

## Why Justification?

### The Structure of Public Power in Transnational Contexts

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# Why justification? The structure of public power in transnational contexts

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## ABSTRACT

This article asks the question why the social praxis of justification has moved to the centre-stage within the debate on transnational legal ordering. The starting point is the development of a generic concept of legally constituted public power aimed at breaking the frames that classically distinguish the national and the transnational and state and society. On that background, two structural differences between national and transnational public power are focused upon. First is the issue of constructing and delineating boundaries, which in national contexts is addressed through reference to territorial borders. Second is the issue of adapting decision-making to changing societal circumstances, which is addressed in national contexts through democracy. Both of these remedies are unavailable or only partially available at the transnational level. It is in order to respond to these deficiencies, it is argued, that a turn to justification has emerged at the transnational level of world society.

**KEYWORDS** Democracy; European Union; justification; transnational law; transnational politics

## 1. Introduction

Recent years have seen an upsurge in academic debates on justice in relation to transnational developments.<sup>1</sup> As also apparent from the other contributions to this special issue, the ongoing debate largely unfolds within a normative terrain informed by analytic philosophy. This article takes a different route by presenting a sociologically informed social and legal theoretical reflexion on the question of why a move to justification is unfolding. The

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<sup>1</sup> Most notably Rainer Forst, *Das Recht auf Rechtfertigung – Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp Verlag, 2007); Dimitry Kochenov, Gr  ne de B  rca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015); J  rgen Neyer, *The Justification of Europe. A Political Theory of Supranational Integration* (Oxford University Press, 2012); and Floris de Witte: *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015). All websites accessed 10 October 2016.

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central focus is therefore on justification as a social phenomenon and the social praxis of justification, ie the actual unfolding of justificatory exercises, rather than on the logical coherency of philosophical reasoning in relation to the concept of justice. This take does not, however, imply that philosophical reasoning is irrelevant for the understanding of justice or that a fundamental contradiction is considered to exist between the two approaches. Instead, this article should be seen as complementary to the interventions which mainly draw upon analytic philosophical reasoning potentially allowing for more grounded theoretical reflections on justice and justification in transnational contexts.<sup>2</sup>

A focus on justification as a social phenomenon implies that praxes of justification need to be observed in the contexts within which they unfold. The understanding of the very nature of transnational legal and political arrangements from which one departs therefore tends to be decisive for understanding praxes of justification in transnational contexts. To put it simply, the academic discourse on transnational law and politics in general and the European Union (EU) specifically is characterised by two central approaches. The first seeks to describe and evaluate the EU and other transnational arrangements on the basis of the factual setups and normative yardsticks of democracy and the rule of law, both of which originally emerged in national contexts. The second insists that national and transnational political and legal processes are substantially different in both structure and purpose.<sup>3</sup> From the latter perspective, the already existing normative grids as well as the normative yardsticks on which transnational legal and political processes should be evaluated are considered to be fundamentally different.<sup>4</sup> This article seeks to go beyond this antinomy with the help of a conceptual move away from the concept of the state, replacing it with a more generic concept of public power that is capable of encompassing both national, ie state-based, and transnational law and politics. However, in a subsequent step, two profound structural differences in the institutionalisation of public power at the national and the transnational level are highlighted. First, at the national level, politics are constructed through reference to territorial boundaries. At the transnational level, boundaries between regimes tend to be systematically unclear. Second, at the national level, the adaptivity of decision-making, ie its

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<sup>2</sup> Through emphasis on compatibility with normative reasoning, this article seeks to further develop a more descriptive sociological perspective developed elsewhere. See Poul F Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (Routledge, 2014).

<sup>3</sup> In relation to the EU, see, for example, Jürgen Neyer, 'Justice, Not Democracy: Legitimacy in the European Union' (2010) 48 *Journal of Common Market Studies* 903, and the subsequent debate; Danny Nicol, 'Can Justice Dethrone Democracy in the European Union? A Reply to Jürgen Neyer' (2012) 50 *Journal of Common Market Studies* 50; Jürgen Neyer, 'Who's Afraid of Justice? A Rejoinder to Danny Nicol' (2012) 50 *Journal of Common Market Studies* 523.

<sup>4</sup> For the argument that the difference between a national and a transnational take is fundamentally a methodological one, see especially Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2010).

ability to change with changing societal circumstances, is primarily expressed through democracy in so far as democracy serves as such a reflexivity mechanism. In contrast, for structural reasons, transnational political and legal processes are not potential sites of democracy or only to a limited degree at best. Transnational arrangements seek, so goes the argument, to compensate for these deficiencies by invoking processes of justification. In transnational contexts, processes of justification can both be understood as vehicles of adaptation and as self-initiating frameworks aimed at portraying a given structure of public power as related to a specific segment of world society. This development further implies a stronger focus on the strategic function of law since law, relative to politics, becomes the central framework through which the praxes of justification are structured and unfold. In reality, the attempt to remedy the absence of democracy through justification however tends to be expressed through acts of self-representation with limited substantial force.

## 2. Public power within and beyond the state

While states are the most important institutional repository of public power, they have never been the only ones. Whereas Max Weber and Michel Foucault, in different ways, conceptualised power as intrinsic to *any* social relationship,<sup>5</sup> a more specific concept of public power might be seen as characterised by abstractness, generality and its legal constitution.<sup>6</sup> Abstractness in this context implies that public power is detached from particular individuals, the epitome being the modern distinction between office and office holder. Under modern conditions, ie since the American and French Revolutions, the subjective interests and preferences of individuals are *in principle* irrelevant, a stance also expressed in John Adams' articulation of the objective of a 'government of laws and not of men' within the framework of the Constitution of Massachusetts of 1780.<sup>7</sup> This makes public power *non-substantialist* and merely *coordinating* to the extent that public power cannot grasp or define the content of the social processes it is oriented against but only provide a general framing of such social processes. With Michael Mann, one can therefore also talk about a specific modern form of de-personalised infrastructural power that is different from personalised despotic power.<sup>8</sup>

<sup>5</sup> Michel Foucault, *Power. The Essential Works of Foucault, 1954–1984* (The New Press, Vol 3 2001); Max Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (Mohr Siebeck, [1921] 1980) 28.

<sup>6</sup> For such a view on public power, see especially the work of Franz L Neumann. In particular 'The Change in the Function of Law in Modern Society' in William E Scheuerman (ed), *The Rule of Law Under Siege. Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press, [1933] 1996) 101–41.

<sup>7</sup> *Constitution of Massachusetts Article XXX* (1780), online: <[www.nhinet.org/ccs/docs/ma-1780.htm](http://www.nhinet.org/ccs/docs/ma-1780.htm)>.

<sup>8</sup> Michael Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results' (1984) 25 *Archives européenne de sociologie* 185.

Abstractness is intrinsically linked to generalisability in so far as the abstractness of public power implies that public power becomes a generalised social medium which is *intended* to be deployed throughout a given polity in a fairly consistent manner. It is a form of generalisability that is conditioned by public power being manifested in a legally grounded administrative apparatus and bodies of rights—namely political, economic and social rights<sup>9</sup>—which are both formally and factually capable of consistently structuring and deploying norms across time and space. The legal constitution of public power therefore becomes essential in so far as law provides public power with its form, thereby making it distinguishable from other types of power. In this particular manner, one might therefore also argue that politics, as an expression of publicness, is constituted through law and not the other way around.<sup>10</sup>

Whereas this sort of public power was clearly ingrained in the modern concept of the state,<sup>11</sup> making states the most important institutional repository of public power, the boundaries of the state vis-à-vis the rest of society has never been clear-cut.<sup>12</sup> In reality, public power has always been bound up on a diverse set of institutional formations ranging from religious organisations, to guilds and other socio-economic bodies such as unions and business associations. Most states are in fact composite states taking the form of organisational conglomerates with some parts formally public and others formally private but all of which is engaged in the reproduction and exercise of public power. In continental Europe, for example, large segments of public welfare provisions are organised and reproduced by religious bodies and other civil society formations.<sup>13</sup> Such activities are formally exercised by private bodies and therefore fall outside the scope of the state while being, at the same time, part of a larger body of legally constituted realms of public power, as expressed, for example, through the incursion of administrative law into the organisation and day to day management of privately organised and owned activities.<sup>14</sup> On this background, the concept of the state appears as a semantic reduction that is not capable of fully encompassing public power. In contrast, the concept of public power provides a more general category, breaking the exclusive focus on the state while retaining a focus on abstractness, generality and the legal constitution of public power.

<sup>9</sup> Thomas H Marshall, *Citizenship and Social Class* (Pluto Press, [1949] 1987).

<sup>10</sup> Hans Kelsen, *Pure Theory of Law* (University of California Press, [1934] 1960) 279ff; Neumann (n 6).

<sup>11</sup> Chris Thornhill, 'The Future of the State' in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing, 2011) 367–93.

<sup>12</sup> Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130(6) *University of Pennsylvania Law Review* 1349; A Claire Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4(2) *Review of International Political Economy* 261, 262.

<sup>13</sup> Gösta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990).

<sup>14</sup> Grahame F Thompson, 'The Constitutionalisation of Everyday Life?' in Eva Hartmann and Poul F. Kjaer (eds), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Palgrave-Macmillan, 2015) 177–97.

This is also the case in relation to transnational developments and the dual and simultaneous emergence and evolution of national and transnational frameworks of legal ordering. Large segments of transnational governance, from the Catholic Church and early modern colonial companies to contemporary globally operating entities, such as The International Accounting Standards Board, The International Organization for Standardization (ISO) and The Internet Corporation for Assigned Names and Numbers, are formally private entities which factually exercise public functions. Public functions might be defined as related to the reproduction of general and non-substitutable activities that are essential to the further existence of society at the local, national or transnational level. Activities as different as local water supply, national welfare services and universally available internet search engines might therefore all be considered as social entities that are structurally linked to the exercise of public power. A switch from a focus on the state to a focus on public power therefore avoids the tendency to merely contrast states with a 'societal' or 'privatistic' perspective.<sup>15</sup> In direct contrast to such a perspective the focus on public power allows for an expansion in the reach of publicness without falling back into the state category. From a normative perspective, the conceptual move away from a focus on the state and towards a broader category of public power might therefore expand the reach of normative claims in relation to the adequate forms of organisation and exercise of power within institutional sites that do not fall under the category of the state but which still involve the exercise of public functions. The trajectory of the European integration process, leading to what is now called the EU, is a good example of such a development. Contrary to prevailing views, the integration process did not start with the initiation of the European Coal and Steel Community (ECSC) in 1952. Rather, private law and contract-based international cartels, most notably in relation to steel, factually but not formally exercising public power, had been in place for several years prior to the launch of the ECSC.<sup>16</sup> The key accomplishment in 1952 was therefore not transnational integration but the recasting of the modus of integration from a private to a publicly organised one, thereby making the integration process subject to the specificities and normative standards of public law.

### 3. Structural differences between national and transnational public power

Shifting the focus to public power implies going beyond the classical nineteenth-century delineations between the state and the private and

<sup>15</sup> For such a substitution see, for example, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012).

<sup>16</sup> John Gillingham, *Coal and Steel and the Rebirth of Europe 1945–55. The Germans and French from Ruhr Conflict to Economic Community* (Cambridge University Press, 1991).

the national and the international (or, in contemporary parlance, the transnational).<sup>17</sup> This, in turn, implies the emergence of two central problems of which, as will become apparent later on, the ‘turn to justification’ is a central reflection.

First, institutional sites of public power are all confronted with a need to delineate the segment of the world they consider relevant for their decision-making. This issue compromises both the question of who the addressees of decisions are, as well as the question of who might ‘have a say’ in the form of influence on decisions taken. In relation to states, this issue has traditionally been handled through reference to the interlinked concepts of sovereignty, rights, national territory, the nation, constitutive power and democracy. States claim sovereignty over a specific social realm that is symbolically demarcated by reference to territory on behalf of the inhabitants of that territory within the legal construct of the nation and, in most cases, states also develop mechanisms aimed at obtaining acceptability and legitimacy from the nation in question. The construction of politics is, in other words, in large part related to the creation and maintenance of boundaries—a segment of the world is included into the realm of a state and the rest is excluded. Transnational bodies, however, have systematic difficulties in developing and maintaining clear-cut boundaries. Public international organisations can formally do so by reference to the jurisdictions of their member states. In practise however, this is more difficult than it seems at first glance. Even the EU, as pointed out by Alain Supiot, tends to describe itself as a ‘space’ or ‘area’ rather than as a territorial entity.<sup>18</sup> The Area of Freedom Security and Justice, analysed in Ester Herlin-Karnell’s contribution to this special issue, and the European Economic Area are indications of morphological structures that are not completely detached from territorial references but which have porous boundaries. For other transnational bodies, such as the formally private bodies mentioned above, dealing with issues such as accounting, standard-setting and the regulation of the internet, the issue of porous boundaries is even more outspoken.

Most transitional bodies resort to the concept of stakeholders as a remedy. The stakeholder concept implies that a given segment of the world has the status of a systemic relevant interlocutor and partner of a given institutional body. Although often developed on a soft law-basis, stakeholder frameworks

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<sup>17</sup> International is here understood as denoting a strict inter-state relationship. Such relationships have however always been embedded in broader transnational setups that cannot be seen as directly or exclusively derived from inter-state arrangements. See Poul F Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (Routledge, 2014).

<sup>18</sup> Alain Supiot, ‘The Territorial Inscription of Laws’ in Gralf-Peter Calliess et al (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag am 30. April 2009* (De Gruyter-Verlag, 2009) 375–93.



are developed with the intention to serve as equivalents to the legal construct of the nation.<sup>19</sup> Nations are entities that are constituted through political, economic or social rights, and serve as reflexion points of decision-making in the sense that members of the nation are both the addressees of decisions and have the right to articulate demands and expectations vis-à-vis decision-making processes.<sup>20</sup> In a similar fashion, stakeholder frameworks are instigated by institutional bodies of decision-making in order to delineate the segment of the world that is considered relevant as both addressees of the decisions and articulators of expectations vis-à-vis decision-making processes.

At least two structural differences can however be observed between the nation and stakeholder frameworks. First, the legal constitution of nations relies, as indicated, on a principle of territorial differentiation. Territorial differentiation implies the construction of a limited and coherent *social space* which is demarcated from other social spaces on the basis of boundaries which symbolically refer to geographical borders.<sup>21</sup> In contrast, stakeholder frameworks tend to rely on functional differentiation, which is characterised by the principle of the *equality of different societal spheres* bound up in different functions of material and normative reproduction in relation to areas such as economy, science, religion and so forth.<sup>22</sup> The relative primacy of functional differentiation within transnational arrangements, typically characterised by legally fragmented regimes concerning issues as different as human rights, investor protection and food safety, has profound consequences since the question who the appropriate addressees and rights bearers is in relation to transnationally developed norms tend to be unclear. Almost everyone tends, at least indirectly, to feel the effects of activities regulated through transnational arrangements, but providing a channel for democratic decision-making with global reach is, at the same time, institutionally unattainable in most cases.

Second, the functional stance that is intrinsic to stakeholder perspectives means that the constellation of appropriate addressees and rights bearers becomes interchangeable. If a given stakeholder constellation does not

<sup>19</sup> For more on this, see; See Kjaer (n 17) 87ff; Poul F Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space' (2010) 2 *Wisconsin Law Review* 489.

<sup>20</sup> For the relation between rights and nation building, see in particular the work of Chris Thornhill. For example, 'The Constitutionalisation of Labour Law and the Crisis of National Democracy' in Poul F Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro* (Rowman and Littlefield, 2016) 89–105.

<sup>21</sup> Although less prevalent, a culturalist concept of segmentary differentiation can also be observed in a number of cases. In contrast to territorial differentiation, segmentary differentiation is characterised by the principle of *equality* of multiple social systems which typically are demarcated upon the basis of blood relations or cultural traits such as language and ethnicity. In its 2011 constitution, the Hungarian state, for example, relies on a segmentary rather than a territorial concept of the nation as enshrined in the principle that 'Hungary shall bear responsibility for the fate of Hungarians living beyond its borders'. See *Hungary's Constitution of 2011*, Article D, online: <[www.constituteproject.org/constitution/Hungary\\_2011.pdf](http://www.constituteproject.org/constitution/Hungary_2011.pdf)>.

<sup>22</sup> Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des Weltrechts* (Suhrkamp Verlag, 2006).

provide adequate problem solving capacity it can be replaced by a different stakeholder constellation. Bearing in mind the central distinction within sociology between cognitive and normative expectations, where the former are subject to change in case of non-fulfilment and therefore can be characterised by a high level of adaptability, while the latter tend to be maintained even if not factually realised,<sup>23</sup> one might therefore argue that the cognitive dimension plays a relatively bigger role within stakeholder frameworks than within the legally constituted nation since the nation is a profoundly normative concept characterised by a limited degree of changeability.

It follows from the above two points that the central problem of stakeholder frameworks is their fluid character and porous form. As highlighted by Martti Koskeniemi,<sup>24</sup> this is also a general characteristic of transnational arrangements that implies that the boundary between the law and the social practises the law orients itself towards becomes increasingly difficult to maintain. 'Lack of substantiality', as we will return to, thereby becomes a central feature of transnational arrangements to a degree which might make stakeholder frameworks into an expression of 'phony law'.

Second, the social world is always in flow. Nothing looks exactly the same today as it did yesterday, and sites of public power are therefore confronted with a permanent issue of adaptation, introducing changes in the institutional setup as well as the substantive content of decisions in order to reflect changed contextual circumstances. Following Tocqueville's introduction of the distinction between static and dynamic constitutions,<sup>25</sup> this issue might also be considered a particular feature of modernity in so far as modern institutions are characterised by a built-in orientation towards the future derived from a linear rather than a circular concept of time.<sup>26</sup> Under modern conditions, reflexivity-increasing instruments capable of observing societal developments in order to adapt decision-making frameworks and substantial decisions accordingly is essential for the long-term viability of any institution of public power. Within modern states, democracy has emerged as the most central institutional mechanism of reflexivity. From a normative perspective, democracy is typically regarded as an end in itself or at least a central institutional vehicle for enhancing a type of freedom which is an end in itself. But democracy can, without disregarding its normative salience, also be understood as an institutional mechanism of adaptation in so far as it allows the political system to 'observe' public opinion and incorporate its constantly changing preferences into itself. A central element

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<sup>23</sup> Niklas Luhmann, *Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft* (Westdeutsche Verlag, [1975] 2009) 51–71.

<sup>24</sup> Martti Koskeniemi, 'Legal Fragmentation(s). An Essay on Fluidity and Form' in Galf-Peter Callies et al. (n 18) 795–810.

<sup>25</sup> Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition* (Liberty Fund Inc, Vol 2 [1835] 2009) 408.

<sup>26</sup> Reinhart Koselleck, *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten* (Suhrkamp Verlag, 1988).

of democracy is therefore its 'openness to the future'.<sup>27</sup> Whereas feudal and totalitarian forms of ordering typically seek to transpose specific values and decisions into the future in a static manner, democracy separates the formal dimension of decision-making from the substantial issues of decision-making, allowing for a considerable degree of open-endedness in terms of substantial outcomes. In the epoch of Western industrialisation, for example, social democratic and other movements pertaining to the consequences of this development emerged, just as in the current era, where environmental issues are at the forefront, green parties and other ecologically conscious movements have emerged. Therefore, from an evolutionary perspective, democracy might also be regarded as superior to other forms of political rule because it is characterised by a higher level of adaptability while at the same time allowing for a high level of reliance on abstract and generalised normative propositions in relation to, for example, equality and universality. Democracy, in other words, seems to overcome the contradiction between cognitive and normative expectations discussed above.

Within the transnational dimension of world society the remedy of democracy is however not, or only in a limited degree, available. A vast number of transnationally operating organisations and regimes, from the Catholic Church to the ISO, have characteristics that might be described with the terms 'abstractness', 'generality' and 'legal constitution', but they are not characterised by democratic mechanisms of reflexive adaptability. The same is the case, though only partially, for the EU, which at best can be described as a 'quasi-democracy'.<sup>28</sup> The EU is an institutional conglomerate of public power that, though strongly dependent on, and institutionally linked with, its member states, remains a site of decision-making with a considerable degree of autonomy. In spite of its autonomy it struggles to develop adequate mechanisms of reflexivity similar to those of developed in democratic nation states. The EU is a hybrid containing both (embryonic) features similar to those which can be found within states, for example territoriality and citizenship, while carrying many of the trademarks of stakeholder-based transnational regimes. In short, the central challenge for transnational arrangements seems to be to develop democratic mechanisms or their functional equivalents not only for salient normative reasons but also for reasons of operability.<sup>29</sup>

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<sup>27</sup> Luhmann (n 23) 131–8.

<sup>28</sup> For more on this see Poul F Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Hart Publishing, 2010).

<sup>29</sup> The Catholic Church, within the legal format of the Holy Sea, the mother of all transnational organisations, might be seen as a case in point in so far as its failure to adapt to the changed expectations of the surrounding society, for example in relation to issues such as women's rights, homosexuality and sexual morals in general, seems to have played a central role in its continued demise.

#### 4. The social praxes of justification and its structuring through law

A constructive, mutually supporting relationship between the cognitive and normative dimensions of social processes discussed above might however appear. To the extent that norms are abstract and generalised (as they are in democracy), they can fulfil a pivotal function in structuring societal processes with a strong cognitive component, such as economically, scientifically and technologically driven social processes.<sup>30</sup> Niklas Luhmann argued that the move to modernity, and with it the move to increased rationalisation, implied a reduction in the importance of normative articulations and expectations within social processes and a concomitant increase in the centrality of cognitive articulations and expectations.<sup>31</sup> But in most instances what can be observed is rather a reconfiguration of the relationship between normative and cognitive articulations and expectations. Under modern conditions, normative expectations become more abstract formations aimed at stabilising increasingly cognitivised social processes.<sup>32</sup> As already indicated, democracy is here a case in point as democratic decision-making has a very strong normative basis, ie in relation to equality and universality, while leaving the substantial outcome of democratic decision-making substantially open-ended. A central element of democracy is, in other words, the special way it combines the two forms of expectations, the normative and the cognitive, thereby allowing for norms to support rather than curtail adaptivity.

A similar view was articulated by Jürgen Habermas. As part of his theory of communicative action, he distinguished between teleological-strategic, normative-social and dramaturgical action, arguing that all social processes, albeit with different degrees of intensity, combine these three aspects. Or differently expressed, he argued that all social processes entail an element of functional goal attainment, ie the striving towards the realisation of specific objectives; normative consonance, ie the striving towards achieving a high level of normative concordance with the surrounding society; as well as engaging in processes of self-portrayal vis-à-vis a wider audience.<sup>33</sup> What is described in this article with Luhmann's concepts of cognitive and normative dimensions pertains to Habermas' two former dimensions, the teleological-strategic and the normative-social dimensions. Where they differ is mainly in relation to Habermas' dramaturgical dimension. Rather than dramaturgical self-portrayal, Luhmann emphasises the time aspect of social manifestations. All social processes unfold in time and the multifarious relationship between the cognitive and the normative dimensions of social

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<sup>30</sup> Luhmann (n 23).

<sup>31</sup> *Ibid.*

<sup>32</sup> See Kjaer (n 17).

<sup>33</sup> Jürgen Habermas, *Theorie des kommunikativen Handelns, Band 1 Handlungsrationalität und gesellschaftliche Rationalisierung* (Suhrkamp Verlag, 1981) 126ff.

processes is stabilised through externalisation in time in the sense that the tension between contra-factual normative propositions and the factual reality is smoothened through a promise of future fulfilment. In a similar way, Habermas' dramaturgical dimension serves as an attempt to bridge the gap between the teleological-strategic and the normative-social dimensions. A detailed analysis of the differences and similarities between the theory constructions of Habermas and Luhmann falls outside the scope of this article.<sup>34</sup> The turn to justification within transnational arrangements, however, seems to express a dual move along both Habermasian and Luhmannian lines, one towards the proceduralisation of decision-making, a transformation of law into an instrument for handling time rather than material issues,<sup>35</sup> and another towards a relative increase in the reliance on new dramaturgical means of self-portrayal.

In relation to time, justification is about reason-giving within an institutionalised social praxis which is oriented toward increasing reflexivity, ie the mutual awareness and accommodation between two or more parties. As such, praxes of justification are mediating the dialectical relation between power-producing entities and those subjected to the consequences of this power within an institutional form, such as the stakeholder form. Such justifications are however always process-based. Institutions of public power produce a never ending stream of decisions that build on each other and in fact grow out of each other. This is inescapable since not making a decision is its own kind of decision. In practise, the classical distinctions between an *ex post* and an *ex ante* focus on decisions, the distinction between what motivates a decision and what the effects of the decision are, is therefore dissolved through recourse to time to the extent that procedures for claiming and providing justifications are built into the legal frameworks of decision-making.<sup>36</sup> Proceduralised frameworks for reason-giving, such as those often found in administrative law,<sup>37</sup> imply that the *possibility* for demanding and delivering justification is reproduced in every act. The static *ex post/ex ante* perspective is thereby being substituted with a perspective that potentially implies continued adaptation through learning and correction and where the justification or the lack of justification

<sup>34</sup> See, however, Poul F Kjaer, 'Systems in Context: On the Outcome of the Habermas/Luhmann-debate' (2006) *Ancilla Iuris* 66.

<sup>35</sup> For the debate on the proceduralisation of law see in particular; Duncan Kennedy, 'Comment on Rudolf Wiethölter's, Materialization and Proceduralization in Modern Law' and 'Proceduralization of the Category of Law' in Christian Joerges und David M Trubek (Hrsg), *Critical Legal Thought. An American-German Debate* (Nomos Verlag, 1989) 511–24; Rudolf Wiethölter, 'Proceduralization of the Category of Law' in Christian Joerges und David M Trubek (Hrsg), *Critical Legal Thought. An American-German Debate* (Nomos Verlag, 1989) 501–10.

<sup>36</sup> Niklas Luhmann, *Legitimation durch Verfahren*. 6. Auflage (Suhrkamp Verlag, [1969] 2001).

<sup>37</sup> Robert Thomas, 'Reason-Giving in English and European Community Administrative Law' (1997) 3(2) *European Public Law* 213; Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20(1) *European Journal of International Law* 23.

informs the next decision. In this particular manner, justificatory measures can also be considered vehicles of continued adaptation and, as such, a reflection of increased reflexivity. In practise the 'turn to justification' therefore implies a turn from democracy to the sort of frameworks associated with global administrative law,<sup>38</sup> and thereby a substitution of politics with law.<sup>39</sup>

The turn to time therefore also implies a reconfiguration of the relationship between the cognitive and normative dimensions of decision-making in so far as adaptivity becomes central. However, this reconfiguration does not necessarily imply a diminishing centrality of normative modes but rather implies that they gain a more indirect strategic role, providing a second-order stabilisation of increasingly cognitivised processes. Abstract and general principles with a strong normative content, for example in the form of constitutional principles, tend to emerge with the objective of guiding decision-making. Such counter-factual normative principles gain the status of secondary forms of ordering in so far as they, typically in an institutionalised teleological form, provide the principles from which both the selection of decisions and the form of their justification is derived in the day to day practise of decision-making.<sup>40</sup> Not surprisingly, normative expectations are often ascribed a constitutional status when condensed into second-order regulatory principles. The 'ever closer Union' teleology of the EU, originally from the opening lines of the preamble of The Treaty Establishing the European Economic Community from 1957,<sup>41</sup> might provide one example of such a counter-factual regulatory normative principle. When normative outlooks become condensed into legal principles they become tools used to select between multiple options for decision-making. This again implies that law and not politics becomes the central grid for structuring, nurturing and safeguarding normative outlooks. As such, a switch from democracy to justification as the central framework of adaptation is mirrored in the stand-off between rights-based, liberal and democracy-inclined republican approaches and the sociologically observable gradual transformation in the function of law in the course of modernity towards an increasing reliance on rights.<sup>42</sup>

This is also apparent from the second dimension, namely the dramaturgical. The turn to justification implies that structures of public power have to explain and provide reasons for their decisions. As such, measures of

<sup>38</sup> Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *The American Journal of International Law* 211.

<sup>39</sup> Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010) 47–69.

<sup>40</sup> See also the contribution of Ester Herlin-Karnell, 'The Domination of Security and the Promise of Justice: On Justification and Proportionality in Europe's "Area of Freedom, Security and Justice"' (2017) *Transnational Legal Theory* doi:10.1080/20414005.2017.1316637, in this special issue.

<sup>41</sup> The Treaty Establishing the European Economic Community 1957, online: <[www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_3\\_antlasmalar/1\\_3\\_1\\_kurucu\\_antlasmalar/1957\\_treaty\\_establishing\\_eec.pdf](http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf)>.

<sup>42</sup> Loughlin (n 39); Neumann (n 6).

justification are essentially legitimacy-enhancing measures. In the absence of democratic representation or, as in the case of the EU, only a partial reliance on representation through the semi-evolved European Parliament, the issue of how decision-making is presented to the wider world becomes a lacuna that transnational decision-making bodies struggle to fill. Since the publication of the famous white paper on governance,<sup>43</sup> the EU has, as a response to this gap, gradually developed elaborate frameworks of consultation aimed at engaging directly with 'those affected' by decision-making and to incorporate correspondent views into its decisions. Further, the European Commission has developed minimum standards<sup>44</sup> and established a general framework for consultation and feedback mechanisms with 'interested parties'.<sup>45</sup> In principle, such frameworks serve as input-oriented channels allowing decision-makers to take note of positions and preferences of the wider society. In practice, however, it is the decisional bodies, such as the European Commission, themselves that define their 'target audience'.<sup>46</sup> The Commission is, in other words, internally constructing a host of stakeholders with whom they subsequently engage in a dialogue, just as the Commission interprets the content of the exchanges. Factually, such frameworks thereby become an expression of self-representation serving as a stage where the Commission is able to portray itself vis-à-vis a wider audience that it itself has composed. Such frameworks can undoubtedly increase the cognitive capacities of the Commission, enhancing its capacity to observe and react upon societal developments. However, equalling such frameworks with democracy, which continues to rely on strong abstract normative principles, seems far-fetched, as such frameworks instead become aesthetic forms with little substance and with little normative guidance. Rather than being part of a drive to democracy, such frameworks highlight the structural limitations to a democratisation of transnational entities. Probably unwillingly, the scholarship that advances concepts of justification therefore ends up advancing approaches to public power that runs counter to mainstream ideals of democracy.

## 5. Conclusion

Within analytical philosophy, great hope has been attached to the concept of justice; this is true to such a degree that justice has been considered the 'master

<sup>43</sup> Commission of the European Communities, 'European governance – A white paper' (25 July 2001), online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A10109>>.

<sup>44</sup> Commission of the European Communities, 'Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission' (11 December 2002), online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF>>.

<sup>45</sup> For the 'Your Voice in Europe' framework, see Commission of the European Communities, 'Contribute to Law-Making' (no date), online: <[http://ec.europa.eu/yourvoice/index\\_en.htm](http://ec.europa.eu/yourvoice/index_en.htm)>.

<sup>46</sup> Thorsten Hüller, *Demokratie und Sozialregulierung in Europa: Die Online-Konsultationen der EU-Kommission* (Campus Verlag, 2010) 135ff.

concept' to which all central insights can be traced back. From a descriptive perspective, it is however the social praxis of justification that is central. The turn to justification can be understood as a reflection of increased temporalisation, ie an increase in the speed of societal change. This development implies a shortening of the lifespan of political and administrative decisions in so far as the functional need to replace decisions with new decisions reflecting new circumstances is increased. As every decision implies a choice between two or more options, increased temporalisation therefore also implies an increase in the demand for justification: Why this decision and not another? Justification thereby fulfils a central role in the stabilisation of expectations and demands vis-à-vis a given chain of political decision-making. This is particularly the case in transnational settings as the broader contextual frameworks, which at the nation state level have been established through century-long processes of state-building, are largely absent. In such a volatile context, frameworks of justification are instigated as substitutes for the type of reflexivity established through democratic processes within the boundaries of nation states. However, it remains questionable whether the turn to justification, both in functional and normative terms, is capable of living up to the standards associated with democracy.

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