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## ORIGINAL MANUSCRIPT

# European crises of legally-constituted public power: From the 'law of corporatism' to the 'law of governance'

Poul F. Kjaer\*

## Abstract

The 'turn to corporatism' in the interwar period implied an erosion of the fragile institutionalisation of legally-constituted public power due to its suspension of the legal infrastructure of society and the concomitant breakdown of the distinction between the public and private realms of society. The dual (trans-)national re-constitution of Western Europe in the years immediately after the Second World War, which the European integration process was an integrated part of, successfully remedied this development. However, over the last decades, Europe has experienced a 'turn to governance', which also implies an erosion of the distinction between the public and private realms, and increasingly challenges the normative integrity and functional capacity of law. This development has been further reinforced by the new post-crisis legal and institutional architecture of the EU as it implies the emergence of a 'dual Union' partly based upon formality and partly upon informality and an increased suspension of open-ended democratic decision-making.

## 1 | INTRODUCTION

As a response to the many and overlapping crises that have hit the European Union since 2007, the legal architecture of both the EU and its Member States has undergone profound changes. The EU's 'macroeconomic constitution' has been fundamentally overhauled,<sup>1</sup> leading to deep changes within the legal orders of the Member States as well. In some Member States, this process has also implied constitutional amendments.<sup>2</sup>

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<sup>1</sup>See, in particular, K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014).

<sup>2</sup>For an overview, see <http://eurocrisislaw.eui.eu>.

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Informed by a sociological jurisprudence perspective, emphasising the actual social effects of law, this article sets these fundamental changes to the legal set-up and modes of operation of the EU and its Member States in their conceptual and historical context. I make three interconnected claims:

- Firstly, the crises that Europe is currently facing ultimately amount to a crisis of legally-constituted public power, which is increasingly challenging the capacity of law to act as the primary framework for the integration of society.
- Secondly, the last time that Europe was faced with a profound crisis of legally-constituted public power was in the interwar period. The interwar crisis trajectory was closely connected to the 'turn to corporatism' which unfolded throughout Europe in that period, as the corporatist surge implied an erosion of the normative integrity and functional capacity of law. This was particularly the case, as corporatism implied a suspension of the legally-constituted distinction between the public and the private realms of society.
- Thirdly, the current crisis might be understood as a reflection of the 'turn to governance' which has unfolded, over the last four decades, at the local, regional, national and transnational levels of European society, as well as beyond Europe. Also, the 'turn to governance' has increasingly challenged the legally-constituted distinction between the public and private realms of society, just as signs of the corrosion of the normative integrity and functional capacity of law and legally-structured democratic decision-making can be observed. This again begs the question of to what extent the response to the euro crisis has further accelerated and fortified this development.

The perceived link between the crisis and the 'turn to governance' does not, of course, imply that the emergence of the governance phenomenon is the only cause of the crisis. The crisis is a multi-faceted phenomenon that can be traced back to a string of different, but interconnected, structural developments in relation to, for example, demographic trends, globalisation, economic and technological transformations, as well as ideological developments and substantial policy choices (such as those associated with neo-liberalism and the different variants of the monetarist paradigm within economics).<sup>3</sup> As such, this article should be seen as exploring only one dimension of the crisis, albeit a very central one.

The argument unfolds in three steps. Firstly, the concept of legally-constituted public power is outlined in its historical and theoretical dimensions. Secondly, the suspension of law within the broader turn to corporatism in the interwar period is analysed. Thirdly, the 'turn to governance' and its relation to the current crisis trajectory is examined. Against this background, the EU's response to the ongoing crises, and particularly the fiscal crises ('the Euro crisis') is scrutinised, raising the question of whether Europe is 'returning to the past' of the interwar period.

## 2 | THE LEGAL CONSTITUTION OF PUBLIC POWER

Max Weber spoke of power in 'any social relationship',<sup>4</sup> just as Michel Foucault advanced the view that power is intrinsic to all aspects of the social world,<sup>5</sup> thereby making it impossible to distinguish public from private power.<sup>6</sup> In contrast to such 'total' perspectives, one might distil a specifically modern concept of legally-constituted public power, which is distinguishable from private power on a number of accounts.

<sup>3</sup>P.F. Kjaer, 'Law and Order Within and Beyond National Configurations', in P.F. Kjaer, G. Teubner and A. Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing, 2011), 395–430.

<sup>4</sup>See M. Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (Mohr Siebeck, [1921] 1980), at 28 (author's translation).

<sup>5</sup>M. Foucault, 'Le sujet et le pouvoir', in *Dits et écrits, tome IV* (Editions Gallimard, 1993), 222.

<sup>6</sup>For this argument, see, for example, C. Borch, 'Systemic Power: Luhmann, Foucault, and Analytics of Power', (2005) 48 *Acta Sociologica*, 155–167.

At least ten characteristics of a modern concept of legally-constituted public, i.e., political, power can be highlighted<sup>7</sup>:

- First, in contrast to a feudal regime, a modern state, acting as an institutional repository of public power, is neither a *patrimonium* in the sense of being the private property of a specific person or family,<sup>8</sup> nor a holistic corporate body characterised by a unitary form of moral agency as assumed by Hobbes in the early modern period upon the basis of the organic notion of body politics.<sup>9</sup>
- Second, a modern state has, since Hegel, been characterised by a formal and factual separation of the state from the rest of society, upon the basis of a legal distinction between state and society (*Staat und Gesellschaft*).<sup>10</sup> The state is not identical with society, but only a distinct partial segment of society.
- Third, since Rousseau, public power is based upon a reference to a singular form of sovereignty-based authority formally vested in the people upon the basis of a legal concept of the nation,<sup>11</sup> or alternatively in parliament.<sup>12</sup>
- Fourth, in contrast to feudal and paternalistic forms of ordering, modern legally-constituted public power is *intended* to be applied across the board in an abstract and non-paternalistic manner without regard to specific persons, as 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>13</sup>
- Fifth, modern legally-constituted public power is based upon generalised and legally-structured formal decisions that are binding for *everyone*—superiors and subordinates alike—meaning not only for decision-receivers, but also for decision-makers.<sup>14</sup>
- Sixth, following on from point five, modern legally-constituted public power does not structure its relations to the rest of society upon the basis of entitlements or privileges, but upon the basis of universal rights, i.e., political, economic and social rights, thereby making rights and rights-based frameworks central legal instruments through which the exchanges between the state and the rest of society are structured.<sup>15</sup>
- Seven, modern legally-constituted public power is characterised by an integrative capability, understood as a formal and factual ability to use 'infrastructural power',<sup>16</sup> including, but not limited to, the exercise of (legitimate)

<sup>7</sup>Traditionally, the concept of legally-constituted public power has been intertwined with the concept of the state. See C. Möllers, *Staat als Argument*, 2nd ed. (Mohr Siebeck, 2011). Both conceptually and historically, the concept of public power can, however, be disentangled from the concept of the state. See P.F. Kjaer, 'Context Construction through Competition: The Prerogative of Public Power, Intermediary Institutions and the Expansion of Statehood through Competition', (2015) 16 *Distinktion*, 146–166.

<sup>8</sup>I. Kant, *Zum ewigen Frieden* (Felix Meiner Verlag, ([1795] 1992), 25.

<sup>9</sup>D. Runciman, 'Moral Responsibility and the Problem of Representing the State', in T. Erskine (ed.), *Can Institutions have Responsibilities?: Collective Moral Agency and International Relations* (Palgrave Macmillan, 2004), 41–48.

<sup>10</sup>G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (Suhrkamp Verlag, [1820] 1970), §257ff.

<sup>11</sup>J.J. Rousseau, *Du Contrat Social ou Principes du droit politique* (Paris: Flammarion, [1762] 2001). For the legal form of the nation, see M. Loughlin, 'What is Constitutionalisation?', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), 47. See, also, more generally, the contributions in C. MacAmhlaigh, C. Michelon and N. Walker (eds.), *After Public Law* (Oxford University Press, 2013).

<sup>12</sup>Pavlos Eleftheriadis, 'Parliamentary Sovereignty and the Constitution', (2009) 22 *Canadian Journal of Law and Jurisprudence*, 267–290.

<sup>13</sup>*Constitution of Massachusetts, 1780*, Article XXX. Available at: <http://www.nhinet.org/ccs/docs/ma-1780.htm>.

<sup>14</sup>F.L. Neumann, 'The Concept of Political Freedom', in W.E. Scheuerman (ed.), *The Rule of Law Under Siege. Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press, [1953] 1996), 195–230.

<sup>15</sup>For the importance of rights as a nation-building tool, see, in particular, the work of C. Thornhill, especially, 'The Constitutionalization of Labour Law and the Crisis of National Democracy', in P.F. Kjaer and N. Olsen (eds.), *Critical Theories of Crisis in Europe: From Weimar to the Euro* (Rowman and Littlefield, 2016), 89–106.

<sup>16</sup>M. Mann, 'The Autonomous Power of the State: its Origins, Mechanisms, and Results', (1985) 25 *European Journal of Sociology*, 185–213.

physical,<sup>17</sup> or symbolic,<sup>18</sup> violence in order to establish 'singular contexts'—or 'societies' through the structuring of singular legal spaces. Such legal spaces are symbolically demarcated through reference to territorial borders, and consist of legally-codified and systematised sets of symbols intended to provide a singular cognitive space, and, in terms of time, a high degree of stability of expectations in relation to further developments through the legal codification of norms.<sup>19</sup> It offers an integrative capability which can also be conceptualised as an ability vested in legal instruments to establish a convergence of the time structures of societal spheres, that is, to ensure convergence between the different paces of change and the different time horizons within spheres such as politics, the economy, religion, science and education, through an 'equalization of time throughout society in its entirety'.<sup>20</sup>

- Eight, modern legally-constituted public power is based upon an institutionalisation of temporalisation, understood as the development of institutional mechanisms oriented towards the constant adaptation and systematic increase in the adaptive capabilities of a given state. This is expressed through the turn to positive law, because positive law, in contrast to customary law, carries with it the capability of systematically changing itself,<sup>21</sup> as well as through adoption of a specific mode of bureaucratic self-organisation enabling constant reform and re-organisation of the different components of the state.<sup>22</sup>
- Nine, and following from points seven and eight, spatial coherency and temporalisation imply a turn to democracy and that democratic decision-making gains centre stage. Democracy is an institutional form of decision-making aimed at constantly observing and reacting to the changes in society within the legal form of the rights-based nation. Democratic representation is therefore aimed at providing a coherent replication of a legally-constituted social space. In addition, democracy is based upon a linear concept of time and, as such, it implies an institutionalisation of 'openness to the future'. The horizon is re-oriented towards the future, rather than towards a tradition-based past, and democracy consequently implies an abolition of prescribed and detailed limitations to specific substantial future actions.<sup>23</sup>
- Ten, and finally, modern legally-constituted public power is, following Alexis de Tocqueville, bound up with a concept of a dynamic or living constitution, which, in close conjunction with democratic processes, is continuously evolving in the face of an unforeseeable future,<sup>24</sup> rather than a static and immutable constitution aimed at maintaining a given order across time.<sup>25</sup>

What follows from the above (non-exhaustive) list of characteristics of modern legally-constituted public power is that the *form* of public power is provided by law in so far as it is through the legal form of positive public law that a

<sup>17</sup>Weber, *Wirtschaft und Gesellschaft*, above, n. 4, at 29.

<sup>18</sup>P. Bourdieu, 'Sur le pouvoir symbolique', (1977) 32 *Annales*, 405–411.

<sup>19</sup>H. Lefebvre, *La production de l'espace* (Anthropos, 1974).

<sup>20</sup>N. Luhmann, *Recht der Gesellschaft* (Suhrkamp, 1993), 427ff. (author's translation). For a legal conceptualisation of divergent time structures in relation to the different constitutional dimensions of the EU, see K. Tuori, 'The Many Constitutions of Europe', in K. Tuori and S. Sankari (eds.), *The Many Constitutions of Europe* (Ashgate, 2010), 3–30.

<sup>21</sup>H. Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury, 2014), at 117f and 128ff.

<sup>22</sup>As also highlighted by Kant in the context of the French Revolution. See I. Kant, *Kritik der Urteilskraft* (Suhrkamp, [1790] 1974), §65.

<sup>23</sup>N. Luhmann, 'Die Zukunft der Demokratie', *Soziologische Aufklärung 4. Beiträge zur funktionalen Differenzierung der Gesellschaft*, 2nd ed. (Westdeutsche Verlag, [1987] 1994), at 126–132.

<sup>24</sup>A. de Tocqueville, *De la démocratie en Amérique* (Institut Coppet, [1835] 2012), at 87ff; P.F. Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (London: Routledge, 2014), at 104f. For the concept of the living constitution in relationship to the EU, see D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press, 2009), at 10f.

<sup>25</sup>For the immutability of pre-modern constitutions, see R. Koselleck, 'Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung', in idem, *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und Sozialen Sprache* (Suhrkamp, 2006), 365–382.

distinction is introduced between public and private power, just as it is through the legal claim to generalisability and abstractness that the possibility of impersonal and thus non-paternalistic and non-feudal forms of social interaction is made possible upon the basis of universal norms.<sup>26</sup> Following Kelsen, and to the extent that one equates public power with the political realm, law can, therefore, be understood as being constitutive of the political realm.<sup>27</sup>

### 3 | THE 'TURN TO CORPORATISM' AND THE SUSPENSION OF LAW

As the references to Adams, Hegel, Kant, Rousseau and de Tocqueville indicate, the essential components of this form of legally-constituted public power emerged in the wake of the Atlantic Revolutions which unfolded throughout Europe and North and South America in the late eighteenth and the early nineteenth century.

However, contrary to popular perception, the factual realisation of this sort of modern public power in the European context was a far more protracted affair.<sup>28</sup> Conglomerate *quasi*-feudal empires with strong privatistic and multi-level features, rather than nation states, to which the above characteristics of modern legally-constituted public power are attached, remained the dominant form of statehood on the continent right up to the implosion of the multinational Austro-Hungarian, German, Ottoman and Russian empires in the wake of the First World War. It was not before 1918 that the modern nation-state became the paradigmatic form of legal organisation in (continental) Europe.<sup>29</sup>

Moreover, the flourishing of legally-constituted power in Europe was short-lived. With Czechoslovakia an important exception, the Central and Eastern states succeeding the continental empires all succumbed to different degrees of authoritarianism within a decade of their formation.<sup>30</sup> This was part of a general 'turn to corporatism' which unfolded throughout interwar Europe. Drawing on earlier institutional formations, mostly related to the guilds and corresponding ideological articulations,<sup>31</sup> a diverse and multi-faceted string of corporatist institutional formations and corresponding ideological movements gained force in the years following the First World War, manifesting themselves in reactionary, totalitarian and progressive formats. The term 'corporatism' became the word of the day, gaining a level of popularity comparable with the popularity of the term 'governance' today, while also maintaining a similar illusive and catch-all character.<sup>32</sup> Factually, corporatism gained different institutional expressions in different national settings, from Italy, Portugal, Austria, Germany, and Hungary to Spain, which all subsequently turned to authoritarianism or totalitarianism, at the same time that corporatism also gained considerable influence in democratic settings from France to the Netherlands and from Scandinavia to the United Kingdom.<sup>33</sup>

In spite of its multi-faceted character, a number of core and shared features of corporatism, which were shared across ideological and national boundaries, can be distilled:

<sup>26</sup>See, most notably, F.L. Neumann, 'The Concept of Political Freedom', in Scheuerman, above, n. 14, 195–230.

<sup>27</sup>See H. Kelsen, *Pure Theory of Law* (University of California Press, [1934] 1960), 279ff.

<sup>28</sup>For two distinct approaches to the delayed modernity thesis, see A.J. Mayer, *The Persistence of the Old Regime: Europe to the Great War* (Pantheon Books, 1981), and E. Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870–1914* (Stanford University Press, 1976).

<sup>29</sup>For Germany, see, for example, F.L. Neumann, 'The Decay of German Democracy', in Scheuerman, above, n. 14, 29–43.

<sup>30</sup>B.B. Trencsényi, 'The Crisis of Modernity—Modernity as Crisis: Toward a Typology of Crisis Discourses in Interwar East and Central Europe and Beyond', in Kjaer and Olsen (eds.), above, n. 15, 37–52.

<sup>31</sup>E. Durkheim, *De la Division du Travail Social* (CreateSpace, [1893] 2015), at 10ff; H.-G. Haupt, *Das Ende der Zünfte. Ein europäischer Vergleich* (Vandenhoeck & Ruprecht, 2004).

<sup>32</sup>B. Jessop, 'Corporatism and Beyond? On Governance and its Limits', in E. Hartmann and P.F. Kjaer (eds.), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Palgrave Macmillan, 2015), 29–46.

<sup>33</sup>Kjaer, above, n. 7.

- A holistic focus on 'society' in its entirety derived from an understanding of society as an organic body, rather than a focus on the state or other institutional repositories of public power. Overcoming the distinction between the public and private dimensions of society was, therefore, at the forefront of corporatist development;
- A sectorial outlook, in *praxis* representing an in-built contradiction to the holistic outlook, emphasising the organisation of society along functional lines on the basis of interest representation;
- A rejection of the rule of law, since law and legal instruments came to be seen as a hindrance for efficient and goal-orientated planning and political action.

In general theoretical terms, corporatism can also be understood as reflecting a 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.<sup>34</sup> It was precisely this duality which came under attack through the corporatist intention to substitute spontaneous processes, including, but not only, market-based processes, with hierarchical structures that relied on organisation and planning. Not surprisingly, price control, rather than free price formation and competition on the market, thus became a key aspect of the economic dimension of corporatism.<sup>35</sup> In its economic dimension, cartelisation thus became, at both national and transnational level, the dominant concrete organisational and legal form of corporatism.<sup>36</sup> This move to cartelisation factually implied the emergence of hybrid structures which cut across the public/private divide, allowing both the intrusion of states into the economy and an inclusion of private actors into public policy. Corporatism thus reflected, as was apparent, for example, in Weimar Germany, both an opening of the private realm to a high level of arbitrary state intervention, as well as a factual (re-)privatisation of public power as informal networks, most notably from industry, *de facto* became institutional actors of the state.<sup>37</sup> To sum up: Capitalist reproduction has always relied on a mix of planning as well as the spontaneity of the market. The intention of corporatism was to do away with the distinction between these dimensions leaving planning as the only dominant trademark of economic reproduction.

Moreover, this factual suspension of the public/private distinction was, as indicated, connected to a more fundamental rejection of the rule of law. This rejection of law, which was taken to an extreme in Fascist Italy and National Socialist Germany, implied a dismissal of the modern form of statehood and, with it, the type of legally-constituted public power outlined above as a suitable means for organising society. As argued by Franz L. Neumann, focusing on developments in the German context, the consequence was not only a strongly cartelised economy and a more general eradication of the separation between the state and the rest of society, but also the disappearance of the state and with it the realm of public power. A state is constituted through the legal distinction between the state and the rest of society and the dissolution of the distinction therefore also implies the dissolution of the state. In the German case, this process had already begun during the First World War through the introduction of a corporatist *war economy* and gradually became more entrenched during the Weimar years, reaching its climax during the National Socialist regime. Rather than a 'strong state', National Socialism became characterised by 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.<sup>38</sup> Alternatively, one can, as argued by Ernst Fraenkel, speak of a 'dual state', as the legal system, on the one hand, continued partly as a 'normative state'

<sup>34</sup>G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization* (Oxford University Press, 2012), at 88ff.

<sup>35</sup>W. Kaiser and J. Schot, *Writing the Rules for Europe: Experts, Cartels, International Organizations* (Palgrave Macmillan, 2014), at 107ff.

<sup>36</sup>A. Colli, *Dynamics of International Business* (Routledge, 2016), at 134ff.

<sup>37</sup>R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014); Thornhill, above, n. 15.

<sup>38</sup>J. Bast, *Totalitärer Pluralismus. Zu Franz L. Neumanns Analysen der politischen und rechtlichen Struktur der NS-Herrschaft* (Mohr Siebeck, 1999), at 279ff; F.L. Neumann, *Behemoth. The Structure and Practice of National Socialism, 1933-1944* (Ivan R. Dee ([1944] 2011), at 467ff. For a somewhat similar view, see, also, M. Foucault, *The Birth of Biopolitics* (Palgrave Macmillan, 2008), at 111f.

(*Normenstaat*) and partly as a 'prerogative state' (*Maßnahmenstaat*), with the former allowing for a continuation of social exchanges within the economy and other segments of society, for example, through the enforcement of contracts, while the latter *instrumentalised* the law, deploying legal instruments as a tool in the advancement of arbitrary political objectives and for the suppression of resistance to the regime.<sup>39</sup> The prerogative state dimension thereby becomes an instrument for coercion.

#### 4 | THE 'TURN TO GOVERNANCE' AND THE RE-PRIVATISATION OF LEGALLY-CONSTITUTED PUBLIC POWER

As a response to the 'turn to corporatism' and totalitarianism, Western Europe underwent a profound dual (trans-)national re-constitution process in the immediate post-Second World War period, which implied a re-invigoration of public power within a neo-corporatist framework emphasizing a mixture of planning and market based coordination.<sup>40</sup> Together with *Les Trente Glorieuses* and the *Wirtschaftswunder*, this development provided for the expectation that Western Europe had finally arrived in modernity. However, since the 1970s, this has gradually changed due to a 'return of crisis',<sup>41</sup> as embodied in the stagnation crisis of the 1970s and the interconnected financial crisis which became visible in 2007.<sup>42</sup>

It was in the context of this prolonged crisis trajectory that the 'turn to governance' gradually unfolded from the 1970s onwards. As was the case with the 'turn to corporatism', the emergence of the governance phenomenon has a dual character which is reflected in concrete institutional transformations as well as in discursive articulations of particular intentions. The concept furthermore remains as multi-faceted and elusive as the concept of corporatism, thereby depriving it of the status of a legal concept in the strict sense.<sup>43</sup> In terms of origin, two different strands can be detected. One mainly has nation-state origins and was closely associated with the introduction of New Public Management and concordant policies associated with the de-centralisation, privatisation and de- and re-regulatory reform programmes which took shape from the 1970s onwards. In terms of scholarly origin, this strand can furthermore be considered a further development of the theories of steering developed in the 1970s.<sup>44</sup> Another strand refers to transnational regimes centred on public international organisations such as the World Bank, the original creator of the concept, and public international organisations, such as the IMF and the OECD, and, of course, the EU.<sup>45</sup>

A common core of the various strands, however, shows certain affinities with the characteristics previously highlighted in relation to the 'turn to corporatism':

- A holistic focus on 'society', rather than the state or other institutional repositories of public power. This implies an explicit intention to cut across the public/private divide, thereby undermining the distinction between state and

<sup>39</sup>E. Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press, 1941).

<sup>40</sup>Neo-corporatism should here be understood as fundamentally different from interwar corporatism. This is especially the case as post-Second World War neo-corporatist arrangements were largely based on public law, whereas interwar corporatism maintained a strong private law basis. See P.F. Kjaer, 'Towards a Sociology of Intermediary Institutions: The Role of Law in Corporatism, Neo-Corporatism and Governance', in M.R. Madsen and C. Thornhill (eds.), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* (Cambridge University Press, 2014), 117–141. More generally on the post-Second World War re-constitution process, see Brunkhorst, above, n. 21, at 436ff, and J.E. Fossum and A.J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Rowman & Littlefield, 2011), at 78ff.

<sup>41</sup>H. Brunkhorst, 'The Return of Crisis', in Kjaer, Teubner and Febbrajo, above, n. 3, 133–171.

<sup>42</sup>W. Streeck, *Gekaufte Zeit: Die vertagte Krise des demokratischen Kapitalismus* (Suhrkamp, 2013).

<sup>43</sup>C. Möllers, 'European Governance: Meaning and Value of a Concept', (2006) 43 *Common Market Law Review*, 313–316. For an extensive analysis in the EU context, see P.F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Hart Publishing, 2010).

<sup>44</sup>R. Mayntz, 'Governance Theory als fortentwickelte Steuerungstheorie?', in G.F. Schuppert (ed.), *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien* (Nomos Verlag, 2006), 11–20.

<sup>45</sup>As expressed in the famous White Paper, *European Governance: A White Paper* (COM(2001) 428 final), 25 July 2001, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52001DC0428>

society or equivalent distinctions between institutional repositories of public power and the rest of society. 'Society as such', rather than institutional realms of public power, thereby gains the front seat, being seen as both the object and the subject of policy-making, while, at the same time, 'society' *de facto* is equated with the 'economy';

- A sectorial outlook at policy-making and legal regimes along functional lines, thereby making it closely aligned with the tendency towards the increased fragmentation of legal ordering. As such, also the governance phenomenon is characterised by a fundamental in-built contradiction as it simultaneously refers to society in its entirety and furthers the fragmentation of society.
- Instead of a focus on the decision-making processes themselves, the focus is externalised through an emphasis on output and efficiency, giving it a strong economic touch.<sup>46</sup> The consequence is a pragmatic emphasis on decision-making and the impact of decision-making, paying less attention to the formal legal structuring of decision-making and associated issues of accountability. Governance therefore implies a turn to informality which goes against the ethos of legal formalism.<sup>47</sup>

The fundamental difference between interwar corporatism and contemporary governance, therefore, seems to be the difference in normative intention, as corporatism, in essence, was about the constitution of a society-based political community unrestrained by formality and law, while governance is about the amelioration of economic efficiency through a loosening of the perceived grip of law and the 'red tape' of government regulation on the market or on market-mimicking social processes. Or, to put it in more abstract terms: whereas corporatism implied a dismissal of the spontaneous dimension of social processes and a reinforcement of the hierarchical dimension, governance is formally aimed at ameliorating the spontaneous dimension and a downgrading of the hierarchical dimension. Governance, in other words, turns the intentions of corporatism upside down. But, at the same time, the two discourses share the focus on 'society', rather than the realm of public power, as their core object, just as they share the turn to informality and the downgrading of law, essentially dismissing the view that law provides the core infrastructure for the structuration of social exchanges and the integration of society.

The effects of the 'turn to governance' is particularly felt within administrative law, as the turn to informality and network-based social exchanges opens up a space for social interaction which administrative law struggles to capture. The emergence of privately-organised entities, often taking a network form, exercising public authority is a case in point.<sup>48</sup> This is particularly visible in transnational governance arrangements,<sup>49</sup> but has also emerged at national level, in the wake of the regulatory transformations such as the privatisation of public utilities of the last decades. A dual movement can be observed in which private law tools, most notably contracts, have moved into the public sector at the same time as administrative law expands out into the private realm, thereby challenging traditional legal categories and the public/private distinction, in a manner which opens up for increased collusion between politics and business.<sup>50</sup> Especially, albeit not exclusively, in contexts such as in Greece, Italy and Spain, where paternalistic and

<sup>46</sup>Möllers, above, n. 43, at 314ff. For the switch from normativity to efficiency as the guiding thrust of 'governance law', see S. Frerichs, 'Taking Governance to Court: Politics, Economics and a New Legal Realism', in Hartmann and Kjaer, above, n. 32, 157–173.

<sup>47</sup>D. Kennedy, 'Legal Formalism', in N.J. Smelser and P.B. Baltes (eds.), *Encyclopedia of the Social & Behavioral Sciences*, vol. 13 (Amsterdam: Elsevier, 2011), 8634–8638.

<sup>48</sup>The ECJ has therefore also dealt with this issue on a number of occasions. See, for example, ECJ, Case C-188/89, *Foster and others v. British Gas plc*, ECLI:EU:C:1990:313; ECJ, Case C-425/12, *Portgás—Sociedade de Produção e Distribuição de Gás SA v. Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, ECLI:EU:C:2013:829; ECJ, Case C-279/12, *Fish Legal, Emily Shirley v. Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd, Southern Water Services Ltd*, ECLI:EU:C:2013:853. See, also, S. Plato, 'The Notion of 'Public Authority' in the Recent Case Law of the European Court of Justice and its Impact on French Administrative Law', (2015) 1 *Montesquieu Law Review*, 1–7.

<sup>49</sup>P.F. Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space', (2010) 2010 *Wisconsin Law Review*, 489–533.

<sup>50</sup>G.F. Thompson, 'The Constitutionalisation of Everyday Life?', in Hartmann and Kjaer, above, n. 32, 177–197.

informal network-based structures which factually short-circuit the operational capacity of formal institutions had never fully disappeared, the introduction of New Public Management reforms has furthermore led to a re-invigoration of such networks through increases in politically motivated appointments and political interventions in administrative matters.<sup>51</sup> In the wake of increased decentralisation, as in Spain, the existence of unified legal spaces has furthermore come under strain, which has led to a reduction in the factual ability of national capitals to control local and regional activities.<sup>52</sup>

Working in conjunction with structural transformations in relation to, for example, globalisation and technological developments, the long-term effects for law, democracy and society of the 'turn to governance' is becoming increasingly clear.

One striking feature of today's Europe is that a whole string of EU Member States remain characterised by a feeble realisation of the type of legally-constituted public power outlined above or a substantial backtracking on the factual force and dynamism of their core institutions of public power.<sup>53</sup> This development is also reflected in an ever-increasing imbalance between parliaments and the executive power dimension of states.<sup>54</sup>

## 5 | THE EU'S CRISIS LAW RESPONSE IN THE CONTEXT OF THE 'TURN TO GOVERNANCE'

The 'turn to governance' at Member State level developed in conjunction with a similar turn within the EU, as most notably expressed through the launch of the Lisbon Process upon the basis of the Open Method of Co-ordination at the beginning of the millennium, a development which has been celebrated by some as aimed at fostering learning and ultimately increasing the emancipation of affected citizens,<sup>55</sup> and was fiercely criticised by others as expressing a turn to 'managerialism'.<sup>56</sup> The substantial policies of the EU over the last decades furthermore underpinned and supported the 'turn to governance' at national level through their emphasis on de-regulation and privatisation and to the extent that one might argue that the 'turn to governance' was co-constructed within a dual (trans-)national framework.

The Lisbon Process and the Open Method of Co-ordination have been dismissed as expressions of 'cheap talk' producing few real effects,<sup>57</sup> but, on the other hand, the 'turn to governance' might be seen as the context from which the EU's crisis response emerged. As already mentioned and as is apparent from the almost decade-long crises-management trajectory, most notably, but not exclusively, in relation to the euro-crisis, the EU and its Member States have instigated considerable changes to the architecture as well as the substantial policies of the EU in their attempt to respond to the crises. This is reflected in the concomitant step-by-step transformation of the EU's macroeconomic constitution initiated in 2010, through the 'Europe 2020 Strategy' (March 2010),<sup>58</sup> accompanied by the 'European

<sup>51</sup>W. Kickert, 'Distinctiveness of Administrative Reform in Greece, Italy, Portugal and Spain. Common Characteristics of Context, Administrations and Reforms', (2011) 89 *Public Administration*, 801–818.

<sup>52</sup>S. Parrado, 'Failed Policies but Institutional Innovation through "Layering" and "Diffusion" in Spanish Central Administration', (2008) 21 *International Journal of Public Sector Management*, 230–252.

<sup>53</sup>C. Crouch, *Post-Democracy* (Polity, 2004).

<sup>54</sup>P. Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso, 2013).

<sup>55</sup>For example, C.F. Sabel and J. Zeitlin, 'Experimentalism in the EU: Common Ground and Persistent Differences', (2012) 6 *Regulation & Governance*, 410–426.

<sup>56</sup>M. Koskeniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *European Journal of Legal Studies*, 1–18; C. Joerges and M. Weimer, 'A Crisis of Executive Managerialism in the European Union—No Alternative?', in J. Scott, G. de Búrca and C. Kilpatrick (eds.), *Critical Legal Perspectives on Global Governance: Liber Amicorum for David Trubek* (Hart Publishing, 2013), 295–322.

<sup>57</sup>S. Borrás and B. Greve, 'Concluding Remarks: New Method or just Cheap Talk?', (2004) 11 *Journal of European Public Policy*, 329–336.

<sup>58</sup>European Commission: 'EUROPE 2020 A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020 Final, available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC2020>.

Semester' (May 2010),<sup>59</sup> the 'EFSF Framework Agreement' (June 2010),<sup>60</sup> the 'Euro-Plus Pact' (March 2011),<sup>61</sup> the 'Six Pack' (December 2011),<sup>62</sup> the European Stability Mechanism (February 2012),<sup>63</sup> the 'Treaty on Stability, Co-ordination and Governance' (March 2012),<sup>64</sup> the 'Two Pack' (May 2013),<sup>65</sup> and the 'Banking Union' (initiated in June 2013),<sup>66</sup> as well as other measures including the revision of Article 136 TFEU in force since May 2013.

As also recognised by the Court of Justice in *Pringle*, where the objective of financial stability became constitutionalised,<sup>67</sup> the result has been fundamental changes to the EU's legal and institutional order. This view also seems to be shared throughout EU law and politics scholarship, albeit for very different reasons and with very different assessments. One strand, most notably, but not exclusively, advanced by political scientists, has, upon the basis of neo-functional, liberal intergovernmental and historical institutionalist approaches, characterised it as 'business as usual', in so far as the crisis responses have followed a fairly traditional path, in which crises tend to serve as catalysts

<sup>59</sup>For an overview, see [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm).

<sup>60</sup>EFSF Framework Agreement consolidated version, available at [http://www.efsf.europa.eu/attachments/20111019\\_efsf\\_framework\\_agreement\\_en.pdf](http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf).

<sup>61</sup>European Council, 24–25 March 2011 Conclusions (20 April 2011), available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/120296.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf).

<sup>62</sup>Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) 1466/97: On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306, 23.11.2011; Council Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation (EC) 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306, 23.11.2011; Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011: On the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23.11.2011; Council Directive 2011/85/EU of 8 November 2011: On requirements for budgetary frameworks of the Member States, OJ L 306, 23.11.2011; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011: On the prevention and correction of macroeconomic imbalances, OJ L 306, 23.11.2011; Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011: On enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, 23.11.2011.

<sup>63</sup><http://www.esm.europa.eu>.

<sup>64</sup>Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, available at: [http://europa.eu/rapid/press-release\\_DOC-12-2\\_en.htm](http://europa.eu/rapid/press-release_DOC-12-2_en.htm).

<sup>65</sup>Regulation (EU) 473/2013: On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140, 27.5.2013; Regulation (EU) 472/2013: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L 140, 27.5.2013.

<sup>66</sup>Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013; Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014; Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) 1093/2010 and (EU) 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014; Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit, OJ L 287, 29.10.2013; Regulation (EU) 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) 1024/2013, OJ L 287, 29.10.2013.

<sup>67</sup>Case C-370/12 *Thomas Pringle v. Government of Ireland*, judgment of 27 November 2012, EU:C:2012:756. The case has been widely discussed: see, among many, P.P. Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology', (2013) 20 *Maastricht Journal of European and Comparative Law*, p. 1; P.P. Craig, 'Pringle and the Nature of Legal Reasoning', (2014) 21 *Maastricht Journal of European and Comparative Law*, 205–20; K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014); B. de Witte and T. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: *Pringle*', (2013) 50 *Common Market Law Review*, 805–848.

for increased integration.<sup>68</sup> Another strand, most notably, but not exclusively, advanced by lawyers, has, on the other hand, denounced the qualitative changes to the EU's architecture as an expression of 'authoritarian liberalism' and a move to 'technocratic rule', which threatens the vitality of Member State democracies and undermines the normative integrity and functional capacity of the EU legal order.<sup>69</sup>

At first glance, both perspectives on the euro-crisis outlined above might be considered correct. The two perspectives tend to 'talk past each other' due to different methodological points of departure. The former perspective mainly provides an 'internal' perspective by focusing on the endogenous logics at play within the EU construct, and is, as such, mainly concerned with *how* decisions are made. The latter, on the other hand, is more concerned with the broader exogenous effects produced *vis-à-vis* society at large, and therefore mainly focuses on *what* is decided, i.e., the normative quality of the substantial outcomes. The time perspectives from which they depart therefore tend to differ. The first perspective largely limits its observations to the time-span of the actual decision-making processes, while the second perspective is more concerned with the long-term impact of the crisis responses on the legitimacy and functionality of the EU and its Member States.

However, taking a closer look at the implications of the EU's crisis response, at least three effects can be observed. The first one is, somewhat counter-intuitively, a potential strengthening of the autonomy of Member States *vis-à-vis* private actors and an increased capacity of Member States to centralise decision-making. The second one is a suspension of the 'openness to the future' as engrained in democratic decision-making, which threatens to make the strengthening of state capacity into an example of non-reflexive *étatisme*. The third one is a move to a 'dual Union', as the new constitutional framework is partly resting on formal and partly on informal foundations.

## 5.1 | The strengthening of state autonomy

A common criticism raised against the EU's revised macroeconomic constitution is that it has effectively hollowed out the capacity of Member States to pursue independent fiscal policies.<sup>70</sup> It is indisputable that the room of manoeuvre for fiscal policy expenditure has been drastically reduced by the measures introduced, just as it is clear that it is a very particular macroeconomic paradigm that has been constitutionalised in this process. But, from the perspective of a weak institutionalisation of public, in contrast to private, power, the measures can also be understood in a different light, to wit, as measures aimed at strengthening the institutional capacity of the Member States to pursue long-term stability-oriented policies through an increased capability to insulate institutionalised public power from the encroachment of private interest and the erosion of the vested power(s) of central government. This, for example, is expressed in the 'Six Pack Directive' on the requirements for the budgetary frameworks of the Member States, which sets out a framework for the establishment of independent institutions in relation to macroeconomic and budgetary forecasting, as these measures might increase state autonomy, especially the capability of the ministries of finance, to fend off particularistic interests and demands.<sup>71</sup> For Member States such as Spain, for example, which are characterised by a high level of regional autonomy, the introduction of balanced budget requirements via the Stability and Growth Pact

<sup>68</sup>P. Genschel and M. Jachtenfuchs, 'Alles ganz normal! Eine institutionelle Analyse der Euro-Krise', (2013) 20 *Zeitschrift für Internationale Beziehungen*, 75–88; P. Genschel and M. Jachtenfuchs, 'Conflict-minimizing Integration. How the EU Achieves Massive Integration despite Massive Protest', in D. Chalmers, M. Jachtenfuchs and C. Joerges (eds.), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press, 2016), 166–189; J. Tosun, A. Wetzel and G. Zapryanova, 'The EU in Crisis: Advancing the Debate', (2014) 36 *Journal of European Integration*, 195–211; D. Ioannou, P. Leblond and A. Niemann, 'European Integration and the Crisis: Practice and Theory', (2015) 22 *Journal of European Public Policy*, 155–176.

<sup>69</sup>See, for example, M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', (2013) 76 *Modern Law Review*, 817–844; the Special issue edited by M. Hartmann and F. de Witte, 'Regeneration Europe: Towards another Europe', (2013) 5 *German Law Journal*, 441–714; the special section on 'Hermann Hellers' Authoritarian Liberalism', (2015) 21 *European Law Journal*, 285–383; Chalmers, Jachtenfuchs and Joerges, above, n. 68; Tuori and Tuori, above, n. 1.

<sup>70</sup>For example, Chalmers, Jachtenfuchs and Joerges, above, n. 68.

<sup>71</sup>Council Directive 2011/85/EU of 8 November 2011: On requirements for budgetary frameworks of the Member States. OJ L 306, 23.11.2011.

and the Fiscal Compact part of the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union might also be seen as measures which strengthen the hand of central governments *vis-à-vis* the local and regional levels of government. These measures might therefore factually serve as a counterweight to centrifugal developments in which the central state had experienced a diminished capability to control local and regional expenditure. As such, one might see the new constitutional framework as reinforcing, in Member State contexts, classical Kantian and Hegelian insights concerning the distinction between the public and private dimensions of society and an insistence on across-the-board generalised legal frameworks aimed at establishing singular legal spaces. In relation to this dimension, the crisis response might therefore be seen as challenging dominant insights from the governance paradigm.

## 5.2 | The suspension of democracy

The *potential* strengthening of Member State capacities through the EU, however, points to a central tension between *étatisme*, where the safeguarding and vitality of the state is seen as a purpose in its own right, and visions of the exercise of democratically vested public power as an end in itself, reducing state institutions to a mere tool for the realisation of this objective.<sup>72</sup> Effectively, the re-working of the macroeconomic constitution implies an increased Europeanisation (and in particular, 'unionisation') of fiscal policy, thereby effectively undermining the handling of fiscal policy through democratic procedures at Member State level. This would be of limited relevance if democratic decision-making in relation to financial expenditure were replicated at EU level. This, however, is not the case, thereby opening up for imperative, normative and functional concerns regarding the state of democracy in Europe.<sup>73</sup>

As mentioned, democracy serves as a mechanism of reflexivity and responsivity aimed at constantly observing and reacting to changes in society within the legal form of the rights-based nation. Democracies are, therefore, characterised by 'openness to the future' in so far as meaningful democratic exercises imply the existence of a multiplicity of possible policy choices and the absence of attempts to project policies out in the future in a static manner by carving substantial policies in stone. It is this fundamental openness which tends to make democracy more adaptive and hence 'evolutionarily superior' to other forms of rule.<sup>74</sup> The mechanisms of responsivity of the EU are, however, when compared with those at Member State level, underdeveloped. This is already reflected in the integrationist logic which has been the central trademark of the institutional structure of the Union from the very beginning, and which makes increased integration the only possible policy choice in the face of crises and challenges.<sup>75</sup> This integrationist teleology has now been complemented with the constitutionalisation of a very specific macroeconomic paradigm which *de facto* implies a suspension of the 'openness to the future' with regard to fiscal policy and thereby indirectly for a whole string of other policy areas as well. This constitutionalisation of substantial policy options removes the core functional advantage of democracy as the macroeconomic constitution, as is most clearly visible in the debt brake and balanced budget requirements, introduces 'reticence to the future' rather than 'openness to the future' as its essential normative regulatory principle. The new framework thereby come to represent a form of immutable constitution of the kind which de Tocqueville warned against,<sup>76</sup> as the projection of highly-specified policy objectives into the future limits rather than enhances the capability to respond to changing circumstances at a future stage.

<sup>72</sup>H. Arendt, *The Promise of Politics* (Random House, 2005); Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1992).

<sup>73</sup>J. Habermas, *The Crisis of the European Union: A Response* (Polity, 2013).

<sup>74</sup>N. Luhmann, *Politik der Gesellschaft* (Suhrkamp, 2000), at 407ff.

<sup>75</sup>Genschel and Jachtenfuchs, 'Conflict-minimizing Integration', above, n. 68.

<sup>76</sup>de Tocqueville, above, n. 24.

### 5.3 | The dual union

The potential strengthening of state capacity through the EU measures outlined above reflects an understanding of constitutional ordering as a form of reflexive self-limitation.<sup>77</sup> States and other bodies of public and private power<sup>78</sup> engage in constitutional exercises with the aim of reducing the volatility, i.e., the arbitrariness and contingency, of their own actions, as such constitutional evolution is closely-linked to reflexive learning processes in which the guiding principles and normative objectives are codified in order to pre-empt the repetition of past mistakes.<sup>79</sup> This, again, provides indications of why states accept the constitutionalisation of transnational ordering in the first place, as such arrangements serve as a form of reflexive self-binding.<sup>80</sup>

The problem with the above move towards this transnationally-introduced constitutional self-binding of nation states, i.e., the EU Member States, is, however, that this constitutional self-binding does not apply to the EU itself. The new constitutional framework is characterised by a dual approach, partly relying on strong formalistic measures and partly on informal institutional settings as, for example, is apparent through the amplified role of the European Council, the Euro group and the informal meetings of ECOFIN.<sup>81</sup> As such, we now have a 'dual Union' which is partly formal and partly informal, factually characterised by a sidestepping of the democratic procedures and oversight of the Member State parliaments and the European Parliament, as well as limited space for judicial review and a limited possibility to rely on fundamental rights as the framework for structuring exchanges between the EU, as a repository of public power, and the rest of society. This again opens up for the arbitrary implementation of norms and selective sanctioning of violations of norms as is already apparent in the different treatment of Member States in relation to the handling of the Euro-crisis.<sup>82</sup> The new framework, in other words, opens up for the selective exercise of coercion.

## 6 | CONCLUSIONS AND PERSPECTIVES: RETURNING TO THE PAST?

The central issue that Europe is faced with today seems to be an 'old issue', to the extent that the central challenge for Europe throughout modernity has been the attempt to institutionalise legally an autonomous realm of public power, which is distinct from the private realm and characterised by a degree of normative integrity and functional capability which enables it to serve as the central *modus* for the integration of society as such, a form of public power which, however, has only been partially realised or has come under increasing pressure within a whole string of EU Member States as well as within the EU itself.<sup>83</sup> The current crises might therefore, in essence, be understood as crises of public power.

This begs the question of whether Europe is 'returning to its past' as expressed in the widespread breakdown of legally-constituted public power in the interwar period. The interwar 'turn to corporatism' was driven by the desire to return to a holistic world in which society as such, rather than a legally-constituted realm of public power, was considered the central source of authority at the same time as hierarchy, rather than the spontaneous processes of the market, was seen as the central organisational form of society. The 'turn to governance' flips this image upside

<sup>77</sup>N. Luhmann, 'Verfassung als evolutionäre Errungenschaft', (1990) 9 *Rechtshistorisches Journal*, 176–220.

<sup>78</sup>For private power, see G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012); and G. Teubner, 'A Constitutional Moment? The Logics of "Hitting the Bottom"', in Kjaer, Teubner and Febbrajo, above, n. 3, 3–42.

<sup>79</sup>For the concept of constitutional learning, see J. Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', (2001) 29 *Political Theory*, 766–781; Brunkhorst, above, n. 21.

<sup>80</sup>For an elaboration of this argument, see C. Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure* (Cambridge University Press, 2016).

<sup>81</sup>D. Curtin, 'Challenging Executive Dominance in European Democracy', (2014) 77 *Modern Law Review* 1–32.

<sup>82</sup>J. White, 'Authority after Emergency Rule', (2015) 78 *Modern Law Review*, 585–610.

<sup>83</sup>Thereby opening of an 'unfinished modernity' perspective à la Habermas. See J. Habermas, *Der philosophische Diskurs der Moderne: Zwölf Vorlesungen* (Surkamp, 1985).

down by seeing the market and other spontaneous processes as the true source of societal progress. But, at the same time, both corporatism and governance rest on fundamentally contradictory foundations, as they ideologically, i.e., normatively, maintain a holistic outlook on society as such, while they—as social praxis—factually advance a fragmentation of society through their dismissal of the integrative capacity of legally-constituted public power.

Against this background, the EU crisis response might be seen as countering the effects of the turn to governance in one particular way, through the intention to ameliorate state capacities and state autonomy *vis-à-vis* private parties in crisis-ridden Member States. This move is, however, being diluted by the fact that the intended strengthening of state capacities is not linked to a concomitant strengthening of democratic policy-making at Member State or EU level. The gradual and still ongoing transfer of fiscal policy from the realm of the Member States to the EU without a corresponding legally-constituted and formalised framework for open-ended democratic decision-making implies that the fundamental problem remains unresolved because the turn to informality and the circumvention of law-based democratic decision-making is being reproduced at EU level. In short, the medium-term and long-term endurance of the EU is inextricably linked to its democratisation, a process of democratisation which, taking the nature of the polity and previous experiences into account, is most likely to succeed in a gradual step-by-step process, rather than through a singular constitutional exercise. Thus, in order to avoid a return to the past, the European ship will have to be re-built in a step-by-step manner while still at sea.

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