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The ECB and EU constitutionalism in the crisis

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Abstract

Rather than halting European integration, the euro crisis, in some ways, has accelerated it. However, it is integration of a different type, which departs significantly from the rule of law-based model of integration that traditionally burnished the EU's legitimacy. The crisis-induced transformation of the European Central Bank (ECB) captures this trend. Through schemes such as Outright Monetary Transactions (OMT), the Bank bolstered its capacity to stabilise the euro without having its mandate formally enlarged, thus confirming the ascendency of technocratic, and often *ad hoc*, governance over democratically and legally circumscribed alternatives.

This article posits the ECB's expanded and politicised role as the manifestation of a new mode of integration - integration through the *disintegration* of law - which inverts the court-driven integration-through-law that consolidated the single market. However, the lack of a solid legitimacy base casts doubt on the long term sustainability of this integration mode.

Keywords: eurozone, European Central Bank, constitutionalism, euro crisis, integration-through-law

Introduction

Contrary to the expectations of post-functionalism (Hooghe and Marks 2009), the crisis-induced politicisation of European integration did not cripple decision-making and institutional innovation within the European Union (EU). Not only did the euro not collapse, but its members emerged from

the most volatile period of the crisis more tightly integrated in economic and fiscal matters. This has provided scholars with an empirical puzzle. As Ioannou et al. (2015: 155) ask, 'why did Economic and Monetary Union become deeper and more integrated when many feared for its survival?' The special issue of the *Journal of European Public Policy* that their article introduces offers various responses to this puzzle, drawing on the major theories of European integration, including neofunctionalism (Niemann and Ioannou 2015), liberal intergovernmentalism (Schimmelfennig 2015), historical institutionalism (Verdun 2015) and a public opinion-based analysis (Hobolt and Wratil 2015).

Further responses still have come from newer theoretical contributions and from adaptations of existing integration theories, many prompted by the crisis itself (Haughton 2016). New intergovernmentalists, for example, address the post-Maastricht paradox of 'integration without supranationalism' - that is, the expansion of EU activity in areas ranging from fiscal coordination to foreign policy, but without any significant new transfers of competence from member states to supranational institutions. On their view, the euro crisis has not induced any radical changes in the prevalent mode of integration, but rather strengthened pre-existing tendencies, including the eclipse of the supranational 'community method' by intergovernmental institutions and processes (Bickerton et al. 2015a; 2015b).[1] Similarly, from a neofunctionalist perspective, crisis-driven integration may be explained by path dependency. Closer integration within the euro area and greater differentiation between euro ins and outs both suggest that EU member states continue to follow pre-determined trajectories, even if in a more intensified manner (Schimmelfennig 2014).

[1] Though this view may be countered by pointing towards the parliamentarisation of the EU, which was evident in both law (notably the Lisbon Treaty) and practice prior to the onset of the euro crisis (Rittberger 2012).

However, categorising crisis-induced integration as 'business as usual' misses signs of a more fundamental break with past modes of integration, which relied on the European project being depoliticised. As Haughton (2016: 71-72) cautions, public opinion matters. Rising popular hostility towards the EU may not have prevented European elites from adopting myriad new legal measures, but there is no doubt that it has shaped the political landscape within member states and at the European level.[2] More generally, the tendency to present post-2010 institutional innovations as positive achievements downplays the negative externalities that have resulted from the ways in which these changes have been secured.[3] As Kreuder-Sonnen (2016: 1353-1354) astutely notes, the 'business as usual' approach leads to the 'normative normalisation' of crisis management, i.e. its presentation as a 'phenomenon that requires no normative questioning.'

This article aims to highlight the normative implications of what may be termed the 'integration-through-crisis' (ITC) dynamic by focusing on the ECB, particularly under the leadership of Mario Draghi. The ECB is not generally regarded as a legal actor. Nevertheless, through its words and deeds, the Bank has significantly re-shaped the EU's 'economic constitution' (Joerges 2015). I argue that the expansion of the Bank's role since 2010 is not merely an instance of the crisis response embracing 'more of the same' (De Witte 2015: 456). On the contrary, it encapsulates a

[2] Evidenced, for example, by the election of a record number of Eurosceptics to the European Parliament in 2014. Far from giving cause to celebrate the ability of EU elites to just 'get on with it', the marginalisation of disaffected citizens may well prompt 'an even stronger Eurosceptic, anti-establishment backlash' at the next European elections (or, perhaps, sooner) (Treib 2014: 1542).

[3] E.g. neofunctionalist accounts tend to view centralised, supranational monetary policy and decentralised, national fiscal policies as a 'functional dissonance' that eventually prompted the spillover necessary to over-come it (see, e.g. Niemann and Ioannou 2015). Further integration is cast as the 'solution' to the problem of a mismatch between national and supranational competences. The normative implications of the means by which further integration is achieved are de-emphasised.

broader constitutional transformation of the post-Lisbon Treaty EU (see e.g. Joerges 2015; Tuori and Tuori 2014).

Draghi's willingness to act in the absence of explicit legal authorisation may well have stabilised the single currency in the short term, but at the expense of eroding the legitimacy of EMU and of the EU more generally. Thus, the ECB has become an important agent of a particular type of integration. Its transformation has been aided - or at least given an *ex post facto* seal of approval - by the Court of Justice of the European Union (CJEU), in what may be conceptualised as a curious inversion of the integration-through-law (ITL) model that so aptly described the development of the European Community prior to Maastricht.

ITL's crucial insight concerned the dual nature of law in the European Community: law was both object and agent of integration (Cappelletti, Seccombe and Weiler 1986: 4). In other words, ITL conceptualised a project of integration *by* law (court-driven constitutionalisation of the treaties) and *towards* law (a closely integrated and legally bound union of people and peoples). In such a project, means and ends were inextricably intertwined. By contrast, ITC employs a 'new style of discretionary governance' (Joerges and Kreuder-Sonnen 2016: 4) that is ends driven - the end being maintenance of the single currency in its ordoliberal frame (Wilkinson 2015). The means through which this end has been pursued are disparate. They include ECB manoeuvres, an increased budgetary oversight role for the Commission, a beefed-up stability and growth pact, the creation of both *ad hoc* and permanent bailout funds, and the elements of a banking union. Unlike the legal integration theorised by ITL, these crisis-driven measures lack fidelity to the EU's overarching constitutional framework; they do not cohere to each other let alone to key tenets of EU constitutionalism.

The article proceeds in three parts. I start by recapitulating the ITL literature and the insights it provided into the development of European integration. Section 2 analyses the changing role of the ECB in the euro crisis, with specific reference to the Outright Monetary Transactions (OMT) programme. Finally, in section 3, I consider the future of EU governance under a crisis-driven mode of integration. Does the ECB's state of emergency-induced transformation into a major economic and political actor form part of EMU's new normal? And, if so, what are the implications of this for the legal constitution and political legitimacy of the European integration project? I conclude by arguing that 'integration through the disintegration of law' is not sustainable in the long run.

I. Integration-through-law and the legitimacy conferred by legal constitutionalism

Integration-through-law (ITL) describes the dynamic whereby courts drive the integration process forward through their dissemination of European legal norms. It also denotes the body of scholarship that theorised these integrative developments and brought them to greater prominence at a time when scholars were more focused on political stagnation in the Council of Ministers (Stein 1981; Weiler 1999). ITL captures one of the features that made the European project unique as an experiment in transnational cooperation - its constitutionalisation. Through the landmark *Van Gend en Loos* and *Costa* decisions, the European Court of Justice turned the Treaty of Rome into a *de facto* constitution. The first of those cases established the direct effect of some types of European legislation, thus enabling citizens and corporations to hold their governments to account in national courts for failures to implement treaty-based rights. The second case established the principle of legal supremacy, thereby giving EC legislation precedence over conflicting national laws.

Direct effect and legal supremacy are the foundations of EU constitutionalism. Neither principle was explicitly present in the Treaty of Rome but both were read into it by the Court, which soon established itself as a potent sponsor of 'ever closer union'. These two principles, in combination with the preliminary reference procedure (Article 267 TFEU), enabled the CJEU to develop a rich

body of case law on the single market and to disseminate it throughout the Community. National courts were integral to the process. The CJEU's treaty interpretations were applied in national judgements, increasing their legitimacy in the eyes of national authorities and amplifying their domestic effect (Weiler 1994). Everson and Joerges (2012: 645) describe ITL, in its guise as a mode of integration, as:

> [O]ne of Europe's great accomplishments, namely, the taming of the Weberian *Nationalstaat*—or concentration of economic and political power within the nation—by means of the establishment of a supranational legal order and the transformation of the state of nature amongst the Member States of the Union into a Kantian *Rechtszustand* comprising its own legally binding commitments.

However, the ITL model contained in-built flaws that became more damaging as EU activity expanded. As Grimm (2015: 460) cautions, '[c]onstitutionalization means de-politicization'. The value-laden nature of court-driven integration, which has tended towards deregulation and the promotion of market freedoms (Scharpf 2009), is obscured by its technical application. That which is codified in the EU's judicially-constructed constitution is removed from the realm of political contestation, impoverishing democracy at the national and European levels. This was easier to justify and less likely to provoke a public backlash when EU governance mainly covered issue areas of low salience. Indeed, legal constitutionalism conferred its own kind of legitimacy for the elites who were most invested in the integration project; member state governments could more easily buy into a process to which they knew their fellow member states were also legally committed.

The Maastricht Treaty marks an important turning point in the history of ITL. It introduced two new 'pillars' that were outside the Community framework and, therefore, much less susceptible to court-led integration. More significantly for the purposes of this article, Maastricht *adapted* the logic of

ITL (rather than adopting it wholesale) and applied it to the new EMU. Like the European Community as a whole, the currency union was to be a 'community of law', with fiscal discipline among participant states guaranteed by formally binding rules on debt and deficit levels (later supplemented by the Stability and Growth Pact) as well as the 'no bailout' clause, which was meant to guard against 'moral hazard' and prevent the emergence of a transfer union by ensuring that each member state would be responsible for its own liabilities.

Crucially, the 'economic' and 'monetary' dimensions of EMU were split, so that while economic policy remained in the hands of the member states (though subject to coordination), monetary policy was made an exclusive EU competence. Accordingly, the technocratic and apolitical ECB was created to set the currency union's single monetary policy. The split between supranationalised monetary policy and nationalised economic policy - EMU's 'decisive birth defect' (Sauer 2015: 973) - was, of course, a major contributing factor to the euro crisis.

However, the way in which the ITL model was adapted for EMU is also key to understanding its constitutional limitations. As legal scholars observed, law in the single market possessed an agency that enabled it to drive integration forward even in the absence of deliberate political action. In this way, the European polity and its legal system were mutually constitutive (Augenstein and Dawson 2016: 1). The law that framed EMU, on the other hand, was stripped of that power. It was law as *object*, rather than law as *agent*.[4] EMU norms do not have direct effect, and so are not subject to the kind of judicial dissemination that so effectively constitutionalised the single market. Instead, implementation of EMU norms required concerted legislative and administrative action. Enforcement of fiscal discipline was ultimately in the hands of the Council, which, for political reasons, chose to take a lax approach. These legal deficiencies became clear once the crisis hit, and

[4] I am grateful to an anonymous reviewer for this point.

it was in that context that the ECB emerged as a key driver of a new mode of integration (Scicluna 2015: 135-139).

II. The ECB in the crisis

The essential points of the ECB's mandate were set out by the Maastricht Treaty and elaborated in the Statute of the ESCB and of the ECB. According to Article 127 TFEU, 'The primary objective of the European System of Central Banks …. shall be to maintain price stability'. Without prejudice to that primary aim, the ECB is also mandated to support the general economic policies of the EU. Thus, the Treaty maintains a distinction, however vague, between euro area monetary policy - the exclusive province of the ECB - and economic policy, which is controlled by national governments, though they are to regard such policies as a 'matter of common concern' to be coordinated through the Council (Article 121(1) TFEU).

In ways both symbolic and substantial, the Frankfurt-based ECB was modelled on the German *Bundesbank*. Not only was its price stability focus codified in the treaties, so too was its independence from other EU institutions and from the member states (Article 130 TFEU). To be sure, there are important differences between the two institutions - whereas the Bundesbank is 'embedded in a system of political checks and balances' (Verdun 1999: 108), the ECB is 'politically and socially "disembedded"' (Majone 2012: 14), given the absence of supranational political actors equivalent to a national finance minister or treasury. Nevertheless, the Bank's tightly circumscribed mandate was an important part of the effort to establish the euro as a 'hard currency'. What the Deutschmark achieved with the assistance of German political culture, the euro was to replicate via the codification of fiscal discipline.

However, European leaders' use of formal rules to frame what was essentially a political project proved naive and misguided (Joerges 2012: 9-11). Despite the hopes and intentions of its creators,

the introduction of a single currency did not spur economic convergence amongst the participant states. Stripped of the agency that law enjoys in the single market, the detailed elaboration of EMU's legal framework could not overcome the functional dissonance engendered by having monetary policy centralised at the supranational level, and economic policy decentralised and in the hands of national governments. Confronted by the crisis in Greece in 2010, EU leaders responded to EMU's structural flaws not with comprehensive treaty reform, but by moving further away from the strictures of legal constitutionalism and embracing a series of expediencies (Scicluna 2015: 148-151). The changing role of the ECB - which has gone from the 'most independent central bank in the world', to 'one of the most politicized' (Wilkinson 2015: 1071) - illustrates well the new mode of integration-through-crisis.

The evolution and extension of the ECB's mandate under crisis conditions

The ECB has worn many hats during the crisis, some of them ill-fitting when measured against the Bank's original mandate. Its role as one third of the so-called 'Troika' (along with the Commission and the International Monetary Fund, IMF) demonstrates just how deeply it has become involved in economic policy making in the eurozone. Along with its Troika partners, the Bank has assumed responsibility for supervising bailouts of heavily indebted euro area states, first via the European Financial Stability Facility (EFSF) and later the ESM, as well as for setting the conditions attached to receipt of funds. At the same time, the ECB has provided Emergency Liquidity Assistance (ELA) to otherwise solvent euro area banks suffering temporary liquidity crises. As a result, the ECB has been responsible for taking highly political decisions that compromise its independence, leave it conflicted, and for which it is not democratically accountable.

The ECB's extraordinary intervention in Cyprus in 2013 illustrates the extent to which it has been politicised by the crisis. On 19 March 2013, the Cypriot parliament rejected a ten billion euro bailout negotiated between the government and the Troika, which controversially required the

imposition of a tax on all Cypriot bank deposits over 20,000 euros. The ECB - itself one of the country's creditors - responded by issuing an ultimatum on Thursday 21 March, demanding that Cyprus secure a new bailout before Monday 25 March, otherwise the Bank would withdraw its ELA from the country's troubled banking sector, likely leading to its collapse (Wearden and Amos 2013). The amended bailout package was duly adopted a few days later, this time in a form that did not require parliamentary approval (Smith 2013). Thus, the ECB was able to use its lending powers to pressure the Cypriot government into accepting an austerity-linked bailout that the Bank itself, as part of the Troika, had helped to design and would help to oversee. It is, therefore, difficult to avoid the conclusion that the ECB has gone well beyond the realm of monetary policy in responding to the euro crisis.

The ECB has blurred the monetary policy/economic policy distinction in other ways as well. Here we return to the OMT programme, which was announced via press release on 6 September 2012, giving concrete expression to Draghi's pledge from July of that year to do 'whatever it takes' to save the euro. OMT is a programme that enables the ECB to buy the bonds of struggling euro area states in potentially unlimited quantities, subject to strict conditions, including affected states' engagement of the ESM.[5] Under the provisions of OMT, the ECB would buy government bonds on secondary markets, thus avoiding the prohibition on direct purchase of the debt instruments of euro area states contained in Article 123 TFEU.

Perhaps the most remarkable fact about the OMT programme is that it has never been activated. Its very announcement had the calming effect on bond markets that Draghi intended. Thus, if judged against its objectives, the OMT programme (or its mere announcement) has been effective. In a

[5] The linkage of OMT to ESM-imposed austerity was essential for maintaining the ordoliberal ideology that underlines the currency union. Moral hazard must be avoided and profligacy and irresponsibility (of borrowers, not lenders) punished (Wilkinson 2015).

2013 speech marking one year since the announcement of OMTs, Benoît Cœuré, a member of the ECB's executive board, set out the circumstances that had demanded such an extraordinary response - spiralling bond yields in countries such as Spain and Italy, based not on underlying macroeconomic conditions, but on panic as investors priced in the risk of an imminent collapse of the single currency. The dysfunctional sovereign bond market, in turn, disrupted transmission of the ECB's single monetary policy (Cœuré 2013). Intervention, therefore, could be justified on the basis of the Bank's core mandate of price stability, rather than the much larger goal of 'saving the euro', which is surely beyond the remit of monetary policy and best left to political institutions.

Does the legal justification of the OMT programme hold up to scrutiny? Here opinion is divided. Many commentators have defended the ECB, arguing that it may have acted unconventionally in trying times, but that it nevertheless stayed within its mandate (see, e.g., Borger 2013; Petch 2013; Wilsher 2013). Arguing against those who claim that the euro crisis response - including the empowerment of the ECB - amounts to a usurpation or transformation of EU constitutionalism, De Witte (2015) suggests that it merely indicates a growing variation of institutional practice within a flexible, but stable, constitutional framework.

It is true that institutional change in the EU takes place through ongoing evolution, and not just formal treaty change. However, the crisis response measures are different in both the extent to which they have gone *outside* the treaty framework (e.g. the ESM and the Fiscal Compact) and the extent to which they stretch provisions of EU law without formally amending them. It is difficult, for example, to reconcile potentially unlimited bond purchases with the prohibition on monetary financing of state debts, or to see the use of secondary market purchases as anything other than an attempt to circumvent the ban on direct purchases. Requiring states to engage the ESM as a condition of OMT assistance is also problematic. It compromises the Bank's own independence, since the Governing Council of the ESM would effectively be in a position to decide on OMT

eligibility. At the same time, the associated strict conditionality impinges on the budgetary sovereignty of recipient states at the behest of the unaccountable and formally apolitical ECB (Joerges 2015).

The CJEU's response to the growth of executive discretion

Unsurprisingly, the OMT programme and other crisis response measures have been subject to legal challenge. These have put the CJEU in a difficult position. As the engine of integration-through-law, the Court pursued, over several decades, the twin goals of 'ever closer union' and constructing and consolidating an EC/EU legal order based on the constitutionalisation of its founding treaties (Stein 1981; Burley and Mattli 1993). When it comes to the euro crisis response, these goals conflict. Measures that stabilise EMU do so by going outside the pre-existing constitutional order. Forced to choose between competing goals, the Court has so far supported the extraordinary measures taken by EU member states and institutions, thereby normalising the exceptional and contributing to the displacement of legal constitutionalism by 'authoritarian legality' (Kreuder-Sonnen 2016: 1361).

In its judgment of 16 June 2015, the CJEU held that the OMT programme qualifies as a monetary policy measure, despite its indirect effects on economic policy, and that it does not, therefore, exceed the ECB's powers.[6] The verdict was a comprehensive endorsement of Draghi's seizure of the initiative in the midst of crisis. The CJEU added that ECB acts remain subject to judicial review, but the value of this guarantee is greatly reduced by the Court's deference to the Bank's technical expertise and cognisance of the high stakes created by the crisis. In a piece of circular reasoning, the Court argued that OMT must be geared towards the achievement of price stability and the safeguarding of the 'singleness' of eurozone monetary policy because that is what the ECB is

[6] Case C-62/14, *Peter Gauweiler et al. v Deutscher Bundestag* (OMT case).

competent to pursue (Wilkinson 2015: 1058). This leaves the ECB's discretion to interpret its own mandate effectively untrammelled and unchecked. Now that the CJEU has endorsed the Bank's unorthodox policy manoeuvres, only treaty reform could reintroduce constraints. Thus, while the ECB's unprecedented empowerment was driven by the circumstances of the euro crisis, it will long outlast the 'state of emergency' (White 2015a: 593-599).

The OMT ruling is consistent with the CJEU's judgment on other aspects of euro crisis management. Particularly significant is the *Pringle* case, in which the Court confirmed the compatibility of the ESM with EU law.[7] Like it did in the OMT ruling, the CJEU in *Pringle* interpreted the treaties flexibly, giving euro states a wide scope to purse their chosen course of action. In this respect, both rulings contribute to an 'erosion of the distinction between law and politics', as the Court deploys legal reasoning in a manner that supports the political preferences of EU institutions and national governments 'almost irrespective of, and perhaps entirely unconstrained by, what the Treaties say' (Beck 2013: 638).

Indeed, contradictions between the Court's reasoning in the two cases point to the heavy influence of political considerations on both. At issue in *Pringle* was whether EU member states could go outside of the treaty framework in order to establish a bailout mechanism for the eurozone. The CJEU held that member states were so empowered precisely because the activities of the proposed ESM - lending money to indebted euro area states under strict conditionality - fell within the realm of economic policy, and did not encroach upon the EU's exclusive monetary policy competence. Yet, the ECB's bond buying programme - engagement of which would require the recipient state to participate in an ESM bailout and to accept the associated conditionality - was justified by the Court

[7] Case C-370/12, *Pringle v Ireland.*

as a monetary policy measure, which contributes primarily to the goal of price stability (Beck 2013: 640-641).

Therefore, the crisis-induced transformation of EMU into a zone characterised by a high level of executive discretion has been endorsed by the EU's highest court. However, the OMT and *Pringle* rulings do not signify the reconciliation of integration-through-law and integration-through-crisis.[8] Instead, the CJEU has effected a 'constitutional mutation', in the sense that 'the meaning of the legal rules is changed compared to how they were previously understood' (De Witte 2015: 436). Article 125 TFEU, which prohibits EU institutions and member states from assuming each other's debts, can no longer be understood according to the ordinary meaning of those words. The prohibition on monetary financing of state deficits, in Article 123 TFEU, is similarly undermined. More worryingly, basic underlying norms of EU constitutionalism - conferral, democratic control, political contestation, and the equality of states - have been weakened by a crisis response that takes power out of the hands of some member states (those that have come under conditionality) and institutions (e.g. parliaments) and concentrates it in the hands of others (the ECB, the Eurogroup, and creditor states such as Germany) (White 2015a: 588-590).[9]

Thus, in suggesting that integration-through-law has been replaced by integration-through-crisis, I am not arguing that law no longer matters at all, but rather that its function has changed. In the emergency engendered by the euro crisis, law is to be interpreted flexibly, so as to enable agencies

[8] The very idea of integration-through-law is compromised by the proliferation of emergency measures taken outside of the EU's constitutional framework because such measures only confirm the insufficiency of the framework. By confirming the right of member states to cooperate outside of the treaties (so long as their agreements do not infringe treaty provisions), *Pringle* enables further constitutional fragmentation.

[9] See Fasone (2014) on the marginalisation of the European Parliament in the crisis.

such as the ESM and ECB to take the decisions necessary - as deemed by the technocratic experts within those agencies themselves - to stabilise the currency union. The *legality* of the new treaty interpretations has been upheld by the CJEU in the *Pringle* and OMT rulings. However, the Court cannot as easily confer the new legal regime with *legitimacy* (Scicluna 2015: 5-6). EMU is still legally bound, but it has lost much of the legitimacy that was derived from adherence to rules.[10]

III. Deriving legitimacy from exigency? The shaky foundations of crisis-driven integration

Reframing the question posed by Ioannou et al. (2015: 155) to focus on *how* EMU became more closely integrated during the crisis, I argue that it was made possible by the willingness of European elites to diverge from established constitutional practice. In other words, the price of guaranteeing the irreversibility of the euro was the partial unravelling of the EU's constitutional framework. This is the crux of integration-through-crisis, or integration through the *disintegration* of law. Like ITL, this is an integrative mode that is driven largely by non-majoritarian institutions and processes. However, ITC involves the fragmentation - not consolidation - of a coherent constitutional framework. Whereas the CJEU was a key driver of ITL, the ECB has played a similar role in ITC. Since political discord amongst national governments inhibited major reform of EMU, the ECB was left to do a lot of the heavy lifting. Indeed, the Bank's proactivity made substantive legal reform less likely by reducing the pressure on national governments to undertake it.

[10] A rhetoric of adherence to rules is maintained when it comes to European leaders' and institutions' insistence on austerity-based conditionality and the refusal to grant Greece debt relief. Not only is this stance economically self-destructive, but it cannot disguise the fact that EMU's legal constitution has been jettisoned in favour of non-democratically legitimated emergency rule.

Meanwhile, the CJEU (albeit with little room to manoeuvre given the way in which the currency union was designed) has acquiesced in its own further disempowerment when it comes to EMU.[11] The free rein given to the ECB to define monetary policy is in marked contrast to the tight control that the Court exercises over policy direction in the single market. Single market policy is highly constitutionalised by virtue of the application of direct effect. Court-driven 'over-constitutionalisation' pushes politics out of single market policy making (Grimm 2015). Only treaty change can override the CJEU's treaty interpretations and this is a prohibitively high barrier. As a result, the EU legislature - the Parliament and the Council of Ministers - can do little other than codify the Court's edicts (Davies 2016).

Legal scholars of the EU have rightly criticised this restriction of the legislature's room for manoeuvre, which is one aspect of the over-reliance on law, and the concomitant weakness of politics, that has long characterised EU 'governance without government' (Everson and Joerges 2012; Davies 2015; Grimm 2015). However, as the CJEU's response to euro crisis management demonstrates, the alternative to a highly legalised, de-politicised mode of governance (integration-through-law) is not necessarily one that embraces democratic political contestation. Instead, the EU's highest court has confirmed the stewardship of technocratic institutions over EMU.

Legal constitutionalism - the doctrine that 'a legitimate political regime must rest on a set of legal rules that constrain the actions of politically responsive decision-makers' (Bellamy and Weale 2015: 259) - is an important plank of the EU's legitimacy. In the construction of EMU, politically responsive decision makers, namely national governments, were meant to be constrained by the fiscal rules written into the Maastricht Treaty and the SGP. This approach was deeply flawed.

[11] *Vis-a-vis* the ECB. In the OMT decision, the Court did take the opportunity to reassert its exclusive right to interpret the legality of the acts of EU institutions, *contra* the reservation of a similar right by Germany's Federal Constitutional Court.

Without automatic enforcement, law could not sufficiently constrain, and the detailed elaboration of legal rules merely served to mask the inherently political nature of the currency union. In this respect, I agree with Bellamy and Weale (2015: 260) that 'the legitimacy of EMU cannot be simply secured by framing the related fiscal rules in legal constitutionalist terms'. Nevertheless, the euro crisis is a crisis of legitimacy for EMU, and the EU more broadly, *not* because it entrenches legal constitutionalism, but because it subverts it. The Court-endorsed empowerment of the ECB eats away at the legal constitutionalist plank of EU legitimacy but does not replace it with one based on democratic politics (i.e. input legitimacy).

To be sure, democratic inputs have never been a major source of the EU's legitimacy.[12] Instead, EU institutions have largely relied on their perceived ability to deliver the goods - 'output legitimacy' in Scharpf's (1999) formulation. They have continued to do so during the crisis, using the emergency itself to justify taking highly political decisions with significant redistributive consequences.[13] Thus, EU leaders' invocation of the urgency of the emergency has fed into a growing elite political culture of 'there is no alternative'. More specifically, as Wilkinson (2015: 1052) has noted, the narrative of the crisis is that 'there can be no alternative - either to austerity or

[12] Majoritarian democracy did not feature heavily in the initial institutional design of the EC - this was not oversight, but deliberate choice given the distrust of democratic majorities in postwar Western Europe (Müller 2011: 125-130).

[13] This usurpation of national democratic prerogatives is especially problematic when the value of the outputs is disputed. In Greece, several years of creditor-imposed austerity has failed to improve the economic situation, leading many citizens to become 'detached' from both national and supranational democratic processes (Armingeon et al. 2016). In Ireland, the ECB's role in advising the government to guarantee the debts of the country's banks, as well as the pressure it exerted on national authorities to prevent bank failures and ensure creditors were repaid, is widely regarded as having significantly increased the cost of the crisis for tax payers (Whelan 2014: 438-439).

to membership of the Euro'. The euro cannot fail, but nor can it be turned into a transfer union (i.e. even if fiscal discipline failed in practice, the ideological commitment of EU elites to ordoliberalism means that it cannot be abandoned).

Widespread acceptance of the 'exceptional measures for exceptional times' justification may help to explain why public opinion in the crisis-hit countries has remained strongly pro-euro (Chiocchetti 2016). Nevertheless, we should be cautious of conflating such opinion polls with a positive endorsement of crisis policies. For example, while support for the currency itself has remained relatively stable through the crisis - and, in fact, increased markedly in Greece - trust in the ECB has significantly declined (Roth et al. 2016). There is surely a very real question as to how long a state of emergency-based legitimacy can last.

Integration-through-crisis as emergency politics

Whereas ITL was characterised by the judicialisation of politics (Kelemen 2012), ITC relies on a discourse of emergency politics. Both phenomena are problematic from a democratic standpoint - the former empowered courts to decide on fundamentally political questions, while the latter empowers executives and technocratic experts. White (2015b: 302-303) defines 'emergency politics' as a 'distinctive mode in which actions contravening established procedures and norms are defended – often exclusively – as a response to exceptional circumstances that pose some form of existential threat.' Emergency politics consists of both rhetoric and action. In the case of the EU's euro crisis response, the rhetoric includes repeated claims by European leaders about the necessity of taking 'extraordinary measures' to 'save' or 'rescue' the eurozone and, indeed, the European integration project itself.[14] The concomitant action includes the establishment of bailout

[14] E.g. Angela Merkel famously claimed that 'if the euro fails, Europe fails' (*Spiegel Online* 2010).

mechanisms outside of the treaty framework, and the unprecedented bond-buying programmes of the ECB.

In fact, the ECB is a core component of EMU's emergency regime.[15] Accordingly, the discourse of 'emergency' or 'exception' is a strong theme in public justifications of policies that seemingly contradict ordinary understandings of the Bank's mandate. For example, in May 2010, then-president Jean Claude Trichet announced the Securities Markets Programme (SMP),[16] which he described as the Bank's response to the 'exceptional circumstances prevailing in the financial markets'. He further insisted that this was an unusual measure designed to correct 'malfunctioning' markets and not a substitute for long term reform (Trichet 2010). Mario Draghi used similar language just over two years later to justify the OMT programme. In a speech to the German *Bundestag* in October 2012, Draghi emphasised that these were not normal times for the euro area, and that action was 'essential' to address a 'disturbed' financial system (Draghi 2012).

There are several problems with emergency politics. As already indicated, it is inimical to democratic deliberation and political contestation, since there can be no room for measured debate when the polity's very survival is at stake. Insofar as the ECB has used the tools at its disposal to pressure states into adopting detailed taxation and spending policies in exchange for financial aid (as it did when it suspended ELA to Greek banks in 2015, and threatened to suspend assistance to Cypriot banks in 2013), it is deeply implicated in this usurpation of national democratic prerogatives.

[15] As White (2015b: 301) points out, it is more apt to think of the EU's response to the euro crisis as having created an 'emergency regime', rather than having revealed any one actor to be sovereign in the Schmittian sense of having the capacity to declare the state of exception.

[16] A forerunner to OMT, this was a programme to buy the bonds of struggling euro area states on secondary markets.

Moreover, the EU lacks formal state of emergency procedures (which would allow, for example, the executive to *legally* suspend - and later resume - normal operation of the law, perhaps with parliamentary approval) (White 2015a: 594). This is why, when confronted with the crisis, EU member states and institutions had to improvise their response, largely by going outside the treaty framework and reaching into the 'toolboxes' of public international law and private law (De Witte 2011: 5). Again, the consequences are well illustrated in relation to the ECB. Since its additional powers were never formally granted, they cannot be easily rescinded once the emergency passes.

Finally, and related to the point above, emergency politics creates a 'temporal paradox'. In other words, there is a temporal asymmetry between the short-term justifications of crisis response measures and their long-term effects (Dimitrakopoulos 2016). In short, the emergency governance that characterises ITC is both less democratic, since power is concentrated in the hands of executive bodies, and less legitimate, since the EU's legal norms can no longer reliably be considered binding (White 2015a: 591).

Conclusion

If the ends justify the means, then the euro was stabilised and it does not necessarily matter how, or by whom. The outcome - deeper integration amongst euro area states - indicates that the crisis was an opportunity taken, while the EU's crisis management only proves the resilience, flexibility and adaptability of its institutions. On this view, it is the continuity of European integration that stands out. No states exited the euro area (and those that planned to join before the crisis, joined), new integrative steps built on old ones (e.g. banking union as a corollary of monetary union), and institutional changes were merely intensified versions of trends evident since Maastricht (e.g. the growing agenda-setting dominance of the EU Council).

However, this picture is both incomplete and complacent. Focusing on the 'path dependent' outcomes of the crisis obscures serious concerns about the legitimacy of *processes* of crisis management (Kreuder-Sonnen 2016). The euro crisis did spur closer integration at a speed and of a kind that would otherwise have been considered impossible. The ECB, in particular, acted decisively to prop up the euro in the face of dithering by the EU's political institutions. However, these actions have come at a cost to the coherence and credibility of EU constitutionalism. The modalities of integration-through-crisis are troubling not because they involve the reinterpretation of a handful of specific treaty provisions, but because they threaten fundamental norms of EU constitutionalism and the institutional framework that supports those norms (White 2015a: 588).

Through its decisions in *Pringle* and the OMT case, the CJEU has endowed the crisis response with a 'thin veneer of legality' (Joerges 2015), but it cannot really legitimate it. What is called for, instead, is a re-constitutionalisation of EMU, with emergency measures brought within the treaty framework, and increased legislative and judicial oversight over executive agencies. In the case of the ECB, at the very least, its legal mandate should be realigned with its *de facto* role (either by widening the former, or restricting the latter). In the absence of such a re-constitutionalisation, the legacy of integration-through-crisis will likely be the *disintegration* of key elements of the EU's legal framework.

Bibliography

Armingeon, K., Guthmann, K. and Weisstanner, D. (2016) 'How the Euro divides the union: the effect of economic adjustment on support for democracy in Europe', *Socio-Economic Review* 14(1): 1-26.

Augenstein, D. and Dawson, M. (2016) 'Introduction: What Law for What Polity?' 'Integration-through-law' in the European Union Revisited', in D. Augenstein (ed), *'Integration-through-law' Revisited: The Making of the European Polity*, Oxford: Routledge, pp. 1-10.

Beck, G. (2013) 'The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the Pringle Case', *Maastricht Journal of European and Comparative Law* 20(4): 635-648.

Bellamy, R. and Weale, A. (2015) 'Political legitimacy and European monetary union: contracts, constitutionalism and the normative logic of two-level games', *Journal of European Public Policy* 22(2): 257-274.

Bickerton, C.J., Hodson, D. and Puetter, U. (2015a) 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', *JCMS* 53(4): 703–22.

Bickerton, C.J., Hodson, D. and Puetter, U. (2015b) 'The New Intergovernmentalism and the Study of European Integration', in C.J. Bickerton, D. Hodson and U. Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post Maastricht Period,* Oxford: Oxford University Press, pp. 1–48.

Borger, V. (2013) 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area', *European Constitutional Law Review* 9(1): 7-36.

Burley, A. and Mattli, W. (1993) 'Europe before the Court: A Political Theory of Legal Integration'. *International Organization* 47(1): 41–76.

Cappelletti, M., Seccombe, M. and Weiler, J.H.H. (1986), *Integration Through Law,* Berlin: De Gruyter.

Chiocchetti, P. (2016) 'Trapped in the Eurozone? Radical left Eurorejectionism between Economic Realities and Political Constraints', *paper presented at the 8th Pan-European Conference on the European Union, ECPR SGEU,* Trento, 16-18 June.

Cœuré, B. (2013) 'Outright Monetary Transactions, One Year On', *European Central Bank, Directorate General Communications,* Berlin, 2 September 2013, http://www.ecb.europa.eu/press/key/date/2013/html/sp130902.en.html

Davies, G. (2015) 'Democracy and Legitimacy in the Shadow of Purposive Competence', *European Law Journal* 21(1): 2–22.

Davies, G. (2016) 'The European Union Legislature as an Agent of the European Court of Justice', *JCMS* 54(4): 846–861.

De Witte, B. (2011) 'The European Treaty Amendment for the Creation of a Financial Stability Mechanism', *SIEPS European Policy Analysis* No. 6, pp. 1–8.

De Witte, B. (2015) 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', *European Constitutional Law Review* 11(3): 434-457.

Dimitrakopoulos, D. (2016) 'Emergency politics in the European Union: Intergovernmental drift as a reaction to the crisis', *paper presented at the 8th Pan-European Conference on the European Union, ECPR SGEU,* Trento, 16-18 June.

Draghi, M. (2012) 'Opening Statement at Deutscher Bundestag', *European Central Bank, Directorate General Communications*, Berlin, 24 October 2012, http://www.ecb.int/press/key/date/2012/html/sp121024.en.html.

Everson, M. and Joerges, C. (2012) 'Reconfiguring the Politics – Law Relationship in the Integration Project through Conflicts – Law Constitutionalism', *European Law Journal* 18(5): 644–66.

Fasone, C. (2014) 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?', *European Law Journal* 20(2): 164-185.

Grimm, D. (2015) 'The Democratic Costs of Constitutionalisation: The European Case', *European Law Journal* 21(4): 460–473.

Haughton, T. (2016) 'Beelines, Bypasses and Blind Alleys: Theory and the Study of the European Union', *JCMS* 54(S1): 65-82.

Hobolt, S.B. and Wratil, C. (2015) 'Public opinion and the crisis: the dynamics of support for the euro', *Journal of European Public Policy* 22(2): 238-256.

Hooghe, L. and Marks, G. (2009) 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', *British Journal of Political Science* 39(1): 1–23.

Ioannou, D., Leblond, P. and Niemann, A. (2015) 'European Integration and the Crisis: Practice and Theory', *Journal of European Public Policy* 22(2): 155–76.

Joerges, C. (2012) 'Europe's Economic Constitution in Crisis', *ZenTra Working Papers in Transnational Studies* No. 06/2012, pp. 1–28.

Joerges, C. (2015) '*Pereat iustitia, fiat mundus*: What is left of the European Economic Constitution after the OMT-litigation?', *paper presented at the European Court of Justice, the European Central Bank, and the Supremacy of EU Law Conference*, Copenhagen, 17-18 September.

Joerges, C. and Kreuder-Sonnen, C. (2016) 'Europe and European Studies in Crisis. Inter-Disciplinary and Intra-Disciplinary Schisms in Legal and Political Science', *WZB Discussion Paper SP IV 2016–109*. Available at SSRN: https://ssrn.com/abstract=2847115 or http://dx.doi.org/10.2139/ssrn.2847115, 26 September, pp. 1-31.

Kelemen, R. D. (2012) 'Eurolegalism and Democracy', *JCMS* 50(S1): 55–71.

Kreuder-Sonnen, C. (2016) 'Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance', *JCMS* 54(6): 1350–1366.

Majone, G. (2012) 'Rethinking European Integration after the Debt Crisis', *UCL: The European Institute* Working Paper No. 3/2012, June 2012.

Müller, J.-W. (2011) *Contesting Democracy: Political Ideas in Twentieth Century Europe,* New Haven: Yale University Press.

Niemann, A. and Ioannou, D. (2015) 'European Economic Integration in Times of Crisis: A Case of Neofunctionalism?'. *Journal of European Public Policy,* Vol. 22, No. 2, pp. 196–218.

Petch, T. (2013) 'The compatibility of Outright Monetary Transactions with EU law', *Law and Financial Markets Review* 7(1): 13-21.

Rittberger, B. (2012) 'Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament', *JCMS* 50(S1): 18–37.

Roth, F., Jonung, L. and Nowak-Lehmann, F. (2016) 'Crisis and Public Support for the Euro, 1990–2014', *JCMS* 54(4): 944–960.

Sauer, H. (2015) 'Doubtful it Stood…: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment', *German Law Journal* 16(4): 971-1002.

Scharpf, F. (1999) *Governing Europe: Effective and Democratic?*, Oxford: Oxford University Press.

Scharpf, F. (2009) 'The Double Asymmetry of European Integration. Or: Why the EU Cannot Be a Social Market Economy', *Max-Planck-Institut für Gesellschaftsforschung, MPIfG Working Paper* 09/12, November 2009.

Schimmelfennig, F. (2014) 'European Integration in the Euro Crisis: The Limits of Postfunctionalism', J*ournal of European Integration* 36(3): 321–37.

Schimmelfennig, F. (2015) 'Liberal Intergovernmentalism and the Euro Area Crisis', *Journal of European Public Policy* 22(2): 177–95.

Scicluna, N. (2015) *European Union Constitutionalism in Crisis*, London: Routledge.

Smith, H. (2013) 'Cyprus Saved – but at What Cost?', *The Guardian*, 25 March.

Spiegel Online (2010) 'Merkel Warns of Europe's Collapse: "If Euro Fails, So Will the Idea of European Union"', 13 May.

Stein, E. (1981) 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law 7*5(1): 1–27.

Treib, O. (2014) 'The voter says no, but nobody listens: causes and consequences of the Eurosceptic vote in the 2014 European elections', *Journal of European Public Policy* 21(10): 1541-1554.

Trichet, J.-C. (2010) 'The ECB's Response to the Recent Tensions in Financial Markets', s*peech given at the 38th Economic Conference of the Oesterreichische Nationalbank,* Vienna, 31 May.

Tuori, K. and Tuori, K. (2014) *The Eurozone Crisis – A Constitutional Analysis*, Cambridge: Cambridge University Press.

Verdun, A. (1999) 'The Institutional Design of EMU: A Democratic Deficit?' *Journal of Public Policy* 18(2): 107-132.

Verdun, A. (2015) 'A Historical Institutionalist Explanation of the EU's Responses to the

Euro Area Financial Crisis', *Journal of European Public Policy* 22(2): 219–37.

Wearden, G. and Amos, H. (2013) 'Cyprus Crisis: Politicians Race to Agree Details of "Plan B"', *The Guardian*, 22 March.

Weiler, J. H. H. (1994) 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies* 26(4): 510–34.

Weiler, J. H. H. (1999) *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration*, Cambridge: Cambridge University Press.

Whelan, K. (2014) 'Ireland's Economic Crisis: The Good, the Bad and the Ugly', *Journal of Macroeconomics* 39: 424-440.

White, J. (2015a) 'Authority after Emergency Rule', *Modern Law Review* 78(4): 585-610.

White, J. (2015b) 'Emergency Europe', *Political Studies* 63(2): 300-318.

Wilkinson, M. (2015) 'The Euro Is Irreversible! … Or is it?: On OMT, Austerity and the Threat of "Grexit"', *German Law Journal* 16(4): 1049-1072.

Wilsher, D. (2013) 'Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis', *Cambridge Yearbook of European Legal Studies* 15: 503-536.