European Law Open (2025), page 1 of 16
doi:10.1017/elo.2024.45

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

The EU global regulatory state and the search for transnational democracy – reflections from the edges of Europe

Maria Weimer

Amsterdam Centre for European Law and Governance, University of Amsterdam, Amsterdam, Netherlands
Email: m.weimer@uva.nl

(Received 14 May 2024; accepted 30 August 2024)

Abstract

In this essay, I reflect on the evolving role of the European Union (EU) as a global regulatory state against the backdrop of Christian Joerges's influential work on European constitutionalism. Engaging with Joerges's intellectual oeuvre represents a personal moment in my academic journey, having come of age as a scholar under his guidance during my PhD studies at the European University Institute in Florence. I therefore would like to use the opportunity to critically engage with his work while situating my scholarly analysis within the broader context of my personal experiences across Europe and how they have shaped my focus on political power beyond traditional state politics. The essay begins with a personal reflection on the interplay between the personal, the political, and the academic in my work on democracy in the EU regulatory state. Subsequently, I delve into Joerges's theory of conflicts-law-constitutionalism, examining its strengths and weaknesses, as well as its relevance for understanding the new geopolitical turn in EU external regulation and its implications for democratic constitutionalism.

Keywords: EU regulatory state; EU constitutionalism; transnational democracy; EU external regulation

In this essay, I reflect on the evolving role of the European Union (EU) as a global regulatory state against the backdrop of Christian Joerges's influential work on European constitutionalism. Engaging with Joerges's intellectual oeuvre is not only a theoretical endeavour, but also a personal moment in my academic journey, having come of age as a scholar under his guidance during my PhD studies at the European University Institute in Florence. Therefore, while critically engaging with his work, I will also situate my scholarly analysis within the broader context of my personal experiences across Europe and how they have shaped my focus on political power beyond traditional state politics.[1] The essay begins with a reflection on the interplay between the personal, the political, and the academic in my studies of democracy in the EU regulatory state. Subsequently, I delve into Joerges's theory of conflicts-law-constitutionalism, examining its strengths and weaknesses, as well as its relevance for understanding the new geopolitical turn in EU external regulation and its implications for democratic constitutionalism.

[1]In doing so, my work connects to scholarship calling for new 'situated perspectives' on Europe and its law, see L Azoulai, 'Living with EU Law' 1 (2022) European Law Open 140; F de Witte, 'Here Be Dragons: Legal Geography and EU Law' 1 (2022) European Law Open 113.

1. East–west street: the lived experiences of a European *Grenzgänger*

As social epistemologists[2] will tell you, we always know from a particular place in the world. 'Place' ought to be understood broadly here. The place I am writing this essay from is at my desk, in 'a room of my own,'[3] in The Hague, at the Dutch coast of the North Sea. But there are so many more places and experiences that have come before and that have shaped my way of thinking about the European Union. I am a Russian-German woman and law scholar who has spent almost her entire life migrating across the European continent and whose ancestors had done much the same in the centuries past. And so now, when I sit at my desk in The Hague and reflect on the work I have done over the past 10–15 years on democracy in the EU regulatory state, I can't help but wonder to what extent my personal experiences have shaped my scholarship, driving me to study political power outside of traditional politics, in more obscure and muddled places such as bureaucratic networks, expert committees, and economic governance; in short: political power beyond the state. Equally, I can't help but wonder to what extent my experiences as an outsider to every national community I have travelled through in my life have shaped my search for a new normative understanding of democracy beyond the state; a transnational democracy at the edges of representative institutions. Christian Joerges's intellectual influences on my work, his insights into 'the economy as a polity' and the 'politics of expertise' as well as his unwavering faith in the possibility of a genuine European democracy have therefore fallen on very fertile ground indeed. But before I turn to his work and related scholarly questions, let me dwell for just another moment on the above-mentioned connections between the personal and the political.

As I said, much of my scholarly work happened while I was moving around Europe, freely as a worker. Most of it was done with the help of public funding and state support systems. It was the German state that provided me with a free university education and has supported me throughout my studies with student grants and interest-free loans, including a grant to do a PhD at the European University Institute in Florence, a place the utopian beauty of which has sealed my fate as a perpetual European *Grenzgänger*. It was the German state, therefore, that paid for my elevation from Eastern European migrant into the circles of Western European intelligentsia. Today it is the Dutch state that makes my academic career as a non-Dutch citizen possible, and whose open and international university system has become my intellectual home. Through all of that, it has been the European Union, and its legally created common market, that have allowed me to maintain my complicated post-national identity. The EU as a *Heimat* of last resort.

Yet this story, this painting of my 'positionality' as a knower, would not be complete without mentioning the lessons I learned about state, market, and democracy as an Eastern European. In Russia, my European identity had always been part real and part a mirage, but certainly always a hope. A Gorbachevian utopia of pan-European cooperation that would include Russia as part of Europe. A future beyond nationalism. It was the Soviet Union in its dying breaths that taught me a lesson or two about powerful states and what happens when they break down. About life in a society in the 'trauma zone',[4] where neither the state nor the market work for ordinary people. About the lack of free movement and what it does to people's imagination. During the turbulent years of the Soviet collapse, the USSR wasn't quite the Hobbesian war of all against all, but it was close.

[2]Social epistemology – as a critique (most notably from feminist scholars) of traditional conceptions of knowledge focused on the individual knower – assumes a socially embedded view of human beings and their capacity to know; it understands knowledge as a social process shaped by communities and contexts. See L Code, *Epistemic Responsibility* (Brown University Press 1987) and L Herzog, *Citizen Knowledge: Markets, Experts, and the Infrastructure of Democracy* (Oxford University Press 2024) at p 28 and throughout.

[3]On the importance for female authors to have a room of their own, see V Woolf, *A Room of One's Own* (Penguin Books 2004 [1929]).

[4]A Curtis, 'Russia 1985–1999: TraumaZone' (BBC iPlayer 2022) <https://tinyurl.com/1985-1999-TraumaZone> accessed 14 February 2024.

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

We are in a new historical context today. The Russian Leviathan has been resurrected, tragically crushing the dream of a European Russia – at least for the foreseeable future. But here at my desk in a room of my own on the Dutch coast, I am a European and I worry about other things. I worry less about the power of the state, and more about its weakness, its struggle to control the power of the globalised market and its destructive forces. And so, my Western and Eastern European experiences seem to point in two different directions. One that is concerned with too much market. The other one with too much state. But perhaps those are not different directions, but the two defining tensions of European democracy today. Two democratic worries that must be seen together. To put this bluntly: European democracy as an aspirational project of transnational democracy (and not just a transnational market) is caught between a rock and a hard place. Between the rock of a territorially unbound market and the hard place of the territorially bound state, the democracy of the latter fragile and stuck at the national level.

Or is it? What about the EU and its *regulatory* state?[5] Doesn't it, at least as ideal type, get the balance right between state and market? Isn't it a unique regional, supranational polity whose raison d'être is to solve transnational problems and mitigate risks (eg, setting high global standards for environmental protection, food and product safety, data protection, digital markets and AI) whilst being embedded in democratic structures? Embedded in institutions which whilst imperfect, are nonetheless governed by the principles of democratic representation, openness, participation, and deliberative democracy?[6] Put shortly, can the EU regulatory state be seen as a vehicle of transnational democracy understood as democratic norms and practices which transcend national boundaries? Having arrived at the actual subject of this paper, we are immediately in trouble.

The trouble is that despite the many debates on this question, no settled conception of EU democracy exists on the basis of which it could be answered. Indeed, depending on the perspective taken, one could arrive at very different conclusions.

For some, the very question is problematic. One of the leading scholars of the EU regulatory state, Majone, would argue that democratic regulation is an oxymoron, and that the beauty of the EU regulatory state is that it is not about democracy, but about economic efficiency.[7] This line of thinking would presumably resonate with recent debates in democratic theory about the crisis of contemporary democratic representation and which argue in favour of system corrections based on the idea of an epistocracy – the rule of the knowledgeable.[8] While different conceptions, both epistocracy and technocracy have little faith in the epistemic virtues of the democratic process. Both also rely on an objectivist understanding of knowledge in which facts and values, knowledge and politics can be separated. The virtue of the EU regulatory state would therefore lie in its distance from national democratic politics with its redistributive battles and short-term interests. Majone's technocratic vision of the EU regulatory state has been highly influential in large parts of EU regulation scholarship and in EU policy circles, the latter often emphasising effective, efficient, and evidence-based problem solving as the main added value of the Union – delivering results to citizens is what Europe is all about. This is not an unattractive idea, especially if we consider some of the issues on which democratic politics are currently dramatically failing – take global warming and the interests of young people and of future generations. But does technocracy really work? The

[5]The notion of the regulatory state is amorphous. I use the notion of the EU regulatory state to refer to the role of EU regulation (positive integration as both internal market legislation and its implementation) in the process of European integration since the 1980s and the growth of EU and hybrid administrative institutions (EU agencies, regulatory networks, committees) in managing the internal market; see for a discussion K Yeung, 'The Regulatory State' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 64.

[6]Consolidated Version of the Treaty on the European Union [2012] OJ C326/15, Arts 10 and 11; A von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations' 23 (2012) European Journal of International Law 315.

[7]G Majone, *Regulating Europe* (Routledge, 1st edn 1996).

[8]J Brennan, *Against Democracy* (Princeton University Press 2016).

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

ongoing politicisation of EU regulation despite the many attempts to keep politics out, as well as abundant studies on EU regulatory politics, seem to suggest otherwise.

For others, 'the lure of technocracy'[9] is precisely the problem with European governance. From this perspective, not only is the ever-growing European regulatory state alienating citizens, it also fails to offer solutions to the most pressing problems. It enables globalised capitalism rather than preventing its disastrous social and ecological effects. The EU technocratic elite – experts and bureaucrats – is either too weak or suffers from various types of capture, be they epistemic, ideological, economic, or all of the above. As Habermas puts it, EU executive power needs the counterweight of a democratic public to stand up to highly concentrated economic interests.[10] For him the answer is transnational democracy at EU level. But for those who believe that the true locus of democracy is the modern nation state, after all the birthplace of modern democracy, the problem with the EU regulatory state is that it erodes effective self-government at the national level. On both accounts, the two faces of the EU regulatory state, technocracy and market efficiency, alienate and disempower ordinary citizens, both grinding at their collective self-government and equal freedom.

Christian Joerges is one of the few scholars who have argued that the European political process, the process of EU positive integration through regulation, has its own inherent democratic legitimation. Good scholarship is about getting the question right and Joerges's guiding question remains today as urgent and pertinent as ever: How to manage international interdependence under the conditions of globalisation whilst preserving democracy? His answer, with many vignettes and provisos, is the EU, but not the EU as another derivation of the state (either the nation state or a new federal European state), but as a new transnational form of political authority that is both functional in nature (it aims to solve transboundary problems) and committed to the ideal of democratic constitutionalism. Joerges, of course, is not oblivious of the constitutional truism according to which the EU is a polity of derived powers. But isn't a true democratic experiment always more than the sum of its parts? Joerges sees the EU as also having a genuine democratic legitimacy, which is grounded in its ability to correct the democratic deficits of national democracies. His pluralist theory of EU constitutionalism, conflicts-law-constitutionalism (CLC), rests on the assumption that democracy in a globalised world can be established neither at the national nor at the supranational level alone. Instead, it proposes a new hybrid and pluralist constitutional constellation that sees both operating in tandem and that can therefore be understood as a truly post-national constellation.[11]

In the following, I will engage with Joerges's scholarship, not just for the sake of honouring a teacher, but because it is valuable for contemporary thinking about a new type of transnational democracy. One that can transcend the exclusionary and dehumanising effects, the dark legacies, the unfreedom of the outsiders of modern state constitutionalism. As I alluded to above, this will be a reflection on democracy at the edges of representation. I will not engage with classic democratic themes of voting, parties and parliaments or separation of powers. Rather, I am pleading for a broader understanding of democracy as being relevant to the many different (and sometimes obscure) places in which political power is exercised and to the many ways in which we as citizens, consumers, workers, and human beings engage with politics across spaces.

More concretely, I will discuss two strengths and one blind spot of Joerges's CLC. The two strengths are complementary, and they make CLC stand out. The first strength pertains to Joerges's recognition of the political nature of markets and of EU market integration; the economy as a polity – he saw that long before political economy has become fashionable in EU legal studies. The second strength pertains to his equally important recognition of knowledge as political; his

[9]J Habermas, *The Lure of Technocracy* (C Cronin (tr), Polity 2015).

[10]Ibid.

[11]See PF Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-National Constellation* (Bloomsbury 2010).

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

analysis of the challenges of integrating science and politics through EU law. Joerges' approach to EU integration thus, in my view, combines political economy with political epistemology[12] when thinking about European democracy. Both strengths are relevant for the observations in the last part, where I consider the blind spot. The latter has to do with a recent transformation, which CLC does not address, but for which its core principles may nonetheless be relevant: the transformation of the EU into a global regulatory state. I will argue that EU global regulatory power is a new iteration of EU economic constitutionalism, which requires imaginative thinking about new conflicts of laws and transnational democracy.

One clarification on terminology is in order. Throughout the paper, I will reflect on the different facets of the term 'transnational' defining it rather loosely as processes, regulations, and democratic norms and practices that go beyond national boundaries, involving multiple states and public and private actors in a way that integrates their socio-economic, political, and legal dynamics to address shared cross-boundary problems. Transnational problems require transnational regulation, which requires new ways of thinking about legal and political authority and its justification. The main goal is to break with methodological nationalism, whilst keeping the notion nonetheless open for new theorizing.[13]

2. The economy as a polity and integration through law

Before I go on, I would like to note that engaging with Joerges's work on European integration feels like engaging with several scholars at once, each not entirely in agreement with the others. Undoubtedly, Joerges's oeuvre is shaped by his multiple scholarly identities. There is Joerges the EU lawyer and Joerges the international private lawyer. There is Joerges the political scientist, Joerges the economic sociologist, and Joerges the historian. There is Joerges the German social democrat and Joerges the European and even the transnationalist. For those interested in understanding his scholarly journeys, both intellectual and physical, I recommend his latest book.[14] Here I will just say that a conversation with him is a fascinating one despite, or maybe *because* he is not easy to place as a thinker. Over the years I have learned that there is also an element of scholarly strategy: that of bringing in different perspectives without always reconciling them and sometimes simply leaving things open - Joerges, the conflicts-of-law thinker.

The ideational roots of Joerges's CLC reflect this pluralism of scholarly identities and perspectives. CLC as a pluralist approach to EU constitutionalism, an attempt to code the idea of 'unity in diversity' into the EU's constitutional DNA, must be understood against the background of Joerges's social democratic convictions and his worries about economic rationality as the legal coding of EU economic constitutionalism. CLC developed as a critique against the rigidity of legal

[12]See on this approach M Morvillo and M Weimer, 'Who Shapes the CJEU Regulatory Jurisprudence? On the Epistemic Power of Economic Actors and Ways to Counter It' 1 (2022) European Law Open 510; Herzog (n 2).

[13]I draw inspiration from the scholarship on global and transnational constitutionalism, see H Brunkhorst, 'Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism, und Weltstaatlichkeit' in M Albert and R Stichweh (eds), *Weltstaat und Weltstaatlichkeit* (VS Verlag für Sozialwissenschaften 2007) 63; P Zumbansen, 'Law as Critical Cartography: Global Value Chains, Borders, and the Spatialisation of Vulnerability' (2023) Transnational Legal Theory 1; Kjaer (n 11); and on transnational European private law, see A Beckers, 'Three concepts of European Private Law and the Transnational' in A Beckers, H Micklitz, R Vallejo and P Letto-Vanamo (eds), *The Foundations of European Transnational Private Law* (Hart Publishing 2024) 27. This literature understands transnational law as 'useful to identify, understand, and assess the place and role of EU private law throughout a vast array of legal regimes or policy domains beyond the frontiers of the internal market. This is mainly due to its capacity to pluralistically trace the diverse actors, norms, and processes involved in those regimes and to bridge established distinctions between the private/public, national/international, or law/non-law. With its pluralistic framework, transnational law thus offers a distinctive analytical ductility that has been mainly attributed to its methodological nature, rather than conceiving it as some kind of theory or substantive field'. See R Vallejo, 'The Jurisprudence of Process and European Transnational Private Law' in Beckers et al, ibid., 107. However, I apply these ideas to European public regulatory law.

[14]C Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart 2022).

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

supranationalism and integration through law and the resulting top-down intrusion into national constitutional and socio-economic systems. Its first dimension is concerned with the CJEU internal market jurisprudence. It is a call upon the Court to exercise judicial self-restraint when interpreting EU constitutional principles, such as direct effect and supremacy, and to show deference towards democratic choices at the national level.[15] It is interesting to contrast Joerges' writing with that of Fritz Scharpf, another German scholar of the social democratic tradition who has been critical of the power which the CJEU had usurped in the so-called foundational period[16] to drive forward integration through law (ITL). On the one hand, Joerges shares Scharpf's concern about the power of the Court and its constraining effects on national democracies. On the other hand, he is more ambivalent about the neoliberal tendencies of ITL as well as about the structural weakness of the EU (which according to Scharpf is almost impossible to overcome) when it comes to re-regulating the internal market at EU level. This ambivalence in Joerges is arguably Polanyian. The market is always a polity, its dis-embedding[17] always followed by re-embedding, and so on. The free, neo-liberal market is a 'stark utopia' and that goes for the free EU internal market as well. As Joerges keeps emphasising with reference to Polanyi:

'His understanding of capitalism as a process of commodification and countermoves of societal self-protection deserves the attention of Europeanists and constitutional theorists likewise.'[18]

As a Polanyian, Joerges sees the process of EU integration as a dynamic and ongoing struggle between market forces and social protection.[19] And with such a dynamic process, there are victories and set-backs alike. This ebb-and-flow understanding of EU market integration could explain why Joerges sometimes celebrates EU (case-) law as manifesting the deferential and procedural spirit of CLC (Cassis),[20] sometimes laments that it does not (Viking and Laval),[21] and sometimes is outraged about the absence of EU law altogether in what he sees as processes of de-legalisation (Open Method of Coordination[22]) or law's 'overburdening' (the crisis governance of the European Monetary Union).[23] To some extent, the ambiguity of Polanyi's concepts is carried over in Joerges's work, resulting in a lack of clear normative benchmarks which could help assess when EU law is ensuring social protection and when it is undermining it. On the other hand, Joerges can combine critique of ITL with a constructive vision of a legally constituted EU as a democracy, and to preserve the open-ended nature and contingency of the European project.

Probably, Joerges's more optimistic view of the integration project is also due to his work on EU risk regulation (environmental, consumer, health and safety), which as Scharpf himself recognises, does not fit into his narrative of structural asymmetries and de-regulation.[24] The EU has not only achieved considerable success re-regulating these areas, it continuously sets high standards of protection both within the EU and globally (and is constitutionally obliged to do so, see Article 114 TFEU). This applies to other areas as well, such as data protection, banking, and digital markets. Scharpf's analysis is poignant, but it is focused on specific (social policy) areas and does

[15]After the financial crisis, Joerges's attention has also turned to the new forms of economic governance of the European Monetary Union and the CJEU review of ECB actions, which Joerges considers to be a constitutional anomaly and an 'overburdening of the law.' See ibid., Chapter 3.

[16]JHH Weiler, 'The Transformation of Europe' 100 (1991) The Yale Law Journal 2403.

[17]On the different meanings of this term, see JA Caporaso and S Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' 63 (2009) International Organization 593.

[18]C Joerges's contribution to this issue.

[19]Closer perhaps to Caporaso and Tarrow's understanding (n 17), although Joerges is also critical about them.

[20]Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

[21]Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* ECLI:EU:C:2007:772; Case C-341/05, *Laval v Svenska Byggnadsarbetareförbunder* ECLI:EU:C:2007:809.

[22]Referring to a non-legislative integration technique, open method of coordination (OMC) involves the establishment of guidelines, timetables, and benchmarks.

[23]Joerges (n 14).

[24]FW Scharpf, 'The Assymetry of European Integration, or Why the EU Cannot be a "Social Market Economy"' 8 (2009) Socio-Economic Review 211.

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

not hold across all EU policy fields. But even if one were to agree with Scharpf's problem analysis, what are the solutions? His conclusions – transnational democracy at EU level is unrealistic and we should turn back to the nation state – are difficult to accept. Can a vision of social democracy in the 21st century, in times of global warming and global inequality, really be confined to the nation state? And while the social democrat Joerges is likely to share that nostalgia, the European-Polanyian Joerges offers a more attractive vision with CLC.

As important as the ITL debates have been for infusing EU legal scholarship with much needed critical self-reflection, today they seem too narrow to account for how European integration has evolved and continues to evolve. We need to think not just about ITL, but also about the by now abundant and multi-faceted EU *integration through regulation*, which takes place through EU-level political processes (both legislative and administrative). The search for an adequate balance between EU transnational problem-solving and democratic legitimacy is ongoing. Here, our attention shifts to the challenges of the EU regulatory state.

3. The politics of expertise and the EU transnational political administration

This brings me to the second strength of Joerges's work, namely his understanding of the EU regulatory state as expressed in the second and third dimensions of CLC. It is an understanding that is both richer and more nuanced than that of Majone, and it has been influential for my own thinking about this subject. Joerges does not see the EU regulatory state as a technocratic, efficiency driven institution, but as a *political administration* (see below), which, in its ideal form, shapes and embeds the internal market within broader social purposes. This is a much more astute understanding both as an empirical observation of how the EU regulatory state operates in practice – its regulatory politics and contestations today widely studied – and as a normative vision which demands its democratic constitutionalisation.

The democratic worry about market rationality and the dis-embedding of markets from social purposes goes together with the democratic worry about the *Verselbständingung* of technocratic rule – the dis-embedding of state power from democracy.[25] CLC rightly recognises the double threat to European democracy. It also goes beyond critique. Joerges (here his political science inclinations play a role) recognises the value of the EU's complex and sometimes opaque administrative governance for the management of transnational problems. The implementation of EU law (and its preparation) relies on transnational structures of regulatory cooperation between EU and national administrative actors, experts, and private actors. These administrative governance structures are a multi-level and networked institutional response to the functional needs of European integration (above all to the need to gather relevant information and knowledge and to ensure compliance amidst diverse local conditions).[26] They are not organised along national-territorial lines (ie, representing the member states), but along transnational-functional lines of regulatory problem solving (eg, food safety, environmental protection, financial stability).[27] To solve problems, significant discretion is outsourced to and exercised within these regulatory governance structures (eg, agencies, committees, regulatory networks). They are involved in a cascade of norm-making all the way down. Hence, the discerning notion of the *political* administration – a notion coined by Joerges's *Doktorvater*, the German legal scholar Rudolf Wiethölter already in the 1970s. Back then it referred to the shift from 'conditional' legal programming associated with 'legal formalism' towards 'purposive legal programming'

[25]This worry has become even more pronounced in Joerges's later work on the financial crisis and the governance of the European Monetary Union (EMU), the legal developments of which, for Joerges, are no longer fitting the idea of a legally constituted EU deliberative administration. Therefore, the following reflections do not apply to the legal developments of the EMU. On the impacts of EU monetary integration on Social Europe, see S Klein, 'European Law and the Dilemmas of Democratic Capitalism' 1 (1) (2020) Global Perspectives 13378.

[26]Kjaer (n 11).

[27]For a similar argument based on systems theory in Kjaer (n 11).

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

(*Zweckprogamme*) in the German social welfare state, which was supposed to help advancing social reforms through a more just 'material law'. This entailed the creation of an active political administration, for which the boundaries between political and bureaucratic dimensions were blurred. Joerges sees a similar development taking place in the EU context, in the aftermath of the 1986 Single Market programme. An EU political administration operating through transnational networks was a necessary reaction to the project of EU social re-regulation of the internal market, of its re-embedding. But how to reconcile this with democratic constitutionalism?

Joerges' answer to this question is deliberative supranationalism,[28] which was later incorporated into the broader framework of CLC. Recognising that the power of the executive lies in its ability to make claims to rationality grounded in expert knowledge, Joerges suggested already in the 1990s that any new theory of transnational constitutionalism must find a way to democratise the processes through which knowledge is generated and used in executive decision-making. Contemporary EU administrative law debates would greatly benefit from Joerges's insights into the epistemic challenges of the EU regulatory state,[29] which are essentially also the challenges of contemporary democracy as recently convincingly argued by Lisa Herzog.[30] A healthy democracy must find ways to overcome the power imbalances caused by the simultaneous processes of specialisation and marketisation of knowledge in modern society, which ultimately threaten political equality and our ability to have common knowledge. Joerges, of course, had long been warning about the dilemmas of the politics of expertise. Deliberative supranationalism, inspired by Habermasian theory of deliberative democracy, explicitly recognises the power exercised in bureaucratic networks, such as comitology, but argues that it can and must be constitutionalised by ensuring the equal inclusion of all relevant knowledge. As such, it recognises the epistemic function of democracy[31] and tries to make it work for EU transnational governance.

Deliberative supranationalism has been widely discussed and critiqued, sometimes for good reasons[32] and sometimes less so.[33] To defend an EU comitology system as the future of EU democracy would be to make a caricature of Joerges's ideas about it. To dismiss these EU transnational structures of decision-making and knowledge production as irrelevant for our thinking about EU democracy would nonetheless be a grave negligence. What I would like to uphold here is not comitology as such, but the idea of deliberative supranationalism as 'one of few attempts aimed at developing normative concepts that go further than merely applying nation-state concepts to the EU.'[34] Deliberative supranationalism contains the seeds of a new theory of transnational democracy, but it must be developed further. Above all, deliberative supranationalism must contend with the critique of Habermas and of deliberation as an elitist rationalistic theory that reproduces societal inequality.[35] Deliberation in transnational networks, such as comitology, cannot be confined to the bureaucratic expert discourse. It must strive to open the space for a truly inclusive deliberation and epistemic diversity.[36] This in turn requires a broad

[28]See C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' 3 (1997) European Law Journal 273.

[29]M Morvillo and M Weimer, 'Who Shapes the CJEU Regulatory Jurisprudence? On the Epistemic Power of Economic Actors and Ways to Counter It' 1 (2022) European Law Open 510.

[30]Herzog (n 2).

[31]Ibid.

[32]Kjaer (n 11); M Weimer, *Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology* (Oxford University Press 2019).

[33]JHH Weiler, 'Epilogue: "Comitology" as Revolution – Infranationalism and Democracy' in C Joerges and E Vos (eds), *EU Committees, Social Regulation, Law and Politics* (Hart 1999) 339–49.

[34]Kjaer (n 11) 11.

[35]See the discussion of debates in social and political epistemology and feminist studies in Herzog (n 2) 61–83.

[36]C Holst and A Molander, 'Public Deliberation and the Fact of Expertise: Making Experts Accountable' 31 (2017) Social Epistemology 235; Morvillo and Weimer (n 29).

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

understanding of knowledge, including not only expert knowledge but also local and indigenous knowledge and knowledge through experience; and recognising the social, political, and contextual nature of knowledge.[37] A new theory of transnational democracy based on deliberation also requires a broad understanding of deliberation, which includes forms of political struggle, contestation, 'unruly practices' and 'counter discourses.'[38] In other words, the force of the better argument can only prevail under conditions of epistemic justice[39] – an argument which I will leave for another day.

4. The EU global regulatory state and the search for transnational democracy

The previous discussions illuminate how the dual perspectives of political economy and political epistemology are essential to understand the evolving role of the EU as a regulatory state. In the remainder of this essay, I will reflect on the relevance of Joerges's critique of EU economic constitutionalism to the EU's external regulatory actions. Over recent decades, the EU regulatory state has been undergoing a transformation, a development not captured by Joerges. The internal consolidation of the EU regulatory space – the double upward expansion of both EU legislative output re-regulating the internal market and EU executive institutions involved (directly or indirectly) in the implementation of such output (eg, EU agencies and regulatory networks) – is today accompanied by a new sideward expansion of EU regulatory influence globally.[40] Here, too, in a Polanyian dynamic of movements and counter-movements, (transnational) market integration triggers attempts at EU (external) re-regulation, the latter pursuing both economic (eg, shielding EU companies from global regulatory competition or ensuring EU supplies of critical resources) and non-economic (eg, sustainability) objectives. Both, the political nature of markets and the political nature of knowledge (here as specialised knowledge necessary to govern transnational economic processes), are crucial to understanding these shifts and its constitutional ramifications. The global iteration of the EU regulatory state relies once again on both EU market power[41] and EU regulatory capacity and capability.[42] There is a growing debate about the nature of this new type of EU regulatory influence, its modes of 'travel', the actors involved and the kind of law that both underpins it[43] and is being produced by it.[44] The conceptual contours of the phenomenon remain open to discussion and different disciplines provide different terminology as well as different theoretical, methodological and empirical perspectives.[45] Despite the richness of

[37]Herzog (n 2) 180–6.

[38]N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (25/26) (1990) Social Text 56.

[39]M Fricker, 'Epistemic Justice as A Condition of Political Freedom?' 190 (2013) Synthese 1317; and further discussion in Herzog (n 2).

[40]See the seminal studies by Anu Bradford and Joanne Scott; A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2019); J Scott, 'Extraterritoriality and Territorial Extension in EU Law' 62 (2014) The American Journal of Comparative Law 87; J Scott, 'The New EU Extraterritoriality' 51 (2014) Common Market Law Review 1343; M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019). See also I Hadjiyianni, *The EU As a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Bloomsbury Publishing 2019); J Zeitlin (ed), *Extending EU Experimentalist Governance – The European Union and Transnational Regulation* (Oxford University Press 2015); S Lavenex, 'The Power of Functionalist Extension: How EU Rules Travel' 21 (6) (2014) Journal of European Public Policy 885.

[41]C Damro, 'Market Power Europe: Exploring a Dynamic Conceptual Framework' 22 (2015) Journal of European Public Policy 1336.

[42]S Lavenex et al, 'Power Transitions and the Rise of the Regulatory State: Global Market Governance in Flux' 15 (3) (2021) Regulation & Governance 445.

[43]Cremona and Scott (n 40).

[44]See Beckers et al (n 13).

[45]For an excellent overview of the discussion see Vallejo (n 13) 107.

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

the discussion, scholars of EU constitutionalism are only beginning to grapple with the external dimension of the EU regulatory state and with its constitutional implications.

A. EU supply chain regulation as a key example of EU external regulation

The EU's global regulatory entanglements signify a broader geopolitical shift in its external law and policy. As Rodrigo Vallejo noted recently:

> the EU has most forcefully entered the complex geopolitical power play by seeking to 'promote European interests and values on the global stage' through building 'a stronger Europe in the world' and fostering 'our European way of life' as one of its 'strategic priorities'. Despite their polemic overtones, these are the ambitions that are now officially guiding the political actions and regulatory programmes of EU institutions within and beyond the internal market in several socio-economic realms. The EU is thus currently experiencing a salient 'geopolitical awakening'.[46]

The EU's ambition to regulate the global economy is one important manifestation of this 'geopolitical awakening.' In different policy fields, such as data protection, competition law, environmental law, food safety and more recently digital markets and AI regulation,[47] the EU aspires to be a global standard setter for transnational business activities. An interesting recent example of this is EU supply chain regulation (SCR) which aims to infuse sustainability concerns into the operation of global supply chains. EU SCR has several characteristics that distinguish it from other forms of extension of EU standards to the rest of the world, such as through sustainability chapters in trade agreements[48] or through the the EU's participation in multilateral institutions. Two prominent examples of EU SCR are the EU Corporate Sustainability Due Diligence Directive (CSDDD)[49] and the recently adopted EU deforestation regulation.[50]

The first characteristic is the unilateral nature of EU SCR, which is put into place through EU internal legislation. It regulates business activities that take place in one way or another on the EU internal market. The second feature is that it uses market access to regulate conduct beyond the EU's territory, often in so-called producer countries in the Global South. It is therefore referred to as EU regulation with global reach or extraterritorial regulation or territorial extension.[51] As such, EU SCR is an attempt of the EU to shape global markets outside of, or in addition to, multilateral frameworks of international cooperation.[52] The third feature of EU SCR – interrelated with the above two – is that its governance design relies on mandatory due diligence (MDD) - a concept coined by the international relations scholar John Ruggie, and imported into EU law from international business and human rights discourse. MDD is a relatively new EU regulatory technique. It refers to a new wave of EU legislation, which places legal obligations on private businesses to employ due diligence to avoid human rights infringements and environmental harm

[46]Ibid., 108 with reference to L van Middelaar, 'Europe's Geopolitical Awakening' 8 (2021) Groupe d'études géopolitiques Working Paper 8.

[47]On the latter, see eg, D Mügge, 'The Securitization of the EU's Digital Tech Regulation' 30 (7) (2023) Journal of European Public Policy 1431.

[48]See G Vidigal and K Claussen, *The Sustainability Revolution in International Trade Agreements* (Oxford University Press 2024).

[49]Directive 2024/1760 which requires companies to exercise human rights and environmental due diligence in their operations and supply chains both inside and outside of the EU.

[50]Regulation 2023/1115, which prohibits the placing or making available on the Union market of products made through deforestation or forest degradation. It requires traders and operators to conduct due diligence in their entire supply chain.

[51]J Scott, 'The Global Reach of EU Law' in Cremona and Scott (n 40) 21.

[52]As Scott (n 40) rightly points out, often, however, EU standards are based on international standards or seek to stimulate international cooperation.

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

in their supply chains.[53] Different laws give different meaning to MDD ranging from obligations of transparency and reporting to actively preventing human rights and environmental harm. The core idea behind MDD, however, is to capitalise on and steer how lead firms privately govern their supply chains.

As such, EU SCR emerges as a new type of transnational (hybrid public-private) regulation, which utilizes global supply chains as the main vehicle through which the EU extends its governance to other jurisdictions.[54] Addressed at private companies operating on the internal market, EU standards reach across national and sub-national jurisdictions, sometimes directly clashing with the laws of such jurisdictions, without being directly addressed at third country governments (although they sometimes incorporate third country law in their normative content). The implementation of EU SCR relies on co-regulation by private actors, who must ensure EU standards are carried through their supply chains and who enjoy wide discretion in that process. Therefore, not unlike EU internal regulatory governance, EU supply chain regulation follows not the logic of territorial jurisdiction, but the logic of a new functionally organised ordering along global value chains.[55] It reaches into foreign jurisdictions creating new layers of normativity, which compete with other national and transnational norms applicable to economic actors. Put differently, EU SCR and similar forms of EU global economic regulation are likely to create new conflicts of laws.[56] They are also affecting many (not only powerful, but also vulnerable) actors involved in the global supply chain economy, producing unintended effects and new distributional conflicts in the global political economy.[57]

Joerges's CLC as well as most other debates on EU constitutionalism do not explicitly deal with the external dimension of the EU regulatory state.[58] The connection to CLC is, however, evident. Just as with internal EU economic constitutionalism, also externally the EU market is at the core of this new type of EU transnational ordering. Here, too, EU regulation pursues the dual objective of market making and market governance in pursuit of non-economic (eg, environmental or sustainability) objectives, the latter being set at a high level compared to most other jurisdictions triggering (or attempting to trigger) a race to the top in global regulatory competition.[59] Moreover, EU law plays a crucial role in coding this new type of transnational economic governance. As such we are dealing with a new type of external integration through law for the purpose of solving transnational problems (often global collective problems that no state could solve on its own, such as climate change). The crucial difference, of course, is that EU external regulation does not take place within a multilateral legal framework, which has delegated the EU any such powers. What then are the normative implications of the EU regulatory state going global? How is the legitimacy of this new type of EU external economic regulation to be assessed? And are questions of democratic constitutionalism at all pertinent here?

[53]See JG Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', Corporate Responsibility Initiative (2017) Working Paper No 67 (John F. Kennedy School of Government, Harvard University).

[54]See also J Salminen, M Rajavuori and KH Eller, 'Global Value Chains as Regulatory Proxy: Transnationalising the Internal Market Through EU Law' in Beckers et al (n 13) 367.

[55]On problem orientation as an important characteristic of the transnational legal process, see Vallejo (n 13).

[56]A Beckers, H-W Micklitz, R Vallejo and P Letto-Vanamo, 'European Transnational Private Law – Considerations for a Research Agenda' in Beckers et al (n 13) 1, with further references.

[57]P Schleifer, *Global Shifts – Business, Politics, and Deforestation in a Changing World Economy* (MIT Press 2023); E Zhunusova et al, 'Potential Impacts of the Proposed EU Regulation on Deforestation-Free Supply Chains on Smallholders, Indigenous Peoples, and Local Communities in Producer Countries Outside the EU' 143 (2022) Forest Policy and Economics 102817.

[58]Exceptions can be found in J Zeitlin, *Extending Experimentalist Governance?* (Oxford University Press 2017), and Hadjiyianni (n 40).

[59]See D Vogel, *Trading Up: The Consumer and Environmental Regulation in a Global Economy* (Harvard University Press 1997); Bradford (n 40).

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

B. EU external regulation as a new form of global governance

Just as sometimes in debates about the internal legitimacy of the EU regulatory state, debates about its external regulation largely bypass questions of democracy as presumably irrelevant. What is sometimes discussed is the internal democratic legitimation of EU external governance, which played a role, for example, in the debates about the EU comprehensive trade agreements (eg, TTIP and CETA) and the regulatory cooperation mechanisms contained therein.[60] The concern in these debates has been that EU regulatory cooperation with other (economically equally powerful) countries (eg, the US) could lead to the lowering of EU standards of social and other types of protection (safety or environmental) thereby undermining the EU's democratic right to regulate.

But what about legitimacy of EU external regulation from the perspective of foreign actors and jurisdictions at the receiving end of EU norms? Current legal scholarship on EU extraterritoriality discusses the justification of EU unilateralism vis-à-vis foreign constituencies mostly in terms of its legality under international law, and here mostly under the international law of jurisdiction.[61] I cannot do justice to the arguments made in this rich literature here and will summarise the main points. Given the currently broad interpretation of the law of jurisdiction among others by the CJEU,[62] the mere existence of some kind of territorial connection or 'trigger' means that EU action in most such cases is covered by the principle of territoriality under international law. Therefore, the EU rarely engages in true extraterritorial legislation. Instead, it employs the legislative technique of 'territorial extension', whereby the EU 'uses the existence of a territorial connection (notably, but not only, market access) with the EU to influence conduct that takes place outside the EU.'[63]

It is doubtful, however, that we can make sense of the kind of transnational business regulation described above – and of its normative implications – through the lens of territorial jurisdiction. As mentioned above, EU territorial extensions do not follow a territorial logic, but a functional one.[64] Territorial extension does not extend the EU's physical territory. EU regulation of conduct abroad (eg of agricultural cultivation on deforested land in Indonesia) extends 'the reach' of EU regulation. Put differently, it makes a claim that EU law ought to govern beyond EU's physical territory. What is being extended is the EU's (claimed) right to rule over certain kinds of extraterritorial conduct to address certain kinds of problems. It seems more fitting, therefore, to speak of the functional extension of EU's *legal* territory.

Of course, the existence of a territorial link, often the ubiquitous 'market access', maintains the link between this legal construction of territoriality as 'right to speak the law' and EU physical territory.[65] Yes, this link is very tenuous indeed. Once goods and services arrive in or depart from the EU market, the territorial link is established and the claim to jurisdiction is justified. The bigger and more open the EU market, the more powerful the EU's jurisdictional claim. To some extent EU territory and EU market could be seen as collapsing into one and the same category. But where are the market's limits? The 'internal market' is global and digital, and it has no real physical boundaries. Does it still make sense to speak of market access as a 'territorial link' in the sense of a link to the EU's physical territory? Should we speak directly of market links and market extensions instead? Given the ubiquitous nature of the EU market, the

[60]M Bartl, 'Regulatory Convergence through the Back Door: TTIP's Regulatory Cooperation and the Future of Precaution in Europe' 18 (2017) German Law Journal 969.

[61]C Ryngaert, *Selfless Intervention: Exercising Jurisdiction in the Common Interest* (Oxford University Press 2022) and Scott (n 40); Scott's work on the 'complicity' of the EU does, however, link up with the discussion on legitimacy; Exceptions include: Hadjiyianni (n 40); E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' 107 (2013) American Journal of International Law 295.

[62]Case C-366/10, *Air Transport Association of America* ECLI:EU:C:2011:864; see also Beckers (n 13).

[63]Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 40).

[64]Lavenex speaks about functional extension, see Lavenex (n 40).

[65]See also Salminen et al (n 54) 377 (market access as the lynchpin of EU's external regulatory strategies).

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

territorial links triggering EU legal extensions seem to be the 'fig leaves' of the law of territorial jurisdiction. EU territorial extension makes the geography of EU law potentially unbound, too. Yet while CJEU jurisprudence authorises the global reach of EU regulation, it does little to legally limit the exercise of EU regulatory power and to hold it to account from the perspective of affected actors abroad.[66] This raises the question(s) of who – and in what way – will police the limits of territorial jurisdiction and hold powerful actors such as the EU to account for their unilateral regulatory choices and their intended and unintended effects on actors and countries outside the EU?

In a similar vein, Nico Krisch has recently argued that 'a territoriality focused jurisdiction would no longer have much of a limiting function; it would largely follow the extent of state power'.[67] His analysis of global business regulation (in international football, finance, ports, human rights and data) shows that there is a growing schism between the theory and the practice of the law of jurisdiction, whereby the core underlying idea that jurisdiction is a 'a tool to regulate the coexistence of equal sovereigns' and to demarcate 'horizontally' spheres between sovereign states so as to prevent them from encroaching upon each other's authority no longer captures the legal practice of jurisdiction in global business regulation. While such a 'horizontal framing' is rhetorically upheld, in practice, the ability to claim jurisdiction (as the EU does when it extends its standards beyond its territory) today reflects unequal power relations in the global economy. It has become another form of global governance exercised unilaterally by the few most capable states. As Krisch puts it

> a few powerful countries wield the capacity to set and implement the rules. Jurisdiction is thus misunderstood if framed as an issue of horizontal relations among sovereign equals but should rather be regarded as a structure of global governance through which (some) states govern transboundary markets.[68]

As a form of global governance that is enacted de-centrally by (some) states, jurisdiction operates not in a world of equal cooperating states, but in a world of deep-seated historical inequalities in world politics. It is, therefore, a new type of 'oligarchical' global governance. Global business regulation, such as EU SCR confronts the law of jurisdiction with 'unlocalised acts, ubiquitous actors, and unbound markets'; and create 'widespread assertions of practically globalised, 'unbound' jurisdiction'. 'Thin, partial links' and 'territorial connections' (such as ships entering ports, aircrafts landing in airports and goods or services entering the market) are widely accepted as grounding jurisdiction whilst they can be established by almost every state, but they are typically invoked only by states with sufficient economic and regulatory capacity to do so.

C. Constitutional challenges and the search for a new theory of transnational democracy

This above analysis calls for a fundamental shift in how we understand what EU external regulation is and what its normative challenges are. Understood through the global governance prism, EU regulation raises questions of external legitimacy and accountability from the perspective not only of EU Member States and citizens, but also from the perspective of democratic self-government in third countries, particularly those with weaker market power and regulatory capability.[69] The analysis also underlines the problematic role of law (both EU and international law) as enabler and a tool of legitimation of regulatory unilateralism, but as failing to provide adequate mechanisms of accountability and power limitation. EU external economic

[66]M Cremona, 'Introduction: The New Frontiers of EU Administrative Law: Is There an Accountability Gap in EU External Relations?' 2 (2017) European Papers 482.

[67]N Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance' 33 (2022) European Journal of International Law 498.

[68]Ibid., 481.

[69]Ibid., 505.

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

constitutionalism is, to paraphrase the German political sociologist Hauke Brunkhorst, a pre-democratic one. If it is undertaken in the spirit of cosmopolitan ideas,[70] it is a new 'cosmopolitanism of the few'[71] who can set and enforce rules in the global economy.

Brunkhorst's work on the three transformations of the world society adds another critical edge to my argument. The first transformation is economic, from '"state-embedded markets of regional late capitalism" into the "market-embedded states of global turbo-capitalism".' The second is religious, 'the transformation of the state-embedded religions of Western regional society into the religion-embedded states of the global society.' And the last one is that of state power, whereby 'the internally fragmented executive branches of the state have decoupled themselves from the state-based separation, coordination, and unification of powers under the democratic rule of law, and they too have gone global,' resulting in a 'post-national governance without democratic government'. Pre-democratic global constitutionalism for Brunkhorst is legal globalisation as a gradual de-coupling of law from democracy, whereby rule of law is replaced with an 'elitist rule *through* law'[72] by a 'transnational politico-economic-professional ruling class'.

> As a result, the new globalised executive power seems to be undergoing the same transformation as markets and religious belief systems, and it is thus transformed from state embedded power to power embedded states. This leads to a new privileging of the globally more flexible second branch of power vis-à-vis the first and third one, which jeopardises the achievements of the modern constitutional state. The effect of this is an accelerating process of an original accumulation of global power beyond national and representative government'.[73]

Brunkhorst's analysis captures well the parallel processes of economic, legal, and technocratic globalisation, the combination of all three being the foundation of EU global regulatory power. EU extension of legal standards relies on the parallel extension of EU's 'global executive power', both accompanying (and being justified by) the globalisation of markets. (Note again in comparison the similarity to the internal dimension with EU market liberalisation having led to re-regulation and the growth of the EU administration). Contrary to the arguments about the decline of the state in view of economic globalisation, we observe a transformation of state power instead.[74] The reassembling of a new, transnational, executive, and disaggregated state power without democratic constitutionalism.

The above reflections have hopefully made clear that the external expansion of EU regulation has similar features as its internal evolution. It combines a new form of economic constitutionalism enabled by EU law with regulation through transnational regulatory networks, whereby EU executive actors (and private actors) play a crucial role in the implementation of EU global standards. It represents a 'new stage in the EU's global market-building project',[75] and raises a crucial normative question, namely, 'how to constitutionalise this new form of transnational governance?'

The search for an answer to this question is only beginning[76] and should consider the core insights and normative aspirations of CLC. Above all: the management of transnational problems arising out of (economic, political, or ecological) interdependence cannot legitimately rely on

[70]As argued by Ryngaert (n 61).

[71]H Brunkhorst, 'Constitutionalism and Democracy in the World Society' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 179.

[72]See also NM Rajkovic '"Global Law" and Governmentality: Reconceptualizing the "Rule of Law" as "Rule through Law"' 18 (2012) European Journal of International Relations 29.

[73]Ibid., 193.

[74]See also S Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press 2012) 4.

[75]Salminen et al (n 54).

[76]Beckers et al (n 13) and PF Kjaer, 'From conflicts law to transformative law: facing "fragmented globalisation"', in this issue.

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

unilateral imposition of solutions by some actors and legal systems over others. It requires cooperation and mutual respect between political and legal constituencies. Moreover, attempts to implement unilateral standards globally amidst strong socio-economic, cultural, and geographical complexity, not to mention political resistance to EU regulation in many places of the world, are likely to be ineffective, too. 'The legitimacy of this governance is to be measured by the deliberative quality of the decision processes organised in it'.[77] At the very least, EU law must provide a robust procedural framework[78] for the governance of the EU global regulatory state that facilitates truly inclusive deliberation based on the principles of epistemic diversity and justice[79] and that provides for cooperation and conflict resolution that is inclusive of local context and of local actors and their knowledge. At a time when multi-national institutions and international cooperation are failing to solve the most pressing problems, unilateral attempts to solve transnational problems, such as EU external regulation, are probably rightly considered as necessary and as the only available path to protect important values and to provide 'effective legal governance in the Anthropocene'.[80] Yet we should not hasten to accept their current normative justifications under traditional frameworks, such as jurisdiction, and instead acknowledge the acute legitimacy and accountability problems which they pose.

The search for a new theory of transnational democracy that can allow for meaningful critique and legal reform goes on. Taking transnational democracy seriously in the context of EU external regulation means overcoming the dualism ingrained in modern state-based constitutionalism and ensuring the democratic inclusion of actors affected by EU legal norms 'on all levels of their creation (local, national, regional and global) and in all institutions (political, economic, social and cultural levels).'[81] It requires a critical-realist[82] agenda which studies the emergent practices[83] of EU global jurisdictional assertions. Such assertions may change the very nature of the EU regulatory state and its relationship with democracy. They are likely to involve a mix of coercion, persuasion, and authority. They will have distributive consequences and unintended negative effects on actors who have no say in how the EU sets its standards. These actors are likely to resist unless their interests and concerns are taken seriously by the EU and other global governance oligarchs[84]; unless they are no longer treated as 'aliens'. This in turn 'may yield the formation of new political communities that do not necessarily track the physical borders of the state.'[85] Herein lies, I believe, the transformative potential of Europe for democratic governance and modern state politics. It does not lie in othering and alienation. Not in integration through law and not through markets, although all that plays a role. The transformative potential lies in opening up cracks in European law and governance, through which struggles and resistance are able to come in and around which new transnational political communities can be formed.

[77]C Joerges, 'Deliberative Supranationalism – A Defence' 5 (8) (2001) European Integration Online Papers. https://eiop.or.at/eiop/pdf/2001-008.pdf.

[78]Vallejo (n 13).

[79]See Section 3.

[80]SL Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' 46 (2005) Osgoode Hall Law Journal 565; Ryngaert (n 61) 25.

[81]Brunkhorst (n 71).

[82]See R Forst, 'Towards a Critical Theory of Transnational Justice' 32 (2001) Metaphilosophy 160.

[83]On the study of practices in international law and politics, see NM Rajkovic, TE Aalberts and T Gammeltoft-Hansen, 'Introduction: Legality, Interdisciplinarity and the Study of Practices,' in idem (eds) *The Power of Legality. Practices of International Law and Their Politics* (Cambridge University Press 2016) 1.

[84]M Weimer, 'Reconciling Regulatory Space with External Accountability through WTO Adjudication: Trade, Environment and Development' 30 (2017) Leiden Journal of International Law 901; Seck (n 80).

[85]F Irani, 'Beyond de jure and de facto boundaries: Tracing the Imperial Geographies of US Law' 26 (2020) European Journal of International Relations 397.

https://doi.org/10.1017/elo.2024.45 Published online by Cambridge University Press

At my desk, I have a picture that was taken on the day of my PhD defence at the EUI on the terrace of the Villa Schifanoia in Via Boccaccio in Fiesole. A younger me and a younger Christian Joerges are smiling from that picture. Christian has always called me and continues to call me by my Russian first name (unknown to most of my Western European colleagues). He has always seen that part of my identity and I think that his academic support of my work is also an expression of his commitment to epistemic diversity: the value of including different voices and different experiences of Europe, and of its arbitrary boundaries, in academic debates about European integration.

Cite this article: M Weimer, 'The EU global regulatory state and the search for transnational democracy – reflections from the edges of Europe' (2025) *European Law Open*. https://doi.org/10.1017/elo.2024.45