract law? Did you consider yourself a private lawyer?

CJ: I was mainly teaching private law. I never gave a course in private international law because I had published no books and there were no candidate students. So, I focused on private law, and on economic law. Suddenly other things popped up, especially legal regulation. The real breakthrough was the establishment of ZERP. This was really a major event. With the Willy Brandt era over, the German dedication to a social democratic reform project (so deeply connected with an attempt at recovering what we perceived as positive in the Weimar years, including Hermann Heller's legacy) had no chance anymore. What to do next? In Bremen we thought: if the German project is dead, let us try Europe. Of course, this was a fantasy. But at the time was not completely implausible. European institutions could be thought then as holding a hope for reformists. It was a way of preserving the dream of a new kind of public control of the economy and a new kind of progressive economic and social policy making. A group of Wiethölter's people persuaded Hans Koschnick, the president of the senate of Bremen, to establish an institute for European law and European legal policy as a means of pursuing a transformative reformist project at a transnational level. Koschnick supported us and managed to get it established. This took three years of preparatory work, but at the end of the day, we managed and we got Norbert Reich as director of ZERP. We gathered a whole crowd of new people. We got five assistants. So, we could do research on things such as legal sociology and consumer protection. And we developed good links with European institutions. We thought that what was unlikely to happen in Germany was still possible in Brussels.

ELO: Did ZERP have autonomous funding from the region, or did you always have to seek external funds?

CJ: At the beginning we were fantastically funded. The expectation was that you would do projects and raise money, but we got several positions. The European Commission was, at the time, seeking support for its projects (foremostly on environmental protection and consumer protection) among academics, and the Bremen faculty was a good partner for them. In this context, it was perceived that it was more important to get the approval of the Commission for a certain project than to actually raise money. The region of Bremen was apparently still wealthy enough to afford this. With the benefit of hindsight, it was a miracle. Again, Wiethölter's ghost managed miracles. He came in when I had put together a foundational document for ZERP. We then had an opening conference in the *Rathaus*. ZERP was a success story. Not least because it helped the Bremen faculty to establish links with colleagues outside Germany. A move which has borne many fruits.

ELO: Was there also research on social issues? Labour law?

CJ: No. Labour law was then not regarded as a 'European' subject. One of the first books published under ZERP was Norbert Reich's on the regulation of pharmaceuticals. I have listed some of my work at the period in *Conflict and transformation*.[21] I was working on standardisation, later on

[21]C Joerges, *Conflict and Transformation: Esssays on European Law and Policy* (Bloomsbury 2022).

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comitology. Also, quite unexpectedly, on competition law. I did a huge project on the spare parts distribution industry, and I wrote a book on that topic. A fascinating subject, through which you really learn about the functioning of competition policy. The Commission wanted expertise, and they gave us small grants. They prepared a new regulation, needed legal advice, and we provided some. This kind of thing happened for a while.

ELO: But there were also relationships with US universities, as in the transatlantic project about critical legal thinking, out of which came a book you co-edited with Trubek. Was that somehow related to Teubner and to reflexive law?

CJ: The story is a bit more complicated. The first thing I did in Bremen as a leader of a theory project was on reflexive law. This was in many ways Gunther Teubner's project. The result was a working paper, which Habermas used in his teaching in Frankfurt. You can imagine we were very proud of that. It was unfortunate that we did not publish that as a book. But the idea that Bremen had to produce a new way of doing jurisprudence was already there. I profited from a sabbatical in the Netherlands to prepare the project of a transatlantic conference on critical legal thought. We managed to get the support of Habermas for this. He did not show up, but he gave his blessing to this project. That was enough to get funding from the *Volkswagen Stiftung*. The idea was to explore the German progressive legal traditions of the twenties. We had to renew these traditions in the Federal Republic. The best way to do that was an international workshop, in which we could have 'our' United States immigrants, together with the leftist US scholars.

ELO: So, you gravitated almost naturally to Wisconsin.

CJ: You could say that they opened their doors to us wide. So, after the application I spent half a year preparing for this. It was a success not because the application was good (though perhaps it was) but because we had the blessing of good people. If you look into the table of contents of *Critical Legal Thought: An American–German Debate*,[22] you see great names. All the progressive Germans were in it and good Americans, including Duncan Kennedy. And the little exchange between Duncan Kennedy and Wiethölter was the highlight. It is still worth reading and was indeed republished by the German Law Journal.[23] The fact that Bremen had made it happen made us all very excited.

ELO: Did it have much of an impact in Germany?

CJ: It got reviewed two or three times. No impact whatsoever. Later, together with Florian Rödl, I tried to renew the effort and do the second part, 25 years later. We wanted to consider what had happened to critical legal thought in Germany. We planned to organise another conference. This time the *Volkswagen Stiftung* rejected our application. Unexpectedly. Odd. We wanted to reflect on what had happened to critical legal thought and what had gone wrong with it. So, we opted to republish the old book in the *German Law Journal*. What we really wanted to do was to initiate a debate on why critical legal thought was no longer, in 2011, popular among academics.

ELO: The book reveals not only the specific features of critical legal work, but also the different strands within it. Did you become more aware of these tensions at Bremen? Say between Teubnerian theoretical work and the more sociologically laden approaches.

CJ: There were tensions, but of a limited magnitude. My guess is that Teubner did not go along with the kind of Wiethölter's theorising. Teubner was such an interesting figure because he was

[22]C Joerges and DM Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos 1989).

[23]Cf. C Joerges, DM Trubek and P Zumbansen, '"Critical Legal Thought: An American–German Debate"; An Introduction at the Occasion of Its Republication in the German Law Journal 25 Years Later: The Legacy of Critical Legal Thought and Transatlantic Endeavours' 12 (2011) German Law Journal. <http://doi.org/10.1017/S2071832200016692>. The whole text of the book followed in the same issue.

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not at all a leftist. The idea of reflexive law came out of his interest in the theory of music. This line of thought could have progressive implications, but this was not what was driving him. The same goes for his work on transnational governance and consociative constitutionalism. It is always potentially progressive. And certainly, intellectually progressive. But you cannot say there is a specific leftist agenda which is being pursued. This comes from the fact that he has read everything. He has read his Heller and his Sinzheimer and writes about all this.

ELO: Teubner was one thing. Another was the the 'Gessner group' (Josef Falke, Armin Höland, Knut Holzscheck and Konstanze Plett). How did that come about?

CJ: To explain why the Gessner group enters the story we have to take a step back. The Bremen project was prepared by one of Wiethölter's best students, Volker Kröning who was then a powerful politician in Bremen. Later on, he became a relevant figure in the Bundestag. He was key in moving the project ahead, with the help of Reinhard Hoffmann and Rainer Köndgen. These people understood that in Bremen we could do progressive legal policy. This was not accidental in a Hansestadt with a progressive leftist law faculty and an open-minded government. But then the one million Deutschmark question emerged: financing. That is where the Gessner group entered into the equation. They had very good connections with the ministries in Bonn and access to considerable sums of research money. Why not continue in Bremen? This was the plan! And this is how this whole group came to Bremen.

ELO: Did you play any role in this at all?

CJ: I had written a research agenda, which with the benefit of hindsight seems to me a good one. With Norbert Reich we had found somebody with the energy needed to develop it. He was the pioneer in the design of projects on regulatory politics. He realised the importance of the subject matter even earlier than Majone, in a way. Consumer protection, his preferred field, was of course a somewhat strange field, but taking this angle was nevertheless a very clever move. And as when ZERP was established, we had a promising agenda: pharmaceuticals, standardisation, foodstuffs law.

ELO: So how did the financing part work? Did the Commission put in lots of money?

CJ: For the most part, financing came from German institutions. Take for example my first project on the European law on the spare parts distribution industry. The money coming from Brussels was very small. But as I pointed out, it was important to enhance these institutional connections. And when we did work on the safety directive, the Commission was delighted. They were keen to get connected to progressive academics in the Member States. And there were not that many around. It was a good deal for us, so to speak. Still, our major source of financing remained the German Science Foundation. We had a series of very good projects, and the books which came out remain relevant to this day. So, for a while, this went rather well. But our financial basis was fragile. We were encouraged to develop connections with political scientists – Michael Zürn, Stefan Leibfried and other people. They prepared a huge project on the 'Transformation of the State' from which ZERP profited considerably. From then onwards, the projects we put together involved them. This proved crucial for ZERP. It played a major role in facilitating my keeping a presence in Bremen after I got half a position in Florence.

6. An ordoliberal interlude

ELO: So far, we have hardly mentioned ordoliberalism. At first sight, it is specific to Germany, but, as research has shown, it is rather a frame of mind not exclusive to Germany (think of Rueff or Einaudi), even if it developed there with special force. You have contributed enormously to the current interest in ordoliberal ideas, and also to their criticism. Let us focus a bit on these. For sure,

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ordoliberalism is a late child of the Weimar years. But tell us why it should be of interest to legal scholars?

CJ: Because of the central role played by law in ordoliberal theory. Keep in mind the very specific postwar German context marked by the memory of the collapse of Weimar and by the rise to power of Hitler, who managed to elicit a relevant societal consensus. In this context, the ordoliberals came up with a theory which hinged on law as a nonpolitical, objective kind of truth. A force which would organise society according to principles and rules, which would ensure both freedom and a kind of 'democracy'. This was not political democracy in any relevant sense, but they believed that their principles were valid irrespective of the political constellations surrounding them, strong enough to establish a sort of order which would be both freedom-oriented and, in a sense, just. Well, what kind of justice was it? It was the justice of the market, but they had this wonderful, innocent belief in markets as objective distributors of wealth in society. And the only one who questioned that was Müller-Armack, who was, for that reason, not really welcomed within ordoliberal circles.

ELO: Law was at the centre because it contained the promise of order, right?

CJ: You can compare the idea of order in Wiethölter and in Eucken. According to the fomer, order is the assembly of the diverse in the form of a whole. For Eucken, order is a legal constitution. This is key. For ordoliberals, the ordering of the economy was a *legal* project. Nobody else outside Germany had ever heard of this, but it was their core hypothesis. This generated the idea that ordoliberalism is a social theory, not just an economic theory. A societal theory capable of delivering the basis for a just society and a free society.

ELO: Who were the ordoliberals in West Germany? Were not many of them jurists?

CJ: A number of them were professors in private law departments. There were also public lawyers (Inke, for example, who was a minister for a good while). In contrast to the ordoliberal private lawyers, these public lawyers wrote things that were closer to the American New Dealers. But the core ordoliberals, so to speak, did not at all consider the United States. They defended their own theoretical edifice, made of the crucial distinction between principles and rules and of the core idea that the legal ordering contains the moral foundations of society. They praised the moral implications of principles such as monetary stability, which had transversal appeal in German society, not least among the lower middle class, still traumatised by the memories of hyperinflation. The strength of ordoliberalism most likely resulted from the capacity of these scholars to translate their ideas into trivial political messages. That endures to this day. It suffices to consider the images of the Schwabian housewife or the stories around the debt brake. I never believed in all that.

ELO: The Catholic/Protestant divide was also a relevant cleavage in the ordoliberal story, right?

CJ: Eucken was part of Bonhoeffer's protestant circle, while Müller Armack was part of the social catholic circles. So, they have feet on both camps, so to speak. All these efforts to reestablish a German political culture or identity had religious foundations because of what was perceived as the untainted character of some religious groupings. Eucken, for instance, who is now frequently criticised on account of being a Schmittian, resisted Heidegger when he was rector of Freiburg University.

ELO: And yet, the celebrity of ordoliberalism is due to its embrace by leading German political and economic actors in the postwar period. Why was the concern with economic power and with the dangers of 'proletarisation' such a big issue in postwar Western Germany?

CJ: The German economy was bound to play a key role in the reconstruction of Europe. But then came the Korean war, which accelerated things. I have always been of the view that the whole

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Wirtschaftswunder (economic miracle) was propelled to a considerable extent by the Korean War, which tightened the economic, political and military relationships between Germans and the Americans. At the same time, however, Germany lacked a democratic tradition. Weimar was certainly a democratic republic, but 'stable' is the least fitting adjective one can apply to the republic. So, Germans were searching for such stability. Reading back on the period, you can sense the fear that democratic institutions may not be able to take root, to serve as the backbone of a new society. This is what made the set of ideas that the ordoliberals developed so attractive to many.

ELO: And still economic law is not unknown outside Germany. Only that it is called economic administrative law. This is clearly true in the case of Italy, Netherlands and France. It comes from a public law tradition. Now, Germany emerges from the war as a completely state-directed industrial political economy. There certainly was a German tradition similar to the Italian, French or Dutch. And yet the ordoliberals essentially managed to change course.

CJ: Very interesting. But there is there is one difference. One that I think is uncomfortable for the Germans. It has to do with the strength (or, rather, the weakness) of German trade unions, which also goes back to Weimar. Economic democracy, I think, is the core problem which we have never resolved. We have in a way dilapidated Weimar's legacy in that regard. Codetermination remained a strong strand of thinking in postwar Germany. And, basically, the big debates between ordoliberals and social democrats were on codetermination. Which led to a judgment of the Federal constitutional court defending the codetermination tradition. And this codetermination tradition is something which too is unknown outside of Germany. Codetermination was believed to be the lever with which you could somehow build up a political economy with a strong social basis. This is where Polanyi's idea of the socially embedded economy comes into the picture.

ELO: Would you agree with Jeremy Leaman's analysis that the ordoliberals were also the right people at the right moment for the Americans? As occupying forces in the middle of a Cold War, they were seeking elites' alternative to the social democratic ones, who could not be trusted with not meddling with private property and were too keen on genuine democratic developments that the Americans feared on account of German recent past.

CJ: All very complex. My take is that the integrity of the market was a central part of the ordoliberal belief system. And that was central in the role they played in politics. Of course, the idea had been nurtured and would be further developed by the likes of Hayek. But somehow, you could say that there is no such thing as a really German economic theory other than ordoliberalism. The ordoliberals were convinced that they had the instruments and the ideas which would enable the postwar economy to recover. And they persuaded the Americans.

ELO: This comes a long way in explaining the weakness of Keynesian thinking in Germany . . .

CJ: There was a moment of German Keynesianism, linked to Anglo-American traditions. But it came very late, at the end of the sixties, with Kurt Schiller and later with Helmut Schmidt. So yes, some thinking emerged in due course that was influenced by progressive Anglo-Saxon economic theories. But, as an economic theory that aspired also to be a social theory, a legal theory, and at the same time guide policy making, ordoliberalism was unique. And in many ways, remains so.

ELO: Quite obviously they managed to exert enormous influence on economic policy, and still they did not win the constitutional battle.

CJ: They managed to find the way to reorganise the German economy in a time of deep crisis, and in the process, to frame the discourse. And yet, the constitutional court refused to read into the Fundamental Law the fundamental principles of ordoliberalism. The extent to which the Fundamental Law contained or did not contain a 'partisan' economic constitution was indeed at the heart of the German debate.

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ELO: But the debate was soon also a European debate. With the reconstruction of Germany so closely entangled in the reconstruction of Europe, looking at the European level was virtually unavoidable, we imagine.

CJ: In a way, I have stressed that since my first contributions to then Community law. The very first piece I wrote on the matter was a long article in a very nice book edited in Mannheim.[24] Scharpf and Lepsius were part of it. I showed how the institutionalisation of the European Union, the common market, was very much compatible with ordoliberal principles. So, there is a match of sorts between ordoliberal ideas and the fundamental principles of integration through law. This was my point, and it was a critical point. It implied that there was not a real conscience of what kind of economy was being forged at the European level. Fifteen years later, there was a conference at NYU, on the debates in Germany on European law, led by Armin von Bogdandy and the Heidelberg Max Planck Institute. They produced a report of 100,000 words or more. There was not one argument about the European political economy. The *economic* in the European *Economic* Community was outside of the equation. I wrote a letter to Von Bogdandy saying, well, how can it be that the word 'market' in your 100,000-paged report only shows up when you refer to the *Common Market Law Review*? This kept on being the case for a long time. The economy has simply not been an object of European legal thinking.

ELO: The emphasis on the economic constitution, whatever one thinks about how specifically one defines it, is an ordoliberal contribution that must be acknowledged.

CJ: It is perhaps only a trifle of an exaggeration to say that the German ordoliberals had the copyright of the idea. Few others had ever heard of the term. And nobody read German. But the whole idea of an economic constitution, which would be supreme over the democratic constitution, was something that you could basically not sell. Sometimes those using the term have an intellectual affinity with ordoliberalism, but it is rarely rendered fully explicit. For example, somebody like Weiler never speaks of an economic constitution. If nobody in Europe talks about the economy, that there is one school of law stressing that the economy is key to solve the problem of the political order, this is something that is clearly a merit of that school. Hardly anybody outside Germany ever noticed that. VerLoren van Themaat was one of the few.

ELO: It is interesting to notice that we tend to forget that this thought emerged in a context marked by planning. Production and distribution were heavily planned during the war. This trait left its imprint in postwar thought, even on the ordoliberals.

CJ: Moreover, you could say, with Polanyi, that a market order is never unplanned. It's the result of careful planning.

ELO: And indeed, what the ordoliberals were proposing was the creation of an *ordo*. This fits very nicely with the spirit of integration through law. The planned unleashing of market forces. Yet, some ordoliberal thinkers, such as Röpke, were unpersuaded by the project of European integration because they saw a real danger that the whole thing would follow a *dirigiste* trajectory . . .

CJ: From my dissertation onwards I relied on Habermas and his theory of democratic constitutionalism. And within that theory, it was very clear that the market is a polity. The idea that the market is an autonomously, automatically functioning, self-regulatory institution is absurd. And this is where Habermas was always very clear. I mean, he is not deeply engaged in

[24]C Joerges, 'Die Europäisierung des Wirtschaftsrechts' in R Hrbek (ed), *Die Entwicklung der EG zur Politischen Union und zur Wirtschafts- und Währungsunion unter der Sonde der Wissenschaft* (Nomos 1993) 31.

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political economy, but he knows enough. And he wrote also the important *Legitimationsprobleme im Spätkapitalismus*.[25]

ELO: This brings us straight into the alternative understanding of the economic constitution, put forward by Sinzheimer and Heller during Weimar.

CJ: Yes, this is why Habermas's enterprise, as well as Wiethölter's, was to reconnect with Weimar. The hope of postwar German progressive intellectuals was to transform Germany into a democracy. And such a democracy, much as Weimar's, had to take seriously the fact that the power structure of society is defined by economic institutions. This is where Sinzheimer and Heller come into the picture. Frankfurt was key in that regard. People like Mahlmann and Denninger knew their Heller. Moreover, they were not part of the tradition of a state-oriented constitutionalism, the dominant German tradition.

ELO: The ordoliberals certainly managed to monopolise the term economic constitution in the postwar period. They captured it. And by doing so, they also strengthened their position. This was not exactly friendly towards the whole idea of economic democracy.

CJ: Not quite. Let me explain: The first booklet we did in Bremen, Heinz-Dieter Assmann, Gert Brüggemeier, Dieter Hart and me, was *Economic law as a critique of private law*.[26] So we claimed that the private law society is *the* ordoliberal society. Economic law has the potential of taming the implications of such a turn. I would say we had the idea (or, rather, the German tradition had cultivated the idea) that there must be a way of establishing social justice in an economy, and that this must rely on the proper management of the economy. However, it is also necessary to pursue social justice objectives. This is something you cannot say is the characteristic task of a discipline such as administrative law. But, at the same time, trade unions are not just exercising private autonomy, they are exercising social power. They are supposedly representing another type of political alternative to the usual organisation of the economy. This corresponds to the idea that there must be a social basis or a social force in society, which defends the idea of social justice. These are, primarily, the trade unions.

ELO: So that's the reason why labour law is so central. And also why labour law is a strange animal in terms of the public/private distinction.

CJ: If I ever write another book, it will be about that. To understand how economic law and labour law are affiliated or need to be coordinated as one system where you work to reduce the conflict between capitalism and social justice. I think that the debate on economic democracy is an element of the German tradition which one should cultivate.

ELO: One more ordo point and then we should go on to the Florence years: at the heart of ordoliberalism there is a concern with the integrity of the law, which comes hand in hand with a fear of overburdening the legal system with things that it is not equipped to do. So, the ordoliberal criticism of the Maastricht 'economic constitution' was that you cannot have an economic constitution that, instead of taking a fundamental decision about the shape of the economy, endorses every value and objective in the world. If you assign a constitutional status to all of that, then you have chaos. Not least because you lose the directive quality of constitutional law.

CJ: That is why I have insisted all the time on imagining European law through the lens of conflicts of law. The real interesting thing about conflicts is that you realise that our legal systems are all full of internal conflicting objectives and mechanisms. And this is why conflicts are, in a sense, an inherent dimension of modern legal systems. Nobody says so, but what else do you have? You

[25]J Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp 1973).

[26]HD Assmann, G Brüggemeier; D Hart and C Joerges, *Wirtschaftsrecht Als Kritik Des Privatrechts : Beiträge Zur Privat- U. Wirtschaftsrechtstheorie* (Athënaum 1980).

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have to reconcile. You have, of course, environmental objectives. You have also all sorts of justice objectives, all sorts of things, and they never come spontaneously to a reconciliation. The idea of conflicts law is that you use law as an instrument to discipline, to tame, to civilise these conflicts in society. Habermas was very favourable to this idea. We discussed this. I keep on thinking that it is a deep insight, which underlies the element of struggle at the heart of societal life.

ELO: So, you recognise that conflict is unavoidable, but you strive to find the institutional structure to render it possible to handle it through politics and law.

CJ: This is why private law is about conflicts. Wiethölter slowly came up with this idea. In his late writings he became ever clearer on this point. Conflicts law is the core element of modern law. Modern legal systems are conflictual all the time. The key question is how you make that compatible with civilised life.

ELO: But that is where Eucken, arguing against that, comes close to Schmitt. The economic constitution as the fundamental decision on the economy is precisely the opposite of a pluralistic society with a pluralistic set of objectives which learns how to live with conflict.

CJ: The tragic element with Weimar is that it did not work. And still the basic assumption about there being a fundamental decision that is taken in favour of a competitive society, that makes competition its core institution (and the highest value), remains an absurdity.

ELO: And yet many find it very interesting to read the ordoliberals because they believe they offer a theory capable of reconstructing what is going on.

CJ: I would be very cautious. If somebody comes along and says, look, I have a solution to the European problems, then they have to redeem their claim, and afterwards you can discuss their arguments. This, I think, is what is fascinating about ordoliberalism. It is something which constitutes a value in itself. That is for example the value of Mestmäcker, the last ordoliberal in many ways. He has always insisted that we must be able to control the economy through law. However, already when Kurt Schiller became the minister of Economics, and the 'konzertierte Aktion' was institutionalised in Germany, it became clear that from then on a constant management of the economy was indispensable. There are different forces that fight against each other all the time, and the art of politics is to somehow tame this kind of, unfortunately, very unruly horse. So, my impression is that Mestmäcker was about to abandon the idea of law-guided economic policy. Inspiration can be drawn from Habermas's work on deliberative processes. There you find the idea that you can somehow discipline the economy through legal rules, legal techniques, legal argumentation, and, in this way, protect the economy against discretionary, arbitrary, corrupt management techniques. Through law, you have something that can overcome this kind of nasty dimensions of our societies.

7. Florence

ELO: You started in Florence in 1987. You were first hired as a part time professor, and by the mid of the 1990s, you shifted to a full-time position. Why start with half-time?

CJ: The story basically goes like this. Francis Snyder had been visiting at the EUI and was likely to be hired as a professor. Still, for family reasons, he did not want to leave the UK for good. I came into the equation as the *pro tempore* replacement of Teubner, who was going to spend one year in the US as a visiting professor and was also happy to explore the possibility of teaching in Florence. So, Francis came up with the idea of sharing a chair. I also had family reasons not to leave Bremen for good. So, it was optimal for the two of us to share the chair.

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It is odd that half-time positions have been discontinued. For the institute it is a win–win scenario. You get two people, and, they can organise many activities. Indeed, Francis and I were very different, but we were mutually interested in what the other did. In addition, having links with other institutions is positive. If only because it means that people remain linked to what we may call 'the real world' somewhere, with all the difficulties and troubles characteristic of universities which are not so well funded (and not so lucky in their location) as the EUI. Moreover, to go back and forth is good. With the benefit of hindsight, I can say that I had my most productive years under this arrangement. Half a year in Florence allows you to do a lot. Moreover, during the summer semester, what happens in Florence? People sit in the library, but there's not so much going on there. The seminars tended to be in the first term.

ELO: Who did you meet at the EUI?

CJ: Of course, Teubner, who played a fundamental role in easing my way and establishing acquaintances. Thanks to him, I got to know two key figures at the EUI: Mauro Cappelletti and Joseph Weiler. When ZERP started operating, both of them visited. Teubner had persuaded them to do so, with the argument that the most exciting things in Germany were happening in Bremen. So both of them came. Cappelletti wanted to spread the voice of his *Integration through law project*. He talked to Norbert Reich, who would have been the best choice for the volume on consumer protection, but the thing did not materialise. Weiler was puzzling. In a way, I came to realise later than his main interest was not strictly academic. He was researching his later novel *Der Fall Steinmann*.[27] He had an office at ZERP, but he was also walking around and interviewing the Jewish community in Bremen. The book is beautiful, not least because of Weiler's sixth-sense that allows him to see power structures in academic relations. What he wrote about the situation of postwar jurisprudence in Germany is brilliant. In particular, the way people tried to camouflage their past by means of, among other things, striking out all the footnotes in their books.

ELO: But this was also the time at which Giandomenico Majone started his project on regulation, in many ways opening the path which would lead to the whole governance literature.

CJ: Majone followed what could be described as a more technocratic approach. His discovery of regulatory politics, I would say, saved the Institute because that was a project that was once and at the same time of intellectual depth and obvious real-world empirical significance. He had the right idea at the right time. And he managed to put together a good group of people around him, including Renaud Dehousse, but also Michelle Everson. Consider the European policy unit, one of the ideas of Weiler. At some points it was perhaps made up of three people. And still it was a significant place. There were many things going on. All focused on Europe, but all coming from different perspectives and seeing things from different angles.

ELO: How was the relationship with Italian institutions? What were your expectations, regarding the Italian cultural milieu, so to say, and how did it work out?

CJ: For Italian academics, the EUI was a dream. They wanted to be there. They themselves wanted to go there, and they also wanted to send their best students there. So, the EUI was important in that sense. What it did not manage to do was to establish itself as part of the Italian culture, certainly not of Italian legal culture. I mean, you have a very strong tradition in Italy of comparative and international law. You have strong departments of legal history, especially in Florence. But there was no cooperation. The only person later who did something of this sort was Giuliano Amato. At some point he was favouring the establishment of similar institutions to those research institutes we have in Germany (the Max Plancks). In my case, it was a question of lack of time. As a professor, even as a part time professor, you were very much in demand. Many people

[27] J Weiler, *Der Fall Steinmann* (Piper 2000).

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wanted to invite those teaching at the EUI. But this did not translate into stable webs of collaboration. We did one project, Gunther Teubner, Silvana Sciarra and I, on franchising contracts. Silvana was a nice bridge into the Italian culture. And yet the connection was not there. The University of Florence is so close, Pisa and Bologna are really nearby. But no stable arrangements were ever put into place. In the case of law faculties, an obstacle was perhaps the considerable extent to which Italian law professors practice law.

ELO: What about Von Bar and all these people on the European civil code. Did you engage with them?

CJ: I wrote a couple of things. This is another tragedy. I had my background in private law and everything, and a couple of very, very good things on unjust enrichment. That's all. When this idea of a European civil code came up, I tried to do something. Christoph Schmidt came to Florence and soon his *Habilitation* got into the direction of the European Civil Code. We had a wonderful group of students. They all came from Bonn and these traditional universities. They were very clever young German academics. We produced working papers, but then decisions were taken which basically led to the group being disbanded. It was a pity because I keep on believing that the Europeanisation of private law needs to be worked out by inserting into the equation conflicts law. The opportunity was lost to develop private law as part of economic law, to reconsider what it means to build up a private law that is politically sensitive. The way the Von Bar project went on, with all those books they produced and all those conferences, was a different one. The new private law group in Amsterdam is a real hope!

ELO: By the end of the 1990s, we come to what, in rather self-ironical way, you like to refer to as 'Joerges and his Nazis'. Tell us about that.

CJ: Throughout all my life as a researcher, I have always had this nightmare in my mind. When you are a German, you simply cannot avoid it. Of course, my generation was always exposed to the difficulty of being German. This was part of our existence. It was a weight that fell upon us, but also a challenge. In this interview we have talked a bit about the specific characteristics of the German traditions. But we have not yet mentioned Carl Schmitt. Instead, I have referred to Weimar and to the scholars proposing economic democracy on Sinzheimer's footsteps. The challenge of being German is the origin of it, and as with many other things, I can say that Wiethölter was the one who showed me the path to follow. Perhaps I am exaggerating a bit, but only a bit. He was fully aware of the shortcomings of German legal traditions. Nevertheless, he committed himself to establish something like a theory of democratic law in postwar Germany. That was the very objective he pursued in Frankfurt, in those years I have already referred to. He never engaged directly with the Nazi dark legacies, but he informed us about the past of many of his colleagues in Frankfurt. In cautious but relevant ways. The faculty was an odd mix. Simplifying a lot: a couple of Jews, a couple of Nazis and a couple of irrelevant Germans. The constant struggle for the re-education of German lawyers, so as to ensure a break with the authoritarian traditions. In that sense, the Nazis were always there. Since very early on, I was interested in finding out what these people thought. How could cohorts of bourgeois Germans, with a relevant cultural background, become Nazis? How could they be carried away by Nazi ideology?

ELO: And then, at some point, such latent interest becomes an actual one . . .

CJ: It all sped up when I got the full-time position. It was also the case that Massimo La Torre was still at the EUI in 1997. He had written a very thoughtful PhD on Karl Larenz. So, we joined forces to work on the influence of these dark traditions on European law. We were wondering: Did they disappear? Were they alive? How could we know? What had happened and what *was* happening?

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ELO: And that is the origin of the *Darker Legacies* project, right?

CJ: Exactly. At that point we did the standard thing at the EUI, namely, to approach the Research Council of the Institute. To our surprise, we caused an uproar of anger. The idea that an Italian and a German would do something on this matter together, and at a European scale, was to us common sense. There was no sinister plan behind it. We sincerely believed that the European project would profit from some self-critical reflection. Instead havoc broke loose. Many in the Research Council were furious. So instead of the standard funding, we got something in the vicinity of 800 euro.

ELO: So how did you go forward?

CJ: I could make use of other funds. Moreover, the people who attended were prepared to pay their costs. So, it was relatively easy even if we had no money. The enthusiasm was there. You may say that the book that we produced had not enough coherence. That is true. And yet, the collection of articles in the book is still quite amazing.[28] We got 27 reviews, which is a lot for one little book. Moreover, I am happy to say that the book is quite well known in Eastern Europe.[29]

ELO: In many ways, the book came ahead of its time, as now it is so plain and evident that the dark legacies of the past have always contributed to shape the present.

CJ: Precisely. There are several projects running its course right now in which they try to find out about the impact of their own traditions on democratic thinking, the revival of populist legal theory, and so on. So, the book was a major event, and it was one that, I think, fascinated a certain class of students. I held a long series of seminars on the topic, and there were always people who came up with elements of their own traditions, and it was fascinating to do that.

ELO: Of course, you were not expecting that reaction of the Research Council at that point in time. In many ways, it was and remains shocking, but in other ways, it proves the relevance and urgency of the project, don't you think?

CJ: The great piece in this book, I think, is, Michael Stolleis's. He discussed the difficulty of looking into the mirror. He was of course writing for Germans, so as to explain the difficulties of Germans to cope with the past. Through the project, I became aware of the linkages with colonialism, in particular with the exploitation of Africa. That was part of the European project (it suffices to think about Eurafrica). So, it is quite obvious why this was not perceived as the smartest PR for the EUI. But in academic and in cultural terms, not to speak in political terms, it was and it is a good idea to foster that line of research. It will be done, and sooner rather than later, because it is also much about the self-esteem and about coming to terms with what you are doing. If you allow me to put it bluntly, European integration is a valuable project precisely because you confront the ugly times. It has to be addressed, and I am sure it will be.

ELO: Moving from the scholarly agenda into the public discussion. What are your recollections of the debate at the EUI as the process of European integration was transformed? For example, how was Maastricht perceived at the time? Unlimited optimism, to quote Majone, was the *ordre du jour*, but your own take on the Maastricht ruling of the German Federal Constitutional Court was very cautious. How were students and professors in Florence dealing with the shifting character of the EU?

[28]C Joerges and NS Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Hart Publishing 2003).

[29]C Joerges, *"Darker Legacies of Law in Europe": The Florence Project Revisited. Accomplishments, Failings, Lessons* (Florence: EUI) <https://cadmus.eui.eu/bitstream/handle/1814/75376/LAW_WP_2023_01.pdf?sequence=5&isAllowed=y>.

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CJ: The EUI was then at its finest moment. The small Badia with people sitting in the bar and discussing interesting stuff. Europe became, already with the internal market, ever more obviously relevant. And also, of course, the object of big policy making. With the idea of a single currency as the crowning of it all. On what concerns Maastricht, I do not think that the attention paid by the EUI was overwhelming. Some discussions and some books came out of it, such as Renaud Dehousse's *Europe after Maastricht*.[30] But the importance and the dramatic implications of the common currency were largely not registered. Some people were obviously doing monetary integration. But as a result of the prevailing academic fashions, the Economics Department did not really research into the dramatic conflicts which could result from it. The only exception was Francis Snyder, who from the beginning sensed the transcendence, in all senses, of what was going on.

ELO: So, researchers were so focused with the nitty gritty of the technical and policy details that they missed the structural implications. But did that not imply some other kinds of losses?

CJ: The Institute kept on growing, even at a higher speed, and attracting ever more political interest. But the perspective of the early years, the feeling that Europe was an exciting adventure for a new generation, was somehow lost.

ELO: Could you provide a concrete example of what you mean?

CJ: When I arrived at the EUI, in 1987, Werner Maihofer was the President. I came with with an unfinished book about critical legal thought in the German and the American systems. A book that is probably now forgotten, but which was very important to me. Maihofer looked at the book and said: what can I do for that book? Maihofer was an intellectual, one who had experienced the brutality of the war (he spent the whole war as a soldier in Hitler's army) and became a life-long liberal and democrat, on the same wavelength as Ralf Dahrendorf. The kind of knack for academic work for the sake of it is perhaps no longer part of our times. Certainly, that change also contributes to explain the reaction of the Research Council to the darker legacies project. Or the lack of enthusiasm that my idea of inviting Bruce Ackerman and Susan Rose Ackerman to spend a year at the EUI met in the late 1990s. Both of them were at the peak of their careers. And yet the idea felt flat, because research had become too policy-oriented and most people simply were not interested, if they even knew who the Ackermans were.

ELO: In retrospect, what are your feelings about the EUI? How has it changed? What was and what is the purpose of the EUI?

CJ: If you simply compare the surroundings of the EUI with Bremen, you understand what motivated my choice. My academic career in Germany was also complicated. I had made a couple of attempts to move up, but I never had the slightest chance. In such circumstances, to get the invitation to go to Florence was, of course, wonderful. It made me more visible in Germany. I did not have a full position at the EUI, but everybody came to know me. Add to this that hanging around for such a long time in Florence is a wonderful satisfaction. At the same time, it was not always easy because it meant that I had to reorganise my research, to reorganise topics. It was always a bit hectic. It is not so easy to organise when you have to move back and forwards between two places. There was this one wonderful break I had in Berlin, in the *Wissenschaftskolleg*. A full year of nothing but contemplation and walking around Berlin. That was fantastic. The man who brought me in was Dieter Grimm.

ELO: Let's end with the truly important things in Florence. Whatever happened to your vintage red *Cinquecento*?

[30]R Dehousse (ed), *Europe after Maastricht: An Ever Closer Union?* (Beck 1994).

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CJ: Oh, this is a very sad story . . . a very sad story. It was still running fine, but it would have needed a lot of money, and I was not so sure whether I could be able to manage it still. So, I mean, I loved it, but I sold it, and then it came back with a vengeance. The story is wonderful. Each car has a number. Now this is the very identity of your car. And in my case, it came out when I tried to sell it that this number was fake. It was a fake. I thought it was a '65 car. After so many years. I went every two years to the *revisione auto* to have the car checked, and nobody ever looked at this number. Anyway, the *Cinquecento* is somewhere alive and well, I think. I sold it to a very, very clever person, and I think he fixed it and keeps it all together.

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