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Context construction through competition: The prerogative of public power, intermediary institutions and the expansion of statehood through competition

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This article examines the relationship between the evolution of statehood and competition in the European context. To begin with, a particular take on the evolution of modern political power in the state form in Europe is developed. Against this background, the article re-constructs how the institutionalisation of competition as a specific type of policy tool has been used by emerging modern states to establish their authority vis-à-vis competing claims to public authority in society. The article, furthermore, engages in an examination of (neo-) corporatist and governance based attempts both to curb and to expand the use of competition as a tool for organising social processes, and the implications of these attempts for the state of statehood.

Keywords: Competition, corporatism, Franz Neumann, governance, neo-corporatism, public power, state-building, state theory

Introduction

This article examines a specific dimension of the historical emergence and evolution of modern statehood by exploring the relationship between statehood in the nation state variant and the introduction of a specific modern form of competition. The focus of the article is on Western European developments with a particular focus on France and Germany. The central argument is that the emerging modern states, and in particular the liberal variant of modern states, throughout modern history systematically has deployed the instrument of competition as a tool in order to combat and undermine alternative centres of public power in society. Since the breakthrough of modernity in the era of the French Revolution states have introduced competition in a wide range of societal settings on the basis of a ‘divide and rule’ strategy aimed at splitting up opponents to state dominance and install themselves as the central arbiters of publicly structured societal coordination. Competition has been a key instrument through which states has sought to establish and re-inforce themselves *vis-à-vis* competing claims to public authority and power in society and has as such played a central role in the attempt of the emerging modern states to reconstruct the societal

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contexts from which they emerged in order to make them into unitary societies centred on a single source of public authority.

The term 'public' is of central importance. Whereas states since the passing of the Sherman Act in the United States in 1890 increasingly has been engaged in competition policy - antitrust in American parlance - in order to increase economic efficiency and productivity, this enquiry is focused on a somewhat different subject matter namely the attempt of states to breakdown intermediary institutional formations such as guilds, corporatist organisations and professions embodying alternative forms of public authority and power with the help of competition. Following Franz Neumann, public power is understood as possessing specific qualities which is characterised by an ability to produce generalised legal norms and to regulate inclusion and exclusion into confined normative orders which rely on their own autonomous sources of authority. Albeit important links exists, the central focus of the article is therefore not on competition policy, which as a side effect of its focus on economic efficiency and productivity also tend to undermine the amassing of private power and influence in society. One consequence of this is that the perspective presented differs from an ordoliberal perspective. Ordoliberalism emphasises the important role of the state in regulating the economy while the central focus here is on the role of competition *within* the domain of public power.

The specific focus on public power implies that the deployment of competition by the emerging modern states not only occurred in relation to economic processes. Instead it is a tool which has been used in a variety of societal settings from the economy to religion, health, education and the mass media. As such competition is not a phenomenon which is particular to the economy and market based exchanges. From the perspective of states, competition is a far broader social occurrence which, furthermore, has been deployed as a state-building tool throughout the history modern statehood. The evolutionary trajectory of this state-building endeavour can be traced back to the High Middle Ages, but, in most European societal settings, was only realised in the first half of the twentieth century, far later than is often assumed in most contemporary literature. It was at this rather late stage that modern European states first succeeded in gaining a high level of institutional stability and autonomy through the creation of structured and fairly coherent societal contexts of their own.

The article is informed by a broad understanding of competition as a particular institutional arrangement aimed at organising social interaction. More specifically, the particularity

of the modern form of competition is furthermore understood to be its triangular form where two or more contestants compete in favour of an audience. An audience which is not partaking in the actual competition but instead are external to it while possessing the capability of deciding the outcome of the competition in question by designating the successful contestant.² A central feature of the historical trajectory of modern states can therefore be found in their attempts to monopolise the function as the central designator of competition within the realm of public power.

Complementing the perspectives developed in the other contributions to this special issue, this article, should be seen as a historical sociologically informed social theoretical reflection on the relation between statehood and competition. As already indicated, the article very much draw on insights developed by Franz Neumann, who was one of the first scholars to systematically reflect on the societal function of competition and its relation to modern statehood. The article proceeds in the following manner: First, the central characteristics of the evolutionary trajectory of modern statehood are outlined. Second: the specific form and purpose of modern political power in the state form is examined in more detail. Third: Departing from the notions of statehood and modern political power the relationship between the emergence and stabilisation of modern statehood at the time of the French Revolution and the introduction of the social institution of competition is examined. Fourth: the dual rejection of both modern statehood and competition within late 19th century and early twentieth-century corporatism is scrutinised. Fifth: the post-Second World War introduction of competition within the economic sphere, on the basis of a formalised competition regime with relevance for this specific societal domain, and the *simultaneous* safeguarding of non-economic spheres of society from competition within the larger framework of the post-war welfare-state conglomerates are analysed. Sixth, and finally, the expansion of competition beyond the economic area in the era of governance and its implications for statehood are touched upon.

The Protracted Emergence of Modern Statehood

In his essay entitled *Die Verfassung Deutschlands* of the year 1800, G.W.F. Hegel asked the question of why Germany was not a modern state like England or France, or why Germany - he oscillates between the two formulations - was no longer to be considered a state (Hegel 1971). This short text, some 80 pages long, not only presents a *Zeitdiagnosis* of the state of Germany in the years following the upheavals of the French Revolution, but can also be considered as the first text

² For a detailed outline of this perspective and a reconstruction of the evolution in the meaning of the notion of competition over time see Werron 2015 in this special issue.

of modern historical sociology. In the text, Hegel engages in a comparative study of the state-building processes of these three states over the centuries preceding its publication, and the conclusion at which he arrives is that the Holy Roman Empire of the German Nation was not a modern state, because it represented a mismatch of privatistic structures in the form of principalities, cities, nobility networks, church-controlled domains, and guilds, which formed no coherent whole. The German space was not a unified entity but rather a conglomerate of social orders, each of which relied on vastly different sources of normativity and claims to authority.³ Twenty years later, in 1820, in his *Grundlinien der Philosophie des Rechts* (Hegel 1970), he was able to adopt a somewhat more positive view as the Holy Roman Empire of the German Nation had, in the meantime, been dissolved just as the Prussian Reform Movement - led by Stein and Hardenberg - had instigated a whole series of constitutional, administrative and economic reforms, in the aftermath of the initial Prussian defeat by Napoleon in 1806, reforms which moved Prussia, which was, by then, the dominating German power, far closer to the set-up which characterised other advanced European states.

As the developments which started to unfold within the context of the Weimar Republic some 100 years after the publication of the *Grundlinien der Philosophie des Rechts* testified, Hegel turned out to be overly optimistic. From the retrospective position of today, the materialisation of modern statehood proved to be a far more protracted process than many previous observers had imagined. In the historical-sociological literature, the formative years leading to the emergence of modern statehood in the European setting had respectively been traced back to specific events and developments such as the separation of worldly and clerical power in the eleventh and twelfth centuries (Brunkhorst 2009; Brunkhorst 2014, 90ff.); the emergence of an interlinked network of European cities also in the twelfth century (Tilly 1990, 38ff.); the freeing of the individual believer from the subordination to the hierarchy of the Catholic Church during the Protestant Reformation in the sixteenth century; the military and organisational revolutions emerging from inter-state competition from the sixteenth to the eighteenth century (Black 1991; Roberts 1956); the cultural and scientific transformations in the wake of the Enlightenment; the late eighteenth century

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At the organisational level, a common trait of these structures was, however, that the household institution served as their central organisational nucleus and thus that they were based upon an integrationist logic in which multiple functional processes related to everything from economic transactions, religious manifestations, intimate reproduction and the exercise of political power all unfolded in a manner which meant that they were not easily distinguishable. One consequence of this was that the pre-modern context was characterised by the absence of a clear-cut distinction between public and private, as also expressed in the distinction between public and private law, in which public law refers to the structuration of the relationship between legal subjects and the state, and private law to the horizontal relationship between legal subjects. See, also, Kjaer 2011b.

American and French political revolutions; the industrialisation and urbanisation processes gaining speed in the nineteenth century; and to the formation of increasingly homogenous cultural spaces within Western European national frameworks in the decades preceding the First World War (Weber 1976). All of these events and developments undoubtedly played an important role in the evolutionary trajectory of modern statehood in Europe. Modern statehood is, however, a specific kind of political order which implies the existence of generalised and unitary structures and processes which are applied across the board within a social space which is symbolically demarcated through references to territoriality (Luhmann 2000; Thornhill 2013). A form of statehood which, as already emphasised by Kant, differs from pre-modern forms of rule because it is not a *patrimonium* in the sense of being the private property of a specific person or family (Kant 1992, 25). But, as pointed out by Franz Neumann in 1933, just after the National Socialist takeover, “Germany was never a united nation – and never a democracy. She was always divided” (Neumann, 1996b, p. 29). Neumann’s point was that the kind of unified statehood which Hegel had been advocating had, in fact, never been realised in the German context. Drawing on Pierre Viot, he argued that Germany, throughout its history, had remained a conglomerate of social orders operating side by side in a horizontal manner:

“Besides the Germany of Potsdam and the Germany of Weimar there exists an industrial and an agrarian Germany, a proletarian Germany and a Germany of the propertied classes, a Catholic and a Lutheran Germany, a Germany of the federal states and a Germany of the Reich, a Germany of youth and one of old age. There is above all a democratic and an anti-democratic Germany. This division began in the Reformation, which was never completed, either in regard to space or in regard to its fundamental conception.” (ibid, p. 29)

Thus, the democratic state of the Weimar Republic only served as one of several centres of public power. It was a state which was entangled in lateral relations with alternative centres of public power which possessed their own sources of authority, and which, in most instances, never accepted the legitimacy and supremacy of the democratic order of the Weimar Republic as established in the wake of the First World War. The proponents of the democratic order of Weimar were, therefore, in spite of the formal superiority of the Weimar constitution, forced to engage in continued efforts to work out compromises with social forces which were located *outside* the state. But at the same time the efforts to integrate these forces into the state were only partially made on the state’s premises and upon the basis of individual rights. Instead, a strategy of collectivistic inclusion was pursued, a strategy which allowed these social groups to maintain both their

autonomy and their independent normative points of orientation and sources of public authority, with the result that their integrity as essentially anti-state orientated groups was maintained in spite of their inclusion into the state. Combined with the very problematical societal environment created by the defeat in the First World War, hyperinflation and the Great Depression, the strategy of collectivistic inclusion provided, according to Neumann, the basis for the gradual disintegration of the German state from the inside, in so far as the operational capacity and day-to-day *praxis* of the state was short-circuited from within.⁴ As also argued by Chris Thornhill, (Western) Germany, as a consequence of this, failed to obtain an unquestioned and institutionally-stable form of modern statehood before the 1950s, after the various competing centres of public power had collapsed both during, and in the immediate aftermath of, the National Socialist regime (Thornhill 2011a, p. 335ff.).

But France, too, which, in the historical sociological literature, has traditionally been seen as the “strong state” *par excellence*, is characterised by similar trajectories. In the twelfth century, the French king was essentially a large landowner (*Großgrundbesitzer*) among many others in the French context (Elias 1997, 132ff.). In the sixteenth and seventeenth centuries, the first central features of an overarching and centralised power structure were put in place. But although these features of a developed form of modern statehood emerged, lateral relations never ceased to play a central role. The developments which eventually led to the bankruptcy of the French monarchy and to the Revolution in 1789 were characterised by a logic in which the monarchy, in order to extend and stabilise its reach, engaged in institutionalised forms of exchange with other segments of society, most notably the estates of the Church (the First Estate), the land-based nobility (the Second Estate) and the guilds and other forms of corporations. In practice, the inclusion of these lateral social formations into the state was thus conditioned by the granting of collective privileges. From the control of educational measures and the monopoly on the exercise of religious activities to production and trade monopolies as well as the right to enforce standards and norms for economic activities and exchanges these segments of society were granted an autonomous privileged based standing in society (Haupt 2004, p. 12ff). Privileges which were not, or were only to a certain extent, based upon generalised and positive law oriented towards the population in its entirety, but were, instead, based upon the granting of usually inheritable rights to specific persons within a patrimonial system. The consequence was a dual development. Firstly, the financial basis of the

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For more on this, see, in particular, the work of Chris Thornhill, in particular, Thornhill 2015.

state became increasingly strained due to the ever-increasing costs of purchasing the loyalty of these groups through the conceding of exemptions from taxation and the granting of monopolies within specific segments of societal reproduction. This development severely undermined the level of tax revenue obtained by the French state when compared with the levels raised by competing states, most notably England, and thus led to a situation in which France, the largest and most populous European state at the time, consistently under-performed in interstate competition (Thornhill 2008, p. 179ff.). Secondly, the monarchy sought to compensate for the chronic lack of financing through the selling of public offices to individuals from the social formations located outside the state, essentially granting them access to the resources and prestige of the state, thereby enabling them to use state authority as a vehicle for their private activities with the long-term consequence that the integrity and legitimacy of the state's power eroded from within. This development was, as also pointed by Norbert Elias, furthermore complemented by a development in which the emergent modern state, due to its growing complexity, internally began to develop elements of modern bureaucratic forms of organisation. The consequence was that a new type of nobility, the *noblesse de robe* (nobility of the gown) or "civil servant nobility", which represented the bureaucratic structure of the emerging modern state, gradually began to emerge. The new bureaucratic class gradually marginalised the classical *noblesse d'épée* (nobility of the sword) upon which the monarchy had relied through its dual scheme of privilege-granting and the selling of public offices (Elias 1976, p. 251ff.). Thus, the central opposition to the feudal order did *not*, as is typically assumed, emerge from *outside* the state, but, instead, from *within* the state and thereby from *within* the realm of public power. The Revolution had more the character of a *coup d'état* than that of a movement carried out by forces located outside the state "in society". As also pointed out by Neumann, the Revolution might, therefore, just as well be understood as a reaction to the monarchy's failure to use its power *vis-à-vis* the social orders located outside the state, rather than a reaction against the misuse of its powers in relation to the rest of society (Neumann 1996c, p. 213). As we shall return to, it was in order to rectify this failure that the modern instrument of competition gained strategic importance for the emerging modern states.

Although the Revolution formally brought down the privileges of the nobility and the church, and led to abolition of the guilds and their substitution with market exchanges based upon freedom of contract, the persistence of the *ancien régime*, as also pointed out by Arno J. Mayer, was, in fact, immense. The consequence was that French society in its various dimensions, such as those referring to politics, the economy, education and religion, continued to be structured by

essentially feudal norms and social practices for decades after the Revolution (Mayer 2010). This was especially the case because of the persistent duality between the political and administrative centre in Paris and the rest of French society. *La France profonde*, the “Deep France” of the countryside, maintained strong feudal traits which ran in parallel with the Paris-based “official France” for centuries after the move towards a centralisation of power had started to unfold, and also for decades after the symbolic overturn in 1789. As argued by Eugen Weber (1976), it was not until the decades immediately preceding the First World War that the French state succeeded in engineering its population in a manner which enabled the transformation of France into a singular society in the form of a relational space, structured by a fairly uniform set of norms across time and space, constructed through the deliberate breakdown of localistic life-modes (Højrup 2003) and their substitution with bureaucratically-structured abstract modes of interaction. Thus, the French Revolution was a protracted process which did not gain realisation “on the ground” until some 100 years after the symbolic events of 1789.

The Function and Status of Political Power in the State Form

The evolution of statehood in Europe, as briefly and selectively outlined above, has been interpreted in many different ways within historical sociology, with the consequence that the function and centrality of the state in the European context remains disputed. In a somewhat simplified manner, two main perspectives dominate: the first assumes that, at some point in their historical evolution, states gained such a centrality that European societies became state-centred in the sense that non-state societal processes became subsumed under the state and thus became dominated by the logics and organisational forms emerging from within the state (e.g., Mann 1988). In this line of thinking, the state gained a capacity to expand its power into the most remote areas of society, and to engineer and structure the core fabric of society in substantial detail. The second perspective takes the opposite position, in so far as the emergence of a modern institutionally-stable and autonomous form of statehood is primarily seen as the result of the differentiation of the state from the rest of society, rather than its expansion out into the rest of society (Luhmann 1990, Thornhill 2008). This kind of differentiation is, furthermore, seen as being conditioned by the emergence of reflexive mechanisms of self-limitation, most notably through constitutional arrangements based in positive law, which are purely internalistic to the state itself, thereby enabling it both to define and to maintain its own boundaries *vis-à-vis* the rest of society in a relatively autonomous manner, and thereby to decide autonomously what the specific prerogative of the state is (Luhmann 1990, Thornhill 2008).

A fruitful middle way between these two positions can, however, be taken, in so far as we are dealing with a paradoxical double-movement in which the expansion of the state into society might fruitfully be seen as being conditioned by its differentiation from society. The account of the very protracted process of modern state-building outlined above testifies that the fully state-centred society has never actually existed as a factual reality. Even at the point in the mid-twentieth century when substantial segments of North Western Europe, North America and a few other parts of world society became marked by a very developed kind of statehood, this did not imply the emergence of a fully state-centred society in which non-state social processes became completely subordinated to the state.

The reason for this is that the modern form of the political in the state form emerged through *co-evolutionary processes* which not only implied an increased differentiation of the political system in the state form, but also an increased differentiation of other segments of society as well. As outlined by Karl Polanyi (Polanyi 2002) the move to modernity implied that the economy increasingly differentiated itself from the rest of society and gained an autonomous systemic form which enabled it to pursue its reproduction upon the basis of its own profit-maximising logic. Similar processes unfolded within science, which, in the wake of Humboldtian revolution, became subject to an autonomously-defined striving for scientific truth; within the area of intimacy, where love for the purpose of love became a legitimate quest from the eighteenth century onwards; within art where ‘art for the sake of art’ became a central slogan in the nineteenth century, as well as within areas such as medicine, education and sports in the course of the nineteenth and early twentieth century. The consequence of this co-evolutionary trajectory is that the political system in the state form has throughout modern history been both functionally and normatively incapable of defining, evaluating and controlling the logics and evolutionary paths of these other spheres of society. When the subjugation of these non-political spheres has been attempted, most notably within authoritarian and totalitarian regimes, the result has typically been economic dysfunctionality, kitschy art and instrumentalised science, as well as a breakdown of the integrity and functionality of the state itself (Teubner 2012, 21ff).⁵

Against this background, the specificities of modern political power can be fleshed out. Following Neumann, the central characteristic of modern political power is that it is oriented

⁵ Another reason is, of course, the emergence of extensive forms of public and private forms of transnational ordering located beyond the state through the European integration process and various forms of ‘global governance’. For further reading on this dimension and its implication for statehood see Kjaer 2014.

towards a general and very fundamental, but nonetheless limited, societal function. While asymmetric power-based social relations containing a bias in favour of specific preferences, interests and articulations are observable throughout society (Borch 2005), modern political power in the state form has rather specific features. This is not just the case because modern states are formally and factually separated from the rest of society, as was also expressed in the twelfth-century separation between the power of the pope and the power of the emperor, and in Hegel's introduction of the distinction between state and society (*Staat und Gesellschaft*).⁶ More fundamentally, modern political power has a *generalised* nature, in the sense that it is applied in an indiscriminate manner throughout a social space which is symbolically delineated through references to territorial traits (Neumann 1996c). In contrast to, for example, the private power of a firm, modern political power produces decisions which are collective in nature, which means that they apply to *everyone* within the segment of world society to which a given state claims a relation. The decisions produced within the form of modern political power are not only binding for the addressees of the decisions but also for those who dispatch them, that is, for subordinates and superiors alike. The nature and orientation of public power is therefore substantially different than the nature of private power. The attempt to limit the *influence* of private actors, such as but not only economic actors, on political decision making was a central motivation for the introduction of modern competition policy. But as we will return to and although considerable grey zones exist between public and private power, such attempts to reduce the capacity of private actors to influence the exercise of public power constitutes a somewhat different problem constellation in so far as public and private power are not functionally equivalent. Private power might limit or undermine the autonomy of public decision-making but private power cannot substitute public power.

Apart from generalisability a second core dimension of public political power is that it only exists within a legal form. According to Neumann, modern political power only becomes a specific type of power, which is distinguishable from other types of power, through its legal form. Or differently expressed: Modern political is paradoxically constituted in so far as its generalisability is conditioned by its legally mediated limitation. It is through legal categories that modern political power gains generalisability, since one of the most central features of modern positive law is that it

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Although this distinction was somewhat unlucky in so far as it indicated that the state was external to society and not itself a part of society, it clearly indicated that the modern state was to be understood as an autonomous structure with distinct normative and functional features.

only recognises norms which are general in nature as law. Particularistic norms are not part of the legally constituted political realm. One consequence of this is that modern law is never oriented towards specific persons, but only towards persons in the abstract (Neumann [1933] 1996b, 106ff) thereby indicating the difference between modern law and the feudal form of granting privileges to specific persons. This severing of the link to specific persons, which is built into the modern concept of the rule of law (“a government of law and not of man”), means that modern power is less contingent than pre-modern power. The abstraction of public power gives it a far higher level of calculability because it is not linked to contingent subjective preferences and perspectives derived from specific individuals.

The implication is that the legal forms is the central framework through which the state-based political system both simultaneously differentiates itself from, and re-connect itself, with the rest of society. Law, and most notably rights, serve as the inclusion/exclusion form through which segments of society are either introduced into, or externalised from, the political system. In the liberal tradition (e.g. Kant 1990, 23ff), rights have traditionally been conceived as being oriented towards individuals. This is certainly the case, but rights also serve a more systemic function as the filters which structure the exchanges between the different spheres of society, for example, between the state and the economy in relation to the dual complex of property rights and taxation, as it is only through the granting of property rights that a limited extraction of resources through taxation becomes possible. In a similar vein, the right to the freedom of religion is a central instrument through which religion simultaneously is excluded from the state and granted an autonomous standing of its own (Brunkhorst 2014, 151ff).

Modern Statehood and the Introduction of Competition

It follows from the above that the strategic centrality of political power in the state form is derived from the very general societal functions that it fulfils. The real reason why very advanced forms of modern states might, after all, be capable of constructing somewhat unified social spaces in which the set-up of society bear identical traces throughout is that modern society rely heavily on formal organisation (Luhmann 2011) In post-war Western societies, the state might not have the ability to evaluate the validity of a scientific argument, to grasp the depth of a religious sentiment, to provide an adequate diagnosis of a patient’s health, or to define the essence of good art, but it nonetheless did, in many settings, through public universities, state churches, public health provisions and public museums, provide the organisational infrastructure within which the social processes relating

to areas such as science and education, religion, health, and art all unfolded. In *praxis*, the welfare states of the mid- and late-twentieth century became organisational conglomerates in which a string of different social rationalities and *praxes* became tied together, leading to the establishment of specific national contexts which served as particularistic “higher orders” within the larger context of world society.

The evolution and emergence of this sort of national contexts can essentially be seen as the history of the continued attempt on the part of emerging modern states to establish their own societal contexts with the help of generalised and abstract legal frameworks which were deployed in order to eradicate localistic and particularist alternatives to state-based public power. Thus, neither class struggle nor inter-state competition, though also important, seems to have been the central cleavage in the history of modern state-building. Instead, the struggle between centre and periphery was the defining element. This was the case in so far as the continued struggle for factual supremacy over social spaces delineated through references to territory and the re-engineering of such spaces with the aim of establishing increasingly coherent and unified social spaces was the core challenge for the emergent modern states. In this effort, the introduction of competition was one of the central tools. First of all, guilds, together with clerical and nobility structures, served as localistic normative orders which claimed an *autonomous* standing in society. They claimed to exercise *public functions*, since they reproduced inclusion/exclusion mechanisms which enabled the regulation of access to confined normative orders, just as they served the dual function of internally stabilising these orders while simultaneously developing mechanisms for establishing external compatibility *vis-à-vis* other normative orders (Haupt 2002, 12f;). As such, they *de facto* and in many instances also *de jure* served as micro-polities in their own right, thereby undermining the claim to unity advanced by the emerging modern states because their existence signified the existence of multiple public orders, or societies, rather than a singular public order. The introduction of the freedom of contract in relation to economic exchanges and the freedom religion, opening up for state-defined competition between different economic agents within the economy and different religious congregations within the sphere religion, however undermined the *claim* to publicness of economic and religious institutions. The introduction of these rights reduced economic exchanges and participation in religious acts into *voluntaristic* enterprises falling outside the generalised realm of public power. Thus, competition served as a central instrument through which public power was redefined and limited to specific functional tasks which was increasingly monopolised by the emerging modern states. The introduction of competition furthermore served as

a tool to pacify society, in so far as the attempt of states to establish not only a formal but also a factual monopoly of violence implied the introduction of institutions of competition capable of transferring social conflicts into structured norm-based processes characterised by an absence of physical violence. From the perspective of economic agents, for example, competition might be seen as providing an increase in the range of possible actions and choices, but, from a state perspective, it can be regarded as a way of establishing orderliness through its transmission of processes of “pure competition” into processes of “indirect competition”. A switch which, as already indicated, implies a change from a dyadic form of competition between two parties and into an indirect form of triadic competition where the two parties compete for a goal set by a third party (Werron 2010; Werron 2015). As we shall return to, this move towards a structured form of competition furthermore paves the way for an indirect second-order form of steering of social processes (Foucault 2008, 159ff).

The introduction of this novel and specifically modern form of competition, however, only emerged in a protracted manner. The most central characteristic of the *ancien régime* was not feudality, but rather the corporate order upon which it relied. In essence, the *ancien régime* consisted of a plethora of corporations, most notably visible in relation to the Church and the guilds, which, in their core, were aimed at ensuring a monopoly in relation to the specific social activities they reproduced. It might, therefore, be argued that the central achievement of the 1789 Revolution was the abolition of the corporations. It follows that the central strategy for asserting the sovereignty of the emerging modern state was closely tied to the notion of competition as the central tool through which competing orders, relying on alternative forms of publicness, were demolished (Crossick & Haupt, 16ff). Specifically in relation economic reproduction one might therefore also challenge the widespread understanding that a zero-sum game unfolds between statehood and the economy (e.g. Streeck 2014). On the contrary, the introduction of economic competition was in fact one of the central tools deployed to ensure the expansion and factuality of the modern form of political power. From the perspective presented here, the relationship between modern political power in the state form and the modern capitalist economy is not an antagonistic relationship, but rather a relationship of mutual increase in which more of one implies more of the other.

Corporatism and the Dual Rejection of Competition and Modern Statehood

Whereas guilds and other types of intermediary corporations experienced a serious decline in England long before it happened on the continent, thereby indicating the more advanced state of modern statehood in England, France and, in particular, Germany experienced a far more gradual process in which such corporations, after the stripping of their formal standing as autonomous bodies, continued to exercise considerable influence (Thelen 2004). Although clearly linked to various forms of economic production process in terms of goods and trade, the pre-modern guilds were never pure economic entities. The functional nucleus of the guilds was much broader in so far as they were oriented towards the reproduction of the societal conditions enabling economic production. They were aimed at integrating economic production and societal processes related to issues such as education, policing and religion. This led to the idea that intermediary institutions and in particular guilds, in an updated version, also could serve as the constitutive basis of societies operating under explicit modern conditions. This was, for example, clearly visible in Émile Durkheim's call for the re-installment of guilds in a modern nationwide version capable of substituting the localist form of feudal guilds. Durkheim detected a functional need to stabilise competition-based social exchanges through structures which showed a high degree of stability over time in order to counter the tendency of "general moral deterioration" (Durkheim 2014, p. 10), and argued that the state is ill-suited to fulfil this stabilising function *vis-à-vis* social, including but not limited to economic, exchanges and relations (ibid. p. 11ff.). In the context of this article, however, it is most interesting that his call for modern types of guild-based corporations implied an understanding of them as autonomous structures which were to be independent of the state:

"The two organisms [The state and the corporations], although in contact with each other, should remain distinct and autonomous; each has functions that it alone can perform." (ibid. p. 25).

Thus, Durkheim was calling for the instalment of distinctly *public* institutions which were to function side by side with the state, a call for publicness which meant that he largely dismissed the potential of the emerging modern type of trade unions which he saw as mere private institutions which was purely linked to the economic sphere (ibid. 12). Thus, he *de facto* challenged the concept of a society based upon unitary integration through a singular form of publicness in the state form. While normatively rejecting it, he furthermore made a direct link between a private sphere

characterised by competition and unitary statehood, thereby factually confirming the existence of a mutually-reinforcing relationship.

Durkheim was not alone in going down this road. Similar perspectives can be found by Georg Simmel (Werron 2015), just as broader societal movements of both socialist, syndicalist and Catholic variants emphasised the need for a curbing of competition in society through the re-instatement of guild or guild-like corporations aimed at re-integrating a wide range of diverse social function from economic reproduction and welfare services to religious practices and law enforcement (Wiarda, 1997). These movements, in most instances, saw themselves as opposed to both liberal and Marxist ideas, and often emphasised the protection of artisans, shopkeepers and other groups appertaining to the *petite bourgeoisie*. This line of thinking was taken up in the interwar period through the development of strong corporatist ideologies, which, although they only superficially attached themselves to the above-cited sociological theories, did *de facto* instrumentalise them for political purposes which were often, although not necessarily, authoritarian or totalitarian in nature. Corporatist ideology gained different expressions in different national settings such as Austria, Germany, Hungary, Italy and Spain, which all subsequently turned to authoritarianism or totalitarianism, at the same time as they also gained considerable influence in democratic settings from France to the Netherlands and from Scandinavia to the United Kingdom, as well as throughout eastern and central Europe (ibid.) In spite of their diversity, these ideological articulations maintained – at their core - the central dual insight originally developed by Durkheim and his consorts: that a limitation of competition was needed, and that modern statehood was an insufficient basis for societal order.

The corporatist rejection of the social institution of competition which particularly gained ground in the wake of the First World War was strongly concerned with the establishment of order and certainty. The central element was, therefore, a more general rejection of the spontaneous dimension of social processes and their substitution with planned and organised processes. Most functionally-differentiated areas of society are characterised by a duality between hierarchically organised and spontaneously co-ordinated areas as, for example, expressed in the distinction between firms and the market, the political system and public opinion, and between institutionalised religious congregations and their believers (Teubner 2012, 88ff). It is precisely this duality which corporatist ideologies sought to break down through the substitution of spontaneous processes, including but not only market-based processes, with hierarchical structures which relied on organisation and planning. Not surprisingly, price control, rather than free price formation on the

market, was, therefore, a key aspect of the economic dimension of corporatism (Kaiser & Schot 2014, 189ff.), just as the central thrust of corporatist ideology was the rejection of the very idea of a competition based society (Winkler, 107ff.).

Over the course of the 20th century a reductionist take on corporatism gradually evolved, in so far as leading proponents of corporatism increasingly reconfigured the corporatist rejection of a competition-based society into an issue of the binary relation between the state and the economy (Most notably, Schmitter 1974; and Schmitter & Lembruch 1979). A move which also was based upon the idea that the relation between the state and the economy is based on a fundamental antagonism. This led to an understanding of corporatism as state-centred, in so far as the objective of corporatism was considered to be a substitution of the free market with state control. The corporatist discourse in the 1970s was built up around the idea that early inter-war forms of corporatism had been state-centred, and had been essentially concerned with the introduction of a system which was capable of either ensuring direct or indirect state control over the economy, in order for economic developments to be aligned with state objectives (*ibid.*). This perspective, however, under-estimates the dual rejection which characterised early 20th century corporatist movements, since not only a competition-based economy, but also modern statehood was rejected. Corporatism is based upon a “rejection of the rule of law” because positive law is seen as an alienating tool which inhibits efficient and goal-orientated planning (Winkler, p. 108). This rejection of law, however, which was taken to an extreme in Fascist Italy and National Socialist Germany, also implied a dismissal of the modern form of statehood in so far as it implied that the boundaries between the state and the rest of society were dissolved. As pointed out by Neumann, a structure such as the National Socialist regime, which not only relied on a strongly cartelised economy but also was characterised by a more general eradication of the separation between the state and the rest of society, was therefore not to be considered to be a “strong state”. Instead National Socialism represented a particular form of “totalitarian pluralism” in which the notion of statehood had lost its meaning as both the formal and factual distinction between the state and the rest of society had disappeared altogether (Bast 1999, 279ff; Neumann 2009, 467ff.).⁷ Inter-war corporatist ideology was, in fact, based upon a dual rejection of both competition and modern statehood. In contrast to the perspective advanced in the 1970s, the very object of early 20th century corporatism was neither the economy nor the state but society as such. In this sense, early 20th

⁷ For a similar view, see Foucault 2008, p. 111.

century corporatist ideologies can also be understood as reactionary ideologies which sought to undo “the fall of man” (“*Sündenfall*”) of functional differentiation (Luhmann 1989, p. 264). It is therefore hardly surprising that corporatist modes of organisation advanced the most in the parts of Europe where modern statehood had gained least traction, that is, in areas in which the advance towards unified statehood had only emerged at a rather late stage, such as in Austria, Germany and Italy, or in countries such as Greece, Portugal and Spain, which, in the first half of the twentieth century, continued to be characterised by essentially patrimonial forms of social organisation.

Competition in the Context of Post-war National Conglomerates

It is against the background of the above that de-cartelisation and thus competition policy gradually gained a strategic status in the post-war European order. This development not only implied an emphasis on competition within the economic sphere but also a *simultaneous* exclusion of competition from other social spheres such as education and health within the framework of the emerging welfare states. As mentioned, a formalised competition (antitrust) policy developed gradually in the United States from the late 19th century onwards. In European settings formalised competition law and policy did not play any substantial role before the post-second world war period and only gradually gained force in the decades after 1945. In the immediate post-war period competition policy remained an essentially North Western European and especially German phenomenon (Gerber 2001).

The intellectual impetus for this development was derived from the experience of totalitarianism. Referring to developments in the German context, Friedrich August von Hayek and Polanyi simultaneously developed theories concerned with why totalitarian regimes had emerged. But they arrived at diametrically-opposed conclusions, in so far as the former argued that the problem was “too little”, and the latter “too much”, market and competition (Hayek 2001; Polanyi 2002). In sociological terms, their respective positions can also be seen as being focused upon whether the existence or the absence of a functionally-differentiated society was the underlying reason for the emergence of totalitarianism. Furthermore, for Neumann, competition emerged as one of the “four Ds” which subsequently became the pillar of the US-American occupation strategy in Germany: de-nazification, democratisation, de-militarisation, and finally, de-cartelisation (Neumann 2009). While not sharing Hayek’s general stance on society and its central driving forces, Neumann decisively opted for a functional differentiation approach, in so far as his central point was that de-differentiation between economic and political processes due to a suspension of generalised formal law was a central reason for the breakdown of the Weimar Republic. As such, he

admitted a central strategic role to law as the framework which aims at simultaneously separating and re-connecting economic and political processes (Neumann [1933] 1996a). Inspired by US anti-trust policy, he came to see competition policy as a central instrument aimed at not only framing economic processes, but also at preventing that resources are concentrated to such a degree that economic actors would be able to undermine the autonomy of the political system (ibid.).

Neumann developed his position within a wider ideological debate on the compatibility between the rule of law and the emerging welfare state (Joerges 2010). Although coming from a more left-leaning political background, Neumann's stance shared many features with the Ordoliberal Freiburg School associated with scholars such as Franz Böhm and Walter Eucken. These scholars were however mainly concerned with the role of private power in society (Böhm 1980; Eucken 2008). Neumann, in contrast, advanced a broader and more sociologically informed perspective which allowed for a more fundamental re-conceptualisation of the relationship between the sphere of public power and the rest of society as outlined above. Thus, in contrast to the ordoliberals the ultimate concern of Neumann was not the economy but the internal coherency and vitality of political power.

Neumann's particular view on the fundamental but yet limited role of the political in modern society furthermore corresponded closely with the actual developments unfolding within the emerging post-war welfare state conglomerates. Although significant variations can be observed (Esping-Andersen 1989) a general feature of Western European post-war societies was the emergence of a new type of intermediary institutional frameworks in the form of neo-corporatism. When viewed from a sociological perspective, this development implied a double-movement oriented at establishing institutional structures fulfilling a dual function. Neo-corporatist intermediary institutions are *simultaneously* oriented towards internally stabilising functional delineated societal spheres such as the economy, health, education, science, and religion, while providing frameworks for the compatibility between these spheres. The neo-corporatist welfare-state conglomerates furthermore shared the feature that they had formal organisation and formalised positivist law as their key organisational components. As such they were directly opposed to the core anti-legalistic organisational ideal that had driven inter-war corporatism. Neo-corporatist structures are characterised by hierarchically-organised "peak-associations" which serve as negotiation systems (*Verhandlungssysteme*) (Wilke 1990) which mediate between the different spheres of society. This is most notably, but not exclusively, the case between the economy and the political system in the state form, and the objective is to establish a mutual stabilisation of

exchanges between the spheres in question (ibid).⁸ Thus, neo-corporatism can also be understood as a specific type of intermediation through which different societal praxis's, organisational regimes, epistemic communities and professions operating within different functionally delineated areas such as the economy, health and education are made compatible (ibid). What we, in mainstream language, have come to understand as nation states, take the form of configurational webs, mainly established at the level of organisations and regimes, in so far as the "higher order" of nation states emerged through a mutual stabilisation of expectations and exchanges between multiple social spheres bound together through a neo-corporatist web. Formal organisation became the form through which internal order was established within functionally-delineated areas, just as they came to serve as the "contact points" for inter-systemic exchange between, for example, national organised science, education, religion, health, mass media, economy, and politics. The consequence is that a particular form of non-state public power emerged. The internal form of stabilisation within functional spheres became a question which was channelled into formalised, often profession-based, organisational arrangements, which produced collectively-binding decisions or the functional equivalents to collective decisions within their respective functional areas. Thus, a central feature of these arrangements was their rejection of institutionalised competition and the substitution of competition with collective decisions within their respective societal spheres.

Competition especially within its ordo-liberal variant, merely gained a specific function as the internal form of ordering *within* the economy. As pointed out by Foucault, ordo-liberalism had little to do with *laissez-faire* liberalism, in so far as competition became institutionalised and formalised as an objective, and its realisation became the task of an "active policy" and "governmental art" (Foucault 2008, 120). Consequently, the market and the state are not just in need of separation, but also in need of re-connection, to the extent that "pure competition" within the economy can only be produced through "governmentality" (Foucault 2008). In the German context in particular, the form of this relationship was, however, essentially a legal one. The intervention of the state in the structuring of economic exchanges was, following, at least ideally, ordo-liberal ideas, based upon a double-movement aimed at *simultaneously* separating and re-connecting the economy and politics through law. Thus, the objective was to maintain functional differentiation while re-integrating the economy and politics within a specific form. This gives law, much neglected by Foucault, a strategic position as the form through which expectations are

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For a critique of the concept of neo-corporatism from an US-American critical theory perspective, see Sciulli, 1992, p. 73ff.

stabilised, and exchanges and transfers take place between the economy and the political system in the state form. Foucault, furthermore, indicates that it is the structuring of the market that becomes the overriding purpose of the state. While the structuring of the market is, indeed, a central prestation (*Leistung*) of the political system in the state form, this view probably under-estimates the orientation of the state towards its own reproduction and the expansion of state power, as well as the general function reproduced by the state *vis-à-vis* society in its entirety. The constitutional coupling of law and politics is aimed at establishing a general convergence of time throughout society (*Gesamtgesellschaftliche Zeitausgleich*) (Luhmann 1993, 427ff), thereby ensuring that the different time horizons and paces of social change within partial segments of society are made compatible. The convergence between the market and rest of society is, however, merely one dimension of this. The “state-complex” of law and politics constitutes a common context through the structuring of relations and the convergence of time between a constellation of other social spheres and regimes such as science, health and education as well as the economy. This is also reflected in the societal reality of most post-war European settings, in that areas, such as science, health and education, remained largely excluded from the market (Esping-Andersen 1989, 3ff.). Instead these spheres were, as mentioned, structured upon the basis of an ideal of professional autonomy (Hartmann 2015b). Like the market, this sort of autonomy was characterised by a dual set-up, which simultaneously emphasised their self-regulatory nature and their reliance upon an external legal basis provided by the state. Thus, in North Western Europe, the post-second World War period was marked by a gradual strengthening of competition as an institutionalised form in relation to economic production processes, and a simultaneous, legally structured, limitation of competition to the economic sphere. This enabled the political system in the state form to stabilise itself as the “first among equals” within the larger conglomerate of the laterally-related institutional regimes which make up the nation state at the same time as the continued centrality of profession based autonomy meant that society newer became totally state-centred. What, in lay-man’s language, is understood as the nation state should, therefore, rather be understood as considerably more complex configurations, in which the horizontal nature of the relations between the state and the other spheres of society remain a central feature at the same time as the political-legal complex takes up a strategically central position which enables it to engage with other societal dimensions in an asymmetric but not completely dominant manner.

Contemporary Perspectives: Dissolution or Strengthening of State Power through the Expansion of Competition?

The multi-dimensional structuring and convergence of society through time by the legal-political state-complex did not materialise in most Western European settings before the 1960s and the 1970s. First, then, one might plausibly argue that at least *some* European states had gained the capability of “establishing societies” through the structuring of relatively singular societal contexts. This evolutionary achievement was, however, “tragic” in nature, in so far as this unitary society started to unravel in the moment of its completion (Thornhill 2011b), thereby creating a basis for contemporary golden-age nation-state nostalgia (Hurrelmann et al. 2007). The challenge to the allegedly state-centred society came mainly from two fronts, both of which are intimately, albeit in different ways, linked to the notion of competition.

First: The massive expansion in the size of the public sector and the general “demand overload” which European states were confronted with from the 1970s onwards led to a planning and steering crisis and ultimately to a legitimisation crisis (Habermas 1973). The “turn to governance”, typically associated with de-centring, and increased hybridisation between the public and the private, as well as increased de-regulation and privatisation from the 1980s onwards, is typically seen as a response to this development (Stoker 1998). This shift did not, however, imply a substantial shrinking of the state, but rather a re-configuration, through a shift in policy priorities, a re-structuration of the tax base upon which states relied, as well as an internal re-organisation of states through the introduction of new public management (NPM) techniques.

In ongoing critiques, this policy regime is often defined as neo-liberal, although it can probably more correctly, in allusion to structural Marxism, be described as an expression of structural liberalism, in so far as it sees the market as the central driving force of society. Accordingly, structural liberalism has implied an expansion of commodification and marketization throughout society. While this is certainly an important trend, this development does, however, not seem to imply a reduction in the reach of state power. On the contrary, a double-movement implying a dual expansion of both the economy *and* statehood is the central trait and with it a radical expansion in the use of competition as an instrument for organising social relationships can be observed. The re-organisation of the state through NPM implied, in most European settings, the introduction of competition as a central steering instrument within public institutions. From public service mass media (Deakin 2009), to public research funding and health care (Le Grand et al. 1998), the establishment of internal modes of competition, in which tasks and funds are allocated through competitive bidding, have become commonplace. Frameworks of this sort mimic the logic of the market, but remain essentially non-market, in so far as they are typically organisational or

regime internal institutions in which both the parameters and the final decisions tend to rest with the management, and, as such, are hierarchically, and not spontaneously, defined. Thus, whereas this development does indeed imply an increased marketisation, it also and probably more substantively implies an expansion of a state-based bureaucratic logic. A logic which *de facto* serve as a tool for undermining the profession-based autonomy of areas such as health, science, and mass media, and, as such, is aimed at achieving an unravelling of the complex constellations of the European nation states, which are characterised by a bundling of numerous different regimes. The competitive bidding for resources is, in other words, an instrument which allows for an expansion of political rationality - which, to a large extent, might be considered to be bureaucratic rationality in disguise - into spheres which had heretofore been capable of upholding a certain degree of autonomy *vis-à-vis* political influence.

Second: The expansion in competition is also reflected in the transformation which the specific regime of competition policy has undergone in recent decades. A significant transformation can be observed through the move towards a narrower “economic approach” which emphasises the maximisation of welfare as the overriding, if not the only, objective of competition policy in a manner which excludes broader social concerns (Drexler 2012; Fikentscher 2004). This is particular the case in the US context, but this development has also had an important impact on European developments at both national and EU level. This move is paradoxical in nature, in so far as it represents a double-movement in which the focus of competition is narrowed down to the issue of “welfare maximisation” while, at the same time, this narrowing down has been accompanied by a move towards an increased broadening of the fields to which competition law and policy is applied (Buch-Hansen & Wigger 2011, 88ff). Here a certain nexus and entanglement of the broader phenomenon of competition as a tool for organising social relations and the objectives of competition policy become visible. The increased reduction of competition policy to a matter of economic efficiency and welfare maximisation is, for example, being used to undermine the autonomy of professions, which traditionally have organised and stabilised relations within their given areas on the basis of broader regulatory approaches aimed at integrating a wide area of concerns and values in relation to professionalism, impartiality and occupational excellence. As such competition law and policy are turned into a battering ram which increasingly is used to undermine the autonomy of non-state regulatory frameworks. A development which opens up for a

subsequent re-configuration of social relations by the state within social spheres which until recently largely relied on a principle of societal self-organisation (Hartmann 2015a).⁹

The most fundamental transformation resulting from the re-configuration of the state is, however, observable at the legal level through the dual expansion of contract and administrative law (Thompson 2015). Here, a contradictory double-movement can be observed, in that the contract tool has been introduced into the organisation of public policies at the same time as increased hybridisation between public and private implies that administrative law provisions are increasingly applied to private structures as well, *de facto* leading to the emergence of considerable grey-zones which are not clearly demarcated to one or the other sphere (ibid). This is, for example the case in relation to new types of intermediary institutions such as public/private partnerships which tend to take the form of hybrids which are neither public nor private (Skelcher 2007). This development indicates that the differentiation between state and non-state social processes is becoming increasingly strained, potentially allowing for the increasingly unregulated introduction of privatistic logics into public processes and *vice versa*. This development is further enhanced by the ethos dominating NPM and the wider structural-liberal discourse, in so far as its call for increased efficiency and adaptability are closely linked to an anti-legalistic discourse in which the “removal of red-tape” hampering social interaction is seen as a central objective. Whereas the corporatist discourse of the early twentieth century was closely linked to an anti-legalist discourse because formal law was seen as inhibiting the possibility of both planning and political action, the structural liberal discourse develops the same argument upon the basis of the idea that legal formalism inhibits spontaneous market processes. Thus, one might argue that not only in early corporatism but also in contemporary governance the starting point is the claim that it is “society”, and not the state, that should be considered as the true constitutive object and source of social progress, at the same time as both discourses, paradoxically, provide the basis for an expansion of state-power in the short and middle term. As is, for example, clearly visible in relation to the still ongoing financial crises, the legal infrastructure, with its strategic function of *simultaneously* separating and re-connecting numerous social spheres, such as but not only the economic and the political dimensions of society, however, came under sustained pressure in most developed countries from the 1990s onwards. Over time, this led to an incremental undermining of both the integrity and the sustainability of political, economic, and other social processes (Kjaer 2011a). Much like

⁹ Due to the Europeanization of competition law and politics, this development is, of course, not only pursued by states but also by the European Union, acting as another centre of public power and authority.

corporatism, the turn to governance and its accompanied expansion of competition might, therefore, in the short- and middle-term, have established the basis for a dual expansion of political and economic rationality at the same time as the suspension of “reflexive self-limitation” through law indicates the long-term dangers associated with this development for the state as well as the economy.

Conclusion

Following Neumann’s concept of the political as constituted through positive law, this article has examined the relationship between modern statehood and the social institution of competition. A central insight was that modern statehood and competition are co-original phenomena in that they emerged together and are structurally linked to each other. In addition, the emergent modern states used the instrument of competition as a tool which was deployed by these states in their ongoing attempts to undermine alternative claims to public authority in society, which, most notably, found expression through the guilds, and, later on, through profession-based structures. Furthermore, the emergence of strong corporatist counter-movements in the early twentieth century, and especially in the inter-war period, marked an attempt to undermine the dual constitution through law of the state and the competition-based society, an attempt which was based upon an ideal of a return to society as such as the core object of political aspirations and a substitution of spontaneous social processes with hierarchal organised social processes. Ultimately, however, this led to disaster in most societal settings in which corporatism had gained traction as testified by the emergence and subsequent collapse of authoritarian and totalitarian regimes. The evolutionary reaction was the post-war neo-corporatist attempt to install a simultaneous separation and re-connection of the political and economic spheres of society through law. This attempt implied, with the help of a formalised competition law and policy regime, a re-enforced focus on competition within the economic sphere but just as important also a simultaneous exclusion of competition from non-economic societal spheres. This limitation, however, came under increased pressure with the “turn to governance” and the introduction of new public management techniques. Since the 1980s, the logic of competition as an organising tool has expanded into areas such as education, health and science. This time the objective is, however, to further spontaneous processes at the price of hierarchically-organised processes. But the expansion of the logic of competition into the remotest areas of society has, paradoxically, also been accompanied by an expansion of state power, *de facto* challenging the distinction between the state and the rest of society. In the long term, the “turn to governance”

might therefore imply an erosion of the reflexive self-limitation through law, which was at the heart of the modern attempt to separate the political, economic and other social dimensions of society.

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