European Law Open (2025), **4**, 104–117
doi:10.1017/elo.2024.24

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

From conflicts law to transformative law: facing 'fragmented globalisation'

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(Received 8 February 2024; revised 5 June 2024; accepted 18 July 2024; first published online 17 December 2024)

Abstract

How does 'Europe' cope with its dark past and how does it handle its internal conflicts and contradictions? This is the question at the heart of Christian Joerges's 600-page opus magnum *Conflict and Transformation – Essays on European Law and Policy* where he advances his reconceptualization of EU law as a particular form of conflicts law as his answer. But the problem constellation the EU is faced with in today's world is well-beyond what can be encapsulated by a conflicts law perspective. As an alternative the idea of transformative law is introduced and its potential for acting as a basis for the reconceptualization of the EU legal order discussed. Joerges's oeuvre moreover has a blind angle, as it is internalistic in nature. But rather than internal forces driving the integration project forward the structural trigger and driver of European integration should rather be found in the reconfiguration of Europe's relations with the wider world. From (de-)colonialisation to todays 'fragmented globalisation' it is the structural reconfigurations of Europe's relationships to the rest of the world which is the central driver of the integration process.

Keywords: Conflicts law; transformative law; fragmented globalisation; EU Law; societal constitutionalism; European integration

1. Introduction

Globalisation is fragmenting. But this does not imply the disappearance of globalisation, a phenomenon that has been with us at least since Columbus and his crew made landfall on the island of Guanahani (which he named San Salvador) in present day Bahamas on 12 October 1492. It just implies that it will take a new form. The perspective emerging is that of two – and if the Europeans get their act together, three – hegemonic worlds in the world, an American, a Chinese and an EU centric world. Three parallel worlds which each have global reach and are characterised by internal synchronisation and external dis-synchronisation vis-à-vis the manifold surrounding worlds.

This development has profound consequences for how we understand the role and function of law in contemporary society. In particular, it has profound consequences for how we understand EU law, its status, purpose, and effects. Here the lifelong work of Christian Joerges becomes a central prism for conceptualising EU law in its wider societal context. A prism allowing us to face contemporary problems through facing the past, ie the dark past of Germany and Europe. The question is however if the conflicts law approach so elegantly developed by Joerges is a suitable tool for conceptualising the role of law in addressing the contemporary challenges Europe is facing. As an alternative transformative law might prove a more suitable approach for conceptualising the challenges of Europe.

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https://doi.org/10.1017/elo.2024.24 Published online by Cambridge University Press

Yet, Europe is also part of the wider world. Indeed, one might argue that the reconfiguration of Europe's relations to the rest of the world has been and continues to be the core driver of the integration process. That was the case from the US/Soviet standoff in the cold war over decolonialisation to contemporary developments in China, Russia, the United States and the Middle East and North Africa. Hence, while relying on transformative law for its internal composition, conflicts law is likely to reappear as the central toolbox for handling Europe's relations with the many other worlds operating in the world and indeed as the central toolbox for handling collisions in the new global configuration we are entering.

2. Facing the past through conflicts law

Joerges's oeuvre is multifaceted and highly subtle in its style. *Feingefühl*, a certain sensitivity, is called for to apprehend the depth of the insights presented. The approach, engaging carefully with the broad host of (German private) law scholars and their European entanglements from Friedrich Carl von Savigny onwards, moreover presents itself as an intellectual history of legal thought and of the European integration process.

His point of departure is an ontological one – the assumption that nation states not only exist but also that they are the central units of societal organisation. As such he embraces Max Weber's conceptualisation of the nation state, without adopting his political views:[1] a 'stringent defence of Weber the methodologist against Weber's political polemics'.[2] It is within this nation state framework private law emerged through 'the trinity of the organic formation of law, the legal profession and legal science itself'.[3]

The Weberian nation state however ended in catastrophe as expressed in the imperialist, nationalist and totalitarian developments that have dominated Europe's past.[4] These catastrophes reached their peak in the first half of the 20th century but had – as we will return to – a long built-up period starting from the so-called 'scramble for Africa' in the late 19th century that marked the beginning of the end of the Euro-centric world. They moreover continue their reverberations until this day. Not only was totalitarianism alive and well in Central and Eastern Europe until the 1989 fall of the Berlin Wall and the 1991 implosion of the Soviet Union, but Brexit and the contemporary war in Ukraine show that the dark past keeps returning. The two latter events, Brexit and the Ukraine war are both post-imperial exercises aimed at re-establishing imperial status. One through democratic means, albeit within a flawed democracy, and the other through military aggression.

Hence, Joerges's oeuvre is marked by a peculiar – and very German – internal tension, a love/hate relationship to the nation state. The starting and end point is nation states. He regards the nation state as the central institutional and cultural context of human interaction in modern times, ie the ultimate social unit forming the lives of individuals. But the nation state is also the ultimate source of violence and danger. So, while insisting on nation states as the core units of social organisation, he also makes the democratic deficit of nation states, as a first step, the core normative anchor of his work. The interdependency of nation states, and of their economies in particular, means that 'constitutional states are unable to guarantee the inclusion of all those persons who are impacted upon by their policies and politics within their internal decision-making processes'.[5] The core principle of democracy, '*quod omnes tangit ab omnibus approbetur*' or 'what affects everyone is decided by everyone' is being systematically violated in democratic processes organized within a nation state frame. Hence the justification for the existence of the EU

[1] C Joerges, *Conflict and Transformation. Essays on European Law and Policy* (Hart Publishing 2022) 56f and 402ff.
[2] Ibid., 404.
[3] Ibid., 53.
[4] Ibid., 405.
[5] Ibid., 109.

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and similar transnational frameworks is that they are entrusted with the task of correcting the democratic deficits of nation states by developing and deploying procedural instruments aimed at handling the lack of responsiveness of nation state embedded democratic procedures to their extra-territorial effects.

This vision for how to organise the European space is further underpinned by his adoption, as a second step, of an understanding of how nationally embedded political economies have evolved over time that emphasises diversity rather than homogeneity as the central characteristic of political economies. Following in the vein of the Varieties of Capitalism literature, the persistent divergence in the organisational forms of economic reproduction processes is a central focus point for Joerges.[6] A divergence he also describes as a diversity of economic cultures and institutional infrastructures.[7] Also along the lines of Varieties of Capitalism, he sees this divergence as apparent between, on the one hand, the coordinated political economies of northwestern continental Europe and, on the other hand, the Anglo-American political economies of Australia, Canada, Ireland, New Zealand, the United Kingdom and the United States. In the context of the euro-crisis a second frontline, inspired by Fritz Scharpf, becomes central: that between the German political economy and the southern European states.[8] So rather than seeing the German political economy as part of Rhine capitalism with similarities rather than divergences between Belgian, Dutch, French and German forms or organising economic reproduction as the prevailing characteristic, he includes Germany in the batch of Northern economies together with the Nordic countries and the Netherlands. Joerges thereby produces his own version of Gøsta Esping-Andersen's 'Three Worlds of Welfare Capitalism':[9] a version that is highly inspired by the economic sociology of Karl Polanyi.[10] It is against this background that Joerges argues for an 'obligation' of the EU to respect and to preserve the different national institutional formations embedding the economy in different national settings, including the particular historical trajectories and values they are built upon.

This becomes most apparent in his dealings with the Eurozone crisis as it unfolded from 2009 onwards. Seeing the European Monetary Union, as launched with the 1991 Maastricht Treaty, as a mistake and failure, Joerges does not seem to take the full step and argue for its abandonment. Rather he sets out to analyse the legal consequences of the institutionalisation of ad hoc 'managerialism' and the functional and normative erosion of the integrity of the law which comes with it.[11] An analysis which seems guided by a another love/hate relationship, in the form of his assessment of ordoliberalism, which he both seems to respect and profoundly disagree with due to its particular understanding of the role and (limited) potentiality of democracy in society.[12] It is on this background that he seeks to take the EU's motto 'United in Diversity' seriously through the development of his conflicts law approach. An approach which is three-dimensional not only dealing with horizontal and vertical but also with diagonal conflicts, ie between different areas of competence which have gone through different degrees of Europeanisation.[13]

An approach and oeuvre which however distils its fuel from the personal experiences of coming of age in the shadow of the past in the post-WWII *Bundesrepublik* (Federal Republic).[14] Not surprisingly, his maybe most important and impressive contribution is his highly nuanced and

[6]Ibid., 107ff.

[7]Ibid., 120.

[8]FW Scharpf, 'The Costs of Non-disintegration: The Case of the European Monetary Union' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 29–49.

[9]G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990).

[10]Joerges (n 1) eg 106ff.

[11]Ibid., 1993ff.

[12]Ibid., 286 and 583f.

[13]Ibid., 110

[14]Ibid., 523ff.

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impressive excavations of the dark pasts of German and European legal thought. The actual point of departure and anchor for Joerges's oeuvre is the past or rather the duty to face the past and to remember.[15]

3. Facing fragmented globalisation

Joerges's focus point is as outlined above the democratic deficit of nation states, the potential of EU law to act as a remedy in this regard combined with the concern for how democracy and the welfare state can be maintained under the conditions of increased integration. Concerns which on a deeper level are driven by the trauma imposed by the darker legacies of German and European history and the duty to remember. The outline illustrates the depth and reach of Joerges's impressive oeuvre. There is however a blind angle in his theoretical construction. That is hardly surprising for the simple reason that all theoretical constructions have a blind angle. The blind angle I refer to is the EU's relationship with the rest of the world. Minor work on WTO law apart,[16] his work remains guided by an intra-European perspective. The fuel driving European integration is to be found in its history and the entanglements of European states, a view which is very similar to the 'official' narrative of the EU as promoted by Brussels, through a focus on the world wars, French-German reconciliation, and the quest of lasting peace. While these aspects indeed have acted as important sources of fuel, the most central one is omitted, namely the reconfiguration of Europe's relations to the rest of the world.[17] The integration project was launched in the context of the emerging cold war and unfolded within an US–American security umbrella and through strong American encouragement that was succeeded by the decolonialisation wave further reducing the clout of European powers.[18] The acceleration of the integration process through the entering into force of the Single European Act in 1987 was to a large extent driven by competitiveness concerns vis-à-vis Japan and the United States. Maastricht and with it the European Monetary Union (EMU) was conditioned by the end of the cold war, the collapse of the Soviet Union and the unification of Germany. The treaties of Nice and Lisbon were intimately linked to Central and Eastern European enlargement. An enlargement the EU could not escape even if it had wanted to. The war in Ukraine has in similar manner accelerated the move towards another round of enlargement and a strengthening of the external affairs and security dimension of the Union. Hence, the fuel of the integration process is largely coming from geopolitical events of an external nature, and most are developments beyond anyone's control thereby forcing the hands of those at the wheel.

But behind this there is a bigger story to tell about the reconfiguration of Europe's relationship to the rest of the world. The Seven Year's War (1756–63) was the first global conflict, involving the major as well as a large number of not so major European powers of the time, including Austria, France, Great Britain, Hanover, Hesse-Kassel, Portugal, Prussia, Russia among others. But the list of belligerents also included the Algonquin People, the Carnaic Sultanate, Hyderabad, the Iroquois Confederacy, the Kalmyk Khanate, the Mughal Empire as well numerous others and with theatres of war unfolding at all continents except for Australia. A similar story can be told about the Napoleonic wars. While global in reach, European powers however played the central role in these

[15]C Joerges and N Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing 2003).

[16]Eg C Joerges, 'Judicialization and Transnational Governance: The Example of WTO Law and the GMO Dispute' in B Iancu (ed), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Eleven International Publishing 2009) 67–84.

[17]N Luhmann, 'Europa als Problem der Weltgesellschaft', in 5 (1994) *Berliner Debatte* 5 3–7.

[18]For the entangled relationship between the European integration process and (de-)colonization see M Brown, *The Seventh Member State: Algeria, France, and the European Community* (Harvard University Press 2022). See also KK Patel, 'The latence of the European colonial past' 1 (4) (2022) European Law Open 1059–62 and the rejoinder by Brown; M Brown, 'The latence of the European colonial past: a reply by the author' 1 (4) (2022) European Law Open 1063–66.

https://doi.org/10.1017/elo.2024.24 Published online by Cambridge University Press

conflicts and the European dominance continued to expand reaching a zenith with the 1884–85 Berlin Conference and the 'scramble for Africa'. Indeed, following Carl Schmitt, the dissolvement of the *Ius publicum europaeum*, the European legal order constituted on the distinction between 'European' and 'non-European' powers, began on 22 April 1884. On that date the United States unilaterally and against European opposition recognised the Congo Free State as a sovereign state thereby breaking the self-confinement of the United States to the western hemisphere as instigated by the 1823 Monroe Doctrine. For the first time the leading power in settling an issue of global interest was a non-European power.[19] By 1890 the economy of the United States moreover became the largest in world and the 1904–05 Russo–Japanese War marked the first significant defeat of a major European power towards a non-European power in modern times. What followed from 1914 to 1945, the dual European suicide attempt, was in this sense just an acceleration and intensification of a structural development that had begun decades earlier. A structural development that ended in the implosion of the euro-centric world.[20]

The European integration project was not only conditioned but also triggered by the development described above. EU law is the quintessential version of post-imperial law. There are many 'varieties of empire'. A typical through not exhaustive list of characteristics include centre/periphery as the central organising principle, no confinement to fixed boundaries, conglomerate and multi-level governing structures, legal pluralism with multiple partly overlapping legal orders as well as manifold highly diverse cultural formations in play. Internally, empires are typically held together by an *acquis communautaire* largely oriented towards setting minimum standards for social exchanges and conflict resolution between their various parts while externally insisting on suzerainty vis-à-vis surrounding states.[21] Hence, from this perspective EU and its law can be understood as a functional equivalent to empire and imperial law.[22] Two decisive differences however appear between, on the one hand, imperial law and, on the other, EU law. First, the normative fabric of EU law consists of democracy, human rights, and the rule of law, combined with an idea of equality between Member States. This makes the normative fabric of EU law fundamentally different than the normative fabric of imperial law. So, while EU law might be a functional equivalent to imperial law it is not a normative equivalent. Second, while Joerges seems to ontologically assume the existence of well-defined nation states, the nation state did not become the paradigmatic form of statehood in Europe before the period between 1917 and 1923, after the dissolution of the Austrian–Hungarian, German, Ottoman and Russian empires. Empires which in most cases were succeeded by institutionally weak, autocratic, and instable nation states. Weimar Germany was not the exception but rather the paradigm case of a Central European state in the 1920s.[23] For the states located in the western part of Europe, colonial empires moreover continued to play an essential role until the 1960s or even beyond. Hence, nation states are a rather new phenomenon and, in the version Joerges is referring to, essentially a post-1945 construct. The constitution of nation states is therefore intrinsically linked to the process of European integration, though while being pivotal by no means the only factor which led to the re-constitution of post-imperial nation states in the European context. Re-constitutions which went far beyond

[19]C Schmitt, *Der Nomos der Erde. Im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot 1950) 200f. See also PF Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (Routledge 2014) 19ff.

[20]It follows from this that in contrast to Eric Hobsbawm's notion of a 'short 20th century' from 1914 to 1991 we are rather having a 'long 20th century' from 1884 to some point either already passed in recent years but not recognized yet for its significance or to come in the near future, for example condensed through a global conflict over Taiwan. For the Hobsbawm perspective; E Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914–1991* (Penguin Michael Joseph 1995). For the alternative: Kjaer (n 19).

[21]For the classic text, E Ehrlich, *Grundlegung der Soziologie des Rechts* (Duncker & Humblot 1913).

[22]PF Kjaer, 'Global Law as Intercontextuality and as Interlegality' in J Klabbers and G Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press 2019) 302–18.

[23]C Thornhill, 'The Constitutionalization of Labour Law and the Crisis of National Democracy Thornhill' in PF Kjaer and N Olsen (eds), *Critical Theories of Crisis in Europe: From Weimar to the Euro* (Rowman & Littlefield 2016) 89–105.

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'a rescue'.[24] Processes of re-constitution which however in the first round were limited to Western Europe because of the Soviet dominance of Central and Eastern Europe but which has unfolded in the eastern part of the continent with full force since 1989.

In more general terms, a decisive change occurred post-1945 in that states founded post-1945 tend to be transnationally constituted states.[25] While elements and variants of this can be observed throughout Europe as well as globally in the post-1945 de-colonisation processes, the establishment of the *Bundesrepublik*, the German Federal Republic, is here the paradigmatic case. Its basic structure, in terms of territorial reach, constitutional setup and its institutions of *Soziale Marktwirtschaft* (social market economy) were constructed through a multifaceted process with local, national and transnational dimensions, with the latter represented by the allied occupation powers and later on European partners. Hence, the 'German model' of democracy and political economy cannot in its *Entstehungsgeschichte* (historical origin) be understood as a purely German model.[26] In contrast to the mix of socialist and nationalist metaphysics presented by Wolfgang Streeck, through the assigning of a transcendent status to socio-economic institutions developed and vibrant in a very particular and brief period in the post-WWII era, the post-WWII nationally embedded 'golden age' Keynesian welfare state was a dual (trans-)national construct.[27] One dimension of this was that the post-WWII nationally embedded 'golden age' Keynesian welfare state lived and thrived within the framework of the US-American security umbrella and the US-constructed Bretton-Woods system. Hence, the analytical disentanglement of 'welfare' from the 'economy' and the assignment of one to national and the other to the transnational sphere shows itself as historically reductionist and simplistic.[28]

The Western, ie US-centric, world which succeeded the euro-centric world is however itself faced with challenges today. The G7 is increasingly overtaken by the G20 and BRICS seeks to formulate an alternative to the US order. For the first time states representing a majority of the world population demand a seat at the top table. Or differently expressed: after the European configuration, the western configuration followed and now we are entering a truly global configuration.[29] The tragic war in Ukraine is here very instructive. During the equally tragic wars in ex-Yugoslavia in the 1990s, especially the war in Bosnia and Herzegovina, the ones with a 'stake' in the war, besides the inhabitants of ex-Yugoslavia, were confined to the larger EU member states France, Germany, Italy and the United Kingdom, as well as Russia and the United States. The old 'Concert of Europe' plus the United States. Besides the populations of Ukraine and Russia, the ones with a "stake" in the war in Ukraine are, in contrast, China, the EU, India, Iran, Turkey and the United States among others. Hence, the future implies a 'Concert of the Globe,' not a 'Concert of Europe'. Realpolitik will most likely be the central characteristic of this global configuration. If it goes well, it will pan out as the European configuration of the 1880s and 90s. If it goes wrong, it will be like the 1920s and 30s. Therefore, Europe is faced with new structural circumstances forcing its hand. Not reacting is not an option. Unless of course one is guided by a death wish or feels pleasure in being swallowed.

[24]For the 'rescue' thesis see A Milward, *The European Rescue of the Nation State* (2nd edn, Routledge 1999). For the re-constitution thesis see H Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury 2014), 429ff. and JE Fossum and AJ Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Rowman and Littlefield 2011).

[25]Hence, Alexandre Kojève could see the European Community as the embodiment of the idea of the end of history as originally developed in A Kojève, *Introduction à la lecture de Hegel. Leçons sur la Phénoménologie* (Gallimard [1947] 1971).

[26]As done by Wolfgang Streeck. See eg W Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford University Press 2010).

[27]PF Kjaer, 'The Transnational Constitution of National Social Market Economies: A Question of Constitutional Imbalances?' 57 (1) (2019) Journal of Common Market Studies 143–58.

[28]As pursued by Fritz Scharpf. See F Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks, FW Scharpf, PhC Schmitter and W Streeck (eds), *Governance in the European Union* (Sage 1996).

[29]See Kjaer (n 19), 34f.

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In sociological terms, this development can be understood as representing an expansion of 'modernity' in terms of the increased reliance on linear time, functional differentiation, and social abstraction through modern forms of organisation.[30] At the same, the majority of the world is currently in a grey zone, not really poor but not really rich, not really totalitarian but not really democratic.[31] In the hey-day of western centric modernization theory, Sweden and the United States were typically considered the most 'advanced' national societies which the rest of the world were seeking to 'catch up' with,[32] just as Germany and the United States were represented as the paradigmatic cases of 'coordinated' and 'liberal' economies in the Varieties of Capitalism literature. These distinctions however only make sense when tacitly assuming that the North Atlantic area is the epicentre of the world. Today that is however no longer the case. Instead, the paradigmatic type of national societies, the type of national societies most typical and characteristic of the world, are national societies like Argentina, Brazil, Indonesia, Mexico, South Africa and Turkey with China and India also sharing many of their affinities while being on their own. Or expressed in numbers: the middle class of Indonesia is rapidly approaching a size that makes it bigger than the population of France.[33] This again makes Paul-Henri Spaak's words rather prophetic: 'There are only two types of countries in Europe: small countries … and countries which are small, but don't yet know that they are.'[34]

Behind all this lies the fundamental paradox of globalisation. Increased global synchronisation and spatial reach of social processes, not only economic but also economic processes, simultaneously produces more homogeneity and more diversity. On the one hand, the interconnectivity of the world has never been denser and the interdependency so tangible. Developments in the Chinese economy has become a 'systemic factor' for the rest of the world and conflicts in Africa effect migrant flows in Europe and so on. Culturally an underlining homogenisation is also taking place.[35] But at the same time, the implosion of the euro-centric world and the current erosion of the western centric world implies a move towards a world with no obvious centre. We are entering the era of fragmented globalisation, ie a world which is both one world and many worlds at the same time.[36]

Fragmented globalisation implies that those with the will and resources to do so will establish 'strategic autonomy' by creating their own 'worlds'. Worlds which are internally synchronised through institutional regimes and where exchanges with other worlds are conditioned upon institutionalised filtering processes. From energy and financial markets to the internet and supply chains and technology as well as literally all other areas of importance, 'having one's own' becomes

[30]Ibid.

[31]PF Kjaer, 'The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law' 2 (1) (2021) Global Perspectives 1–17.

[32]RN Gwynne, 'Modernization Theory' in R Kitchin and N Thrift (eds), *International Encyclopedia of Human Geography* (Elsevier 2009) 164–68; S de Vylder, 'Sweden 1870–1995. The Rise and Fall of the 'Swedish Model''. A report commissioned by UNDP, Human Development Report Office, Stockholm, October 1995, published by UNDP Human Development Report Office, Occasional Papers no. 26, New York 1996 <https://hdr.undp.org/system/files/documents/stefandevylder.pdf> accessed 6 November 2024.

[33]'Aspiring Indonesia – Expanding the Middle Class'. *The World Bank*, 2019, 81ff <https://www.worldbank.org/en/country/indonesia/publication/aspiring-indonesia-expanding-the-middle-class> accessed 6 November 2024.

[34]Quoted after speech of Charles Michel on 28 September 2020: 'Strategic autonomy for Europe – the aim of our generation', Brugel Think Tank <https://www.consilium.europa.eu/en/press/press-releases/2020/09/28/l-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/> accessed 6 November 2024.

[35]JW Meyer et al., 'World Society and the Nation-State' 103 (1) (1997) American Journal of Sociology 144–81.

[36]PF Kjaer, 'Facilitating Transfers: Regulatory Governance Frameworks as "Rites of Passage"' 24 (5) (2018) Contemporary Politics 507–23. Seemingly the term 'fragmented globalisation' has so far only been used to refer to the economic dimension of globalisation. See eg MA El-Erian, 'Fragmented Globalization', *Project Syndicate*, 8 March 2023 <https://www.project-syndicate.org/commentary/globalization-not-ending-but-becoming-more-fragmented-by-mohamed-a-el-erian-2023-03?barrier=accesspaylog> accessed 6 November 2024. See also K Zeng and X Li, *Fragmenting Globalization. The Politics of Preferential Trade Liberalization in China and the United States* (University of Michigan Press 2021).

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the mantra. As such strategic autonomy is an issue of securitisation as developed by the Copenhagen School of international relations in the 1990s.[37] So while this reconfiguration of globalisation indeed is 'societal' involving processes exceeding states and their control the consequence will most likely not be single societal constitutions for the internet, global mass media, global finance, global value chains and so on.[38] Rather there are likely to emerge fragmented constitutionalised regimes like a Chinese internet constitution, a European internet constitution and a US-American internet constitution and so on. The Varieties of Capitalism *problématique*, though more adequately called a variety of modernity *problématique*, reappears as a global not a North Atlantic phenomenon.

4. Facing the future through transformative law

The implications of fragmented globalisation for the EU are hard to overestimate. The EU is currently dealing with the largest military conflict in Europe since WWII, a related energy supply crisis, combined with generally instable supply and value chains, an ambitious 'green transition', the loss of its financial centre due to Brexit, a half-finished EMU which, if to be sustained, will need to be complemented by a substantial fiscal component, continued flows of migrants and refugees, an erosion of rule of law in certain Member States, while also falling behind in technological competition with China and the United States among other things. On top comes the systematic uncertainty about the future of the United States. Europe currently relies on a security umbrella which might or might not be effective after the recent US-American presidential election, thereby making the unpredictability of US politics the largest strategic security concern for Europe. Simply tossing a coin and hope for good luck is not an option. No matter how much foot-dragging Europe mobilises, circumstances will force it to mobilise autonomous resources capable of securing not only its territorial defence but also its capability to intervene in conflicts in its immediate neighbourhood from North Africa over the Middle East, Western Balkans to the former Soviet Union and even further beyond. On top are structural problems related to demographics and low economic growth, while maintaining generous welfare regimes and a vibrant democracy. Each of these challenges is a major one and addressing a single of them requires sustained efforts, combining the mobilisation of massive societal resources, meticulous planning, sustained political will and not least a common European approach. In addition, they are entangled. The military security situation is entangled with energy security, which in turn plays into the possibility of a green transition and a green transition will require massive amounts of capital which are preconditioned by the existence of deep unified capital markets and so on. Classical functional spill-over at work as predicted by classical functionalist integration theory.[39] The problems are moreover of a nature which cannot be solved by putting an explanatory label on a bottle of liquor.[40] In short, the challenges Europe is facing are far beyond something that can be addressed through conflicts law, as conflicts law assumes the existence of sovereign and clearly demarcated nation states. The degree of entanglement already present within the euro-zone and the initiatives needed to address contemporary challenges however goes beyond such a setup.

This raises the question, what the adequate approach might be? It is in this context that transformative law is emerging as a possible contender, ie as an episteme combining a concept of law and a legal praxis.[41] The core concept of transformative law is 'sustainability'. While

[37]O Waever, 'Securitization and Desecuritization' in RD Lipschutz (ed.) *On Security* (Columbia University Press 1995) 46–86.

[38]G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

[39]E Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford University Press 1964).

[40]Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* EU:C:1979:42.

[41]PF Kjaer, 'What is Transformative Law?' 1 (4) (2022) European Law Open, 760–80. For empirical applicability and further development of the concept see PF Kjaer, 'Five Variations of Transformative Law. Beyond Private and Public Interests' 2 (16) (2023) Erasmus Law Review 1–7 and PF Kjaer, 'Three Models of Transformative Law', *Transformative Private Law Blog*, 24 April 2024 <https://transformativeprivatelaw.com/three-models-of-transformative-law/> accessed 6 November 2024.

https://doi.org/10.1017/elo.2024.24 Published online by Cambridge University Press

'sustainability' originates from an environmental discourse, the sustainability lens has spread to all societal domains and policy areas. It is on this background that a legal conceptuality of sustainability, compatible with and connecting ecological, economic, security and welfare-oriented sustainability discourses is emerging. Sustainable finance policy, as unsuccessfully pursued within the EMU framework, sustainable migration and sustainable welfare are just a few examples. Transformative law therefore implies the development of institutional formations that are both coherent and meaningful for society as a whole and capable of maintaining their vibrancy over time. The focus on 'society as a whole' moreover implies a close analytical link to *Gesellschaftstheorie* (general theory of society) and the reinstalment of a concept of society as the point of departure for legal thinking and practice.[42] It thereby serves as an alternative to the dominant dual – essentially US-American – episteme consisting of human rights law and law and economics; a dual episteme which does not contain or depart from a concept of society. Instead human rights law and law and economics respectively depart from the complementary concepts of aggregated individual rights and aggregated individual preferences.[43]

The reason why transformative law might take centre stage is however in the implications of a sustainability focus as this requires not only a focus on 'society as a whole' but more specifically on the coherency of society through an aligning of external securitisation and internal sustainability. A move which however implies a profound recalibration of legal conceptuality, in terms of both the core societal unit which is considered the object of law, the forms of rights, and the sort of interlegality, as in Joerges's approach, which are central to establishing coherency in a complex world with many sources of power, legitimacy and law.[44]

From a constitutional theory perspective, transformative law carves a third way between traditional state-centric constitutionalism and societal constitutionalism.[45] The oeuvre of Joerges is very much committed to and relying on the former and with it '*alteuropäische Semantik*' (old European semantics),[46] as expressed in the vocabulary and conceptuality of 'nation state', 'sovereignty', 'democracy' and '*Rechtsstaat*' ('state of law') among others. A vocabulary which is essential Hegelian in its first systematic conceptualization.[47] Weber's later theory, which Joerges relies on, was very much a further development of this foundation.[48] The reliance on '*alteuropäische Semantik*' is however not particular for Joerges. On the contrary, it has remained the dominant vocabulary of law and the social sciences to this day just as it provides the essential components of public imagination and concrete societal practices and policies. So even if theoretical advancements have taken place providing more suitable scientific tools and lenses it remains of outmost importance due to its substantial performative effects.

As an alternative the theory of societal constitutionalism offers itself.[49] The variant of societal constitutionalism advanced by Gunther Teubner focuses on the role of law in forming and

[42]PF Kjaer, 'How to Study Worlds: Or Why One Should (Not) Care About Methodology' in M Bartl and JC Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022) 208–22.

[43]Kjaer, 'Five Variations of Transformative Law' (n 41) p 2.

[44]For an outline of such recalibration see Kjaer, 'What is Transformative Law?' (n 41) 768ff.

[45]Kjaer (n 19).

[46]N Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp Verlag 1997) 931ff.

[47]It is surprising that Hegel and his *Rechtsphilosophie* (Philosophy of Rights) does not seem to appear anywhere in Joerges's oeuvre as his theory very much can be considered as embodying the view of the world found there. The only reason Weber and not Hegel has run with the prize as the most prominent embodiment of old European semantics is probably that the emergence of sociology as an independent discipline and the social sciences in general allowed for a disengagement with the 'philosophical' Hegel. But more importantly is probably the launch of the Americanized version of Weber's work in the 1950s making it the central foundation of American social sciences.

[48]See, for example, for his theory of bureaucracy: CKY Shaw, 'Hegel's Theory of Modern Bureaucracy' 86 (2) (1992) The American Political Science Review 381–9.

[49]D Sciulli, *Theory of Societal Constitutionalism. Foundations of a Non-Marxist Critical Theory* (Cambridge University Press 1991); D Sciulli, *Corporate Power in Civil Society. An Application of Societal Constitutionalism* (New York University Press 2001); Teubner (n 38).

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sustaining societal constitutional formations delineated along functional lines. While Joerges adopts a nation-state centric perspective, Teubner, in another very German attempt to handle the discomfort associated with the nation-state, downplays the role of states and public law and policy as much as possible. The true drivers of societal evolution are instead to be found in the internal dynamics of constitutionalized 'private' regimes.[50] But the two musketeers from Bremen – with the third one being Karl-Heinz Ladeur[51] – both seem to overemphasize the angles they seek to promote. Looking at factual societal developments, the most dominant and 'successful' institutional formations rather seem to combine state-centric and societal constitutionalism. The *Wirtschaftswunder* (the economic miracle) and *les trente glorieuses* (the thirty glorious years) were conditioned by a combination of factors, including demographics, ideology, technological developments, the US-American security umbrella among others. But it was also characterized by a moment where the stars aligned through a convergence of state-centric and societal constitutionalism in the neo-corporatist form. Societal, typically profession-based, self-regulation unfolded within legal frameworks and *Verhandlungssysteme* (frameworks of negotiation) made it compatible with state-centric constitutionalism.[52] An aligning of the stars that – depending which context one looks at – has been either outright disrupted or faced with erosion over the past 50 past years. Disruptions and erosions which can be traced back to a combination of partially similar factors such as demographics, ideology, technological developments as well as intensified globalization. The EU legal order moreover owes its particular, and when viewed over the long-term, impressive, dynamics to the way it combines governing and governance, ie hierarchy and heterarchy. A combination through which its embeddedness in society is secured while also using the governance dimension as transmission belts through which transplants, including but not limited to legal transplants, are transposed out in society.[53] In short, the EU is the central contemporary example combining public, ie state-centric, and societal constitutionalism and as such the EU can also be considered a hybrid three-dimensional structure combining a vertical dimension between the EU legal order and its member states, a horizontal dimension between its member states and a second horizontal dimension between the wider functional delineated spheres of society.[54]

It follows from the above that the EU might be the central contender for the role as the primary source and context for transformative law.[55] Duncan Kennedy famously distinguished 'classical legal thought' of a mainly German origin, 'social law' mainly derived from a French context, and the sort of US-American legal thinking associated with the dual episteme of human rights law and law and economics which has been dominant in the last 50 years.[56] The central question is not only what will follow this dual episteme but also what the source and context will be. EU law has in this respect several traits providing it with structural advantages. The EU legal order is an organic legal order characterized by an impressive dynamic fuelled by the consistent and increasing demand for transnational norms. Around it a new epistemic community of transnational lawyers has moreover emerged,[57] just as EU law provides central impetus to the transformation of legal

[50]Ibid.

[51]For an appreciation see PF Kjaer, 'Embeddedness through Networks – A Critical Appraisal of the Network Concept in the Oeuvre of Karl-Heinz Ladeur' 10 (4) 2009 German Law Journal 483–99.

[52]H Wilke, *Ironie des Staates. Grundlinien einer Staatstheorie polyzentrischer Gesellschaft* (Suhrkamp Verlag 1995).

[53]PF Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Hart Publishing 2010).

[54]PF Kjaer, 'Three-dimensional Conflict of Laws in Europe' 2 (2009) *ZERP – Discussion Papers*. For the combination of public and societal constitutionalism see also H Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005).

[55]Kjaer, 'What is Transformative Law' (n 41) 779.

[56]D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19–73.

[57]A Vauchez, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 151ff.

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scholarship and education.[58] Von Savigny's trinity of the organic formation of law, the legal profession and legal science itself re-emerges in a new variant within the context of EU law. But more profoundly than this, EU law is characterised by a duality by being both regional and global – or even 'cosmopolitan' – at the same time.[59] In terms of substance, EU law moreover is the avant-garde structure spearheading the most progressive forms of regulation from 'artificial intelligence'[60], 'data protection'[61] over 'due diligence in value chains'[62] to the 'green transition'[63] just to mention a few. Regulation which tends to obtain de facto global reach.[64]

Underneath the EUs efforts, the question of power, ie resources and institutional capabilities however looms. The mainstream view guiding global public opinion is that the stand-off between China and the United States will be the dominant cleavage around which global society will turn for the foreseeable future.[65] That might be true. But just as the 13 colonies placed on the periphery of the *Ius publicum europaeum* were a highly unlikely contender for the status as the centre of the world when they declared independence on the 4th of July 1776 so might the EU potentially end up surprising the world. It took 114 years from the Declaration of Independence until the United States obtained the status of the largest economy in the world and 165 years until the United States took over global leadership in 1941 as symbolically manifested in the declaration of the Atlantic Charter on 14 August 1941. To the extent that the 1950 Schuman Declaration can be considered the functional and normative equivalent to the Declaration of Independence, one notes that 74 years have passed since it was put on the table. In comparison 74 years after the Declaration of Independence, in 1850, the tensions leading to the American Civil War 11 years later were already visible and making contemporary tensions in the EU look minor in comparison. As for the 114 years that passed until the United States gained the status as the largest economy in the world and the 165 years before it took over global leadership the respective years for the EU would be 2064 and 2115.

While pedagogically instructive, linear structured projections like the ones presented above are of course of limited value. More importantly, EU law offers an institutional and normative template for handling interdependencies and collisions in an ever more compressed and compact world. The new 'Concert of the Globe' is replaying Europe of the late 19th century, but Europe, as described so meticulously by Joerges in his Comitology studies, is already far beyond that sort of thinking in the world view guiding it in its internal organisation and institutional setup.[66] For functional and normative reasons, possibly after several suicide attempts, the other regions of the globe and the globe in its entirety might eventually go down the same path as Europe. While Europe's first performance as lead instigator of globality from 1492 to 1941 was marred by the atrocities it created, Europe might, if learning enough from its past, be able to redeem itself in the

[58]M Bartl and C Leone, 'The Politics of Legal Education' in M Bartl and JC Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022) 159–76.

[59]H Brunkhorst, 'Solidarität in der Krise: Ist Europa am Ende?' 29 (4) (2011) Leviathan 459–77.

[60]Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[61]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[62]Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

[63]See 'The European Green Deal: Striving to be the first climate-neutral continent' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en> accessed 6 November 2024.

[64]A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[65]E.g. M Wolf, 'US-China relations have entered a frightening new era', *Financial Times*, 25 April 2023 <https://www.ft.com/content/00d033a8-2a8d-4858-8eae-bf5e5966d1c4> accessed 6 November 2024.

[66]Joerges (n 1) 161ff.

https://doi.org/10.1017/elo.2024.24 Published online by Cambridge University Press

second round. An endeavour which however requires, as already outlined by Edmund Husserl just before the darkest hour of Europe took hold, a return to reason although now as a global and not as a European vocation:

> 'The crisis of European existence can end in only one of two ways: in the ruin of a Europe alienated from its rational sense of life, fallen into a barbarian hatred of spirit; or in the rebirth of Europe from the spirit of philosophy, through a heroism of reason that will definitively overcome naturalism. Europe's greatest danger is weariness.'[67]

A global perspective however implies that the EU is only one dimension of a bigger puzzle.[68] Societal evolution operates in the schema between variation, selection and re-stabilization.[69] The globalisation waves that have unfolded over the past 500 plus years are a clear example of this. Globalisation has unfolded in a two step forward and one step back mode. The world is currently taking one step back, as expressed in the fragmentation of globalisation, increasing the pressure for an institutional re-stabilisation of social processes. In complex terminology, one might say that a second order normative stabilisation of first order cognitive processes is in demand. A form of second order normative stabilisation which is the very purpose of constitutionalism.[70]

Both in national, European and global contexts, recasting the constitutionality of public and private power will have to occur if the stars are to align again. Achieving that is however conditioned by a conceptual loosening of the concept of public power from the concept of the state. Albeit the most important, states are just one type of institutional repositories of public power. The EU, for example, is another. But going further than that: public power is a particular form of power within the broader category of societal power. Distinct because of five characteristics: First, abstraction. Public power is constructed with the purpose to detach the exercise of power from specific individuals and their particular interests.[71] Second, acting as an alternative to particularistic interests, generality. Public power is deployed based on a claim to be binding for *everyone* within a jurisdiction. Thirdly, equality on the basis of the presumption that equal cases are treated equal. Fourthly, particularness, ie public power is linked to concrete problem constellations and functions be it traffic rules or food safety standards. Fifthly, non-retroactiveness, ie a structural orientation towards the future rather than the past on the basis of linear concept of time.[72] Hence, public power is legally constituted as it is its legal form that differentiates it from the broader category of societal power. Such legally constituted power is moreover present wherever its characteristics are present. The easiest way to identify where public power is appearing and to know where it stops is therefore to see where administrative law or functional and normative equivalents to administrative law, in its state-centric, global[73] and private[74] variants are present. It follows that not only the EU but also formally private universal labour market institutions such as those associated with neo-corporatism, the Catholic Church

[67]E Husserl, *Phenomenology and the Crisis of Philosophy* (Q Lauer tr, Haper 1965), 192. The quote is from Husserl's 1935 'Vienna Lectures.'

[68]For this particular understanding of constitutionalism see Kjaer (n 19) 76ff.

[69]Luhmann (n 46) 456ff.

[70]See Kjaer (n 19) 76ff.

[71]See also PF Kjaer, 'The Law of Political Economy: An Introduction' in PF Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 1–30, 7.

[72]This is a condensed and simplified perspective. For ten dimensions of legally constituted public power see; PF Kjaer, 'European Crises of Legally-Constituted Public Power: From the 'Law of Corporatism' to the 'Law of Governance'' 23 (5) (2017) European Law Journal 417–30, 219ff.

[73]S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' 37 (2005) New York University Journal of International Law and Politics 663–94; B Kingsbury et al, 'The Emergence of Global Administrative Law' 68 (2005) Law and Contemporary Problems 15–62.

[74]R Vallejo, 'After Governance? The Idea of a Private Administrative Law' in PF Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 320–47.

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and profession-based institutional formations and a broad host of other institutional formations can be considered as repositories of legally constituted public power. Arriving at a sustainable society is however conditioned by the alignment of the manifold repositories of public power irrespective of their national, regional (eg European) or global reach and irrespective of their formal private or public anchoring.

5. Perspectives: facing the world through conflicts law

If the EU is 'far beyond conflicts law' does this mean the end to the relevance of conflicts law in general and the Joerges version in particular? This is far from the case. The modern version of *Internationales Privatrecht* (international private law), which has conflicts law as its central methodology, emerged with von Savigny and consorts and gained centrality in praxis during the heyday of eurocentrism in the second half of the 19th century. The European configuration was a configuration of *Realpolitik* and *Internationales Privatrecht* and its conflicts law was the legal complement of *Realpolitik*. The new global configuration we are entering is also a configuration of *Realpolitik*. The paradoxical structure of fragmented globalisation, being simultaneously one world and many worlds, implies that the sort of interdependencies, overlaps and conflicts that provide the material substance on which *Internationales Privatrecht* unfolds itself is likely to be richer and more fertile than ever. As such conflicts law is likely to have a golden future.

Joerges's internalist EU conflicts law perspective however differ from traditional *Internationales Privatrecht*. Both presuppose a certain cultivation, a shared worldview, and cultural affinities.[75] In the Joerges version this however becomes even stronger as Comitology and other institutional fora allow for the emergence of a culture of 'mutual responsiveness'.[76] The Joerges version in other words presupposes the existence of a dense institutional infrastructure, which is not existent to the same degree in the global configuration. The global *Konfliktlage* (conflictual situation) of the future is however likely to require the development of such institutional infrastructures. Hence, as alluded to above, comitology might be regarded as an institutional avant-garde structure with a potential for replication.

But also inside Europe conflicts law is likely to re-emerge. The challenges Europe is facing might be 'far beyond' conflicts law. But Europe is an elastic concept. Who knows where 'Europe' ends? Throughout history, North Africa, Russia and Turkey have at times been considered 'European' and at times not. Europe's history of global entanglements moreover means that the EU is present throughout the world. The EU has 13 Overseas Countries and Territories associated with it.[77] But more importantly the circumstance of *Realpolitik* means that the EU is likely to be forced out in another round of enlargement reaching thirty plus members in the foreseeable future. An enlargement also involving a large country such as Ukraine. Consequently, the EU would have no option than to differentiate internally. Pre-Brexit three visions existed of the EU: UK's 'broad but diluted', France's 'core Europe' and Germany's attempt to square the circle between these two, thereby also strategically positioning Germany at the centre. As also proposed recently by the French/German working group on EU institutional reform, concentric circles consisting of the Eurozone, EU members, associate members (single market membership) and the European Political Community, seems the only viable route ahead.[78] An approach which for the associate membership, in principle, will allow for expansion with no or few limitations, thereby

[75]Von Savigny therefore limited his analysis to the part of the world dominated by Christianity. See also H-P Haferkam, 'Christentum und Privatrecht im Vormärz' in N Jansen und P Oestmann (eds) *Rechtsgeschichte heute. Religion und Politik in der Geschichte des Rechts, Schlaglichter einer Ringvorlesung* (Mohr Siebeck 2014) 181–91.

[76]Joerges is following Jotte Mulder here. See, Joerges (n 1) 110.

[77]<https://international-partnerships.ec.europa.eu/countries/overseas-countries-and-territories_en> accessed 6 November 2024.

[78]Report of the Franco-German Working Group on EU Institutional Reform: 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century', p. 36 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.auswaertiges-amt.de/blob/2617206/4d0e0010ffcd8c0079e21329bbbb3332/230919-rfaa-deu-fra-bericht-data.pdf> accessed 6 November 2024.

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potentially contributing to the cultivation of a culture of 'mutual responsiveness' reaching beyond Europe proper. In this, quasi already existing reality, the 'diagonal conflicts' at the heart of Joerges' conflicts of law approach are likely to reappear. The centre, in particular the eurozone, might be well beyond conflicts law but for the 'larger Europe' and for the rest of the globe conflicts law, especially in the Joerges variant, remains a promising approach. Not least because his core concerns concerning the future of democracy and the welfare state are more relevant than ever.

Data availability statement. None.

Acknowledgements. I thank the editors of the symposium for useful comments on an earlier draft.

Funding statement. This work was supported by the European Research Council Advanced Grant Project 'Global Value Chain Law: Constituting Connectivity, Contracts and Corporations (GLOBALVALUE). Grant agreement ID: 101054237.

Competing interests. The author has no conflicting interests to declare.

Cite this article: PF Kjaer, 'From conflicts law to transformative law: facing 'fragmented globalisation'' (2025) *European Law Open* **4**, 104–117. https://doi.org/10.1017/elo.2024.24

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