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

Expanding Europe's conflicts-law constitution: against negative externalities of dominant function systems

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Abstract

Why should one expand Christian Joerges's pioneering concept of 'Europe's conflicts-law constitution'? The European constitution should consistently incorporate the double plurality of Europe because, for centuries, Europe has been governed by two powerful pluralities that are orthogonal to each other, but at the same time closely interpenetrate each other. Europe's material constitution is characterised not only by the conflicts between nation-state policies, but also by the deeper conflicts between different intrinsic normativities of societal institutions.

The European conflicts-law constitution should therefore not only realise the transnationalisation of the 'political' constitutions of the nation states and their underlying conflicts, but also a 'societal' constitution that inscribes itself into the conflicts of previously unconstitutional worlds of meaning. On the basis of this extension, Joerges's ideas can be made fruitful beyond the conflicts-law constitution that he confined to the EU's political system. If their extension to sectoral constitutions of Europe is taken seriously, the three strategies, which Joerges developed for conflicts between nation states, are also promising for conflicts triggered by the diversity of functional systems. In three case constellations, the article outlines how Joerges' methods can be successfully applied in the most recent European sectoral constitution – in 'Europe's digital constitution'.

Keywords: European constitution; conflicts law constitution; societal constitutionalism; digital constitution

1. Christian Joerges: *diversitas in unitate*

'Europe's conflicts-law constitution' is Christian Joerges' most original contribution in the politico-legal debate on Europe.[1] It gains its strength from building on a powerful intellectual tradition – theories of the material constitution.[2] In the material base of Europe's constitutions lie the roots of both Joerges's sober realism and engaged normativism. His conflicts-law constitutionalism has clear theoretical advantages in comparison with four rival conceptions. First, against legal formalism, Joerges refuses to reduce conflicts-law in Europe to either colliding single legal norms, legal institutions contradicting each other, or conflicting national legal systems. Instead, he finds the material base of conflicts-law's superstructures in the underlying social and political contradictions that have driven Europe's legal and constitutional history. Second, in contrast to Marxist strands of the material constitution, he traces European law not to the economic *Grundwiderspruch* or political

[1]C Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart 2023), in particular 399 ff.

[2]For a recent discussion of the material constitution, M Goldoni, *The Materiality of the Legal Order* (Cambridge University Press 2022).

class conflicts but to broader societal conflicts. Conflicts-law's material bases are what Joerges's teacher Rudolf Wiethölter, in a bold analogy to Karl Marx, had called the juridical *Grundwiderspruch,* ie, law's productive forces in their tensions with law's production relations.[3] Joerges refers to deep socio-political conflicts, particularly power struggles in international politics, colliding interests of the nation-states, tensions between production regimes in the European varieties of capitalism, and conflicts between the regulatory policies of the European Union and the nation-states. Third, in contrast to the cynical realism of Carl Schmitt's material constitutionalism, Joerges finds a strong normative orientation in democratic theory. He identifies Europe's democratic deficit in disquieting external effects of nation-states' policies, which profoundly influence people's lives in other states without them having a voice in these decisions: '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'.[4] Joerges's critique of European law is thus directed against power asymmetries that have an ongoing effect on the current constitution of European law. A conflicts-law constitution is needed to compensate for this deficit. Fourth, most significant is Joerges's opposition to holistic concepts of the material constitution that refer to an imagined collective unity of European society. Joerges opts for conflict, not unity; for difference, not synthesis. His material constitution is based on a conflict-ridden society, divided and fragmented by antagonisms, plagued by all kinds of divisions, exclusions, and differentiations, full of contradictions and paradoxes, a society which can neither presuppose nor achieve a collective unity, but only precarious compromises and temporary arrangements.

Joerges's theory construct, which combines political science with legal theory,[5] has clear practical implications, which militate against the prevailing ideology of the 'ever closer union': for Joerges, law's job is no longer increasing the *unitas in diversitate* but the opposite constitutional strategy: strengthening the *diversitas in unitate*. It is not the EU as a superordinate authority, but the nation states that are responsible for reaching an agreement in their conflicts. As the network centre, the EU legal order is not supposed to make decisions for the member states but limit its politics to coordinate the network's activities. While the nation-states decide autonomously, the EU legal order defines a transnational 'ordre public' in Europe. Joerges proposes mutual responsiveness, a form of dialogue between the conflicting members of the EU to resolve their disputes rather than a formula of supremacy of EU law.[6]

For the multilevel European polity, Joerges adapts classical international private law and generalises its principles into three constitutional strategies for vertical, horizontal, and diagonal conflicts. These strategies are not mere normative fantasies, but they build on recent judicial and legislative practice and extrapolate them into the future:

(1) Inspired by Cassis de Dijon: judicial self-restraint which avoids 'intergovernmental and executive authoritarian destructive intrusion into the institutional infrastructures of economy and society'[7] and at the same time decisively limits negative external effects of nation-state policies via duties of cooperation;
(2) Inspired by comitology: an elaborate proceduralisation of inter-national policy conflicts via negotiation institutions with a comprehensive interest representation[8];
(3) Inspired by EU standardisation practices: self-limitation of the central authority reducing its role to the supervision of para-legal orders.[9]

[3]R Wiethölter, 'Der Reform-Planer' in D Hart et al (eds), *Wissenschaft, Verwaltung und Politik als Beruf* (Nomos 2015) 21–30.
[4]Joerges (n 1) 109.
[5]Ibid., 11 ff.
[6]For this account, PM Baquero, 'European Law from the Perspective of Societal Constitutionalism' (2019) Working Paper, EUI MWP, 2019/10, 12 f.
[7]Joerges (n 1) 120.
[8]Ibid., 161 ff.
[9]Ibid., 447, 461 ff.

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Is there a need to expand this impressive concept of Europe's material constitution? If yes, which aspects of Europe's history and society would serve as its more comprehensive material basis?

2. Europe's double diversity

The direction of the expansion lies in what I would call Europe's double diversity. The dense diversity of nations is nothing special to Europe; something similar has developed in many regions of the globe. The point is the tight interrelation of two types of diversity. This observation has been expressed in different theoretical registers, most prominently in the culturalist and the sociological registers. A somewhat improbable blending of Jacques Derrida's and Niklas Luhmann's perspectives indeed visualises the historical uniqueness as 'Europe's Two Bodies': for centuries, two powerful pluralities have governed Europe. They stand orthogonal to each other but are strongly intertwined at the same time. In his article 'The Other Heading: Reflections on Today's Europe', Derrida speaks of Europe's close interrelation between *'la capitale'*, ie the centre of power, and *'le capital'*, which for him is not just economic capital but *'capital idéal'*, ie, the whole variety of cultural capitals in art, literature, and science.[10] In a parallel fashion, Luhmann sees in Europe the diversity of autonomous nation-states in a small geographical space as closely intertwined with the diversity of autonomous function systems or 'cultural provinces', as Karl Mannheim had called them. In their close interrelation with nation-state politics, science, education, art, religion, economy, and law, each has erected an autonomous and powerful 'cultural empire', each ridden by an obsession with one and only one *idée directrice*.[11] Derrida, in his reading of Paul Valéry, identifies this obsession as Europe's 'desire to maximise' or the 'maxim of maximisation',[12] ie, striving ever to increase either the cumulation of power, knowledge, capital, labour, or the exploitation of nature, a technique of maximisation which has overwhelmed the world.[13] 'All these maxima taken together are Europe'.[14] In a parallel fashion, for Luhmann, each function system's obsession with one binary code is responsible for Europe's improbable cultural dynamics.

In both theoretical registers, only Europe has produced such a twofold *diversitas in unitate*. In particular, it is the inseparable interwovenness of these two diversities that defines Europe's identity. Nation-states interacted intensively with the cultural provinces and their constitutions' *'extrême capillarité des discours'*,[15] which extended to the finest ramifications of social processes. It is a striking peculiarity of European history that it was always one *'capitale'*, one singular nation, that succeeded in peak performance within one distinct cultural *'capital'*, each dominating the European scene for about 200 years: Michelangelo stands for Italy's primacy of art in the renaissance; Louis XIV for the refined techniques of absolutist state power in pre-modern France; Adam Smith for the triumph of the capitalist economy in Britain, and Immanuel Kant for the advances of modern science in Germany. These cultural peaks were surrounded by all kinds of imitations by the other nations, counter-reactions, cultural appropriations followed by re-appropriations, hybridisations, and even imperialist tendencies between them. It is this unique enmeshing of national variations with cultural variations that is responsible for the richness of European culture.

[10]J Derrida, *L'autre cap* (Minuit 1991) 38 ff; English translation J Derrida, *The Other Heading: Reflections on Today's Europe* (Indiana University Press 1992), 15 ff; see M Heller, 'Derrida and the Idea of Europe' 82 (2008) Dalhousie French Studies 93–106.

[11]N Luhmann, *Theory of Society*, vol. 2 (Stanford University Press 2013) 87 ff.

[12]Derrida (n 10) 68.

[13]Heller (n 10) 98.

[14]P Valéry, *History and Politics* (Pantheon 1962) 32.

[15]Derrida (n 10) 44.

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And this double diversity is continued today, even in the technocratic constitution of the European Union. The EU is a strange conglomerate, which cannot be reduced to political–administrative structures but refers simultaneously to a multitude of functional subsystems.[16] Capar argues that the EU, one of the most conspicuous cases of a transnational regime, faces even the 'necessity of sectoral constitutionalisation'.[17] The reason is that the constitutionalisation of international law has no choice but to adopt a sectoral and incremental form of integration. The EU is an exemplary case of sectoral constitutionalism, which creates legitimacy problems of its own. The EU is exposed to the

> [. . .] paradox of global constitutionalism: that its need to adopt a sectoral form of integration may cause a legitimacy gap/deficit because international authorities, resting their legitimacy primarily on instrumental grounds, may face problems in compensating for the legitimacy deficit caused by the erosion of domestic sovereignty and extending their legitimacy to non-instrumental grounds.[18]

As a consequence, Europe's material constitution needs to be conceptualised as a plurality of national constitutions and simultaneously a plurality of sectoral constitutions. Kaarlo Tuori makes the central argument for an expanded material constitution of Europe, an

> [. . .] entity whose 'thin' [one-dimensional, G.T.] credentials as a self-standing juridical and politico-institutional order are unarguable [but] might also be re-imagined and reconstructed in 'thick' [multi-dimensional, G.T.] terms as a popular and indeed 'political, societal' constitution – one with its own democratically sensitive self-constituting authority and its 'own' transnational society as an object of reference.[19]

Paradoxically, the unitary character of Europe's material constitution can be understood only if one takes its dissolution into two diversities seriously. This changes the character of Europe's conflicts-law constitutions. Not just the conflicts between nation-state policies but the more profound conflicts between diverse rationalities and normativities of society shape Europe's conflicts-law constitution. Thus, Europe's constitution should not be understood only as a transnationalisation of the 'political' constitutions of nation-states and their underlying conflicts but at the same time as a 'societal' constitution in which the constitution inscribes itself in the conflicts of previously unconstitutional worlds and becomes a 'transformative' constitutionalism that drives social change.[20]

However, there is a dark side to this intricate interplay of national states and sectoral empires, which nourishes 'growing scepticism about attempts to derive future opportunities from the European rationality of the division of labour and functional differentiation'.[21] Christodoulidis identifies this dark side in expansionist tendencies of dominant function systems, mainly the economy and politics:

[16]PF Kjaer, 'The Political Foundations of Conflicts Law' 2 (2011) Transnational Legal Theory 227–42; PF Kjaer, 'Three-dimensional Conflict of Laws in Europe' (2009) ZERP-Diskussionspapier 2/2009, 3, 29 ff.

[17]G Çapar, 'The Paradox of Global Constitutionalism: Between Sectoral Integration and Legitimacy' (2023) Global Constitutionalism 1–41, 5.

[18]Ibid., 1.

[19]K Tuori, 'The Many Constitutions of Europe' in K Tuori and S Suvi (eds), *The Many Constitutions of Europe* (Ashgate 2016) 169–90, 178. Continuing this argument on Europe's multiplicity of sectoral constitutions, N Walker, 'Where's the 'E' in Constitution? A European Puzzle' in A Skordas et al (eds), *Economic Constitutionalism in a Turbulent World* (Elgar 2023) 11–37.

[20]S Müller-Mall, *Verfassende Urteile* (Suhrkamp 2023) 18.

[21]N Luhmann, 'Europa als Problem der Weltgesellschaft' 2 (1994) Berliner Debatte 3–7, 5.

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> Dangers attach to the generalisation of one single logic of action – political, economic, scientific, legal, and so forth – to the detriment of others in a way that the resultant asymmetries might lead to the subjugation, displacement, or substitution of those other, variably differentiated fields.[22]

European history has experienced not only the disasters of nation-states' imperialistic and colonialist expansion, cumulating in World Wars I and II but also an equally destructive imperialistic and colonialist expansion of the dominant political–military complex, cumulating in the totalitarian politicisation of society, by fascist and communist regimes. Joerges's thoughtful preoccupation with the darker legacies of Europe reflects this destructive side of both Europe's national and functional expansionism.[23]

The damaging dynamics of national domination and functional colonisation are not only a matter of the European past. Controversies between European nation-states are growing today, even within the EU, not to speak about the Russian invasion of Ukraine. At the same time, massive conflicts have exploded between Europe's cultural empires; in particular, the dominating economic and political system have colonised more or less aggressively the other more vulnerable European cultural provinces, science, art, education, law, religion, medicine, and other social systems. Colonisation has created an asymmetry between function systems. 'The point is that the asymmetry is not a temporary or redressable anomaly; it is instead structurally built into the architecture of global capitalism'.[24]

As a consequence, a material European constitution should concentrate on both combating the dark side of national and functional plurality and, at the same time, cultivating their bright side. *The conflicts-law constitution, which attempts to domesticate destructive conflicts between the European nation-states, should be expanded toward dealing with equally destructive conflicts between cultural provinces or functional systems – this is how I would suggest continuing Joerges's life project in the future*. On the bright side, one should follow Joerges's suggestion of breaking the false unity of the European economic constitution by vigorously introducing the varieties of capitalism in Europe. More generally, this means protecting national varieties within the overarching cultural provinces as well as cultivating cultural varieties within the European multi-level political system.

The constitutional challenge is to strive for a precarious dynamic equilibrium within the two pluralities and between them, which means building constitutional safeguards against both the domination by one powerful nation-state and the expansionist trajectory of one of the subsystems at the expense of the others. In any case, such a twofold-directed conflicts-law constitution would be in the spirit of the famous Derrida–Habermas–Manifesto on Europe's political identity[25] and could serve as one of Europe's correctives against the contemporary two totalitarian tendencies of surplus value orientation, power surplus value in China and Russia, and monetary surplus value in the USA.[26]

[22]EA Christodoulidis, *The Differentiation and Autonomy of Law: Elements in the Philosophy of Law* (Cambridge University Press 2023) 21.

[23]Joerges (n 1) 521 ff.

[24]Christodoulidis (n 22) 42.

[25]J Habermas and J Derrida, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe' 10 (2003) Constellations 291–7.

[26]Here, in the relation of Europe to the other main regional regimes of world society, PF Kjaer, 'From Conflicts Law to Transformative Law: Facing "Fragmented Globalisation"', in this issue, identifies the need for an 'external' expansion of Joerges' conflicts-law constitutionalism, which complements the argument for a need of an 'internal' expansion presented in this text. Both approaches converge in demanding a combination of Europe's public and societal constitutionalism.

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3. Expanding Europe's conflicts-law constitution

Of course, Joerges is aware that Europe's material constitution goes beyond mere regulatory conflicts between the EU and the member-states. He makes several moves to grasp Europe's constitutional materiality in more wide-ranging societal conflicts. An ambitious framework of political theories, critical theory Frankfurt-style, in particular Jürgen Habermas's political discourse theory and Rudolf Wiethölter's political theory of law, in addition, Karl Polanyi's double movement of modern capitalism, frame Joerges's perception of the interplay between Europe's political and functional/cultural differentiation in the following aspects. The fact that numerous autonomous function systems and formal organisations in Europe have developed as private law regimes indicates for him a dangerous de-politicisation and a lack of democratic legitimacy. As for Europe's economic constitution, Joerges has a clear vision of dealing with the fundamental conflicts between the capitalist economy and democratic politics.[27] Being aware of the dark side of the autonomisation of action spheres, he resists the primacy of economic reason and finds the answer in conceiving the economy primarily as a 'polity'. Against the hypertrophy of the economic system, he insists on the primacy of democratic politics over the capitalist economy. Occasionally, he accepts, albeit somewhat hesitantly, the existence of a plurality of societal constitutions in Europe but pleads vigorously for the absolute supremacy of the political constitution, thus relegating Europe's autonomous cultural empires to mere policy fields for the EU's regulatory politics.[28] In his standardisation studies, he looks sceptical at the production of legal norms outside political legislation and judicial lawmaking. Reducing them to para-legal systems,[29] he recognises their rules as genuine law only when they fulfil strict legitimacy requirements, with stern supervision by the European central authorities prescribes.[30]

Altogether, Joerges tends to impoverish the richness of Mannheim's historically grown 'cultural provinces' within European society because, reducing them to 'para-legal systems', he recognises them as democratically legitimate only if they are subordinate to the primacy of power-and-policy-driven politics. It seems that Joerges's comprehensive political–theory–orientation enriches his constitutional concept considerably, but in certain respects it works as an *obstacle épistemologique*.[31] To be sure, Max Weber's new polytheism of separate *Handlungsbereiche* and *Wertsphären,* as well as Pierre Bourdieu's autonomous *champs sociaux,* implicitly re-appear in his analyses, but only in the guise of regulatory areas for democratically legitimised authorities. Joerges insists that the dynamics of functional differentiation need to be strictly disciplined by the political system in the supervision of self-regulating social fields. It seems that Joerges' forceful critique of the expansive tendencies of the capitalist economy is responsible for his conviction that the democratically legitimated political system needs to expand deeply into vast areas of European society.

Informed by the sociological theory tradition of Durkheim, Weber, Simmel, Parsons, Luhmann, and Bourdieu, several legal theorists have developed a broader view of the variety of Europe's cultural empires. Already in 1998, Inger Sand dissolved the unity of the European

[27]Joerges (n 1) 285 ff.

[28]C Joerges and F Rödl, 'Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der postnationalen Konstellation' in G-P Calliess et al (eds), *Soziologische Jurisprudenz* (De Gruyter 2009) 765–78, 767, 777 ff.

[29]As a test question, would he also reduce the legal systems of autocratic nation states lacking any democratic legitimacy, which is the majority among the globe's nations, to 'para-legal systems'? How can he justify demanding higher standards for the recognition of the laws of private regimes than for those of public regimes?

[30]Joerges (n 1) 132 ff.

[31]Not only for Joerges, but for many lawyers and political scientists, the obstacle is the state-centricity in defining Europe's identity, A Grimmel, 'Funktionale Differenzierung und europäische Integration: Perspektiven eines neuen Forschungsfelds' in A Grimmel (ed), *Die neue Europäische Union: Zwischen Integration und Desintegration* (Bundeszentrale für Politische Bildung 2020) 291–304.

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Union into a differentiated variety of functional subsystems and asked for consequences in European law.[32] Grimmel argues

> that irrespective of the decisions of the EU member states, which have an effect in the direction of more or less integration, integration dynamics also unfold in the various functional areas of society (politics, law, economics, education, health, science, etc); and this, first of all, independently of the state as a space for political decision-making and, in this respect, also (at least according to possibility) in parallel.[33]

As mentioned above, Kaarlo Tuori makes a remarkably radical move, translating the variety of cultural provinces into 'Europe's many constitutions' and their fundamental conflicts. He criticises the state-centricity of traditional constitutionalism covering only the EU's and the member states' political-administrative structures.

> The state template focuses on the juridical and political constitutions, and tends to neglect sectoral constitutions, a distinct feature of European constitutionalism which corresponds to the basic teleological, policy orientation of European law. Rather than seeing in sectoral constitutionalisation an anomaly it should be treated as a particularity of European constitutionalism, distinguishing it from its state counterpart. In addition to the framing juridical and political constitutions, in the EU constitutionalisation has covered policy fields, such as economy, social welfare and security.[34]

Consequently, Tuori pleads for a more comprehensive constitutional concept that reacts to the European society's richness by establishing a plurality of sectoral constitutions.[35] He identifies a European economic constitution, a juridical constitution that establishes a reflexive relation of the law with itself, a political constitution, a social constitution that consists of the members of society and their social life world, and a security constitution, which addresses the internal and external security risks of community. Normatively, he prioritises the autonomy of each sectoral constitution, its unity and legitimacy, and the need to resolve fundamental conflicts between them.[36] In the relations between political and sectoral constitutions, he even gives the upper hand to sectoral constitutions. He admits that 'the framing political and juridical dimensions enjoy constitutive primacy. But they are subjected to the functional primacy of sectoral constitutions'.[37]

Capar radicalises Tuori's position even more arguing, as said above, that the EU faces the 'necessity of sectoral constitutionalisation'. As it disposes of neither a global legislator nor constituent power, the EU cannot avoid undergoing a process of sectoral constitutionalisation by adopting a fragmented and piecemeal approach. For Capar, sectoral constitutionalism is for the EU the only feasible and promising alternative, given it is caught up in the middle between a domestic and global state/sovereign.[38] Sabine Frerichs describes Europe's constitution as a combination of two ideal types: constitutional pluralism and societal constitutionalism. She situates Europe's constitution between the opposite poles of nation-state constitutions and global

[32]I-J Sand, 'Understanding the European Union/European Economic Area as Systems of Functionally Different Processes' in P Fitzpatrick and JH Bergeron (eds), *Europe's Other: European Law Between Modernity and Postmodernity* (Ashgate 1998) 93–110.

[33]Grimmel (n 31) 294.

[34]K Tuori, 'European Constitutionalism' in R Masterman and R Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 521–53, 537 ff.

[35]Tuori (n 19) 178; see also K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) 8 f, 205 ff.

[36]On the merits of constitutionalism beyond the state in general Tuori (n 19) 170.

[37]Tuori (n 34).

[38]Çapar (n 17) 30.

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civil constitutions.[39] Chris Thornhill extends constitutional pluralism in a different direction via the concept of citizenship. Citizenship, he submits, is not only based on a model that reflects nationality but also on a pattern that reflects the fragmentation of society into distinct functional sectors. He identifies 'domain-specific modes of citizenship practice, in which individual social agents act as the citizens of separated functional spheres, for example, the environment, medicine, education, and they create hard norms for these domains'.[40]

Finally, Pablo Baquero and Poul Kjaer reconstruct the double constitutional plurality within the internal structure of the European Union. Baquero argues that the 'EU legal order should be conceived as a postclassical legal order, formed by a plurality of subsystems, not only by the EU member states and the EU legal order but also by other institutions such as the international standard-setting organisation of the EU and the European Central Bank, among other potentially non-state entities'.[41] Poul Kjaer defines the EU 'as a 'hybrid' located in-between nation-states and transnational regimes. It combines strong state-like features with the kind of functionally differentiated and 'cognitivised' elements that dominate on the global plane'.[42] Contrary to Joerges's critique,[43] Kjaer does not limit himself to sociological empirical analysis but develops full-fledged normative principles, so-called connectivity rules as constitutional contra-indications for an excessive differentiation.[44]

In general, expanding Joerges' conflicts-law constitution to Europe's double diversity has three main implications:

(1) *Material constitution:* Its social base cannot be limited to the political system of the EU and its member states but embraces European society in its entirety, paradoxically fragmented in a variety of social sectors. The expanded conflicts-law constitution would not elevate any of these sectors and their partial rationality, neither the political system nor the economic system, to any primacy. Instead of attempting to increase the potential of political regulation of member state conflicts, European constitutionalism would have to abandon its state-centricity and develop a 'different conceptualisation better able to capture the problems in the relationship between function systems – high autonomy with high causal dependence'.[45] The European constitution would have to deal with the core structural conflicts, ie, colliding *Eigenlogiken* of public and private formal organisations, differing *idées directrices* of social and political institutions, and diverging rationalities of function systems, which include but go beyond the exclusionary logic of the 'political economy' that privileges the economic and the political system at the expense of the others.

(2) *Background theory:* Neither legal theory nor economic theory is sufficiently suited to inform a European material constitution with the necessary profundity. Both would ground constitutionalism only on the hypertrophy of one partial rationality. The same is true for political science, Joerges's preferred social science,[46] which narrows constitutional materiality to power-and policy-based institutionalised politics and reduces the society-wide legitimacy problem to political representation. It seems that a comprehensive social theory is required that does not prioritise one social rationality over others, be it economic

[39]S Frerichs, 'The Rule of the Market: Economic Constitutionalism Understood Sociologically' in P Blokker and C Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017) 241–64.

[40]C Thornhill, 'The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy' 45 (2018) Journal of Law and Society 73–93, 91.

[41]Baquero (n 6) 3.

[42]Kjaer, 'Political Foundations' (n 16) 242; Kjaer, 'Three Dimensional Conflict' (n 16) 29 ff.

[43]Joerges (n 1) 462 criticises Kjaer for a narrow descriptive approach and for a failure to translate his analyses of the integration process into legal categories.

[44]Kjaer, 'Three Dimensional Conflict' (n 16) 1.

[45]Luhmann (n 21) 7.

[46]Joerges (n 1) 11 ff.

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efficiency, democratic legitimacy, scientific knowledge, or juridical justice, not to speak of religious dogma. Different versions of critical theory and systems theory are the primary rival candidates for this task, however, only under the condition that both theories overcome their narrow focus on human communication and concentrate on the crucial interrelation between society and ecology. This will open the potential for theorising an 'ecological-social constitution', which James Tully and others suggest as a replacement for the dominating neoliberal economic constitutionalism.[47]

(3) *Democratic legitimacy*: A potential expansion of constitutionalism into various non-political-administrative sectors of European society, Joerges concedes, requires new forms of democratic legitimation of private government that brings economic, technical, and professional action under public scrutiny and control.[48] However, here he turns against his mentor Habermas, who urges an 'institutional arrangement that can secure a democratic legitimation for new forms of governance in transnational spaces'.[49] With his firm commitment to deliberative democracy in the nation-state institutions, Joerges asks somewhat mockingly: One wonders what could characterise these 'new forms of democratic legitimation'?[50] No need for sarcasm: today, we observe an abundance of democratic experiments beyond the state, some firmly institutionalised, some still in the form of more or less elaborate proposals.[51] One does not need to refer to the two time-honored societal alternatives to parliamentary representation – council democracy and associative democracy. Via their utopian potential, they still provoke the existing democratic nation-state institutions with their alternative to bind the political to the concrete life-worlds of the people, the workplace or the voluntary association. Apart from utopia, the enormous proliferation of the new constitutional '*pouvoirs irritants*' in the post-national order, as Nico Krisch calls them[52] – protest groups, social movements, NGOs, as well as the more traditional labor organisations and consumer associations – shows the real-existing democratic potential of extra-parliamentary opposition. This is democratic constitutionalism from below, whose external pressures give impulses to existing institutions of economic democracy, worker participation, labour representation, public litigation, monitoring institutions, media reports, stakeholderism, and corporate responsibility.[53] Driven by the 68-movements slogan: 'parliamentary representation is not enough; it needs a full democratisation of society as a whole', a wave of democratising societal institutions has swept through media organisations, theaters, universities, and hospitals. More recently, the commons movement has provoked profit-oriented corporations and made even decisive inroads in the digital sphere.[54]

[47]A Wiener et al, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' 1 (2012) Global Constitutionalism 1–15, 10 f.

[48]Joerges (n 1) 481 f, in reaction to G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' 45 (1997) The American Journal of Comparative Law 149–69, 159.

[49]J Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' in J Habermas, *Europe: The Faltering Project* (MIT 2009) 109–30, 445.

[50]Joerges (n 1) 482, fn 131.

[51]For a comprehensive analysis, V Bader and M Maussen, *Associative Democracy and the Crises of Representative Democracies* (Routledge 2024); see also CF Sabel and WH Simon, 'Democratic Experimentalism' (2017) Columbia Public Law Research Paper No. 14–549.

[52]N Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' 14 (2016) International Journal of Constitutional Law 657–79.

[53]For a detailed analysis of new democratic legitimation modes in global constitutionalism, M Niehaus, *Global Climate Constitutionalism "from below": The Role of Climate Change Litigation for International Climate Lawmaking* (Springer 2023) 191 ff, 289 ff.

[54]Eg, C Sharma, 'Tragedy of the Digital Commons' 101 (2023) North Carolina Law Review 1129–228.

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The mere application of legitimacy arrangements of the political system to societal institutions, which Joerges seems to argue for, does not do justice to the *Eigennormativität* of diverse cultural fields. He systematically underestimates the normative potential of civil society institutions. At the same time, he overrates the cognitive and power-related capacities of the political system. It is illusory to believe that political legislation, by virtue of its democratic legitimation, is in a position to autonomously define the legitimacy procedures for science, the arts, the economy, the health service, or the information media and enforce them by means of constitutional law. Already in the 18th century, German idealism defended the autonomy of the cultural fields, in particular art and science, against state interventions. Friedrich Schiller wrote: '[. . .] both enjoy absolute immunity from the arbitrariness of man. The political legislator can block their territory, but he cannot rule over it'.[55]

As for more abstract democratic theory, only a short reference can be made here to a redefinition of transnational democracy beyond traditional representation in nation-states.[56] Searching for transnational societal subsystems' legitimacy requires such a re-definition, ie, contestation and epistemic subsidiarity.[57] In Christodoulidis's re-formulation of societal constitutionalism, the democratic dimension of constitutionalism is not abandoned; instead, the *pouvoir constituent* is reconceptualised as a specific process of communication,

> [. . .] that subtends and animates a series of 'capillary constitutions' of transnational society, which organise various functional spheres of society into an acentric order and frame the question of collective action as appropriate to each of them. These fields, which harbour lasting structures for particular sets of exchanges, include of course the economy but also the global educational and communication sectors, all the way to the regulation of the internet, the arts, sport, and so forth.[58]

All this raises the counter-question: one wonders why democratic legitimacy in society as a whole should remain restricted to that of nation-state institutions?

4. Europe's digital constitution

While Joerges has remained skeptical in recognising 'para-legal systems' as genuine law and in conceptualising self-regulatory regimes as sectoral constitutions, it comes as a surprise that his ideas about the EU's political conflicts-law constitution do carry important lessons, once its expansion to Europe's sectoral constitutions is taken seriously. In particular, Joerges's three strategies mentioned above, which he developed for conflicts between nation states, have a great potential to be successfully applied to conflicts between function systems. I will briefly outline how Joerges's methods could work in this way within the context of the most recent European sectoral constitution, the one missing in Tuori's impressive taxonomy of constitutions – Europe's 'digital constitution'.[59] Instead of telling the legislative history of the European AI Act, I will focus on three problematic constellations which show the relevance of a societal conflicts-law constitution.

[55]F Schiller, *Über die ästhetische Erziehung des Menschen in einer Reihe von Briefen* (Suhrkamp 2009 [1879]), Ninth letter.

[56]W Martens, 'Democracy for Transnational Regimes' in W Martens et al (eds), *Futures of Democracy* (Wilde Raven 2014) 113–38.

[57]G Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' 45 (2018) Journal of Law and Society 5–29, S11 ff.

[58]Christodoulidis (n 22) 56.

[59]A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 2/7: 'European digital regulations reflect a host of values that are consistent with the broader European economic and political project. The EU's digital agenda reflects its manifest commitment to fundamental rights, democracy, fairness, and redistribution, as well as its respect for the rule of law. These normative commitments, and the laws implementing those commitments, can be viewed in aggregate as Europe's digital Constitution'.

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A. Digital case # 1: the business capture of open access

Initially, Open Access had been a digitalised counter-movement against big academic publishers with the aim to limit predatory commercial strategies threatening the autonomy and integrity of science.[60] Open Access has made research freely available to the worldwide scientific community via the internet. However, the 'Open Access Revolution'[61] turned out to be a failure. Powerful academic publishing corporations transformed Open Access into a highly profitable business model. Shifting the costs from readers to authors, this new publication mode threatens to exclude authors, with particularly detrimental effects for scholars in the Global South. In addition, the powerful Science foundations, in their Open Access funding strategies, regularly prioritise exclusively 'big deals' with commercial publishers for Open Access. As a negative side effect, big publishers are gradually moving into the governance of the universities and research institutes. Thus, against the original idea of Open Access, the result has been to strengthen and perpetuate the oligopoly of leading publishing corporations.

This case is exemplary of destructive conflicts between sectoral regimes. They are as explosive as conflicts between nation states and they need a similar domestication. The problem is twofold: how to limit damaging external effects of the economy on the digital world and simultaneously avoid excessive governmental regulation. Similar to what in Joerges's first strategy ('Cassis de Dijon') the EU is supposed to do in relation to nation-states, European law should develop analogical constitutional strategies against the destructive external effects of powerful sectoral regimes on others. *In an exact parallel to Joerges's recommendations, EU law should (1) react with self-restraint and avoid a full-fledged regulatory regime, and instead (2) impose a legal duty on the expanding sector to respect the institutional integrity of other societal sectors.* European law would thus establish a horizontal constitutional bond between the sectoral regimes, which could counter tendencies of colonisation. The goal is a dynamic balance between the EU and a multitude of function systems similar to Joerges's balance of the EU and the nation-states. European law has the potential to compensate for the legitimacy deficits of sectoral regimes, and it can derive its own legitimacy from this role. European law needs to impose binding commitments of sectoral regimes towards each other by the requirement to take the interests and concerns of the other sectoral regime into account.

But where is the normative basis for such an ambitious endeavor? Human rights are the most promising counter institution which militates against the economic colonisation of digital civil society. In relation to this and other phenomena of

> [. . .] digital normativity such as algorithm-based decision-making or private data regimes, human rights function as a kind of 'constitutionalization anchor' by inducing a constitutionalization of autonomous normative orders 'from within'.[62]

In their individual dimension, EU digital legislation is already making significant inroads (data privacy, disinformation, hate speech, online copyright, social protections of platform workers) via the AI Act, the Digital Services Act (DSA), and the Digital Markets Act (DMA). However, beyond these individual concerns, human rights' institutional dimension demands the protection of vulnerable rationalities against aggressive expansive rationalities.[63] The aggressive economic logic of

[60]The text follows the detailed analyses by R Kunz, 'Tackling Threats to Academic Freedom Beyond the State: The Potential of Societal Constitutionalism in Protecting the Autonomy of Science in the Digital Era' 30 (2023) Indiana Journal of Global Legal Studies 265–92.

[61]P Suber, *Open Access* (MIT Press 2012) 1.

[62]D Wielsch, 'Die Komplexität der Menschenwuȷ̈rde und der Pluralismus der Menschenrechte' in A Nussberger (ed), *Menschenrechte als Alpha und Omega des Rechts?* (Mohr Siebeck 2023) 27–47. See also D Wielsch, 'Political Autonomy in the Digital World. From Data Ownership to Digital Constitutionalism' 30 (2023) Indiana Journal of Global Legal Studies 125. For the protection of science against political and economic intrusions, K Zazar and S Roth, 'Political and Economic Instrumentalisation of Science: Towards an Extended Concept of Corruption' (2024) Systems Research and Behavioral Science 1–11.

[63]LH Muniz da Conceição, 'A Constitutional Reflector? Assessing Societal and Digital Constitutionalism in Meta's Oversight Board' (2024) Global Constitutionalism 1–34.

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action violates communicative domains whose internal fragile structures will be destroyed by economic efficiency. Human rights law institutionalisation is the self-limitation of each sphere, policing the boundaries of systems and upholding the mutual demarcations, most importantly, policing the excessive growth impulses of dominant subsystems.[64] The defense of vulnerabilities does not mean only vulnerable individuals but also vulnerable communities, discourses, cultures, rationalities, in short, vulnerable institutions of a 'digital civil society'. The aim is to protect the 'third sector' of the digital space, ie, the space of non-governmental/non-commercial digital activities. Against economic colonisation and against excessive political regulation, the integrity of digital communication in science, but also in journalism, education, medicine, and art needs serious constitutional protection. The digital 'third sector', which tends to be neglected by most accounts of the 'digital political economy', needs elaborate rules to develop stable socio-digital institutions: Hacker communities, digital NGOs, 'digital commons', Wikipedia, 'open source', and Open Access. They would shield them from the two dominant function systems' negative external effects.

As for Open Access, promising self-regulatory bottom-up processes have already begun to turn against its business capture.[65] In alternative open-access models, fees are neither charged for authors nor readers. In addition, they establish community-driven governance of academic journals,[66] which should be managed from within the scholarly community itself. To protect the scientific process's inner logic, EU law would need to support such self-constitutionalisation in the republic of science via constitutional impulses 'from the outside'. Limitative rules will have to reduce the superimposition of economic profit and excessive governmental regulation over science, protecting space for digital infrastructure that follows neither a market nor a state logic. One concrete example, among others, of external support of self-regulatory processes would be diversifying existing funding streams and redirecting them toward alternative Open Access models via reforms of budgetary rules and the organisation of libraries. More ambitiously, taming the concentrated power of big publishers would require antitrust measures and possibly platform regulation legislation. Like Joerges's horizontal obligations between nation-states, horizontal obligations between sectoral regimes would need to be established.

B. Digital case # 2: risk assessment for artificial intelligence

The heated political debate on the dangers of ChatGPT and other AI-text generators has revealed like a shock that regulatory gaps emerge even in the most recent EU regulation of digital technology. The EU law did not keep pace with the fast developments of information technology. As a revolutionary socio-technical development, ChatGPT and other AI forms have raised doubts about their compatibility with the factual assumptions embedded in the GDPR, its regulatory goals, and its concrete legal rules.[67] As a consequence, the disconnection of regulation and technology has incited proposals for a regulatory agency focusing on new sociotechnical developments, the regulatory gap, and how to pre-emptively deal with them.[68] They resulted in suggesting the establishment of an 'AI office' in the new European AI Act.[69]

[64]Christodoulidis (n 22) 20.

[65]For more details on potential counter-strategies, Kunz (n 60) 285 ff.

[66]See the Action Plan for Diamond Open Access (March 2022), <https://doi.org/10.5281/zenodo.6282402> accessed 7 December 2024.

[67]For a close analysis of the regulatory disconnection of the GDPR, M Paun, *Law and Technology through the Lens of Autopoiesis: An Analytical Framework for Dealing with Regulatory Disconnection Illustrated through the Case of the GDPR* (2023) <https://pure.uvt.nl/ws/portalfiles/portal/78266141/Paun_Law_15-09-2023.pdf> accessed 7 December 2024 257 ff.

[68]L Bennett Moses, 'Agents of Change' 20 (2011) Griffith Law Review 763–94; S Gammel et al, 'A "Scanning Probe Agency" as an Institution of Permanent Vigilance' in M Goodwin et al (eds), *Dimensions of Technology Regulation* (Wolf Legal Publishers 2010) 125–46.

[69]S Curtis et al, 'A Blueprint for the European AI Office' (The Future Society, October 2023) <https://www.thefuturesociety.org/a-blueprint-for-the-european-ai-office-pdf> accessed 7 December 2024.

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At this point, Joerges's second strategy – constitutionalising the existing EU comitology which creates a positive duty of cooperation for nation-states – may provide a lesson to the relation between the EU and sectoral regimes. *Inspired by the European inter-national comitology, an inter-systemic comitology would establish a negotiation system between the EU and functional regimes*, in our case, the producers of textgenerators.

What in Joerges's model appeared as a 'policy-conflict constitution' would now be established as a 'rationality-conflict constitution'. What they have in common is to 'include the selection of the expert circles, the establishment of ties with parliamentary bodies and with civil society, and the reversibility of decisions taken in the light of new knowledge or changes in social preferences'[70] While the digital innovation industry ceaselessly promote an interest representation of socio-technical development, like ChatGPT and other AI forms, the urgent problem 'is rather to make sure that one also assembles sufficient spokespersons on behalf of those who might be affected by the disruptive impact that often accompanies the introduction of these entities'.[71] Two main differences to Joerges will appear. First, rather than participation of different interests, participation of different rationalities would be in the foreground. Second, the principle of epistemic subsidiarity for nation-states would be replaced by the epistemic subsidiarity for sectoral regimes.

As for the first difference, Kjaer made the decisive move. He suggested based on the existing REACH model that an inter-systemic governance establishes horizontal forms of coordination between different kinds of rationality. Instead of interest coordination,

> the governance dimension is to a greater extent, characterized by horizontal (*nebengeordnete*) forms of coordination of different kinds of rationality. Hence, GS must be understood as regimes characterised by multi-rationality which act as interfaces between different functional systems.[72]

Such a conflicts-law would require a procedural separation along different rationalities: 'horizontal intermediate structures operating in between the public and the private spheres should be subject to the constitutional principle of functional separation'. A risk assessment of AI would require separate evaluation processes within the committee representing a variety of societal rationalities: AI's impact on environmental and health problems economic and social consequences. This functional separation needs to be combined with a neutral institution that solves the problem of political overload.

The other difference lies in the constitutional principle of 'epistemic subsidiarity', which Jasanoff had proposed for the EU and the member states. It opens new perspectives for developing procedures of self-contestation in different sectoral regimes.[73] It works on the assumption that the relationship between science and politics is highly context-dependent. Paskalev had shown that the science/politics relation in the context of the European Union differs considerably from the same relation in nation-states.[74] This is so because epistemic legitimacy is not entirely a matter of scientific input; it is also based on local and national communities' values, interests, and preferences.[75] Epistemic subsidiarity has been suggested as a constitutional principle that balances the relations between science and politics on those different levels.

[70]Joerges (n 1) 209.

[71]N van Dijk, 'Constitutional Ecology of Practices: Bringing Law, Robots and Epigrams into Latourian Cosmopolitics' 31 (2023) Perspectives on Science 159–85, 180.

[72]Kjaer, 'Three Dimensional Conflict' (n 16) 29: 'Governance extends beyond public structures to include elements reproduced within, for example, the economic system, the scientific system, as well as ecological forms of communication'.

[73]S Jasanoff, 'Epistemic Subsidiarity: Coexistence, Cosmopolitanism, Constitutionalism' 2 (2013) European Journal of Risk Regulation 133–41, 133.

[74]V Paskalev, 'May Science Be with You: Can Scientific Expertise Confer Legitimacy to Transnational Authority?' 8 (2017) Transnational Legal Theory 1–22.

[75]J Ellis, 'Scientific Expertise and Transnational Standards: Authority, Legitimacy, Validity' 8 (2017) Transnational Legal Theory 181–201, 181.

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Epistemic subsidiarity needs to be expanded and applied not only to the EU's relation with different nation-states, but also with different sectoral regimes. Each sectoral regime needs to develop its specific relation between issue-specific expertise on the one side and social protest, stakeholders' and members' interests on the other. To assure sufficient self-contestation in this interaction between expertise and regime-internal politics, the regime constitutions will have to bridge political legitimation and the authority of scientific expertise, as Jay Ellis suggests:

> One such set of institutions would be legal rules that would make possible non-arbitrary rulings on the adequacy of scientific evidence for a given proposition or, more pertinent to the present case, the reasonableness of applying a set of highly technical sustainability standards.[76]

The legitimation problems of such an inter-systemic comitology cannot be simply subsumed under the legitimation problems of public law-making. Instead, the crucial test is whether the production of digital law via inter-systemic negotiations allows for self-contestation within the comitology itself. Indeed, the negotiation of antagonistic interests has a certain self-contesting potential, which allows for the articulation of dissent. However, this is undermined by power asymmetries between the negotiating parties and negative externalities for third parties. The traditional legitimation of rules via negotiation justice ends when problems of power asymmetries or negative externalities arise. This is particularly pertinent when private power begins to endanger the position of other parties. Again, the interference of horizontal effects of constitutional rights is required here as the legitimation basis for sectoral law production. Only when private ordering realises the horizontal protection of constitutional rights, can they increase their legitimacy.

C. Digital case # 3: algorithmic constitutions

Here, inspiration comes from Joerges's third strategy, the EU's 'supervision of para-legal orders'. If his ideas are fruitful for the expansion of the conflict constitution, it would need substantial reconstruction. *Mere supervision is not ambitious enough. It would need to be replaced by the EU's external impulses for the self-constitutionalisation of functional sectors*.

However, one should not identify the EU's set of expansive digital regulations with imposing a genuine constitution on the digital sphere. In contrast to regulatory fantasies about the external imposition of a whole constitutional order, genuine self-constitutionalisation of digital communication is simply unavoidable when the intentions of external impulses are supposed to be effectively realised.[77] The problem lies in the feeble implementation of what regulators proudly call 'Europe's Digital Constitution'. The EU's digital regulations fail when it comes to translate them into effective enforcement via the digital code, thus compromising the goals of the European regulatory agenda in practice. They underestimate new forms of normativity clashes in the digital age and the collision of competing normativities between the rule of law and the rule of tech.[78] Only once in a complex process, the legal rules of the EU are translated via the digital code into algorithmic operations, they will be effective. When Joerges describes the EU's supervision of self-regulating systems as a requirement of 'fair procedures, transparency, openness and balanced interest representation' in para-legal systems in general, for the digital para-legal system in particular, these constitutional principles cannot be simply prescribed and implemented by European law. These are nothing but external impulses for complex processes of a genuine self-constitutionalisation and self-limitation by algorithmic calculations and a thorough re-construction by the digital code.

[76] Ibid. 200. For an elaboration of this argument, VL Viellechner, *Transnationalisierung des Rechts* (Velbrück 2013) 222 ff.

[77] Baquero (n 6) 3: 'any changes or limitations imposed on the different subsystems forming EU law follow a specific logic, where effective limitations depend on the internal change of the system and cannot be imposed solely through external regulation or intervention. Even though environmental external pressures may induce changes in EU legal subsystems, the way these changes will be operationalised and become effective will depend on how the legal subsystem internalises them under its own rationality'.

[78] G De Gregorio, 'The Normative Power of Artificial Intelligence' 30 (2023) Indiana Journal of Global Legal Studies 55–80.

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A radical proposal in this direction has been presented by Oren Perez and Nurit Wimer. They envisage an 'algorithmic constitutionalism', which is built on three pillars:

(a) layered architecture that consists of two levels of code: (i) operative or object level and (ii) meta-level, whose purpose is to shield the core principles of the system from algorithmic-initiated changes;
(b) algorithmic meta-reasoning, which allows the system to operate simultaneously at the two levels, so that it can (self) monitor, verify, and potentially correct in real-time operations at the object level, if they depart from the principles protected by the meta-code level; and
(c) correction by deliberation.[79]

This correction is crucial for connecting algorithmic calculations to human motivation, as revealed through deliberation. The authors suggest a deliberative framework which enables the meta-level to realise the two modes of reflexivity, ie algorithmic meta-reasoning and correction by deliberation. The objective is not to maximise human preferences but rather to satisfice them subject to deliberative constraints, which are used to identify human preferences and resolve ambiguities. The authors suggest two basic options for incorporating deliberation into the meta-level code. The first is the input of an external body of human deliberation, eg, an arbitration court, a certified out-of-court dispute settlement body, or a multi-stakeholder entity. The second option through which deliberation can be incorporated allows to directly engage with its users, relying on various deliberative procedures.

Probably such an algorithmic constitutionalism would need stronger institutional arrangements than a mere supervision of para-legal systems. Rather, more adequate is what Joerges envisages for the relation between the EU-Law and nation-states: a legal duty for both, the EU-law system and the digital code system, to recognise the validity of the other sectoral law. It could create a legal bond between two autonomous systems in terms of a mutual re-entry: the reconstruction of otherness in own terms.

To be sure, Europe's digital constitution is just one among several examples dealing with social domains in need of constitutionalisation. Tuori's impressive typology of sectoral constitutions described above demonstrates already the large variety of Europe's constitutional arenas. It would, however, need to be complemented by other cultural provinces, science and technology, education, health, and religion. The constitutional principles to be developed will not be a simple transfer from national constitutions, rather, they will undergo a thorough respecification. The constitutive and limitative norms will reflect the particularities of the arena involved.

All these examples illustrate something else. The great controversies of social theories which inform Joerges's work as well as his critics, are not necessarily dealing with antagonistic, mutually exclusive and incompatible concepts. Instead, they can be interpreted as mutually illuminating their blind spots and utilised for constitutional law in a complementary manner. That this is a realistic perspective could be shown in this article. Joerges's methods which he had developed for nation states constitutions work in the same way within the context of the European digital constitution. This will be true for other constitutional domains. It shows that Joerges's ambitious synthesis of social theory and constitutional law offers a promising perspective for future work.

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

[79]O Perez and N Wimer, 'Algorithmic Constitutionalism' 30 (2023) Indiana Journal of Global Legal Studies 81–113, 111.

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