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DOI
10.1017/elo.2025.13

Publication date
2025

Document Version
Final published version

Published in
European Law Open

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Link to publication

Citation for published version (APA):
Beckers, A., & Bogoeski, V. (2025). Law, conflict and transformation: debating European law and policy. *European Law Open*, *4*(1), 1-6. https://doi.org/10.1017/elo.2025.13

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Download date:06 Oct 2026

European Law Open (2025), **4**, 1–6
doi:10.1017/elo.2025.13

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

Law, conflict and transformation: debating European law and policy

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(Received 5 February 2025; accepted 20 February 2025)

Keywords: EU Law; conflicts-law constitutionalism; Economic Constitution; Christian Joerges

European law is at a critical turning moment, both internally within the Union and externally with respect to its place in the world. Following major global and EU crises and conflicts, the place of the EU and its law becomes increasingly debated, contested and reconfigured. This may be a good moment to reflect, revisit and debate the fundamental theoretical concepts that have shaped the discourse around EU law, to investigate their legacy and their relevance and validity for today's changing legal and policy landscape. This symposium centres on Christian Joerges's work on conflicts-law constitutionalism, recently compiled in the book 'Conflict and Transformation'.[1] Our aim is to spark discussion on the critical notions and concepts that shaped a pivotal period in European law and to explore how they might contribute to current debates about the role of the EU, Europe, and its legal and policy frameworks both internally and in the global setting.

The contributions are taking two distinct perspectives. First, they explore what is the intellectual, political and legal legacy of the theoretical approach imagining European laws as conflict of laws, and how this conceptual apparatus can and should be used to understand current conflicts within the EU. Second, how can conflicts-law constitutionalism help understand the future and, specifically, the role of the EU in an ever-more differentiated and fragmented world in which conflicts play a central role?

1. The legacy of conflicts-law constitutionalism within Europe

Christian Joerges's idea of conflicts-law constitutionalism developed at a particular time and within a particular conflicting space in the EU. It was a proposal made against the background of an experienced 'dark history' in Europe and was developed in the particular intellectual context of the 1960s.[2] It rests on earlier, quite revolutionary, new approaches to private international law, ie, Rudolf Wiethölter's proposal to view conflict of laws beyond the technical confines of private

[1]C Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart Publishing 2023).

[2]For a broader context, see C Joerges and NS Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing 2003).

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international law, as a mode of working with 'collisions',[3] and Brainerd Currie's revitalising of governmental interests in private international law.[4] Can we not apply such modes of thinking and develop them for the specific types of conflicts that the political and legal design of the EU has brought? We can and we should see Europe's constitutional form as one of conflicts of law. This was, as Joerges himself observes, the 'irritating message' that he put forward. Europe's constitutionalism is one about three dimensions of conflict of laws, namely, horizontal between the Member States, vertical through the primacy and direct effect of EU law, and diagonal when the different levels lead to contradictory demands.[5]

The conflicts addressed in Joerges's scholarship on European integration, although expressed as conflicts of laws across the three dimensions outlined above, go far beyond law. Joerges was one of the pioneering legal scholars to seriously engage with the inter-disciplinary tensions surrounding the European integration process, including those between law, economics, and political science. His work challenges what Turkuler Isiksel frames in her contribution as 'epistemological privilege', namely the idea that any single discipline can provide a definitive interpretation of European integration – what it is, what it should aim to achieve, and how it ought to be legitimised.[6] That is what Joerges's conflicts-law constitutionalism sets out to do – take the law seriously and study it through incorporating insight from the other disciplines, resulting in conflicts-law constitutionalism being a framework suited to study doctrinal developments in EU law and at the same time accounting for the institutional power dynamics in the changing political economy of the European integration process.

As Isiksel further observes, Joerges's work helps debunk several myths surrounding the interpretation of European integration and his ambition with conflicts-law constitutionalism is to develop a framework that won't be limited to those myths. Therefore, contrary to claims of early scholarship on European integration, and European law in particular, his work challenges the misconception that market integration, achieved through the delegation of competences to supranational institutions, is a politically neutral project. Moreover, his work critiques the idea that this delegation of competences is constitutionally neutral.[7] Instead, Joerges's scholarship is anchored in both acute awareness and respect for the diversity of polities and institutions with their unique historical trajectories entangled in the European integration process. Isiksel reminds us that this awareness is at the core of Joerges's critical and self-reflexive approach that emphasises democratic deliberation and legitimacy in managing conflicts. His scholarship is teaching us that, as the EU grows into a transnational polity of its own, the goal should not be to eliminate conflict and reduce diversity by furthering harmonisation and uniformity (his writings on the governance of the Eurozone crisis make this particularly clear), but rather to learn how to manage diversity in democratically legitimate ways. Isiksel's contribution highlights that Joerges's adaptation of the 'conflict of laws' approach to study the EU's multilevel governance dynamics exemplifies precisely this perspective, offering a framework to mediate plurality and discord – an approach that deepens our understanding of the aspirations and concerns surrounding the European integration project.

[3]R Wiethölter, 'Proceduralization of the Category of Law' in C Joerges und DM Trubek (eds), *Critical Legal Thought. An American–German Debate* (Nomos 1989) 501–10.

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

[5]See C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective' 3 (4) (1997) European Law Journal 378, 398–400.

[6]T Isiksel, 'Unpacking the Beast of Burden: Joerges on the Constitutional, Political, and Epistemological Baggage of European Integration' in this issue.

[7]See more in T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016).

A. Vertical conflicts and the democratic deficit

A driving force behind Joerges's scholarship and the initial background for the understanding of EU law through conflicts-law constitutionalism are the variety of vertical conflicts between economic governance at supranational level and the diverse democratic and social institutions of individual Member States. Guided by his genuine curiosity about the intellectual history of the political economy of Europe as a space of diversity and conflict with unique economic, political and legal institutions, deeply rooted in specific local realities, Joerges seeks to understand European law as an institution with a dual character – as something that has created these tensions in the first place but also as a tool that could possibly resolve the tensions that arise between that diversity of unique institutional approaches and the drive for uniform and ever more complete economic integration at supranational level.

His scholarship highlights how this perennial conflict – between supranational economic goals and the particularities of Member States' social and democratic structures – is central to the debates on the democratic deficit and political legitimacy of the EU integration process. Law, including European private law (see part II of "Conflict and Transformation"), has played a critical role in advancing the EU's market-building and economic integration objectives. Joerges's scholarship locates some of the central issues currently questioning the legitimacy of European integration in the process described as 'integration through law',[8] that, according to him, had led to instrumentalising law to serve market building goals, often at the expense of broader democratic and social considerations, and the integrity of law itself.

Joerges has illustrated these tensions in his studies of the 2008 financial crisis and the following sovereign debt crisis in the Eurozone spanning over a decade with consequences still felt across Member States today. He notes how these crises exposed the limits of law's capacity to mediate political conflicts, leading to instances where political decision-making overwhelmed legal frameworks – a situation he describes as the place 'where the law runs out',[9] risking the undermining of law's own integrity and legitimacy. While Joerges initially saw potential in deliberative practices within supranational institutions, such as those developed under the concept of 'comitology' (see Chapter 12 in "Conflict and Transformation"), these mechanisms proved insufficient to address the profound democratic legitimacy challenges that emerged during the crises. The shortcomings of these practices underscored the need for more robust frameworks to manage conflicts and ensure democratic accountability within the EU. Anna Peychev's contribution to this symposium explores how Joerges's conflicts-law constitutionalism can illuminate these issues.[10] Examining the Economic and Monetary Union (EMU), Peychev grapples with the question: how much unity can Europe's diversity sustain? She highlights the inherent tension in the EMU's rules, which reflect two competing worldviews of constitutionalism. While the theory of EMU protects the principle of equality among Member States, in practice, the overarching pursuit of price stability renders some states 'more equal than others'. Peychev explores whether conflicts-law constitutionalism can recalibrate unity and diversity, reclaiming space for national collective choice without overburdening the law. While agreeing that there is potential to conflicts-law constitutionalism given the legal consequences of the Eurozone crisis, Peychev cautions us to consider three obstacles that might make conflicts-law constitutionalism

[8]See C Joerges, 'Integration Through Law and the Crisis of Law in Europe's Emergency' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 299–338.

[9]C Joerges, '"Where the Law Runs Out": The Overburdening of Law and Constitutional Adjudication by the Financial Crisis and Europe's New Modes of Economic Governance' in S Garben, I Govaere and P Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019) 168.

[10]A Peychev, 'Conflicts-Law Constitutionalism in the EMU: How Much Unity Can European Diversity Sustain?' in this issue.

difficult to apply in practice: the further limited national space, the technocratisation of law, and the current political power dynamics in the EMU.

B. The economic constitution and social Europe

Joerges's reflections on the above conflicts and pursuit of a suitable theoretical framework to study the role of (European) law in both creating and resolving them, extend into a unique study of the European Economic Constitution. That endeavour will result in a sophisticated and interdisciplinary analytical framework for the study of the role of law in European integration and possibly a core legacy of his scholarship. An approach that was clearly ahead of its time, now offering foundations for the currently rising law and political economy (LPE) movement and scholarly approach in Europe,[11] further combining economic sociology of European law and historiographies of European integration.

Sabine Frerichs's contribution traces this theoretical and disciplinary richness of Joerges's work, emphasising its normative commitment to a better, more socially conscious Europe.[12] Frerichs reconstructs Joerges's interdisciplinary approach, which spans his early engagement with the political dimension of private international law and Habermas's theories on law and democracy to his Polanyian reflections on the place of law in navigating the relationship between market and society in the EU as a rapidly developing project of large-scale economic and political integration. Influenced by Karl Polanyi's understanding of markets as polities,[13] Joerges dedicated much of his later scholarship to studying the tensions between supranational market building and the so-called 'European social model', a unique combination of supranational, but predominantly national and local social institutions, highlighting law's pivotal role in those conflicts throughout the history of European integration, particularly in the aftermath of the financial crisis.

Steven Klein's contribution further demonstrates the contemporary relevance of Joerges's frameworks.[14] Klein explores how conflicts-law constitutionalism, informed by Polanyi's insights on the effects of commodification of 'fictious commodities' (particularly labour and money), can be applied to current European integration challenges. Klein examines the role of law in both the commodification and marketisation processes that unfolded during the financial crisis and the incremental attempts to address the ensuing legitimacy crisis. Examples of such attempts include the revision of the Posted Workers Directive,[15] the Minimum Wage Directive,[16] and the European Pillar of Social Rights. Klein, although realistic about the obvious shortcomings of the social embedding that these instruments can provide in the European context, demonstrates how they at least reflect efforts to strengthen the social dimension of European integration while navigating ongoing conflicts. Although cautious to speak of a double movement in a narrow Polanyian sense, Klein's contribution again highlights the value of Joerges's interdisciplinary framework for studying the role of law in the conflicts inherent to European integration and demonstrates how his scholarship challenges disciplinary silos and offers a critical lens to understand how law mediates the tensions between market expansion,

[11]See I Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' 1 (2) (2021) Journal of Law and Political Economy 301.

[12]S Frerichs, 'Europe's Unheeded Vocation: From Reconstructive Vision to Counterfactual Critique' in this issue.

[13]See C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing 2011); C Joerges (ed), *The Economy as a Polity: The Political Constitution of Contemporary Capitalism* (Routledge 2005).

[14]S Klein, 'A Transnational Double Movement? Polanyian Reflections on Conflicts Law Constitutionalism' in this issue.

[15]Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173. See V Bogoeski, 'The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe' 2 (1) (2021) Global Perspectives 1.

[16]Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275.

societal needs, and political legitimacy. As the EU continues to grapple with internal and external crises, the insights of Joerges's scholarship remain vital for navigating the complex and evolving landscape of European law and policy.

2. Conflicts-law constitutionalism under differentiation and globalisation

Many of the contributions in this symposium analyse the theoretical background of conflicts-law-constitutionalism and show its central relevance for understanding core EU political and legal questions, such as the role of diversity or European integration. At the same time, the contributions all seem to also share a sense of uncertainty about the current situation in and of Europe and thus ponder the relevance of conflicts-law constitutionalism in, ironically, a world of conflicts. Can conflicts-law constitutionalism perhaps provide us with, if not an answer, then at least a viable direction on how to understand and bear with such global conflicts? The contributions in this symposium also provide a starting point for discussing such endeavours from different perspectives.

Steven Klein integrates in his Polanyian take on conflicts-law constitutionalism the distinctly global perspective that focuses on the possibilities of a transnational double movement. In the end of an intervention that centres the relation between markets and politics in the EU, Klein speculates about the possibility of a transnational double movement in the Polanyian sense and as developed by Joerges for Europe. Although noting the global move away from market incentives and states turning to industrial policy in light of global crises, Klein remains careful to see this as a fully-fledged re-embedding of markets and ends by suggesting that a more 'fundamental constitutional reimagining' is necessary if we were to take conflicts-law constitutionalism seriously in the transnational arena.

Gunther Teubner's contribution[17] engages with conflicts-law constitutionalism in relation to his own theory of societal constitutionalism.[18] For this purpose, Teubner moves the horizontal, diagonal and vertical conflicts within Europe into a context of expansive tendencies of (transnationalised) social systems, specifically the economic system and with it, powerful private actors and the resulting conflicts. The expansion of social systems, he suggests, leads to massive transnational conflicts between sectors that a conflict-oriented theory of constitutionalism needs to bear with. Relying on Joerges's three-dimensional perspective of conflicts, Teubner exemplifies how conflicts-law constitutionalism could work in the different dimensions of Europe's digital constitutionalism: recognising the democratic potential of societal initiatives for Open Access to counter business capture, coordination of societal rationalities in the regulation of generative AI, recognition of digital technology as an own rationality and regulatory undertaking.

Quite similarly, Poul Kjaer takes on the task to translate conflicts-law constitutionalism into one of today's most significant problem constellations.[19] Having a similar theoretical understanding in functional differentiation and fragmentation of orders to Teubner, Kjaer's interest lies in the potential of conflicts-law constitutionalism as a theoretical construct to place Europe in the world. In this context, Kjaer argues that the concept has had a 'blind angle' by means of an inward-looking on Europe's political and legal past, ignoring Europe's transnational, including colonial, embedding. Relatedly, in relation to Europe's future, Kjaer suggests that we may need to move away from conflicts-law, to a perspective on

[17]G Teubner, 'Expanding Europe's Conflicts-Law Constitution: Against Negative Externalities of Dominant Function Systems' in this issue.

[18]G Teubner, *Constitutional Fragments. Societal Constitutionalism in the Globalization* (Oxford University Press 2012).

[19]PF Kjaer, 'From Conflicts Law to Transformative Law: Facing "Fragmented Globalisation"' in this issue.

transformative law, a concept that he has developed elsewhere more extensively.[20] What we can see in both these contributions are productive connections between conflicts-law constitutionalism and recent theoretical attempts to understand the role of Europe in a global and fragmented society.

Finally, in an essay emphasising perspective and positionality, Maria Weimer continues in a similar direction.[21] Her engagement with Joerges's conflicts-law constitutionalism is developed against the background of newer debates on the EU as a global public and private regulator,[22] and engages in a search for the related transnational democracy. In this regard, Weimer suggests both reliance and further development, possibly transformation, of Joerges's ideas to fit the global perspective with the recognition of new transnational political communities inspired by the European heritage.

Read together, the contributions all provide important perspectives on how we can navigate a future Europe in the world with its conflicting legal orders, regulatory ambitions as well as their dark legacies. For these perspectives, conflicts-law constitutionalism has been an influential theoretical framework and indispensable starting point.

Competing interests. The authors have no conflicts of interest to declare.

[20]PF Kjaer, 'What Is Transformative Law?' 1 (4) (2022) European Law Open 760.

[21]M Weimar, 'The EU Global Regulatory State and the Search for Transnational Democracy – Reflections from the Edges of Europe' in this issue.

[22]A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2019); A Beckers, HW Micklitz, R Vallejo and P Letto-Vanamo (eds), *The Foundations of European Transnational Private Law* (Hart Publishing 2024).

Cite this article: A Beckers and V Bogoeski, 'Law, conflict and transformation: debating European law and policy' (2025) *European Law Open* **4**, 1–6. https://doi.org/10.1017/elo.2025.13