Special Issue: *Regeneration Europe*

Administrative Constitutionalism and the Political Union

By Moritz Hartmann[*]

A. Introduction

Between the relics of a nation state past and the promises of a transnational future, the normative evolution of the European Union has rightly been described as "an international legal experiment."[1] Europeanization, in that sense, has been construed as an experimental legal mode for the integration of national economic diversity through harmonized regulation.[2] Even though the European Union's operating code has remained decisively economic, the normative matrix itself has transcended the historical objective of economic homogeneity. European integration therefore experienced a *normative turn* after the completion of the single market; the European Union progressively captured the social space of the continent, evolving into a *societal experiment* of normative imagination and cultural plurality, taking it beyond economic integration, market freedoms, and monetary stability.

But even if "[t]he European Union, as a big integrated economic bloc with external borders, internal economic regulation, robust institutions, and incipient political culture, may prove to be a good experiment in trying to re-appropriate the social question,"[3] European administrative law systemically contrasts with the "Emperor's New Clothes" (Hans Christian Andersen).[4] This is in terms of the law's directives and regulations, norms, codes, and bilateral agreements. Regardless of the Union's normative ambiguity, the legal dialectics of both the principle of conferral and the principle of subsidiarity have constrained the legislative scope of European law, which historically has been limited solely to the common market's well-being.

Societal integration in the European Union has therefore remained a *blind spot* in the shadow of internal market regulation. It has been the judiciary of the European Court of Justice, as well as executive entities of the Member States and European institutions, that

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[1]Bruno de Witte, *The European Union as an International Legal Experiment*, *in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM 19, 19 (Graínne de Búrca & Joseph H. H. Weiler eds., 2012).

[2] *See generally* GIANDOMENICO MAJONE, EUROPE AS THE WOULD-BE WORLD POWER: THE EU AT FIFTY (2009).

[3] Floris De Witte, *EU Law, Politics, and the Social Question* (in this issue).

[4] HANS CHRISTIAN ANDERSON, THE EMPEROR'S NEW CLOTHES (2004).

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has outlined the judicial or administrative references for stimulating the future development of the Political Union. The legitimacy of the European model of checks and balances, however, has rightly been questioned with regard to the political agenda-setting undertaken by the Court and executive formations.[5]

This contribution argues that the administrative evolution of European integration transcends the classical understanding of legislation and executive power in the framework of a singular *Rechtsstaat—state of law*. It thus proposes that the integrated administration of the European Union deserves a justification of normative accountability and legitimacy different to the sovereign nation state of *Westphalian* character. Epistemologically, the re-definition of transnational administrative integration has to be based on a conceptual paradigm that builds on the legal, economic, and social preconditions of the European normative order. In doing so, it should enable serious inclusion of the theoretical and practical reasons for both individual and institutional cooperation within the European Union.

The aim of this contribution is to analyze the normative evolution of the European Union through the lens of EU administrative law. This allows a retrospective examination of the transition from the European integration project, in its economic straightjacket, to a political order that connects economic realities to societal imperatives after the crisis. I argue that the Europeanization of administrative law—as a functionally differentiated method of European integration—has contributed to the convergence of law and politics in the European Union, and, therefore, endogenously accounted for increasing trust and cooperation between Member States and European institutions beyond the entanglement of internal market regulation. The normative paradigm of *administrative constitutionalism*, in particular, opposes the pluralism of legality in the Political Union. It offers the inclusion of historical references and institutional predominances, normative mentalities, and social rules, through innovative administrative rationalities. It therefore provides a third route between executive federalism and the dichotomic paradigm of direct/indirect administration.

This contribution starts by tracing the normative nexus between Europeanization, the legality of integration, and the role of trust as a predominant feature of societal homogeneity in the shadow of the Treaties (B). It then reflects both the executive evolution of the European Union, as well as the normativity of European governance, in order to retrieve the mutualization of *trust* in the European administrative integration (C). Disclosing the inconsistencies and asymmetries of the Union's executive replication, I subsequently assess the normative capacity of *administrative constitutionalism* as a functional mode of—post-crisis—integration in the European Union (D). This contribution

[5] *See generally* PETER L. LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE (2010).

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closes with an outlook on the future evolution of the European Union's administrative configuration (E).

B. Europeanization and societal integration

As a consequence of economic globalization, regulatory internationalization, and normative diffusion, the former monopoly of the sovereign nation state over providing legitimate modalities of governance has now been integrated into new models of public administration. Those models transcend the classical recurrence of statehood on the premise of legal unity, political homogeneity, and reliable hierarchies as the functional basis for societal integration. As Dellavalle has pointed out, "the simultaneous presence of different normative and institutional orders within the same territory, thus, was not welcome as the establishment and recognition of diversity, but rather condemned as sheer *dis*-order."[6] Legal pluralism has provoked, "[i]n the last decades, a new approach to the understanding of legal and political order . . . , in which the plurality of norms and institutions within the same territory and regulating the same matter is not denounced as a pathology anymore, but is accepted as a fact, on the one hand, and a desirable perspective on the other."[7]

In particular, extrapolating the capacities of societal plurality refers to the objective of *regeneration Europe* and its claim to suggest an altered narrative of the European Union, which endogenously builds on the societal promises of transnational integration. This point notwithstanding, only some decades ago, *Walter Hallstein*, the first President of the Commission of the European Economic Community, considered the European Union solely a *creation and source of law, a contingent legal order*.[8] This was based on the *de*-coupling of law and politics as the formal precondition for institutionalizing an autonomous legal order independent from the founding Member States.[9] Compared to the arrangements of international law, the European Union appears to be a homogenous legal order, providing as it does a coherent set of binding Treaties, a judicial review provided by the European Court of Justice, and hierarchical competences between courts and cross-references between European and national legislations. Normativity in the European Communities, and subsequently in the European Union, has been related to the legal principles, norms, and procedures originating from the normative experiment that European integration

[6] SERGIO DELLAVALLE, *Addressing Diversity in Post-Unitary Theories of Order*, *in* DIVERSITY AND THE LAW (Holger Hestermeyer ed., forthcoming).

[7] *Id.*

[8] *See* WALTER HALLSTEIN, DER UNVOLLENDETE BUNDESSTAAT: EUROPÄISCHE ERFAHRUNGEN UND ERKENNTNISSE 33 (1969).

[9] *See* Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2410 (1991); Morten Rasmussen, *From Costa v ENEL to the Treaties of Rome: A Brief History of a Legal Revolution*, *in* THE PAST AND FUTURE OF EU LAW 69, 69 (Miguel Maduro & Loïc Azoulai eds., 2010); JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS: EIN ESSAY 59 (2011).

initially was. Inherently pluralistic, it has therefore been the continuous approximation of national benchmarks and the legality of the open method of co-ordination, intertwined public–private regulatory formations, such as the Lamfalussy method, and a network of methodological bureaucracies called Comitology, under the guidance of the Commission, that have framed the substance of European—legal—integration.[10] Legal harmonization, in that sense subsequently has transcended the normative restriction of the European Union and accounted for the normative deepening of the integration process beyond the legality of the single market. Within the process of European integration, even the hierarchical *modus operandi* of sovereignty has, therefore, been transformed into a procedural mechanism of responsive recognition, and transnational normativity.

On these grounds one has to re-consider the *normative evolution* of European integration sixty years after the adoption of the Treaty establishing the European Coal and Steel Community[11] in 1951 in order to understand that the European Union of twenty-seven Member States and 500 Million citizens cannot be limited to its nature of a "new legal order of international law."[12]

European integration has developed into a societal resource of transnational character, following the procedural adaptation of the Communitarian order in accordance with the Single European Act, and, subsequently, the Treaty of Maastricht in 1992.[13] Normatively, an underlying fiction of societal uniformity has therefore been construed to contrast the legal diversity of the Community. Consequently, with the Single European Act in 1987, the reciprocal modality of the European Union significantly shifted the economic endeavor for ensuring continental peace towards being a societal undertaking: from a consensus-based model of unanimous inter-governmentalism to a majority-based regime of legal supra-nationalism.[14] This change mirrors the capacities of sovereign Member States to enforce and comply with legal norms emanating from distinct supranational orders.[15] Resulting

[10] *See generally* DELLAVALLE, *supra* note 6.

[11] Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

[12] *See* Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratis der Belastingen, 1 E.C.R. 3 (1963); Bruno de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 323, 323 (Paul Craig & Graínne de Búrca eds., 2011); Loïc Azoulai, *The Acquis of the European Union and International Organisations*, 11 EUR. L.J. 196, 199 (2005).

[13] Single European Act, July 1, 1987, 1987 O.J. (L 169) 1; Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. (C 191) 1.

[14] *See* Ulrich Haltern, *Rechtswissenschaft als Europawissenschaft*, *in* EUROPAWISSENSCHAFT 56, 56 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds., 2005); Joseph H. H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267, 292 (1981).

[15] *See* Edoardo Chiti, *The Governance of Compliance*, *in* COMPLIANCE AND ENFORCEMENT OF EU LAW 31, 31 (Marise Cremona ed., 2012).

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from the majority rule, the Member States have been, for the first time, bound by legal provisions of European law, which were adopted without or against their internal political preferences. As the Member States have transferred a large part of their sovereign autonomy to European institutions, European legal integration at the regional level has been forced to domestically hierarchize the legal pluralism accordingly. Trust, as a means for reducing the complexity of society,[16] has therefore evolved into an endogenous part of European integration and its normative conditionalities, even beyond the reciprocal principle of sincere cooperation according to Art. 4 (3) of the Treaty on European Union (TEU).[17]

Nonetheless, Member States have been cautious with regard to a number of policies furthering Europeanization through legal harmonization, such as the integration of environmental taxes due to fiscal sovereignty, competences in the field of common foreign and security policy, and emerging structures of renewable energy policies. The pluralism of legal cultures within the Member States has, therefore, constituted an important factor in the policy fragmentation and implementation inefficiencies on European scales. But despite this the majority-based supremacy of European law has enhanced the incremental functionality of trust *in* and *through* law, as a mode of "social orientation toward other people and toward society as a whole."[18]

I. Normativity and Trust

But what is *trust*, dialectically speaking? Trust is a phenomenon of individual and collective, societal and institutional dimension. It is, at first glance, observable within the daily framework of private friendships, professional relations, and between different market actors. It complements the responsiveness of social institutions and collective orders through cooperative orientation, and has organizational implications as well as monitoring functionalities, thereby acting to stabilize the sustainability of societal inclusion.[19] Considering its capacity to effectively integrate internal and external conditions, trust evokes the disposition to cooperate within the limits of a specific cultural or institutional framework. It is, therefore, not to be equated with the distribution of resources of political power, as it operates within the different mode of cooperative autonomy.[20]

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[16] *See generally* NIKLAS LUHMANN, VERTRAUEN: EIN REDUKTIONSMECHANISMUS SOZIALER KOMPLEXITÄT (1973).

[17] Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13.

[18] Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. OF PSYCHOL. 569, 573 (1999).

[19] *See generally* ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY (1990); THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORM, AND POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL (1651).

[20] *See* MARTIN HARTMANN, DIE PRAXIS DES VERTRAUENS 185 (2011).

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Within the sphere of cooperative autonomy, trust, in particular, enhances the reduction of societal risks, as it provides a stable method of impact assessment on the rational and liable basis of individual or collective interaction. As a functional mechanism of societal homogeneity, trust compensates for a lack in symmetric information, and thereby re-balances the competitive position of different actors within the same market.[21] The responsive rationality of trust seemingly fosters the transparency of multi-level communication processes, since trust internalizes the societal preconditions within its cooperative paradigm. In addition, the further the reciprocal integration process advances, the more the normative expectations of individuals, collectives, and institutional entities solidify, as the internal identification with the national, international or transnational peer-group increases accordingly. Beyond this socio-anthropological deconstruction, the cooperative modality of mutual trust reflects a model of normative reciprocity. Here, "[n]orms provide the background in which agent-neutral roles and shared cooperative activities with joint goals and joint attention enable social institutions."[22]

On the one hand, norms, legal principles, and codes enhance the systemic building of trust and stabilize the reciprocal expectations of societal action. On the other hand, mutual trust disburdens the normative expectations for the sustained functionality of legal orders beyond the sovereign nation state.[23] Norms and legal principles, in particular, enrich and consolidate the modalities of societal and institutional cooperation through the provision of normative sanctions. On the basis of social norms and the related development of trust, societal interactions are stabilized to the extent that a cultural group as a whole reflects its collaborative normativity, especially in contrast to other social entities, since "over historical time individuals are reasoning together and creating social norms to promote cooperation in situations that are often plagued by non-cooperation. Norm creation is thus a cultural-historical process driven mainly by reason, not by intuition."[24] Trust, therefore, is closely connected to the stabilization of transparency, coherence, and societal contingency.[25]

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[21] *See* Diego Gambetta, *Can We Trust The Trust?*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 213, 214 (1988).

[22] MICHAEL TOMASELLO, WHY WE COOPERATE 96 (2009).

[23] *See* CLAUDIO FRANZIUS, GEWÄHRLEISTUNG IM RECHT 208 (2009).

[24] Michael Tomasello, *Why be Nice? Better Not Think About it*, 16 TRENDS IN COGNITIVE SCIENCES 580, 581 (2012).

[25] *See* TOMASELLO, *supra* note 22, at 88; GIDDENS, *supra* note 19, at 107; JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT (1992); Iris Bohnet & Yael Baytelman, *Institutions and Trust: Implications for Preferences, Beliefs and Behaviors*, 19 RATIONALITY AND SOC'Y 99, 99 (2007).

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Within the limits of a mutual cognitive environment, trust allows for the coexistence of individuality and collectivity in collaborative activities, and thus facilitates cooperative communication within the decision-making/taking processes in normative orders of transnational character.[26] In legal entities beyond the Nation-state, the compliance and enforcement of legal norms thus largely depends on the reciprocal trust among concerned subjects, even though norms are not able to replace the building of trust as they rather enhance a process of reciprocal anticipation.

II. Normativity and Identity

Beyond the validity of trust for describing collaborative activities between individuals and/or collectives, its different dimensions play an even greater role for explaining the institutionalization of the single market, as well as, subsequently, the *normative* Europeanization of the Member States in policy sectors, such as education, social security, health, and media.[27]

The European Union has experienced a fundamental transformation from a functional setup of economic integration and policy cooperation into a normatively differentiated scheme for re-regulating the European socio-economic system and the gradual establishment of an area of freedom, security, and justice with global emanation.[28] In this sense, European integration is not only a phenomenon of substantive normative unity, but has become a transnational paradigm of proceduralizing normativity.

Within that normative matrix, even the enforcement of European law is intended to *regenerate* and engage the trust that is at the source of social cohesion and ethnic tolerance, fairness, and diversity. Rather than the formalized politicization of the European Union, it is the reciprocity of law, mutual trust, and institutional cooperation in the European Union, which endogenously defines the Union's normativity and identity.[29] Responsible for designing and developing the dialectic of the genuinely drafted model of European solidarity, the Member States are inherently involved in shaping the common welfare of the European Union.[30]

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[26] *See* TOMASELLO, *supra* note 22, at 72.

[27] *See* Giandomenico Majone, *Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market* 9 (Eur. Univ. Inst., Working Paper No. 1, 1995).

[28] *See* Ann-Katrin Kaufhold, *Gegenseitiges Vertrauen: Wirksamkeitsbedingung und Rechtsprinzip der justiziellen Zusammenarbeit im Raum der Freiheit, der Sicherheit und des Rechts*, 47 EUROPARECHT 408, 408 (2012).

[29] *See* Ulrich K. Preuß, *Europa als politische Gemeinschaft*, *in* EUROPAWISSENSCHAFT 529, 529 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds., 2005).

[30] *See* CHRISTIAN CALLIESS, DIE NEUE EUROPÄISCHE UNION NACH DEM VERTRAG VON LISSABON 116 (2010).

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The societal notion of trust substantiates, in particular, the cooperative environment between European institutions and Member States. The mutualization of trust through distributive solidarity has moved European integration towards a model of economic, legal, and, subsequently, societal convergence. The organizational dimension of trust predominantly enhances the furthered relevance of reciprocity for the process of European integration—within the normative orders of the Member States. This is since, in an enlarged European Union of twenty-seven Member States, mutualizing trust offers a *toolbox* for the inclusion of normative conditions of European integration pre- or post-crisis. Proceduralizing trust through the application of the principle of solidarity therefore reflects the normative nexus between the collective identities among citizens and Member States in the European Union. Within the European Union's normative order, the source of collective collaboration particularly traces the mutual trust between Member States to provide solidarity and distributive justice.

Notwithstanding these roles of trust, in order to preserve the national margins of appreciation, European integration is not to be considered a *plug and play* endeavor. The harmonization of a multitude of national legal systems reflects the ability of normative premises to adapt to different legal cultures, principles, and norms. European legislative acts are to be implemented decentrally in accordance with the national legal preconditions of the Member States. Resulting from the pluralism of the twenty-seven administrative capacities, the enforcement of European law leads to highly differentiated legal realities within the Member States.

Without striving for uniformity, the harmonization within such margins therefore requires the combination of vertical and horizontal processes of integration, constituting a multilateral process of merging legal structures at regional and global levels.[31] This occurs through the integration of different systems, thereby incorporating procedures transnationally to allow for transparency and societal participation. Otherwise, even if the legal harmonization of the single market is closely tied to the Europeanization of the public administration within the Union's Member States, the administrative integration risks illegitimate arbitrariness with the transfer of interpretative power to the European Court of Justice and European administrative entities.[32]

[31] *See* MIREILLE DELMAS MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD 37 (2009).

[32] *See* Francis G. Jacobs, *The Court of Justice in the Twenty-First Century: Challenges Ahead for the Judicial System?*, *in* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW—LA COUR DE JUSTICE ET LA CONSTRUCTION DE L'EUROPE: ANALYSES ET PERSPECTIVES DE SOIXANTE ANS DE JURISPRUDENCE 49, 49 (Court of Justice of the European Union ed., 2013).

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C. European Legal Integration and Administrative Governance

Neither the constitutive provisions of the Treaties nor secondary European law have directly and explicitly anticipated the administrative integration of the European Union.[33] Although, as the European Union *infused* national legal systems with the normativity of the internal market, European integration has captured the capacities of the administrative power that Member States could no longer effectively exercise themselves.[34] Institutionalizing the cooperative architecture of European administrative governance therefore historically encounters the differentiated enforcement of European law within the twenty-seven Member States.

The application of the Lamfalussy process, the Comitology procedures, and the Open Method of Co-ordination have, as mentioned above, intensified the cooperation between administrative entities from the Member States within the European Union.[35] This has blurred the dichotomic distinction of direct and indirect enforcement of European law, but despite this effect, European integration has widely differentiated into decentralized *peninsulas* of administrative monitoring.[36]

Beyond the systemic monitoring of legal implementation, European administrative integration is geared to further politicize the European Union, as a normative order of transnational guise and mutualized trust. Within its functional paradigm, the integrated administration, decentralized as it stands, increasingly became a homogenizing factor of the Union's normative reinforcement. Whereas the normativity of a legal norm has formerly been linked to its position within the functional system of European law as a such, in the context of European legal pluralism—in which norms have disparate origins, partially incommensurable fields of application and largely different instruments of implementation—the normative quality of rules and principles beyond the sovereign nation state has been increasingly difficult to trace.[37]

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[33] *See* Susana de la Sierra, *The Constitutional Bases of European Administrative Law, in* WHAT'S NEW IN EUROPEAN ADMINISTRATIVE LAW? 29, 29 (Jacques Ziller ed., Eur. Univ. Inst., Working Paper No. 10, 2005), *available at* http://cadmus.eui.eu/bitstream/handle/1814/3330/law05-10.pdf.

[34] *See* Alexander Somek, *What is Political Union?* (in this issue).

[35] *See generally* Susana Borrás & Bent Greve, *Special Issue on the Open Method of Coordination*, 11 J. EUR. PUB. POL'Y 185, 185 (2004).

[36] *See* Rainer Nickel, *Participatory Governance and European Administrative Law: New Legal Benchmarks for the New European Public Order*, *in* LAW, DEMOCRACY AND SOLIDARITY IN A POST-NATIONAL UNION 44, 44 (Erik O. Eriksen, Christian Joerges & Florian Rödl eds., 2008).

[37] *See generally* DELLAVALLE, *supra* note 6.

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In addition to the dichotomic direct/indirect enforcement of European law, the European Union has institutionalized a cooperative mechanism of legal enforcement on both vertical and horizontal scales in accordance with Art. 197(1) of the Treaty on the Functioning of the European Union (TFEU), whereupon "effective implementation of Union law by the Member States . . . shall be regarded as a matter of common interest."[38] Furthermore, Art. 197(2) TFEU allows for administrative integration to the extent that the Union is enabled to support the efforts of Member States in improving their administrative capacity to implement European law. This takes place through the facilitation of both access to information and cooperation between civil servants, as well as supporting training schemes.

The cooperative nature of European administration, therefore, outlines a normative organism of administrative co-dependency within the transnational entity that is, or became the European Union. Dialectically, the modernity of European administrative law departs from the functional inclusion of horizontal/vertical and cooperative/hierarchical principles, by subsequently differentiating the reciprocal responsibility of the Member States through flexible administrative *topologies*.

Within an ever-closer Union, the administrative integration of the European Union has expanded accordingly; the Multilevel nature of European administration—the *Verbund*—has evolved into a multidimensional concept of regulation, legal planning, and trust-building.[39] Designing a preliminary typology is, on the one hand, considered to compensate for the rule/exception ratio of enforcing European legal provisions within the Member States normative orders, and to stabilize the cooperative environment between administrative entities. On the other hand, the regulatory dimension reflects a functional part of European public administration, as it transfers the realm of market-oriented regulation—such as energy, telecommunication, and traffic—into a pluralistic network of European administration. It achieves this by *horizontalizing* the described access to information, as a *conditio sine qua non* for the systemic transparency of an integrated administrative space in the European Union.[40] In particular, the *Verbund*, as the legal *texture* of European administrative integration, procedurally intertwines the functional obligations of the monitored, with the legal competences of the monitoring institutions of the European Union.

[38] Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47.

[39] *See* Wolfgang Kahl, *Der Europäische Verwaltungsverbund: Strukturen–Typen–Phänomene*, 50 DER STAAT 360, 360 (2011).

[40] *See* HERWIG C. H. HOFMANN, GERARD C. ROWE & ALEXANDER H. TÜRK, ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION 411 (2009).

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From this perspective, European administrative integration follows the rationality of legal inclusion. Within this paradigm, the legal autonomy of the Member States is embedded in a pluralistic triangle of institutional complementarity, shared responsibility, and transnational dispute settlement.[41] As such, the *Verbund* therefore aspires to institutionalize a functional rule of law within the pluralistic order of the European Union.

Member States have commonly narrowed their delegated and hierarchical structures to fit the European public administration of European law. Furthermore, reciprocal modalities of procedural, distributive, and mutualizing techniques of public administration have emerged between Member States and the European administration.[42] Considering also the inclusive duty of the *Verwaltungsverbund* in the European Union, the extent to which the Member States have surrendered sovereign competences to the European public administration has *asphalted* both the institutional and normative capacity of administrative integration beyond the hierarchical responsibilities shared between the Commission, the Council of the European Union, and the Parliament.[43] Overarching the different procedures of the Union's policy cycle, the *Verbund* reconnects the informal agenda setting, the political decision taking, the legislative adoption of policies, and the functional implementation of norms within the Member States, to the transnational aspiration of politicizing the societal sphere of the European Union beyond the internal market.

European administrative integration, its new modes of governance, institutional cooperation, and reciprocal responsibility therefore constitutes more of a matrix of transnational normativity than a legally framed concept of public power allocation in the European Union. Internalizing the mutualization of trust between executive entities, the functional openness and responsivity of administrative integration has furthered the enforcement of the *Acquis communautaire*—the body of common rights and obligations which bind all the Member States together within the European Union—in a *regenerated* European Union of normative nature. This encourages the decisions in Art. 1 (2) TEU "of an ever-closer Union among the peoples of Europe" to be taken as openly as possible, creating a Union in which "neither national constitutions nor the EU Treaty should dominate the other, and both should exist side by side in a non-hierarchical way,"[44] in accordance with the principle of conferral, and the transcendental principles of subsidiarity and proportionality laid down in Art. 5 (1) TEU. European administrative integration, in that

[41] *See* CHRISTIAN CALLIESS, DIE NEUE EUROPÄISCHE UNION NACH DEM VERTRAG VON LISSABON 47 (2010).

[42] *See* MIRIAM AZIZ, THE IMPACT OF EUROPEAN RIGHTS ON NATIONAL LEGAL CULTURES 5 (2004).

[43] *See* Herwig C.H. Hofmann & Alexander H. Türk, *The Development of Integrated Administration in the EU and its Consequences*, 13 EUR. L.J. 253, 253 (2007).

[44] Gareth T. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 269, 271 (Matej Avbelj & Jan Komárek eds., 2012).

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perspective, builds on a patchwork of legal provisions, *constitutionalizing* principles of the European Union, European secondary law, and norms applied by the Member States with horizontal effects.[45]

Contrasting with the vertical diffusion of sovereignty, the reciprocal provision of checks and balances throughout European administrative integration reflects the search for transnational legitimacy within the European Union.[46] Its compulsive reciprocity provides the normative method for the horizontal diffusion of responsibility, liability, and political determination, even though the multiplicity of actors has colonized both the process of norm shaping and law-making in the European Union.[47] The rationality of the *Verbund*, therefore, aims at institutionalizing reflexive, and, in particular, responsive administrative standards for transcending territorially limited *topologies* of national legal preconditions.[48]

I. Integrated Administration and Executive Management

The formalized scope of the European Commission can be summarized as ensuring both the application of the Treaties and the measures adopted by the institutions, through the exercise of coordinative, executive, and management functions, in accordance with Art. 17(1) TEU. Beyond this however, the devolution of legal and administrative capacities to a number of institutional actors has been of pivotal importance for the normative homogeneity of European administrative integration, in which a majority of legislative entities at the European or Member State level face a multiplicity of quasi-legal instances conferred with regulatory competences. In order to systemically reduce legal collisions between national, European, and international norms or principles, the normative conception of the *Verbund* endogenously aimed to intertwine the administrative capacities of transnational networks of both state and non-state entities.[49]

Beyond the central duty of the European Commission to promote the general interest of the Union, and to take appropriate initiatives to that end, according to Art. 17(1) TEU, the emergence of *executive* and *regulatory* agencies has narrowed the executive radius of the Commission; as the agencies have stimulated the regulatory competition within the

[45] *See* Herwig C.H. Hofmann & Alexander H. Türk, *Legal Challenges in EU Administrative Law by the Move to an Integrated Administration*, *in* LEGAL CHALLENGES IN EU ADMINISTRATIVE LAW: TOWARDS AN INTEGRATED ADMINISTRATION 355, 355 (Herwig C.H. Hofmann, & Alexander H. Türk eds., 2009).

[46] *See generally* Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 EUR. L.J. 225, 225 (1999).

[47] *See* AXEL HONNETH, KAMPF UM ANERKENNUNG: ZUR MORALISCHEN GRAMMATIK SOZIALER KONFLIKTE 64 (1994).

[48] *See* AZIZ, *supra* note 42, at 6.

[49] *See generally* RAFAEL DOMINGO, THE NEW GLOBAL LAW (2010); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

European Union. At the same time, the emergent plurality of agencies has furthered the extrapolation of the European Union as a political endeavor, depriving sovereign Member States from the exertion of substantive autonomous competences.[50] Ensuring the *administrative permeability* of the Union therefore requires the inclusion of societal capacities within the framework of administrative networks. Within this matrix, the Commission then solely features the corridor in which inter-administrative networks are organized.[51]

In accordance with the *regeneration* of the European public sphere beyond the market's bias, inter-administrative networks constitute a model of informal cooperation on horizontal scales, in which the autonomy and reciprocal responsibility of the involved entities is foreseen.[52] Administrative constituencies, in that sense, relativize the formal conception of public administration, as the inclusion of non-state entities generates a third dimension of transnational legal enforcement to be developed within the European *Political* Union.

II. Judicial Integration and Procedural Recirculation

Considering the expansion of the European administration, the legal modalities of the normative order entail limited access of both the European Court of Justice to review national administrative acts, as well as the national courts to review European administrative decisions. This leads to judicial imprecisions and lacking the procedure of legal protection. In this regard, the sustainable stabilization of the integrated administration within the Union, as a legitimate model of executive cooperation, necessitates an effective *recirculation* of procedural remedies.

Designing the model of a *Verbund* of European Courts would therefore allow for an unambiguous liability within the European administrative order, providing a functional dispute settlement mechanism, in order to accommodate for the transnational diffusion of powers within the European Union.[53] Only the establishment of a coherent system of legal

[50] *See* PAUL CRAIG, EU ADMINISTRATIVE LAW 152 (2006); Case C-9/56, Meroni v. High Auth. of the European Coal and Steel Comty, 1958 E.C.R. I-1958; *Communication from the Commission on the Operating Framework for the European Regulatory Agencies*, COM (2002) 718 final (Dec. 11, 2002); *Draft of an Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies*, COM (2005) 59 final (Feb. 25, 2005).

[51] *See Commission Communication to the Council and the European Parliament on the Management of Community Programmes by Networks of National Agencies Delegations Will Find Attached Commission Document,* COM (2001) 648 final (Nov. 13, 2001).

[52] *See* Ingolf Pernice, *La Rete Europea di Costituzionalità: Der Europäische Verfassungsverbund und die Netzwerktheorie,* 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 63 (2010).

[53] *See* Andreas Voßkuhle, *The Cooperation Between European Courts: The Verbund of European Courts and its Legal Toolbox*, *in* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF

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remedies and procedures ensures respect for the right to effective judicial protection of both individual and collective entities.[54]

It follows that *dialoguing* the judicial evolution of the European Union would serve to upgrade judicial standards of protection and the authority of courts, at both the national and European levels of governance. This would be especially the case if the national courts were not only to be seen as faithful agents of the European normative order, adjudicating for the normativity of the European Union.[55]

D. Administrative Constitutionalism, or Post-Crisis Politicization?

Recalling the central objective of *regeneration Europe*—the re-assertion of the *social* in European politics—the European Union should constrain the economic system in order to ensure inherently that it will lead socially to more acceptable outcomes. In particular, the European Union is required to capitalize on both the individual trust between its citizens, and the institutional trust deduced from the mutualized exercise of administrative power in the process of European integration. Whereas the *pre-crisis* European Union mainly allowed the single market to internalize both individual and institutional trust for the sake of minimizing economic risks, the *post-crisis* European Union has to reverse the process, in the sense that it has to extrapolate its transnational legitimacy from the trust between its citizens.

From this perspective, the *Verbund*, considering both its administrative and constitutional dimension as a normative mode of processing legal pluralism within the European Union,[56] has the functional advantage of being able endogenously to internalize the multiplicity of the legal phenomena that are developed on European and Member States levels, without trying to impose an overarching hierarchy of legality. Notwithstanding this ability:

> [T]he function of the law consists in stabilizing the normative expectations of the actors of social

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CASE-LAW – LA COUR DE JUSTICE ET LA CONSTRUCTION DE L'EUROPE: ANALYSES ET PERSPECTIVES DE SOIXANTE ANS DE JURISPRUDENCE 81, 81 (2013).

[54] *See* Case C-50/00 P., Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6677; Regulation 766/2008, of the European Parliament and of the Council of 9 July 2008 amending Council Regulation 515/97 on Mutual Assistance Between the Administrative Authorities of the Member States and Cooperation Between the Latter and the Commission to Ensure the Correct Application of the Law on Customs and Agricultural Matters, 2008 O.J. (L 218) 48, 48.

[55] *See* Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 J. GLOBAL CONSTITUTIONALISM 53, 63 (2012).

[56] *See generally* Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511, 511 (2002); CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Matej Avbelj & Jan Komárek eds., 2012).

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> interactions, and since these social expectations derive from a large number of social subsystems in which functionally specified social interactions occur, the existence of a plurality of social subsystems will correspond to a fragmentation of the legal system. Put differently, insofar as the law has the function to guarantee the internal order of different social subsystems, the law itself loses its unity and develops distinct legal subsystems, each of them characterized by the rationality, expressed in legal terms, that underlies the implementation of the subsystemic functions.[57]

Administrative constitutionalism reflects a functional paradigm intended to absorb the normative inconsistencies created by the executive pluralism within the European Union.[58] Designing an overarching transnational rationality of societal coordination and regulatory harmonization, it deconstructs the idea of legal unity as the most effective realization of a rational order, as it inherently reconnects the plurality of European law to the conditionality of interacting societies, legal discourses and normative preconditions within the twenty-seven Member States.[59]

In particular, *administrative constitutionalism* in the European Union contrasts with the attempts of national legal systems to hierarchize the parallelism of legal norms, through *heterarchizing* societal and administrative interactions. It deconstructs the territorial dimension of legal implementation and administrative functionality, as it unfolds its homogenizing capacities beyond the boundaries of the Member States' sovereignty. Furthering the politicization of the European Union, therefore, means designing a functionally differentiated mode of administrative integration in favor of executive rationalities that link the stabilization of the internal market and public budgets more directly with the societal pluralism of the European Union.[60]

The vertical and horizontal integration of mechanisms, in particular, enhance the enforcement of European law, unclosing the potential for the Member States continuously to *design* the normativity of the European Union according to their legal and political preferences, and, therefore, to solidify the process of European integration beyond the

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[57] DELLAVALLE, *supra* note 6.

[58] *See generally* ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM (2007).

[59] *See* DELLAVALLE, *supra* note 6.

[60] *See* Somek, *supra* note 34.

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internal market. The architecture of *administrative constitutionalism* converts the particularism of the Union's Member States into a normative matrix of administrative cooperation. In this matrix, the couplings of vertical and horizontal enforcement mechanisms are the center of gravity of mutualizing trust between the actors of the multi-level system. But as the *effet utile*—the modus operandi for securing the harmonized application of European law within the Member States—of European integration required the functional enforcement of the market freedoms within the national legal orders, the innovative rationality of European law has forced the Member States equally to realign the capacities of their respective national administrative law. This is despite the fact that the Member States have been reluctant orthodoxly to harmonize their integral substance.[61]

Marking the different stages of European administrative harmonization, one can argue that the institutional preconditions of administrative integration in the European Union were initially set through the judiciary of the European Court of Justice. A second phase of Europeanization was then the normative superposition of national procedural norms through European law. Following on from this phase, it has only been the enduring period, in which the vertical cooperation of administrative entities and the horizontal integration of administrative rationalities are taking place in the European Union *after the crisis.*

Within this matrix, it has mainly been the heterarchical arrangement of administrative collaboration that has stabilized the normative functionality of mutual trust in the EU. The inclusion and processing of extra-legal parameters through cooperative interactions have extended the performative capacities of the European executive order, as they recomposed the classical mode of hierarchical administration between the state and its citizens. Prepared through the processes of deregulation and privatization of state-owned ventures within the last two decades, the traditional dichotomies of administrative law—lawful/unlawful, internal/external, state/society—have been softened. In addition, the genuine rationality of administrative integration has shifted in accordance with the altered comprehension of public law itself.[62]

Beyond the dogmatic understanding of administrative law as a tool of hierarchical organization, strategically empowered within the framework of legal acts, the exercise of administrative power in the European Union has evolved into an adaptive mechanism of societal communication between individuals and collectives.[63]

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[61] *See* EBERHARD SCHMIDT-ASSMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE 31 (2004).

[62] *See* Inger-Johanne Sand, *Globalization and the Transcendence of the Public/Private Divide–What is Public Law Under Conditions of Globalization?*, *in* AFTER PUBLIC LAW (Cormac Mac Amhlaigh, Claudio Michelon & Neil Walker eds., 2013).

[63] *See* Andreas Voßkuhle, *Neue Verwaltungsrechtswissenschaft*, *in* 1 GRUNDLAGEN DES VERWALTUNGSRECHTS (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006); Gunnar Folke Schuppert, *Verwaltungsrechtswissenschaft als Steuerungswissenschaft: Zur Steuerung des Verwaltungshandelns durch*

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Beyond that evolutionary process to transnationalize executive communication, European administrative law emphasizes the finalization of the normative premises of European integration, for which the enforcement of European law is more than ever before shared between private and public entities. Its genuine *raison d'être* is, therefore, to undermine the thickness of European law by offering the mutualization of executive cooperation. Within the variable geometry of European integration, the operational matrix and normative rationality of administrative constitutionalism combines the legal experiment that has been the European Union with the societal phenomenon that European integration has become. In that sense, it is understood as an instrumental model of integration, in the sense that it triggers an equilibrium of social rules, and normative mentalities. It considers the pluralism of legality, but is more political than legal in nature, and therefore offers the strategical inclusion of historical references and institutional predominances. *Administrative constitutionalism*, as portrayed here, provides a functional paradigm for facilitating innovations of the institutional setup of the European Union: the direct election of the President of the Commission through either the European Parliament or the citizens of the European Union, the institutional reduction of the Commission of around a third, the transfer of competences within the Council for increasing the legal capacities of Member States, as well as furthering the modalities of a European *Referendum*.[64]

Administrative constitutionalism is political since it offers a normative paradigm to internalize the diversity of transnational executive models for the *regeneration* of the European Union. First, it regenerates the proportional balance of intergovernmental strategies and enforces the prospective administrative inclusion of public/private entities of the Member States. Second, it enhances the neo-functional aspirations of the Commission in further differentiating its regulatory technicalities as the guardian of the treaties. A third factor is that it allows for a normative federalization of European politics, and advances the inclusive understanding of the democratic normativity of the European Union and its citizens. Fourth, it re-connects the rational basis for transnational cohesion, the intergovernmental institutions created over the last sixty years, and allows for intertwined collaborative modalities between the European Commission, the Council representing the Member States and the European Parliament, as the anchor of democratic legitimacy of the Political Union, formally connected to a multidimensional set-up of transnational agenda-setting.

Verwaltungsrecht, *in* REFORM DES ALLGEMEINEN VERWALTUNGSRECHTS 65, 65 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Gunnar Folke Schuppert eds., 1993).

[64] *See* Miguel Poiares Maduro, Bruno de Witte & Mattias Kumm eds., *The Democratic Governance of the Euro*, Robert Schuman Center for Advanced Studies (RSCAS), Policy Paper 2012/08 (2012), *available at* http://cadmus.eui.eu/bitstream/handle/1814/23981/RSCAS_PP_2012_08.pdf?sequence=1.

According to the Europeanization of administrative law, public administration at both Member State and European levels has altered, in the sense that the *fraying* of sovereignty has discarded the institutional dialectic of public state administration, in which the hierarchical adoption of reliable norms has been the centripetal duty. Public administration, from this perspective, is substantially centered around the enforcement of legal norms, executive norm-making, and the hierarchical control of administrative bodies.[65] Both the internationalization and Europeanization of public administration have, in contrast, qualitatively and quantitatively changed the hierarchical reasoning of European politics.[66]

In opposition to the reasoning of national administrative law based on the contingency of complete information, European public administration has endogenously been linked to the functional provision of full information, in order to re-balance the consistency and coherence of transnational integration within the European Union. Coincidentally, the Europeanization of public administration exonerates the resources of the Member States, and deconstructs the historical *impermeability* of national administration. European administrative integration, therefore, reconnects the normative particularities of the Member States, according to Art. 4(2) TEU, to the administrative order of the European Union, thus legitimately relating democratic resources to both institutional levels.

It can therefore be seen that *administrative constitutionalism* responds to the consolidated function of both the European Parliament as well as the parliaments of the twenty-seven Member States, after the amendments of the decision-taking procedures after the Treaty of Lisbon. It offers a functional rationality developed both to overcome the hierarchical rigidity of European integration, and to regulate the fundamental collision of its normative, economic, and societal dimensions in the transnational world of pluralist social interaction.[67]

Both the functional integration and the normative *clamping* of administrative capacities within the European Union mark the point of reference of the cooperative arrangement, in which the national administrative orders represent co-dependent actors within the European Union's multi-level format. Departing from the sovereign dichotomy of legislation and enforcement, European administrative integration has built a network

[65] *See* MARKUS A. GLASER, INTERNATIONALE VERWALTUNGSBEZIEHUNGEN 12 (2010).

[66] *See* Paul Craig, *European Governance: Executive and Administrative Powers Under the New Constitutional Settlement*, 3 INT'L J. CONST. L. 407, 421 (2005).

[67] *See* DELLAVALLE, *supra* note 6.

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dialogue of normative concretion beyond the territorial dimension of sovereignty. This constitutes the *regenerative "condition postmoderne"*[68] of the European Union.

E. Conclusion

Neither the politicization of the European Union nor the societal evolution of European integration mirrors a *plug and play* process. Institutionalizing political patterns in the realm of transnational politics illustrates the peculiarity of *communication* beyond the boundaries of state sovereignty. Due to the different languages, historical mentalities, regulatory preconditions, and legal cultures included in the Member States of the European Union, the reciprocal translation of executive communication is of pivotal importance for the integrative functioning of European integration. The mutualization of communicative confidentiality, the reciprocal provision of transparency, and the differentiated emergence of both individual and collective trust, reflect the overarching normativity of the European Union and its administrative integration.

In contrast to the unitary conception of legal integration, based on a clear-defined and long-established epistemology, the pluralistic normativity of the European Union's legal order dismisses "a firm basis for legitimacy and a robust criterion for the interpretation of the *lex lata* as well as for the definition of proposals *de lege ferenda.*"[69] Its transnational normativity, notwithstanding, has developed multifaceted *sensors* to internalize and balance the communicative disorder of the enlarged European Union and its twenty-seven Member States.

The horizontal and vertical integration of administrative power throughout the European continent, regardless of all the functionally differentiated modalities sixty years after the European Coal and Steel Community, follows the fundamental assumption that even a transnational society marks out a plurality of interactions, each of them characterized by a specific aim, which influences decisively the discursive contents of the normative or administrative interaction.[70]

The core of *administrative constitutionalism* in the Political Union, therefore, is related to the substance of the communicative rationality of European integration, intended systemically to intertwine the normative discourses provided, and simultaneously to internalize the *societal turn* of the European Union. Designing a conceptional administrative order that responsively recognizes the plurality of legal and political communication within the European Union, requires the *regeneration* of the European

[68] JEAN-FRANCOIS LYODTARD, LA CONDITION POSTMODERNE: RAPPORT SUR LE SAVOIR (1979).

[69] DELLAVALLE, *supra* note 6.

[70] *See id.*

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Union's executive rationality, which has just started: To ensure the democratic legitimacy of European integration, to regain the primacy of politics, and to reclaim the reciprocal trust between European citizens.

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