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Constitutional Balance in the EU after the Euro-Crisis

Mark Dawson and Floris de Witte*

This article analyses how the European Union's response to the euro-crisis has altered the constitutional balance upon which its stability is based. It argues that the stability and legitimacy of any political system requires the structural incorporation of individual and political self-determination. In the context of the EU, this requirement is met through the idea of constitutional balance, with 'substantive', 'institutional' and 'spatial' dimensions. Analysing reforms to EU law and institutional structure in the wake of the crisis – such as the establishment of the ESM, the growing influence of the European Council and the creation of a stand-alone Fiscal Compact – it is argued that recent reforms are likely to have a lasting impact on the ability of the EU to mediate conflicting interests in all three areas. By undermining its constitutional balance, the response to the crisis is likely to dampen the long-term stability and legitimacy of the EU project.

This article analyses how the European Union's (the Union, or EU) response to the euro-crisis has altered the constitutional balance upon which the Union's stability is premised. It will first consider why the stability and legitimacy of any political system requires the structural incorporation of individual and political self-determination. It will highlight that in the context of the EU this requirement is traditionally met by accommodating a plurality of different interests in the decision-making process and by protecting the sovereignty of the individual Member States and their constituents. These commitments are firmly (if implicitly) entrenched in the treaties and serve as a constitutional balance that protects the long-term stability of the Union. The first section breaks down the building blocks of this idea of constitutional balance, distinguishing between its 'substantive', 'institutional' and 'spatial' dimension. The article argues that the Union's response to the euro-crisis significantly alters the balance within each of these three dimensions. Analysing reforms to EU law and to the Union's institutional structure in the wake of the crisis, such as the establishment of the European Stability Mechanism, the growing influence of the European Council, and the creation of a stand-alone Fiscal Compact, we will argue that recent reforms are likely to have a lasting impact on the stability and legitimacy of the Union.

The response to the euro-crisis destabilises the Union's *substantive balance* by circumventing its limited mandate in redistributive policies, which was meant to ensure that citizens have ownership and authorship over the core values that shape their society (the second section). It equally recalibrates the *institutional balance* by decreasing the voice of marginalised interests and representative institutions. This loss of representative influence is likely to result in greater

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power for national executives, with responsibilities for the initiation of, and compliance with, policy proposals shifting during the crisis towards the European Council (in the third section). Finally, the fourth section argues that the Union's response to the euro-crisis also threatens the *spatial balance* of the Union, which protects the voice of smaller and poorer Member States and their citizens from majoritarian or even hegemonic tendencies. The increased influence of the bigger, more resourceful Member States, in combination with the changes to the Union's substantive and institutional structure, leads to the loss of political autonomy for smaller and poorer Member States.

The article concludes that the disregard of the constitutional balance that is laid down in new institutional arrangements (and indeed, the rejection of the treaties' normative structure altogether) in response to the euro-crisis not only undermines the Union's commitment to individual and political self-determination, but also in the long run destabilises and de-legitimises the process of European integration. We conclude with some tentative suggestions as to how law could be used to re-invent constitutional balancing principles in a post-crisis EU, ultimately arguing that such a re-invention requires EU leaders to shift beyond the purely instrumentalist view of legal rules and institutions that has animated their approach to EU governance in recent years.

CONSTITUTIONAL BALANCE IN THE EUROPEAN UNION

The constitutional balance of the EU is hardly ever discussed – in either normative or descriptive terms.[1] Even the Convention on the Constitution for Europe failed to address it.[2] To some extent, this neglect of the idea of constitutional balance is understandable. Within the context of the Union, constitutional balance is often seen in no more than functional or instrumental terms; as a way to balance between different interest groups, political actors and institutions in order to create a structure capable of achieving specific common objectives. On this view, the gradual shift in the objectives of the integration project – from peace and prosperity to political union with centralised monetary and fiscal management – necessarily entails a shift in balance between the priorities of the Union, between the competences of the Member States and the EU, and between the Union's institutions.[3]

Yet, a deeper and more fundamental idea of balance is, and must be, implicit in the Union's set-up. The EU, just like the nation state, is but a social artefact. It does not serve a divine greater good, but rather provides a framework to facilitate the attainment of the objectives of its constituents – whether citizens or

1 To the extent that it is discussed, authors have focused on the *institutional* balance within the Union, that is, the relationship between the different Union institutions and the allocation of power between them. See eg, K. Lenaerts and A. Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in C. Joerges and R. Dehousse, *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002).

2 J. P. Jacque, 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 387.

3 See eg, A. Sbragia, 'Conclusion to the Special Issue on Institutional Balance and the Future of EU Governance: The Treaty of Nice, Institutional Balance and Uncertainty' (2002) 15 *Governance* 403.

nation states. As Halberstam has put it, the understanding of polities as social artefacts implies that its constituents' needs and aspirations become of central concern for the polities' institutional and normative construction.[4] A social structure or polity is, in the long term, only stable and legitimate, then, if it structurally incorporates and reflects the values that 'matter' to its constituents.

Any political community, in other words, must incorporate a two-fold commitment to self-determination.[5] First, it must reflect that citizens are free and equal. Each citizen has a different conception of 'the good', of how to live his or her life, which values to adhere to, and which aspirations to follow and prioritise. A legitimate and stable institutional structure must recognise this 'irreducible plurality' of conceptions of 'the good', and insulate the autonomy of citizens to devise their own vision. This commitment to individual self-determination thus simultaneously recognises the fundamental equality between citizens while also recognising the inevitable differences between their normative outlooks.[6]

The second commitment to self-determination that underlies modern society can best be described as one of political self-determination. Any form of collective organisation requires an institutional mechanism that allows for discussion of, and mediation between different conceptions of 'the good', legitimises the priority accorded to one outcome over alternatives and ties citizens together in pursuit of that larger 'common good'. Within the context of the modern nation state, the political system has traditionally played this role, allowing individuals to self-constitute and assume authorship and ownership over the communal construction of society, while also stabilising society and institutionalising conflict.

The modern nation state can be seen as an explicit attempt to institutionalise this dual commitment to individual and political self-determination. The separation of powers, the rule of law, the establishment of democratic institutions and integrated political parties, the central role for counter-majoritarian institutions, and the protection of fundamental rights all reflect the need to establish the equal recognition for each individual's autonomy, institutionalise social conflict, offer a forum for contestation and communication that is inclusive and sensitive to the aspirations of its subjects, and makes those subjects mutually interdependent in their pursuit of 'the good'.

The EU, on the other hand, does not possess the institutional sophistication required to establish such a genuine political form of self-determination – by means of which it ties its own trajectory to the desires of its citizens. Indeed, it has been argued that this apolitical nature of the EU was constructed intentionally, as an instrument to ensure the efficient pursuit of its initial objectives of peace and prosperity.[7] The EU does not (or at least not yet) carry the 'thick' and integrated political system that allows for the articulation of, and mediation

4 M. Halberstam, *Totalitarianism and the Modern Conception of Politics* (New Haven, CT: Yale UP, 1999) 17.

5 Consider also Habermas's thesis on the co-originality of public and private autonomy: J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory on Law and Theory* (Cambridge, MA: MIT Press, 1996) 84.

6 See eg, S. Benhabib, *Situating the Self* (Oxford: Polity Press, 1992) 158.

7 J-W. Müller, 'Beyond Militant Democracy?' (2012) 73 *New Left Review* 39.

between, the different views citizens have. Properly understood, this is related to a number of factors including the absence of a transnational public sphere, political contestation, civic engagement, and strong centre-periphery relations.[8] These institutional inadequacies, however, neither mean that a commitment to self-determination is not relevant for the stability of the Union (in particular now that it is developing from a regulatory into a redistributive body), nor that such commitments are not incorporated in other, less evident ways.[9]

It is our view that the Union reflects the state's dual commitment to self-determination in two different ways. Upon closer examination, the Union's institutions, decision-making procedures, treaty revision procedures, system of competence allocation, and principles of transparency, subsidiarity, and proportionality incorporate two core values that 'translate' the demands of self-determination to the Union's peculiar tiered political setting. The Union's commitment firstly, to pluralism, and secondly, to sovereignty, on this view, is not only fundamental to its current objectives, but is also a central precondition for its long-term stability and legitimacy.

The commitment to pluralism ensures that a wide variety of societal interests are represented and accommodated within the functioning of the Union. For lack of a direct democratic link that articulates the diverse and often diffuse interests that exist in society into the transnational political arena, the Union has been made sensitive to diverse interests through the complex incorporation of a wide variety of stakeholders within its decision-making processes. This includes interest groups, politicians, experts and administrators on both the national and European levels.[10] As Scharpf has put it, the 'input-side of [the Union's] political processes could not be more pluralist, and less majoritarian in character'.[11] In other words, the underdeveloped nature of the transnational political sphere requires a more direct and explicit involvement of such actors in the decision-making process than it does on, for example, the national level. The commitment to pluralism however is not only reflected through mechanisms by which citizens and interest groups can access the decision-making process (voice) but also by more procedural commitments to transparency, objective reasoning and the obligation to justify policy choices (by way of which citizens can better understand and engage with the policy making process).[12] These commitments to pluralism have always been central in allowing citizens to take authorship and ownership over the development of the integration

8 On some of these factors, see eg, J. Weiler, *The Constitution of Europe* (Cambridge: CUP, 2005) 344–348, and A. Follesdal and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533.

9 The right to free movement, for example, can be understood as disentangling individual self-determination from the constraints imposed by political self-determination. See F. De Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18 *European Law Journal* 698.

10 P. Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy' (2003) 9 *European Law Journal* 549.

11 F. Scharpf, 'Legitimacy in the Multi-Level European Polity' in P. Dobner and M. Loughlin, *The Twilight of Constitutionalism* (Oxford: OUP, 2010) 93.

12 D. Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 686.

process,[13] and are becoming more and more important as the Union engages more directly in redistributive matters (which are politically more salient as they more closely touch on the citizen's own conception of 'the good').

The second central norm that translates the EU's commitment to self-determination into the functioning of the EU is sovereignty. The Union's commitment to protect the (political) sovereignty of its Member States seeks to prevent the Union from engaging in policy areas that are so politically salient that any stable and legitimate outcome presupposes the direct voice of its citizens, something that the European institutional system cannot possibly guarantee.[14] A commitment to sovereignty, in other words, protects the stability of the Union by disempowering it from devising policies that cannot be considered legitimate by European citizens. This commitment to insulate the sovereignty of Member States in policy areas that closely relate to the individual's conception of 'the good' serves as an institutional recognition that integrated political communities not only express but also contain certain normative claims, which, for lack of an instrument of political mediation, cannot be pitted against each other. To put it in simple terms, the prohibition of abortion in Malta is not more 'just' than its acceptance in Sweden; nor is the British decision to charge students £9,000 per year less 'just' than the Austrian choice to fully subsidise university access. Such differences merely reflect the historical, social or cultural idiosyncrasies that are prevalent within different political communities, and whose existence has been legitimised through a process of political communication and contestation that is institutionally sensitive to the individual citizens' view.[15]

From this perspective, the explicit ring-fencing of issues such as abortion, redistributive welfare, rights to collective bargaining, or education from Union involvement,[16] the overrepresentation of the smaller states in the decision-making process, veto rights, the rigid treaty revision procedure,[17] the demand that the Union respect Member States' constitutional identities,[18] and the system of conferred competences[19] all serve to insulate the capacity of citizens to decide on contentious issues within a political unit – the nation state – that allows for the articulation, mediation and reconciliation of diverse interests, and thereby legitimises its outcome. These protective mechanisms, that clearly reflect a commitment to self-determination, serve not only to protect the political autonomy of Member States, but equally the long-term stability and legitimacy

13 This relates to what may be called a procedural understanding of EU law's legitimacy, most famously defended by Habermas. See, for example, Habermas's procedural defence of the idea of a constitution for Europe as well as his conception of a procedural paradigm of law whereby 'persons are autonomous only insofar as they can at the same time understand themselves as authors of the law to which they are subject as addressees.' J. Habermas (1996), n 5 above, 408.

14 See also J. Habermas, 'The Crisis of the European Union in the Light of a Constitutionalisation of International Law' (2012) 23 *The European Journal of International Law* 335, 343.

15 See also *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30 June 2009 at [210]–[270].

16 Consider, respectively, a protocol to be attached to the treaty on occasion of the accession of Croatia that explicitly ring-fences abortion (see 2011/0815(NLE)), Treaty on the Functioning of the European Union (TFEU), Art 156 and TFEU, Art 165.

17 See section headed 'Spatial Balance', below.

18 Treaty on European Union (TEU), Art 4 (2).

19 TEU, Art 4(1) and Art 5.

of the Union, by explicitly allocating policy competences to the level of governance best able to meet the desires of the citizen.[20]

Finally, the balancing concept also carries a 'constitutional' dimension. The Union's commitment to self-determination, in the form of the structural incorporation of plural interests and the protection of Member State sovereignty, is firmly embedded in the treaties. Its constitutional nature acts as the bees' wax, protecting the Union from short-term temptations that may threaten its long-term stability by demanding the sacrifice of commitments towards democracy and self-determination in the face of sudden shocks to the system (for present day purposes, of course, the euro crisis). It is with this idea of constitutional balance, that is, the constitutionalisation of the commitments to pluralism and sovereignty that serve to stabilise the Union, that we are concerned in this paper. In our view, the exact way in which constitutional balance seeks to stabilise the European integration process, and the way in which the Union's response to the euro-crisis has influenced that balance, can best be analysed by distinguishing between three different dimensions: substantive, institutional, and spatial balance.

The idea of substantive balance highlights the need, central to the integration process from the start, to offer Member States and their citizens sufficient space to autonomously determine the social norms and distributive criteria that shape their societies, while also serving to complement the economic agenda devised on the European level. This is reflected primarily in the explicit ring-fencing of the Member States' sovereignty in redistributive policy areas, which reflects the inability of the Union's political process to institutionally accommodate the plurality of interests that distributive conflicts engender. The idea of institutional balance seeks to ensure that the relationship between the different institutions of the Union is structured in a way so as to make them sensitive to different sets of individual, national and supra-national interests. Their interrelationship and specific prerogatives serve both to incorporate a great variety of interests in the Union's decision-making process, and to insulate the sovereignty of Member States in certain policy areas by enhancing the power of the individual states in such areas. Finally, the idea of spatial balance addresses the balance of power within the EU institutions. In this regard, the overrepresentation of smaller Member States in the Union's institutions serves to mitigate transnational majoritarian tendencies in redistributive and socially contentious policy areas, and to allow the citizens of each Member State to autonomously determine the conditions under which their society is structured.

The following sections expand upon each of these categories, highlighting the presuppositions of balance that underlie the different aspects of the integration project, and analysing how the Union's response to the euro-crisis has not only altered this constitutional balance, but, in doing so, challenges many of the assumptions that stabilise the EU as a long-term project. While in some cases, eg the substantive dimension, challenges to balancing principles have been

20 See, for similar observations: C. Joerges, 'Rethinking European Law's Supremacy' *EUI Working Paper* 2005/12; C. Joerges, 'From Integration through Law to Financial Crisis: What is left of Europe's Economic Constitution' (forthcoming, on file with author).

long-standing, the crisis has accelerated and deepened the unravelling of core elements of the Union's legal and political structure.

SUBSTANTIVE BALANCE

The substantive balance in the Union serves to ensure the relative neutrality of the Union's policies. Since the start of the integration process, economic and social policy areas have been separated. It was thought that the former should be collectively regulated on the European level, aiming to create a more efficient internal market, while the latter should be regulated on the national level, where political structures would ensure that the redistributive criteria used matched the expectations and different interests of national citizens. The national political system and the public and civic spheres that surround it serve to engender, bound, and channel diverse ideas of what is socially 'just', and ultimately legitimise and tie all agents to the distributive outcome. In this regard, the idea of substantive balance stabilises the Union and its economic agenda by protecting the sovereignty of Member States in distributive matters, and by allowing citizens to voice their conception of what is 'just' through national political structures. In other words, the substantive balance of the Union protects individual and political self-determination on the national level, integrating national policy outcomes with economic goals pursued at the European level. It presupposes that the Union's economic agenda leaves sufficient leeway for the 'political' on the national level to structure the social conditions of life in accordance to its electorate's wishes – a presupposition that has been under pressure since the very start of the integration project.

At the start of the integration project, indeed, it was thought that this idea of substantive balance, which was indispensable to ensure acceptance of the economic integration project on the national level, could be achieved by simply leaving distributive policies to the nation states, where robust political systems could ensure the generation, accommodation and mediation of different voices and interests. In other words, economic growth would be achieved on the transnational level by the creation of a single market, while the distribution of resources would remain within the domain of national political discourse.[21] This 'separate track' solution would serve, especially 'when account is taken of the strength of the trade union movement in European countries and of the sympathy of European governments for social aspirations',[22] as a guarantee against unacceptable social consequences of economic integration and thereby 'socially embed' the European integration project on the national level in accordance with the wishes of national electorates.[23]

As the integration project developed, this balancing act became more and more difficult to sustain, and more substantive social policy competences were

21 See also S. Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (Cambridge: CUP, 2006).

22 Report by a Group of ILO Experts, 'Social Aspects of European Economic Co-operation' (Geneva: International Labour Office, 1956) para 210.

23 Official summary of the 'Ohlin Report' (1956) 74 *International Labour Review* 99, 108 and 112.

transferred to the EU level. What this indicated, mainly, was that the economic aims of the internal market were indissociably connected to elements of distributive justice that had originally been retained on the national level. At the same time, the competences transferred to the European level were mainly of a regulatory, rather than openly redistributive, nature. The Union obtained new competences in policy areas with a direct effect on the functioning of the internal market (such as issues of dismissal or redundancies),[24] Politically more salient policy areas, or those of an explicit redistributive nature, such as those relating to minimum wages, social assistance, or collective bargaining, remained firmly entrenched on the national level.[25] Again, this limited transfer of competences respected the substantive balance of the Union by explicitly leaving the policy decisions that most closely relate to the individual's conception of 'the good' and which therefore require the citizen's participation as free and equal agents, on the national level.

Meanwhile, as documented in Scharpf's work, the Union's institutional structure generated a spill-over, whereby the rights to free movement increasingly constrained the capacity of Member States (and thereby its citizens) to autonomously decide on substantive aspects of (social) policy that fall within their exclusive competence.[26] In the last decade, this critique has developed into a powerful narrative, which argues that the norms of free movement threaten the social and political conditions necessary for self-determination.[27] Ultimately, this critique highlights the lack of sensitivity of the Union's institutions for their own institutional inadequacies, in particular its underdeveloped political space.

This challenge to the substantive balance of the Union has been further complicated by the Union's response to the euro-crisis in both qualitative and quantitative terms. The latter is evidenced mainly by the spill-over of the Union's legislative competences into previously restricted policy areas; while the former is particularly clear in those Member States that have asked for financial assistance, and which have, in return, been asked to 'effectively renegotiate their basic social contracts'.[28]

Until the advent of the euro-crisis, direct legislative influence in distributive policies was both legally and politically off-limits for the Union institutions. The Lisbon strategy and Europe 2020 agenda, for example, deliberately leave substantive choices to national political systems while attempting convergence of outcomes through benchmarking and intense transnational political cooperation. The euro-crisis changed this paradigm. Its immediacy, propelled by the nervous global markets, led to a total disregard of both the legal and constitutional limitations to transnational cooperation. In order to integrate monetary and fiscal

24 See TFEU, Art 153–156.

25 See TFEU, Art 156, 149 and 153(2)(b), (4) and (5). See also Declaration 31 attached to the Treaty of Lisbon.

26 See, for the most recent restatement, F. Scharpf, 'The Asymmetry of European Integration, or: why the EU cannot be a "social market economy"' (2010) 8 *Socioeconomic Review* 211.

27 F. Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173 or A. Somek, 'The Social Question in a Transnational Context' (2011) LEQS Paper 37.

28 J-W. Müller, 'Beyond Militant Democracy?' (2012) 73 *New Left Review* 44.

policy it has proved necessary to integrate and reform labour and welfare policies.[29] Unsurprisingly, then, the Union's response to the crisis – whether as part of the austerity drive or growth pacts – has been the coordination or even suggested harmonisation of several labour and welfare policy areas that are highly contentious such as labour costs, pensions, income tax, education, or employment conditions.[30] Budgetary co-management between the Member States and the Commission has become the norm, whereby the Commission controls and suggests structural policy changes. Twenty-three Member States are currently monitored and controlled by the Commission under the excessive deficit procedure,[31] while the scoreboard for 2013 indicates that the Commission might further assess and supervise redistributive and fiscal policies for fourteen Member States under the macro-economic imbalance procedure.[32] The President of the European Council has even recently suggested that the harmonisation of pension schemes, including retirement age, is inevitable in the process of stabilising the eurozone.[33] Financial aid to Greece and future aid to Spain is made conditional on VAT increases, pension cuts, and the liberalisation of public services.[34] Similarly, the Memoranda of Understanding that struggling Member States are asked to negotiate with a troika composed of the Commission, IMF and ECB list specific and detailed reforms in salient policy areas such as trade union rights, education, and healthcare.[35] In Greece, for example, all collective agreements have been effectively rescinded as part of the implementation package request of the troika, which has been severely criticised by the ILO.[36] Yet such processes occur outside the formal framework of the treaties, which explicitly prohibits Union competences in such policy areas. This is not only problematic from a purely juridical perspective, but also from a normative viewpoint. The Union's lack of competences was, after all, meant to stabilise the integration project by ensuring a substantive balance between economic objectives and

29 See R. Colliat, 'A Critical Genealogy of European Marcroeconomic Governance' (2012) 18 *European Law Journal* 6.

30 See, for example, the Euro-plus pact and the recently negotiated growth pact, respectively at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf, and http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf (both last visited 4 June 2013). For examples of the reforms demanded in return for financial aid, see See F. Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy' (2011) LEQS Paper No 36, 22.

31 All Member States except Estonia, Finland, Luxembourg and Sweden. See for an overview of the procedures, see http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/index_en.htm (last visited 4 June 2013).

32 Report from the Commission on the Alert Mechanism 2013, COM (2012) 751 final.

33 See 'Rompuys Neues Europa' *Welt am Sonntag* 24 June 2012) at http://www.welt.de/print/wams/politik/article107256056/Rompuys-neues-Europa.html (last visited 4 June 2013).

34 Scharpf (2011), n 30 above, 24. See Master Financial Assistance Facility Agreement between the European Financial Stability Facility and Spain at http://www.efsf.europa.eu/attachments/efsf_spain_ffa.pdf (last visited 4 June 2013).

35 Ireland and Greece had to agree to tough commitments to fiscal retrenchment and supply-side policy reforms. Scharpf (2011), *ibid*, 22.

36 See 365th Report of the Committee on Freedom of Association (GB.316/INS/9/1) para 784–1003, referring in particular to Article 2(7) of Greek Law 3833/2010 on the Protection of National Economy – Emergency measures to tackle the fiscal crisis.

the social values that make those economic objectives acceptable to the 'man on the street'.[37]

Indeed, the Union's attempt to 'save' the eurozone risks undermining the substantive balance that sustains the legitimacy of the integration project. The circumvention of the limits to the competences of the Union is problematic for both structural and substantive reasons. In structural terms, it allows distributive norms to be decided in a forum that is incapable of offering a space of open contestation and communication, which is integral to its overall legitimacy.[38] The Union is simply institutionally unable to 'do' redistributive policies or fiscal transfers. It lacks the robust political space that can come up with a criterion for distributive justice and can legitimise the redistributive choices made by articulating and incorporating the citizens' views and protecting competing values. Crudely put, it cannot offer a political space for discussion between German taxpayers and Greek recipients of public funds.

The measures adopted in the aftermath of the euro-crisis evidence this absence of a political sphere. While there is, as one would expect, disagreement about practically every aspect of the strategy adopted by the Union, one policy response in particular – the austerity drive – has been promoted to an almost constitutional status. The ESM, Fiscal Compact, and eight-pack, the demand that Member States incorporate the 'golden rule' within their national constitutions,[39] and establish automatic penalties for Member States that fail to balance their budgets or stay within the deficit range strongly prioritise, and legally entrench, the priority of austerity over alternative policy options.[40] Despite the economic reasoning behind austerity policies, the legal entrenchment of such policies is neither the result of inter-personal political exchanges between different visions of 'the good', or a process of open political contestation that could legitimise it, nor an attempt to set up mechanisms for future normative reassessment. This is, rather, the constitutionalisation of raw political power and temporary policy preferences. To put it more bluntly, the austerity drive not only overlooks the procedural demand that the citizen's voice be incorporated in devising criteria of distributive justice, but also overlooks the fact that priority accorded to one policy choice must be legitimised by the articulation of, and mediation between, alternatives. Austerity measures structurally reject any alternative policy choice that prioritises public spending over austerity.[41] The ECJ recently not only accepted the legality of the imposition of austerity through the ESM and Fiscal Compact, which formally fall outside the Union structure, but went so far as constitutionalising austerity by reading an obligation of 'sound budgetary policy' into Article 125 TFEU, which entails that financial assistance

37 M. Ferrera, *The Boundaries of Welfare* (Oxford: OUP, 2005) 94.

38 See eg, Follesdal and Hix, n 8 above.

39 See Art 3(1) of the Treaty on Stability, Coordination and Governance of the Economic and Monetary Union.

40 See, for more, 'Spatial Balance' below.

41 This does not only go to the basic choice between spending and austerity, but impacts on policy choices in all areas, including healthcare, education, pensions, social security and social assistance. But see, for the opposite view, *ESM* ruling of BverfG, 2 BvR 1390/12 of 12 September 2012.

between Member States that is not strictly conditioned on the cutting of the budget deficit of the debtor state will fall foul of the Treaty.[42]

In addition to the absence of a forum for the articulation of the citizens' voice, and of any mediation between diverse policy alternatives on the European level, the austerity drive, in particular through the obligations provided for under the European Semester, also sidelines national parliaments from the budgetary control that constitutes their most traditional and symbolic prerogative. It goes without saying that this structural bias for austerity overlooks the Member States' sovereignty in redistributive policies, limits the incorporation of the plurality of different conceptions of the good, and as such threatens the most elementary commitment to self-determination, which, as the German constitutional court has put it, at a bare minimum requires citizens to be free to make decisions as to the fiscal burden imposed on them,[43] as well as the social conditions under which they are to live.[44]

This structural bias also has important substantive consequences. In side-lining the national parliaments, the Union's response to the crisis has excluded a wide range of (often weak and diffuse) societal interests that have no presence in the transnational political arena. The Fiscal Compact and the ESM, for example, were all discussed and set up decision-making procedures outside traditional political frameworks that can legitimise the distributive criteria and fiscal transfers that they imply.[45] Conditionality agreements attached to the bailouts of specific Member States, impact the pensions, welfare services, and labour conditions of citizens who have no access to the decision-making process.[46] When redistributive policies are discussed in such 'thin' political systems as the EU, weaker interests are often overlooked, with a natural bias tending to emerge towards more mobile, richer and integrated interests (which is a shorthand for capital and markets).[47] This is not particularly surprising if we remember that representative politics were born out of a necessity to tame those very same interests. The absence of, for example, transnational media, integrated trade unions, civic society, strong centre-periphery relations, and a transnational public sphere weakens the hold of marginalised interests over the communal agenda by making their suffering less tangible and the call for their alleviation less articulate. This process has already been described in policy areas such as company law[48] or labour law[49] where the free movement provisions have a similar disenfranchising

42 Case C-370/12, Pringle [nyr], para, 135–138. See also Jonathan Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14 *German Law Journal* 169.

43 See *Lisbon* ruling n 15 above, in particular at [256], although the BverfG did not hold that the ESM and Fiscal Compact violated this commitment, see *ESM* ruling *ibid*.

44 See *Lisbon* ruling *ibid*, in particular at [259].

45 See also 'Institutional Balance', below.

46 See Scharpf (2011), n 30 above, 22.

47 A. Callinicos, 'Marxism and Global Governance' in: D. Held and A. McGrew, *Governing Globalisation: Power, Authority and Global Governance* (Malden, MA: Blackwell, 2002).

48 S. Deakin, 'Reflexive Harmonisation and European Company Law' (2009) 15 *European Law Journal* 224.

49 S. Deakin, 'Regulatory Competition after *Laval*' (2008) 10 *Cambridge Yearbook of European Legal Studies* 581.

effect. The same process is omnipresent in contemporary European politics. Simply put, what political clout can Greek pensioners possibly have if their fate is decided in a private European Council meeting, by the secret Commission and troika guidelines, or by negotiations between Merkozy and the International Institute of Finance, that represents major banks?[50] In short, substantive critiques of the Union's response to the euro-crisis argue that by articulating distributive criteria in an underdeveloped political space, a wide range of interests is automatically excluded from consideration, prioritising the political clout of economic power over that of the 'man on the street'.

The Union's view that Member States' public finances are something to be regulated, or a risk to be managed, is a dangerous one.[51] As this section has indicated, the substantive balance upon which the Union's stability is precariously dependent requires distributive decisions to be made in a political space that can articulate alternatives, mediate between different views and thereby tie all subjects to the outcome. This leaves the Union between a rock and a hard place. While allowing national control over welfare and labour policies is increasingly seen as economically unwise, the Europeanisation of such policy areas is also normatively unattractive, threatening the constitutional balance upon which EU integration has rested, and which is indispensible for its long-term authority and stability.

INSTITUTIONAL BALANCE

Of all the aspects of the balancing concept, the one that finds the most obvious anchor in the court's case law is that of institutional balance. Most commonly, the principle is elaborated as requiring simply that 'each of the institutions must exercise its powers with due regard for the powers of the other institutions'.[52] The institutions must thus remain within the basic division of powers elaborated by the EU treaties. This definition of course asks as many questions as it answers. Neither the treaties' division of powers between the EU institutions, nor the normative concerns that underlie this division are clear.[53]

One account that provides greater clarity is the contrast drawn by Majone with a more widely used counter-part, the separation of powers.[54] While the separation of powers doctrine is commonly understood as facilitating a series of checks and balances through the strict division of governmental functions, Majone associates the Union's version of this concept with the division of powers between particular 'estates', or sets of interests. Just as in early-modern

50 See for example http://euobserver.com/1025/116770 (last visited 4 June 2013). See also G. Majone, 'Rethinking European Integration after the Debt Crisis' UCL European Institute Working Paper 3/2012, 19–20.

51 D. Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 667, 668–9.

52 See eg Case C-133/06 *Parliament* v *Council* [2008] ECR I-3189.

53 See P. Craig, 'Institutions, Powers and Institutional Balance' in P. Craig and G. de Burca, *The Evolution of EU Law* (Oxford: OUP, 2011).

54 G. Majone, *Dilemmas of European Integration* (Oxford: OUP, 2005) ch 3, 'The Community Method'.

UK government, where the Parliamentary model represented a distinct series of noble, mercantile and royal interests, each of which carried veto points in the legislative process, the EU model rests upon the need for compromise and mediation between three distinct sets of interests: individual EU citizens (as commonly represented by the European Parliament), sovereign states (as represented in the Council) and the supra-national interest (as embodied by a politically independent European Commission).[55] The notion of estates finds its expression in the division of labour between all three in the Community method; it is also reflected, however, in 'special' legislative procedures, which often provide enhanced power to one of the EU institutions in order to reflect a heightened concern for a loss of pluralism or sovereignty in a particular field.

The institutional balance of the Union carries particular functions. By incorporating a wide range of diverse interests within the legislative process, by making these interests mutually interdependent in the generation of norms,[56] and by creating multiple forums through which the citizen's interests can be articulated (directly through the European Parliament and national parliaments, indirectly through national representatives in the Council, and through the output legitimacy that is guaranteed by the Commission as a neutral arbiter), the Union ensures that citizens have authorship over the norms that bind them. In this view, the balance between the different Union institutions and their different prerogatives within the decision-making process serves to provide checks and balances and act as a last-instance guarantee ensuring that EU law-making is the product of an equilibrium or settled consensus between particular actors. This equilibrium is ultimately designed both to ensure the legitimacy of the law-making process, and to stabilise the Union's role as a supra-national setting for the creation of binding norms.

Even if it may be true that the Union's institutional balance may need to be altered to protect values of self-determination given the EU's foray into redistributive politics (for example by strengthening the voice of the citizens at the European level),[57] we argue that the response to the euro-crisis is counterproductive, undermining the Union's institutional balance. Even if the Community method was not perfectly geared to redistribute resources and legitimise fiscal transfers, it offered more safeguards for the incorporation of diverse interests, and for the commitment to self-determination than the newly emerging institutional balance, which, as will be argued below, prioritises national executives, circumvents mechanisms of political accountability, and disconnects citizens from the decision-making process on both the national and European levels.

55 *ibid*, 48.

56 This incorporation of diverse interests within the institutional structure of the Union becomes even more relevant in light of the precarious position of EU law, which often relies upon other national and EU actors for its effective implementation. 'Buy in' by the Commission and national administrators allows the legislative process to benefit from the administrative and other expertise these actors bring as well as ensuring that all actors have a stake in EU norms being fully complied with.

57 For some proposals in this direction, see M. P. Maduro, M. Kumm and B. de Witte, 'The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis' Policy Report of the EUI Global Governance Programme at http://globalgovernanceprogramme.eui.eu/wp-content/uploads/2012/06/Policy-Report10May20121.pdf (last visited 4 June 2013).

The first way in which the institutional balance is altered concerns the shift in power towards national executives, circumventing the traditional tri-partite institutional process of the Union. This crisis has both reflected, and greatly accelerated, a longer-term trend, which gives the European Council a much stronger role in initiating and securing compliance with Union policies, at the expense of the interests protected by the other institutions.[58]

The most striking example of the rise of the European Council is its usurpation of the Commission's treaty-based powers. The treaties provide for a relatively clear division of powers. While it is the function of the European Council to guide the Union's policies and provide strategic guidelines, it is the Commission which, with limited exceptions, is both the legislative initiator[59] and the body responsible for securing compliance with EU law. This division of power exists with good reason – a stable and de-politicised body is more likely to be seen as a neutral mediation between Member States and diverse interests groups, and as one able to safeguard and reflect the Union's long-term interests. As the euro-crisis has developed, however, it has become quite clear that this division of functions has been eroded. Rather than set out strategic guidelines within which the Commission must act, the European Council has increasingly assumed the role of legislative initiator, both establishing detailed proposals, and securing and monitoring their implementation.

The erosion of the Commission's traditional powers can be found in the changing content of the European Council's main strategic document – the Conclusions produced at the end of European Council meetings. Initially, even extremely important Council Conclusions, such as the famous document produced by the Lisbon European Council in 2000, restricted the Council's prescriptions to general and strategic issues, leaving the initiative over specific legislative proposals to the Commission.[60] Since the crisis though, the European Council Conclusions have changed strikingly. It is clear that the European Council is increasingly willing both to act on its own initiative (in establishing political structures outside the formal EU framework without consulting other actors) and to instruct the Commission on the legislative proposals it should adopt in significant detail. In March 2010, for example, the European Council established a specific task force on economic governance headed by President Van Rompuy and comprised of the finance ministers of the Member States.[61]

58 On more general trends of executivism in EU politics, see D. Curtin, *Executive Power in the European Union. Law, Practices and the Living Constitution* (Oxford: OUP, 2009).

59 See TEU, Art 15(1): 'the European Council shall provide the Union with the necessary impetus for its development and shall define the general political direction and priorities thereof. It shall not exercise legislative functions.'

60 The Lisbon Council, for example, set out the main overall objectives for the Union in the following decade (eg the famous target of achieving a 70% employment rate); elaborated particular strategic challenges (eg managing the shift to a knowledge-based economy) and set out the boundaries of new decision-making procedures to achieve these goals (eg the general framework for the open method of coordination). However, specific legislative proposals were not mentioned, nor did the Council conclusions attempt to establish specific obligations for particular Member States.

61 See 'Strengthening Economic Governance in the EU: Report of the Task-force to the European Council' 21 October 2010 at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf (last visited 4 June 2013).

This task force was to report on measures for greater budgetary discipline within the euro area, and to establish recommendations 'endorsed' by the European Council in October 2010. As a consequence, the legislative 'six pack' introduced by the Commission to strengthen the eurozone in September 2011 reflected almost identically the suggestions highlighted in this report.

By establishing a specific body to draft legislative proposals, with limited input from other institutions, the European Council does not seem to be acting as a provider of strategic guidance. Instead, the European Council increasingly sees itself as an executive actor, able both to establish bodies that directly report to the Council itself, and to develop detailed legislative proposals. Faced with this precedent, the Commission has struggled throughout the crisis to re-establish its initiative function (the failed proposal by President Barroso to establish a consultation on euro-bonds being a foremost example). Unsurprisingly, given the control that national governments still hold over fiscal policy and government lending, only proposals concocted by the European Council itself seem to stand any chance of navigating the legislative process (and being seen as credible by the financial markets).

The Commission's loss of power, however, can not only be seen in its role as initiator, but also in its role further down the policy-making chain. The Commission's powers under the Community method included also its role as a 'guardian of the treaties' ie as the actor entrusted with monitoring and evaluating compliance with EU measures. This too is a role that has been increasingly subsumed by the European Council.

Consider in this respect, the rise of numerous coordination processes designed to ensure that Member States meet certain goals for fiscal and macro-economic policy. The Union has long had a role in monitoring national fiscal policies through the Broad Economic Policy Guidelines (BEPG). These guidelines are adopted on a 3-year cycle by the Council but managed through a mixture of monitoring by ECOFIN itself and the preparation of recommendations and peer review of national reforms through the Commission and informal intergovernmental committees.[62] Given perceptions that the BEPG did little to effectively monitor risky national fiscal choices, the BEPGs were eventually superseded during the crisis by a number of supplementary processes, particularly the 'Euro Plus Pact', agreed to by the European Council in March 2011 and the 'European Semester', which is designed to combine the monitoring of fiscal policies under the BEPG with monitoring of national budgets under the reformed stability and growth pact.

As repeated conclusions of the European Council have made clear, these new processes are meant to be monitored and evaluated both by the Commission and by the heads of governments of participating states themselves, either in the larger European Council or through meetings of the euro-group. The European Council conclusions from March 2012 indicate that, unusually, the European Council had itself discussed preliminary findings relating to the implementation

62 On the mechanics of the BEPG, see S. Deroose and D. Hodson, 'The Broad Economic Policy Guidelines Before and After the Re-launch of the Lisbon Strategy' (2008) 46 *Journal of Common Market Studies* 4.

of the Euro Plus Pact in its March meeting.[63] These findings reflect how the European Council has begun to devote annual meetings to the review of matters of economic governance.[64] The Conclusions also indicated that peer review of national performance under the Pact and the European Semester should be a more habitual part of the European Council's future work, and even that the Council's President should be asked 'to promote regular monitoring by the European Council of progress achieved on key Single Market proposals' through, for example, the establishment of comparative scoreboards of national performance.[65] This illustrates a broader point that roles of monitoring and enforcement previously held by other institutions (particularly the Commission) have become part of the core functions of the European Council itself. This expansion of powers not only applies to the management of the euro area but also to 'core' areas of EU competence such as the governance of the single market.[66] The rise of the European Council indicates the tendency of the crisis to shift EU policy-making towards a model of 'executive politics', undermining the pluralism upon which the institutional balance of the Union is based, and even explicitly rejecting it by establishing (see later sections) structures outside the treaties.

This big shift towards executive politics is exacerbated by the simultaneous decrease in power of both the European Parliament (EP) and national parliaments, which traditionally served as checks on executive power, ensuring the wishes of the citizenry. While it could have partly legitimised the Union's shift to greater re-distributive decision-making, the EP has played no role of significance in either the ESM or the Fiscal Compact. Moreover, the constraints imposed by those measures, and in particular the requirement that national budgets be assessed by the Commission, make it increasingly difficult, if not impossible, for national parliaments to control their executives.[67] This has led to

63 European Council, Presidency Conclusions, 1–2 March 2012, 5 at http://register.consilium.europa.eu/pdf/en/12/st00/st00004-re02.en12.pdf (last visited 4 June 2013).

64 U. Puetter, 'Europe's Deliberative Intergovernmentalism: The new role of the Council and European Council in EU Economic Governance' (2012) 19 *Journal of European Public Policy* 161, 170–171.

65 European Council, Presidency Conclusions, n 63 above.

66 The enhanced role of the Commission in respect of other procedures, eg the new 'excessive imbalances procedure' (EIP), may be seen in part as compensating for this transfer of powers. Certainly, the powers of the Commission have increased under the revised Stability and Growth Pact insofar as the imposition of sanctions under both procedures is to be subjected to a 'reverse qualified majority vote'. The Council's continued role is nevertheless maintained under both procedures through the many procedural hurdles that have to be overcome before a sanctioning decision may be considered. Under the EIP for example, the imposition of sanctions must be preceded by the following: an assessment by the Commission of macro-economic risks in particular Member States, the adoption by the Council of preventative recommendations, a statement by the Council that Member States have a macro-economic imbalance, the issuance of formal recommendations to be addressed through a corrective plan and the rejection/acceptance of that plan. Only in the final stages of the procedure does the reverse QMV procedure apply. In this sense, the new 'institutional balance' provides the Commission with far less decisive decision-making power than commonly made out. See Regulation 1176/2011, Art 10(4) and 12 on the prevention and correction of macroeconomic imbalances.

67 Even if the German Constitutional Court still held that the national parliament (at least formally) still controls the national budget. See *ESM* ruling, n 41 above.

a drastic decrease in the capacity of citizens and interest groups to be heard in the decision-making process.

Almost all of the reforms proposed in the wake of the crisis exclude the EP to varying degrees, either by establishing procedures where its role is merely consultative, or by channelling important decisions outside the official structure of the Union altogether, relegating the role of the EP to that of a mere observer. It should be noted that while the EP implemented the Commission's legislative 'six-pack' in near record time, it did little to enhance its influence over processes of budgetary surveillance. The reformed excessive deficit and new excessive imbalances procedure, for example, contain numerous duties on the part of the Commission to inform the EP of proposed recommendations and to send it reports on the fiscal positions of the Member States.[68] It does not, however, provide the EP with any concrete powers, beyond the promise of an 'economic dialogue' in which the Presidents of the Commission or European Council may be invited before the Parliament's Economic Affairs Committee to explain their actions.[69] While this measure provides a degree of accountability, the reach of procedures such as the EIP is significant: its recommendations are likely to range from issues such as the age of retirement, health coverage, and educational provisions, to issues such as social security and taxation and a whole host of other politically salient areas. Although one might expect the institution responsible for representing Europe's citizenry to have a greater role in any procedure involving the assessment of trade-offs between the goals of Monetary Union and other EU objectives, the European Parliament has been relegated into a forum of limited accountability.

This role was demoted further by the ESM and the Fiscal Compact, which are enacted outside the institutional structure of the Union altogether. The ESM may become the most lasting and important new structure to emerge from the crisis, making decisions on the availability of emergency funding for struggling states, and also attaching stringent repayment conditions that deeply constrain national political choices. As a funding mechanism, however, the ESM is subject to almost non-existent parliamentary oversight both at the national and European levels.[70] The Fiscal Compact is little better in this regard. While the Fiscal Compact's provisions largely duplicate those found in existing secondary law, it bucks the trend of other EU level treaty reforms in providing channels of greater parliamentary involvement. It again provides the EP with a largely informative role, allowing its president to attend meetings of the euro summits,[71] and mandating a 'conference of Parliamentary representatives'[72] to discuss budgetary issues in the Union. Even though the treaty further centralises European fiscal

68 See eg Regulation 1176/2011/EU, Art 3(4) and 5(3) on the prevention and correction of macro-economic imbalances.

69 *ibid*, Art 14.

70 The treaty establishing the stability mechanism makes no mention whatsoever of the European Parliament and only mentions national Parliaments once (via a commitment under Art 30 of the treaty to provide national Parliament with the annual report of its board of auditors).

71 The Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union, Art 12(5).

72 *ibid*, Art 13.

policy, it still does little or nothing to anchor new regulatory functions for the Union in democratic institutions. Parliamentary actors are instead relegated to 'discussing' and 'consulting' on decisions that have already been taken.

As Chalmers has argued, the loss of parliamentary power can also be seen on the national level, further disempowering the citizens' voice in the new, redistributive Europe. The time constraints imposed by the European Semester make it all but impossible for national parliaments to control their own executives.[73] Indeed, the institutional actor that is deliberately insulated from any direct democratic link – the Commission – has been offered the main role in deciding on national budgets, expenditure, and specific cuts, at the expense of the most directly legitimate one. The dwindling power of national parliaments is also visible on the ground. Over the last years, it has become clear that the only mechanism still available for national parliaments to voice their electorates' views on the Union's economic agenda, is to withdraw its support for the government altogether, as the examples of Greece, Italy, the Netherlands, Portugal, Slovakia, and Spain suggest.[74] Parliamentary exclusion is, of course, even more poignant in the Member States that have asked for support in meeting their financial obligations. The conditionality criteria attached to financial aid, requiring specific fiscal, labour market, and welfare reforms, cannot be rejected by national parliaments without both causing the fall of government and leaving the country at the mercy of the markets.[75] It then becomes increasingly difficult to see how parliaments can fulfil what has been one of their main tasks since their establishment: to provide a forum for the disciplining of market forces.[76]

The loss of the citizens' voice is not only reflected in the diminishing capacity of the EP and national parliaments, but also in the increasing tendency in EU policy towards informalisation.[77] Such informalisation may not only lead to executive dominance, but inhibit individual and political self-determination by excluding the degree of transparency and consultation necessary for the genuine involvement of citizens in EU decision-making to take place.[78] Uwe Puetter's account of institutional change during the euro crisis provides a stark example of this. Puetter argues that given the increase in informal coordination, even relatively formal bodies, such as ECOFIN, increasingly adopt informal working methods that can lead to problems of intransparency.[79] In interviews with ECOFIN officials, for example, Puetter points to the increasing importance of

73 D. Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal*, 667, 686–687.

74 Streeck drily notes: 'Monetary union, initially conceived as a technocratic exercise, is now rapidly transforming the EU into a federal entity, in which the sovereignty and thereby democracy of the nation-states, above all in the Mediterranean, exists only on paper.' W. Streeck, 'Markets and Peoples' (2012) 73 *New Left Review* 63, 67.

75 See Majone, n 50 above, 19–20.

76 W. Streeck, 'The Crisis of Democratic Capitalism' (2011) 71 *New Left Review* 5, 8.

77 On general patterns, see T. Christiansen (ed), *Informal Governance in the European Union* (Cheltenham: Edward Elgar, 2004).

78 On the accountability deficits of informal governance, see P. Magnette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?' (2003) 51 *Political Studies* 1; M. Bovens, 'New Forms of Accountability and EU Governance' (2007) 5 *Comparative European Politics* 104.

79 Puetter, n 64 above, 178.

breakfast meetings where bi-lateral discussions occur either between eurozone finance ministers exclusively or through the finance ministers of the most important governments. Commonly during the crisis, such meetings not only produced broad policy discussions, but also produced precise agreements on language that would then be tabled in formal ECOFIN meetings.[80] The respective finance ministers would then leave the meeting of ECOFIN in the hands of their deputies, confident that a majority in support of the informal position had already been secured.

There is little doubt that the European Council has also often acted in this manner since the crisis. As Puetter also points out, the outcomes of European Council meetings were often decided beforehand, their agendas and policy proposals formed as a result of bilateral meetings between the two most important players – the French and German heads of government. While the crisis itself demanded 'instant' responses to crisis situations – promoting the trend towards informalisation – such methods will do little to re-assure those who see the Union as pursuing a path of increasing intransparency and executive control. What ability do individual citizens have to influence an EU agenda that is determined not only by a select elite, but that is effectively hidden from view through informal deliberation? The exclusion of the third 'parliamentary estate' is in this sense promoted not only through the exclusion of the EP as an institution but through the tendency towards an opaque method of acting, amenable to quick results but not to public deliberation or scrutiny.

Both the formal and informal changes to the institutional balance risk upsetting the stability of the Union. The tendency towards executive dominance suggests, once again, that the Union perceives Member States' socio-economic policies and fiscal budgets as a domain to be managed, and not as part and parcel of democratic decision-making that structurally affects how society is run.[81] As made clear by the German Constitutional Court in its Lisbon decision, however, budgetary policy is a core state function: it goes to the heart of the political and societal self-determination of the nation state, leaving no area of policy un-affected.[82]

While the safeguards imposed on the institutional structure of the Union were meant to ensure wide and democratic access to the decision-making process, contain executive dominance, and insulate certain policy areas from interference of supranational institutions, the explicit circumvention of such safeguards by way of the ESM and Fiscal Compact has significantly decreased the authorship and ownership of citizens over the way in which their societies are run. Simultaneously, it has limited the capacity of national parliaments and the EP to control the executive, transforming the sole democratically unaccountable institution of the Union, the Commission, from an independent

80 *ibid*, 172.

81 Chalmers suggests that this trend risks turning EU institutions into agents of executive power, unbounded by the politics of deliberation and representation, unable (or unwilling) to incorporate diverse interests within its decision-making, and inaccessible for the citizens. See http://blogs.lse.ac.uk/europpblog/2012/03/07/european-court-of-justice-enforcer (last visited 4 June 2013).

82 See also *Lisbon* ruling n 15 above at [256].

initiator of policy proposals into the discharger of national budgets. Such a drastic re-alignment of the institutional balance within the Union, however, does not appear sustainable in the long run. The stability of the Union seems to require a fundamental rethinking of the structure, roles, and prerogatives of the different institutions; one that places values of pluralism and self-determination at the forefront.[83]

SPATIAL BALANCE

The final of our three constitutional balancing categories is spatial balance. The term spatial is primarily a reference to the balance between competing national interests, from larger and more populous Member States to smaller and weaker ones. If, as outlined before, the EU's commitment to self-determination rests not merely on majoritarian principles, but on a need to marry together self-determination by individual citizens with the political self-determination of sovereign states or peoples, the Union must also find mechanisms to ensure that each of these states or peoples has a distinctive voice in European decision-making.[84] To put it as simply as possible, it is precisely because Europe cannot dispose of a transnational political system that incorporates each citizens' voice equally, that we must protect the capacity of citizens to make their voices heard within the national political settlement. The protection of the sovereignty of Member States, both by way of the exclusion of certain competences on the European level, as well as by ensuring the equality between them, regardless of size, wealth, or population, reflects this commitment to self-determination. Where institutional balance therefore refers to a balance of power *between* particular EU institutions, spatial balance refers primarily to the balance of power *within* institutions. This idea of spatial balance serves to stabilise the Union by ensuring that weaker, less rich, and smaller Member States, but also normative outliers, such as the UK in certain socio-economic policies or the Netherlands in drugs policy, are not structurally under-counted or marginalised in favour of the majority view, which, in the absence of a strong transnational political space, cannot be legitimately decided. To use an exaggerated example, even if twenty-six out of twenty-seven Member States were of the opinion that soft drugs should be illegal in the Netherlands, the spatial balance of the Union suggests that

83 See, for example Van Rompuy's Report 'Towards a Genuine Economic and Monetary Union' at http://ec.europa.eu/economy_finance/focuson/crisis/documents/131201_en.pdf (last visited 4 June 2013) or M. P. Maduro, M. Kumm and B. de Witte, 'The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis' Policy Report of the EUI Global Governance Programme at http://globalgovernanceprogramme.eui.eu/wp-content/uploads/2012/06/Policy-Report10May20121.pdf (last visited 4 June 2013). See for a critique, C. Joerges and F. Rodl, 'Would the election of a member of the European Parliament as the President of the Commission make democratic sense' at: http://www.verfassungsblog.de/election-member-european-parliament-president-commission-democratic-sense/#.Ua3n3WfwGg (last visited 4 June 2013).

84 It is clear, for example, that the sovereign equality of states was a core aspect of the Monnet-Schuman plan for initial EU integration. As Jean Monnet put it in his memoirs, 'The right to say "no" was the large countries guarantee in their dealings with each other, and the smaller countries safeguard against the large'. J. Monnet, *Mémoires* (London: Collins, 1978) 353–354.

we require instruments to insulate the view of the Dutch electorate that soft-drugs should not be illegal.

Many modern democracies over-represent particular constituencies precisely to safeguard basic constitutional values and the values that are important to certain political constituencies.[85] In states containing distinctive national minorities for example (such as the Danish minority in the German Land of Schleswig Holstein) or where the surrender of sovereignty to 'higher' levels of governance is deemed to pose risks of marginalisation (such as for the mountainous states of the American West), it has been seen as consistent with constitutional principles to over-represent smaller territorial entities or to create separate electoral rules.

Within the EU, the instruments for the protection of spatial balance are those of the overrepresentation of smaller Member States in voting arrangements, an independent mediator for the initiation of policy proposals, the system of competences that protects against majoritarianism in sensitive areas, and the rigid treaty revision system, that requires consent of all Member States to 'change the rules of the game'. Each of these serves as a safeguard against excessive majoritarianism that would marginalise small Member States as normative outliers.

Let us first look at the voting arrangements in the EU. In each of the dominant EU institutions, there is no direct correlation between overall population and national representation. This disparity varies in range from a relatively (but not absolutely) direct correlation between population and representation in the European Parliament to a total equality of formal representation (regardless of size) in institutions like the Commission and European Council. In all of these institutions, smaller Member States are to a greater or lesser extent over-represented. This over-representation is reflected not only in the weight of votes provided to each Member State in institutions, but also in voting procedures. The requirement, for example, of a Qualified Majority Vote in voting under the Ordinary Legislative Procedure in the Council both seeks to compensate the Member States for the loss of sovereignty, and also to ensure that smaller Member States can, in combination, succeed in blocking unilateral legislative decisions by their larger neighbours.[86]

A second constitutional guarantee of spatial balance lies in the power vested in supra-national institutions. As discussed in the previous section, the involvement of the Commission, in particular through its prerogative of legislative initiative (as well as its capacity to retract proposals), and the EP ensure that the larger Member States in the Council cannot dominate the decision-making process. Whereas the superior size and greater technical and financial resources of larger Member States may allow them to dominate inter-governmental bodies or at the very least set their agenda, the Commission (a body both autonomous from the national context and made up of 27 Commissioners from 27 countries)

85 On this point, see D. Halberstam and C. Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10 *German Law Journal* 1241, 1247–1249.

86 To give a simple example, the eight largest Member States combined still only carry 197 votes in the Council, significantly short of a qualified majority.

may be seen by the smaller Member States as a more neutral arbiter and agenda setter.[87] Empirical studies have tentatively supported this thesis – smaller Member States, particularly when allied with one or more larger actor – have often benefited from the desire of the Commission to build broader decision-making alliances.[88] Similarly, the lack of competences for the Union in certain areas,[89] the requirement of unanimity in others, and the recently introduced 'emergency break' procedure,[90] all reflect the need to protect Member States that are normative outliers from majoritarian tendencies in politically salient areas, such as drug policy, abortion, social security, trade union rights, or education policy.

A third and final constitutional guarantee that serves to protect the spatial balance in the Union concerns changes to the Union's overall architecture. Under Article 48 TEU, changes to the EU treaties, including those made under 'simplified' revision procedures, require the unanimous agreement of all Member States, regardless of their size. If major constitutional alterations to the Union are to occur, including changes to its constitutional balance, such changes must be the result of a wide-ranging negotiation that takes the constitutional desires and objections of each Member State into account. The threat of a veto in the process of EU treaty formation thus gives smaller Member States a power that they would not otherwise have. In other words, the EU treaty revision procedures ensure that smaller states are not placed in a position where their objections can simply be ignored on the basis that larger states will 'simply go on ahead without them'.

In the wake of the euro crisis, reforms have once again re-configured this concept of balance; increasing the capacity of bigger and richer Member States to marginalise their smaller or less rich neighbours, and normative outliers, and, of course, the citizens of those Member States.

Let us deal first with voting arrangements. Although no changes have occurred with regard to the formal number of votes allocated to particular Member States, either in the Council or the Parliament thus far, the creation of parallel institutions and decision-making structures operating under different principles is concerning, especially since they do not give smaller states similar constitutional guarantees. The permanent European Stability Mechanism is an example of such an institution. Leaving to one side many of the concerns raised by legal scholars as to the exact legal status of the mechanism,[91] voting under the ESM is based on capital contributions. Levels of influence upon the ESM's principle decisions are therefore determined by the financial strength of the Member States, only indirectly taking into account their populations. As a result, there are significant disparities in influence when compared to normal decision-

87 Consider eg the demand of Ireland to retain a national Commissioner in negotiations surrounding the ratification of the Lisbon Treaty.

88 P. Magnette and P. Nicolaides, 'Is the Commission the Small Member States' Best Friend' (2005) SIEPS Report 9.

89 See above, 'Constitutional Balance In The European Union'.

90 See, in social security, TFEU, Art 48.

91 See eg M. Ruffert, 'The European debt crisis and European Union law' (2011) 48 *Common Market Law Review* 1777.

making procedures. Germany, for example, has 27 per cent of all votes in the governing board of the ESM compared to 8.5 per cent of all votes in the Council. Cyprus by contrast carries 0.2 per cent of ESM votes compared to 1.2 per cent of votes in the Council.[92] Most decisions of the ESM are to be made by an 80 per cent qualified majority (with only the most important decisions carried by unanimity).[93]

Considering the political implications of the ESM's decisions, such as its ability to impact the very survival of the eurozone, as well as its power to impose stringent conditions over Member States in receipt of emergency funds, this seems a voting arrangement where the EU's normal constitutional guarantees to smaller or less rich Member States have been concerningly depleted. Governed by a largely inter-governmental structure, and able to make decisions even without the support of 12 of its 17 members (who together carry significantly less than 20 per cent of the board's votes), the risks of dominance by larger and richer Member States seems high.[94]

The position of larger Member States has also been strengthened in relation to other aspects of Monetary Union. The shift to 'reversed qualified majority voting' – while increasing the power of the Commission – also makes it far more difficult for smaller states to join together to resist measures they consider prejudicial to their interests.[95] Such a threshold could not be achieved without bringing most of the larger Member States on board. While many small Member States may see this change as necessary to improve budgetary discipline, it also seems, especially if generalised to other areas in the future, it may lessen the incentives for institutions like the Commission to take into consideration their concerns. If anything, it appears that the Commission is made more sensitive to the needs of the larger and richer Member States at the expense of the smaller ones, which are both economically and politically less powerful.[96]

As discussed in the previous section, the new role for the Commission and the shift in legislative initiative towards the European Council, circumvent the limits imposed in the treaty that serve to guard against excessive majoritarianism. This procedural shift allows the larger Member States in the European Council to flesh out detailed legislative proposals without regard to the concerns of their smaller neighbours, poorer peripheral states, or the concerns of normative outliers and their citizens. This is all the more concerning in view of the European Council's tendency to demand proposals in policy areas specifically

92 See Annex I of the Treaty Establishing the European Stability Mechanism.

93 Treaty Establishing the European Stability Mechanism, Art 4. Examples of measures taken by unanimity include adopting the maximum capital of the ESM, the provision of support and conditionality agreements, see the Treaty Establishing the European Stability Mechanism, Art 5(6).

94 Taken together, Belgium, Cyprus, Malta, Finland, Ireland, Slovakia, Slovenia, Luxembourg, Estonia, Austria, Portugal and Greece carry a total capital contribution and therefore vote share of approximately 17%.

95 See eg Regulation 1173/2011, Art 5 on the effective enforcement of budgetary surveillance in the euro area.

96 The Greek and Irish complaints about the alleged difference between their bailout conditions and the much less stringent conditions considered for Spain are a good example of fears regarding this trend.

excluded from EU interference by the treaty. Such limits to the competence of the Union originally served to protect the wishes of the citizens in each Member State, but in particular in those where normative views differ from those elsewhere. The circumvention of these limitations, in combination with the lack of over-representation in the decision-making process, significantly threatens the capacity of smaller Member States, normative outliers, and Member States that receive conditional financial aid to decide autonomously on politically salient matters, ranging from pension ages, healthcare structures, or trade union rights.[97] The imposition of majoritarian views in such areas, without the consent of the citizens to whom it applies, strongly implies an increasing hegemony.

The final safeguard to protect the spatial balance in the Union, the treaty revision structure, is also in danger. While Article 48 TEU itself remains resolutely intact, its practical usefulness as a guarantee for the sovereignty of smaller states (and indeed for the more 'reluctant' larger states too) has been significantly curtailed as a consequence of the UK's decision to veto a new EU treaty, leading to the adoption of the Fiscal Compact. The Fiscal Compact is an ordinary international treaty, lacking the features and 'direct effect' of normal EU treaties.[98] Most significantly, and unlike normal EU treaties, its ratification does not depend upon the uniform consent of all Member States. The treaty instead enters into force once 12 states have ratified it.[99]

Given the tortuous process of ratification for prior EU treaties, this development should not be underestimated. In the case of previous ratification processes, smaller Member States often saw treaty re-negotiation as a time where their voices could be heard. Unlike in ordinary legislative negotiations, where smaller states can often simply be 'legislated around', the treaty revision veto allows smaller Member States either to halt treaty reform altogether, or (much more likely) to extract concessions. A well-known example is Ireland, which negotiated guarantees in relation to sensitive national concerns such as opposition to abortion rights and the appointment of Commissioners from smaller Member States, as an inducement to pass the Lisbon Treaty after a second referendum in October 2009.[100]

The adoption of significant reforms to the EU through a separate international treaty both opens the door to the continued use of this practice in the future, and also prevents smaller Member States from having a similarly decisive say this time around. As was made clear to Irish voters in no uncertain terms when facing their 2012 referendum on the fiscal compact, an Irish 'No' would have the effect not of leading to re-negotiation but simply of leaving Ireland sidelined.[101] Given the precarious economic position of many Member States of the Union (including

97 See Scharpf (2011), n 30 above, 22.

98 On legal issues arising from the Fiscal Compact's adoption, see 'Editorial comments: Some thoughts concerning the Draft Treaty on a Reinforced Economic Union' (2012) 49 *Common Market Law Review* 1.

99 Treaty on Stability, Coordination and Governance in Economic and Monetary Union, Art 14(2).

100 G. de Burca, 'The Lisbon Treaty No Vote: An Irish Problem or a European Problem?' (2009) 3 UCD Law Research Paper.

101 See the warnings of the Irish Taoiseach, 'Kenny stresses vote importance' *Irish Times* 30 April 2012.

Ireland), for whom accession to the Fiscal Compact is a condition for access to bailout funding, this is hardly a viable option.

As a consequence, the new model of treaty reform places smaller Member States in a far weaker position. Rather than participate in treaty changes from a position of constitutional strength, such states face a stark choice: accept the majority position or face isolation on the outside of a policy-making framework that will develop with or without their support. As was made clear in the days both leading up to and following the decisive EU Summit on the Compact on 9 December 2011, all but the most sceptical of Member States considered themselves under significant pressure to accede to a treaty drafted almost exclusively by the German and French governments.[102] The principle threat to spatial balance here may be the prospect that a previous guarantee – that the Union will develop as one Union regardless of the decision-making costs this may involve – can no longer be taken as given.

This is equally relevant for the Member States that did not sign the Fiscal Compact, namely the UK and the Czech Republic. The increased convergence of the euro-states and those looking to accede, by way of the euro-plus pact, the ESM and the Fiscal Compact, is very likely to lead to a spill-over in economic policy domains that remain within the scope of the 'ordinary' TFEU treaty, in which the spatial balance of the Union is protected much more strongly. Regardless of the Fiscal Compact's commitment to respect the obligations of Member States under the TEU and TFEU,[103] it appears likely, and perhaps even necessary, that those Member States within the eurozone vote en bloc in favour or against certain legislative proposals dealing with the internal market, leaving the UK and the Czech Republic marginalised. This is especially likely from November 2014 onwards, when the 17 eurozone Member States will have an in-built qualified majority in the Council.[104] Indeed, Article 7 of the Fiscal Compact forces signatories to support Commission recommendations for sanctions under the Excessive Deficit Procedure when they are tabled in Council. Such an obligation makes a mockery of the idea of a free vote for such decisions, guaranteeing their adoption, whilst also creating a treaty-sanctioned voting block among eurozone states that could further incentivise actors like the Commission to disregard input from non-eurozone members.

All in all, the three main methods of protecting the spatial balance of the Union, and the rights to self-determination of the citizens of the different Member States, all proved ineffective in the aftermath of the euro-crisis. The last several years have seen a trend towards the marginalisation of the interests of smaller Member States, normative outliers, and Member States in receipt of financial aid, to the advantage of the bigger and richer Member States, able to

102 See eg the reported words of Nicolas Sarkozy to the Danish Prime Minister deliberating whether to accede to the new treaty: 'You're an out, a small out, and you're new. We don't want to hear from you.' in 'To Opt in or Not to Opt in' *The Economist* 14 January 2012 at http://www.economist.com/node/21542766 (last visited 4 June 2013).

103 See the Treaty on Stability, Coordination and Governance in Economic and Monetary Union, Art 2.

104 TFEU, Art 238(3).

financially ensure the euro's survival. This not only limits the voices incorporated within the decision-making process, excluding dissenting and weakly articulated ones, but also structurally threatens the acceptance of the norms generated by the EU in peripheral Member States, and indeed the acceptance of the Union as such.

CONCLUSION

At first glance, arguing both for the presence and the protection of constitutional balance in the EU may seem rather conservative. The danger is that the principle of 'constitutional balance' merely reifies existing institutional and legal arrangements, thereby acting as a principle to be deployed against any changes to the existing status quo. As earlier noted, an EU that is to be 'fit for purpose' must also be able to adapt to the changing needs and desires of its citizens.

An attachment to 'constitutional balance' is precisely, however, an attachment to the political responsiveness of the EU to its citizens. There is a danger that the EU's response to its present crisis depletes, rather than strengthens, the EU's ability to be politically responsive. The rise of executive control via the European Council, the increasing ease of making treaty and legislative reforms without consulting smaller member states, and the creation of eternal fiscal rules uncontrollable by national parliaments, unable to be fully discussed and legitimated, is now in danger of desensitising the Union to concerns and interests that need to be accommodated for a stable EU project to continue.[105] Especially at a time when the Union is venturing into redistributive politics, it needs to carefully protect its input legitimacy. Unlike with regulatory policies, after all, the justness of fiscal transfers or pension cuts is not assessed by the success of its management, but by the extent to which they reflect the wishes of the electorate.[106]

Müller and Scharpf, among others, have argued that the Union's built-in apolitical constitutional nature have long shielded it from hegemonic majoritarianism.[107] The institutionalisation of this objective, however, through the depoliticisation of the integration process, can no longer serve in times of fiscal coordination and redistributive transfers between member states. Such policies are legitimate only to the extent that they reflect and engage the political preferences of the Union's citizens and their governments. This leaves the Union, as Habermas has also highlighted, with two options: a jump towards executive federalism or a turn towards transnational democracy.[108] This paper has highlighted that the former option, which appears to carry the preference of

105 See eg L. Azoulai, 'The European Court of Justice and the Duty to Respect Sensitive National Interests' in B. de Witte, E. Muir and M. Dawson (eds), *Judicial Acitivism at the European Court: Causes, Responses and Solutions* (Cheltenham: Edward Elgar, 2012).

106 See Habermas (2012), n 14 above, 347.

107 J.-W. Müller, 'Beyond Militant Democracy?' (2012) 73 *New Left Review* 41; Scharpf (2010), n 11 above.

108 Habermas (2012), n 14 above, 345.

most governments,[109] is deeply problematic from the perspective of the long-term stability and legitimacy of the Union. Working towards the latter, then, difficult as it may be, could prove the only viable long-term option to safeguard the values of individual and political self-determination in the EU.[110]

The idea of constitutional balance discussed in this paper is based on an idea of law as a guarantor of such self-determination. Law can be used in this sense to hold institutional actors to long-term values that transcend day-to-day crises and emergencies. It can be used both to protect the *sovereignty* of states (and thereby their citizens) over core policy questions and to ensure the necessary degree of *pluralism* needed to defend the EU's institutional structure against domination by any one actor. Substantive, institutional, and spatial balancing norms therefore allow the Union to translate principles of self-determination into its everday policies. This, however, leaves a crucial question unanswered. How could the EU move towards a more unified and powerful fiscal or political Union without upsetting these norms? While this is a more complex question than this essay can meaningfully tackle, it may be useful to conclude by reflecting on how law can be used to achieve this task. The euro crisis has in many ways unearthed the ambiguity of 'constitutionalising' particular substantive values through law and the treaties. On the one hand, the crisis shows the negative effects of this effort. Many of the critiques of the EU during the crisis – particularly from the left – have reflected disaffection in using law as an instrument of de-politicisation.[111] If one examines the 'golden rules' established via the fiscal compact, for example, law is used as a means of 'removing particular issues from the table' ie the levels of debt and risk that can be accumulated by society. We increasingly see a potential 'colonisation' of politics by legal rules, which attempt to remove the normativity and contestability of societal choices or encourage us to see certain policies as being beyond real political decision-making entirely.[112]

Constitutionalism is also, however, about political enablement.[113] Law can be used – and has been used in the past in the integration process – precisely as a means of politicising societal choices. It can be used as a way of encouraging reflection on common values (eg the reflection of common rights via the EU Charter) or of ushering individuals into the political process (through commitments in the treaty to elections or participatory democracy). It can also be used

109 See also the proposal by the 'Future of Europe' workgroup, headed by the German Foreign Affairs Minister, at http://www.auswaertiges-amt.de/cae/servlet/contentblob/626338/publicationFile (last visited 4 June 2013) or the Barroso/Van Rompuy proposal 'Towards a Genuine Economic and Monetary Union' at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131201.pdf (last visited 4 June 2013).

110 See also the symposium issue on 'Regeneration Europe' (2013) 14 *German Law Journal*.

111 See eg Streeck (2012), n 74 above, 67; P. Anderson, 'After the Event' (2012) 73 *New Left Review*.

112 Habermas has referred to this as the negative form of 'juridification': law as a medium of strategic rationality. See J. Habermas, 'Law as Medium and Law as Institution' in G. Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin: de Gruyter, 1986).

113 Habermas, *ibid*, described this as the use of law 'as institution'. The politically enabling constitution is, however, a long tradition among American jurists of the Republican school. See eg B. Ackerman, *We the People* (Cambridge, MA: Harvard University Press, 1993); F. Michaelman, 'Constitutional Legitimation for Political Acts (2003) 55 MLR 1.

to ensure that long-term political commitments are not overturned with reference to short-term emergencies (or if they are altered, are altered only after extensive societal deliberation).

In this sense, law need not be a mere 'agent' to implement pre-defined goals, but can also be an institution for community building and common reflection. In the tumult of late-night euro summits, bi-lateral emergency conference calls, market free-falls, and government collapses, such reflection may often seem a luxury that the EU cannot afford. Finding a new 'constitutional balance' for the EU, however – one able to use law as a connector between EU policies and European citizens – may well be the challenge to which the Union must rise in the coming decade. If that is the case, the Union's existing response to its euro crisis does not bode well for the future.