From the rule of law to the rule of rules

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From the rule of law to the rule of rules: Technocracy and the crisis of EU governance

Abstract

This article focuses on two trends emerging through the eurozone crisis, both of which diminish the quality of democracy in the EU and its member states. Firstly, the crisis has led to an increased reliance on non-majoritarian institutions, such as the ECB, at the expense of democratic accountability. Secondly, the crisis has led to a new emphasis on coercive enforcement at the expense of the voluntary cooperation that previously characterised (and sustained) the EU as a community of law. Thus, the ECB's (over-)empowerment is a synecdoche of a wider problem: The EU's tendency to resort to technocratic governance in the face of challenges that require political contestation. In the absence of opportunities for democratic contestation, EU emergency governance – Integration through Crisis – oscillates between moments of heightened politicisation, in which *ad hoc* decisions are justified as necessary, and the (sometimes coercive) appeal to the depoliticised rule of rules.

Keywords: Technocracy, eurozone, crisis governance, rule of law, European Central Bank

How has the euro crisis affected the EU's legal and political constitution? In short, it has made EU governance more technocratic *and* more politicised – a paradoxical outcome that undermines democracy at both national and supranational levels. The euro crisis has led to the politicisation of policy areas and decision-making processes in which most Europeans previously had little interest, including the decisions and policies of the European Central Bank (ECB). However, this has not spurred any meaningful democratisation of monetary policy making, nor of any other aspect of the

crisis response. On the contrary, as a result of the crisis, the regulatory space in which the ECB operates has expanded, rather than contracted. Indeed, this expansion was driven by the Bank itself, which, for a variety of reasons, seized the initiative at the height of the crisis, including by taking decisions that have redefined what constitutes a monetary policy measure. This move is made all the more problematic by the ECB's involvement in the coercive turn in EMU governance. In this connection, the ECB, in its role as provider of liquidity to eurozone banks, has been instrumental in pushing debtor states, such as Greece and Cyprus, towards acceptance of harsh austerity policies.

Moreover, the euro crisis has revealed deficiencies and pathologies in EU governance that go far beyond the intricacies of monetary policy making. We suggest that the EU has moved from a mode of governance centred on law as both agent and object (Integration through Law, ITL), to one predicated on expediency (Integration through Crisis, ITC) (Scicluna 2018). We use the ECB as a point of departure to illustrate that transformation. How and why did a highly independent, deliberately-insulated, secretive (Kreuder-Sonnen 2018b), and narrowly mandated body become such a powerful *political* actor? The answers reveal major shortcomings in the EU's institutional architecture and political culture. The former include the difficulty of formally amending the EU treaties, and the incomplete construction of EMU as a monetary union without a fiscal counterpart. These, in turn, hint at the latter: National and EU leaders are reluctant to attempt treaty reform because doing so would require referendums in at least some member states, and there does not seem to be much appetite among European publics for further supranational integration. Similarly, there are major disagreements among national governments about how best to

proceed, e.g. on whether the eurozone ought to have its own budgetary resources, or on the creation of a eurozone finance minister. Therefore, our case study exemplifies a more widespread pathology of EU governance, namely an ever greater reliance on technocracy, accompanied by a greater emphasis on coercive enforcement.

The paper is organised as follows. We begin with a general discussion of the challenge posed to representative democracy by phenomena such as economic globalisation and the complexity of the modern welfare state, which promote an ever-greater reliance on policy-making by professional bureaucracies and expert agencies. We then turn to the EU post-2010 in order to elaborate on the idea of Integration through Crisis as a specific integrative mode. We continue the elaboration of ITC via a focus on the role of the ECB as a regulatory body that is both very powerful and highly insulated from majoritarian democracy, constituting a paradigmatic case of 'an overmighty citizen' (Tucker 2018: ix). In particular, the ECB has come to symbolise two key characteristics of ITC: Firstly, the exacerbation of the EU's pre-existing tendency to concentrate power in the hands of executives and non-majoritarian bodies. Secondly, the belated and misguided turn to coercive enforcement of EMU rules.

Again, what makes the crisis-driven empowerment of the ECB so significant is what it tells us about more serious deficiencies in the EU's institutional architecture, which leaves insufficient space for the kind of open political contestation that is necessary for democratically legitimate policy-making. It is telling, for example, that the ECB's bold redefinition of its own mandate was legally ratified by the Court of Justice of the European Union (CJEU), rather than through any legislative process. Herein lies the

connection between ITL and ITC. To put it provocatively, they are both forms of technocracy, though they utilise different forms of expertise. Rule by judges is replaced by rule by bankers. To be sure, there are important differences between legal reasoning and the reason of emergency. The former is slow, cumbersome, built on a detailed reading of legal texts and the doctrine of precedent; the latter is faster-paced, discretionary, responsive to market events and not beholden to internal consistency. Nevertheless, in an EU in which non-majoritarian bodies are insufficiently balanced by political organs of government, *both* the CJEU and the ECB have behaved as 'overmighty citizens'.

Thus, the final part of the paper returns to a broader discussion of the implications of ITC for democracy and legitimacy in the EU. We conclude by challenging the idea that 'more Europe' and 'more law' would somehow solve Europe's many problems; rather this very approach is a part of the problem. Defying the persistent trend in EU scholarship, we join the likes of Giandomenico Majone (2014) and Christian Joerges (2014: 262) in calling for 'more modesty in Europe's ambitions'.

Governance without government? The technocratic challenge to democracy

The degradation of the substance of democracy is not unique to Europe. As Yannis Papadopoulos (2013) has argued, the basic problem, encapsulated in the growing distance between policy-makers and policy-takers, afflicts all established democracies. For a variety of reasons, including pressures generated by economic globalisation (the impersonal and ominously-invoked discipline of 'market forces'), the growth of transnationalised and internationalised regulation, the judicialisation of politics (Hirschl 2008), and the sheer complexity of modern welfare states, policy-

making power is increasingly taken out of the hands of elected representatives and delegated to non-majoritarian, often tenuously democratically accountable regulatory institutions within and beyond the state. Even for those policy-making competences that remain with national legislatures, room to manoeuvre is restricted by the number of commitments that are 'locked in' by their constitutionalisation, delegation, or incorporation into international treaties (Tucker 2018: 12). The institutions and processes of representative democracy – party-structured electoral competition – continue, but the substance is hollowed out (Mair 2013).

Thus, democratic degradation is neither specifically European, nor especially new, but the phenomenon does take particular forms in the EU. We argue that EU membership exacerbates many of the issues described above – judicialisation (Kelemen 2012), the locking in of policy commitments, and the tendency of modern polities to delegate large chunks of policy-making power to non-majoritarian, efficiency-maximising bodies (Scharpf 2009). Due to its complexity, much of the 'back-stage' policy-making (Papadopoulos 2013: 3) of European governance is done by regulatory agencies. Moreover, as Dieter Grimm (2015) observed, EU law is over-constitutionalised by virtue of the fact that much of what would be considered ordinary law in a national context (e.g. single market policy) is contained in the EU's founding treaties. Since the barriers to treaty change are prohibitively high, CJEU rulings that touch on treaty interpretation are also effectively constitutionalised, making the Court a powerful policy actor in its own right (Davies 2016).

It is clear, then, that the EU's problematic 'absence of politics' predates the present crisis. As Peter Mair noted, 'while European integration serves to depoliticise much

of the policy-making process at the domestic level, it fails to compensate for this reduction by any commensurate *re*politicization at the European level.' As a result, political contestation is undermined 'in Europe, and by Europe' (Mair 2007: 17). Thus, the EU's legal construction very much facilitated its peculiar depoliticisation. This was the structure already in place when the euro crisis hit, at which point the democratically deficient model of Integration through Law (ITL) gave way to the 'authoritarian turn' (Kreuder-Sonnen 2018a) of ITC. In fact, it is no exaggeration to speak of the EU's 'existential crisis' as the crisis that 'emanates from the dysfunction of European democracy' (Jones and Matthijs 2017: 199). It is this dysfunction that we seek to bring to light by analysing the actions of two non-majoritarian bodies that have taken on ever more political roles: the ECB and the CJEU.

ITL and the construction of the European project

ITL describes the dynamic whereby courts drive the European integration process forward through their dissemination of legal norms. The Court of Justice created the framework for this process via its groundbreaking articulation of the principles of direct effect and EC legal supremacy in the 1960s. Combined with the preliminary reference procedure, direct effect and legal supremacy enabled the CJEU to issue binding treaty interpretations, the normative force of which was amplified by the fact that they were incorporated into the judgements of national courts in cases brought directly by member state nationals. It is in this way that the EU's founding treaties were constitutionalised (Weiler 1994).

ITL's crucial insight concerned the dual nature of law in the then-EC: law was both object and agent of integration (Cappelletti et al. 1986). In fact, ITL scholars were not

the first to recognise the centrality of law to the emerging European construct. For Walter Hallstein, the first Commission president, law was key to the realisation of a federalist *European State in the Making*. Already in 1962, Hallstein identified the multifaceted nature of law in the European Community, noting that it served to advance the integration project in three distinct ways (cited in Höntzsch 2007: 74):

(1) Via its emergence and structure, i.e. the EC is a creation of law [*Schöpfung des Rechts*],
(2) Via its tasks and activities; i.e. the EC is a source of law [*Quelle des Rechts*], and
(3) Owing to its end-goal, i.e. the EC is the realisation of the idea of law [*Verwirklichung der Rechtsidee*]

While Hallstein's federalist vision never came to pass, his ideas had an enduring influence on conceptualisations of the EC as a Community of Law (*Europäische Rechtsgemeinschaft*). These ideas, in turn, were further advanced and elaborated in the ITL scholarship that developed from the 1980s (see Bogdandy 2017). Accordingly, 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).

Importantly, ITL was more than a theoretical construct. Until recently, it also denoted a spectacularly successful practice. Integration by and towards law worked for a number of reasons specific to the institutional architecture of the EU and its

underlying ideals. Firstly, the CJEU attained a unique position in the EU system of governance because – unlike conventional supreme courts 'that do not operate in a vacuum' (Höpner 2014: 9, 23) – it had no obvious counterpart in the political realm. Its decisions are difficult if not impossible to alter (Grimm 2016). Moreover, the CJEU judges, who tend to be recruited from a self-selected group of legal professionals, are motivated by 'the idealist, visionary impetus' that favours an ever-closer union (Höpner 2014: 13, Kemmerer 2017: 91). As Armin von Bogdandy (2001: 23–24) argued, European law is unique in that its role is *not* to stabilize 'social relations and normative expectations', but to change them with the view of a common European future:

> Considering the centrality of the sovereign nation state in almost all aspects of social relations, European law appears as a primary instrument in what is ultimately a *revolutionary plan*.

For a long time, it was plausible to justify this radical transformation owing to the fact that it was based on the shared ideal of voluntary cooperation. Defying the Weberian definition of the state, with its focus on territory, a clearly defined political community and the monopoly on violence, the EU prided itself on *not* having at its disposal any instrument of coercion (Pernice 2005). In this way, European integration appeared to have superseded traditional thinking about law and the state as two sides of the same coin. Similarly, the single European currency was conceived as a currency that did not need a quasi-federal state. This was misguided. As we argue below, just as EMU could not be held together by law, neither can it be held together by technocratic prescriptions.

The euro crisis and the transition from ITL to ITC

EMU, as framed by the Maastricht Treaty, adapted the logic of ITL, but did not adopt it completely. Like the single market, EMU was to be a 'community of law', with fiscal discipline guaranteed by formally binding rules (e.g. on public debt and deficit levels). However, EMU norms do not have direct effect, and are not subject to the kind of judicial dissemination that so effectively constitutionalised the single market. Instead, implementation of EMU norms required the kind of concerted legislative and administrative action that, prior to the crisis, was often not forthcoming. In sum, EMU was a political project, framed by formal rules, but without giving law the kind of agency it had enjoyed in relation to the single market.

The global financial crisis of 2008 became a European crisis in 2010. Initially framed as a problem caused by excessive and unsustainable sovereign debt, the crisis manifested most urgently in relation to Greece. In fact, already in May 2010, Greece received the first in what was to become a series of bailouts, the initial one taking the form of bilateral loans from European partners (Louis 2010). We will not recapitulate the story of the euro crisis here. The important point, for our purposes, is that the crisis precipitated a transition to a new mode of integration, which we term Integration through Crisis (ITC) (Scicluna 2018). The key characteristics of ITC are as follows:

- It is ends-driven. The end being the preservation of EMU, with its current membership, and without turning it into a transfer union,
- It is extra-constitutional, in the sense of avoiding treaty reform by going outside the treaty framework,

- It exacerbates pre-existing tendencies in the EU to avoid political contestation by concentrating power in the hands of executives and non-majoritarian bodies,
- It places more emphasis on the coercive enforcement of EMU's rules (including rules adopted through *ad hoc* and extra-constitutional processes),
- And, finally, it is justified through emergency rhetoric.

Thus, ITC does not *explicitly* abandon law. Indeed, an emphasis on the importance of following rules has featured prominently in the rhetoric of national and EU leaders throughout the crisis response. However, the 'law' that underpins the crisis response is a poor imitation of the law that underpinned the construction of the European Community. The emergency regime that has evolved over the last several years rests on an *Ersatz* legality, which, in fact, undermines the rule of law and which has produced a crisis of law itself (Kemmerer 2017).[1]

To be clear, the flaw in the construction of EMU was *not* that it was insufficiently legalised. On the contrary, the erroneous belief that EMU *could* be legalised was used to justify its half-formed structure. In other words, a currency union comprising a dozen economically disparate member states, lacking both a fiscal counterpart and the political will to create one, was meant to be held together by formal rules. Far from being under-utilised, law was overburdened (Joerges 2012b).[2] It follows that the solutions to the problems that afflict EMU are not to be found in 'more law'. But neither are they to be found in the abdication of political decision-making to the 'authoritarian managerialism' (Joerges and Glinski 2014) of ITC. The problem is profound. As Helen Thompson (2018) puts it, the EU is trapped: 'Stuck with an

unworkable currency union, the EU can neither accommodate democracy in its member states nor suppress it.' Indeed, as popular discontent grows, so too does the elite consensus needed to sustain ITC decline (see Hooghe and Marks 2017). Witness, for example, the ongoing confrontation between the Italian government and the European Commission over Italy's budget. Thus, while the crisis is far from over, the high point of ITC may well have passed.

The ECB as an agent of Integration through Crisis

It is in the context of the transition from ITL to ITC that the ECB took centre stage. Since its creation in 1998, the ECB has been an important component of the EU's regulatory state. It is an independent agency, insulated from direct majoritarian pressure, which has been mandated by its principals to set monetary policy for the eurozone. Yet, the idea that the ECB was set up as an *apolitical* body was always somewhat misplaced (Tooze 2018: 99). What the Bank did and refrained from doing was shaped by the political goals of the monetary union. As David Marsh (2011: 52) observed, for example, the ECB refrained from collecting data about trade imbalances within the eurozone on the assumption that these were irrelevant in a truly unified single market – an assumption that proved profoundly damaging as it undermined the Bank's ability to anticipate the crisis. Similarly, as Adam Tooze (2018: 100) documented, the ECB made a choice to completely equalise borrowing costs across the eurozone, enabling the Greek state to borrow 'on terms that were better than ever before in their history'.

This is not to suggest that the ECB's mandate is open-ended. It is clearly circumscribed in some areas, but incomplete in others. Two key aspects are made

explicit in the Maastricht Treaty. Firstly, the Bank is confined to monetary policy making and excluded from the realm of economic policy making, which is left to national governments. Secondly, the Bank is given an explicit hierarchy of objectives to pursue – price stability is its primary goal, though it may also act to support the general economic policies of the Union so long as such actions do not conflict with the objective of price stability. There are other, equally important respects, however, in which the principal-agent contract is incomplete. 'Price stability' is not defined, and neither are the policy instruments by which the ECB may pursue its mandated objectives.

The crisis offered an opportunity to fill in some of those gaps. Faced with possible collapse of the eurozone in 2010–2012, the ECB began to adopt a number of unconventional policy instruments, including the Outright Monetary Transactions (OMT) programme, and to take a bigger role in providing much-needed finance to euro area banks via the Emergency Liquidity Assistance (ELA) programme. The Bank's actions over the crisis years have often been described as 'necessary' (cf. Sinn 2014: 280–293). But how are we to understand and evaluate necessity under these circumstances, and how does it relate to legitimacy?

We argue that the rhetoric of 'necessity' has been used to foreclose debate; to rule out some courses of action and promote others on the basis that 'there is no alternative' in an emergency. Yet, the policy problems addressed by the ECB are very much open to a variety of responses, which should be open to political contestation. Rather than being value-neutral, the ECB's actions are distributional in their effects and, therefore, not suitable for technocratic resolution. In fact, the crisis has exposed the

monetary union as an incomplete project and the euro as a currency in search of a state. As Adam Tooze (2018: 109) argued,

> Coping with highly integrated financial capitalism requires a state that is disciplined, has the capacity to act and has the will to do so. Coping with a banking crisis on the scale that was brewing in Europe required a very capable state indeed.

Considering the scale of the challenge, the institutional apparatus of EMU was a poor substitute for such a state. To be sure, numerous proposals for major EMU reform have been put forward over the last several years. However, none have been, or can be, implemented due to a lack of political consensus. Consequently, EMU is trapped in its present, deformed state. So long as EU leaders are unwilling to countenance any change in the composition of the eurozone, ITC appears as the only way forward. This leads us to the two interlinked trends we wish to highlight. Firstly, the renewed emphasis on technocratic solutions implemented by non-majoritarian bodies, and secondly, the coercive enforcement of those solutions, particularly on debtor states. As we discuss in the following sections, the ECB has been at the forefront of both trends. Thus, the Bank exemplifies ITC – technocratic, coercive, open neither to political contestation nor effective legal constraint.

The Gauweiler litigation: Constitutionalisation of technocratic overreach

The *Gauweiler* litigation represents the most significant test of the constitutionality of the euro crisis response to date (Fabbrini 2016: 3). The case has exposed the limits of EU law and its ability to address the political deficiencies of EU, and EMU,

governance. Importantly, in the context of our paper, as both the German Federal Constitutional Court (FCC) and the CJEU proved unable or unwilling to arrest the self-empowerment of the ECB, the *Gauweiler* decision marks the move from Integration through Law to Integration through Crisis.

The case concerned the compatibility with EU law of the OMT programme, an initiative announced by the ECB in September 2012, according to which the Bank would purchase the debt instruments of eurozone member states on secondary markets, in exchange for the affected state entering into a programme of financial assistance with the European Stability Mechanism (ESM). The OMT programme was, thus, the policy manifestation of Draghi's famous pledge, made in July 2012, that the ECB would do 'whatever it takes' to guarantee the eurozone's survival. Measured against its aim of calming markets so as to ensure the smooth transmission of ECB monetary policy, the OMT programme was highly successful. So successful, in fact, that it was never used. Its mere announcement had the desired effect.

Nevertheless, the fact that it was never used did not allay concerns over the programme's alleged illegality. This was especially so in Germany, where most steps in the crisis response have elicited fears that EMU is becoming a transfer union. The complaint brought by the Christian Social Union (CSU) politician, Peter Gauweiler, and others was couched in constitutional terms. It centred on the claim that the ECB had acted *ultra vires* in announcing OMT, since this was an economic policy, outside of the Bank's monetary policy remit, and, furthermore, that the programme breached Article 123 TFEU's prohibition of monetary financing of government debts.

The case came first to the FCC, which referred certain questions to the CJEU - the first time in its history that the FCC had used the preliminary reference procedure. In this respect, the constitutional significance of the case extended beyond its particular subject matter to take in the relationship between national courts and the CJEU in the EU's informally constitutionalised judicial order. For, although the FCC's utilisation of the preliminary reference procedure could be regarded as indicating acceptance of the CJEU's exclusive competence to interpret EU law, the text of the referral made it clear that the situation was not so settled (Fabbrini 2016: 4).

Indeed, the potential for direct conflict between the two courts was flagged by the German Court's invocation of its own previously established test of whether an EU institution has exceeded its competences.[3] That is, the FCC suggested that the OMT programme constituted a 'manifest violation' of the ECB's powers that caused a 'structurally significant shift' in the allocation of competences between the national and supranational levels.[4] The FCC's very ability to articulate such a test is not accepted by the CJEU, which claims for itself sole competence to find the act of an EU institution ultra vires. Hence, the *Gauweiler* case was an opportunity to test not only the legality of the euro crisis response but also either to reaffirm or reconfigure core features of the EU's constitutional settlement.

The CJEU announced its decision in the *Gauweiler* case on 16 June 2015.[5] The Court affirmed the legality of the OMT programme, applying an objectives-based, rather than effects-based, test that allowed the bond buying programme to be qualified as a monetary policy measure, notwithstanding its potentially significant economic policy effects (Louis 2016: 60–1). What are the consequences of the *Gauweiler* verdict?

Formally, the ECB's mandate has not changed. Yet, *de facto*, the ECB has expanded the scope of its powers considerably – an expansion that the CJEU has constitutionalised.

In particular, the objectives-based test takes the ECB at its own word. OMTs must be a monetary policy measure because the Bank's stated aim in announcing the policy was to safeguard the 'singleness' of eurozone monetary policy, itself a prerequisite of the Bank's effective pursuit of price stability. The CJEU's deferral to the ECB's expertise on the question of what constitutes monetary policy is neither surprising nor without justification (see e.g. Zilioli 2016). Since preparation and implementation of a programme such as OMT requires the ECB 'to make choices of a technical nature and to undertake forecasts and complex assessments', the Bank 'must be allowed, in that context, a broad discretion'.[6] Certainly, it would not make sense for the Court to substitute its own judgement on the highly technical questions involved in the case for that of the ECB. Yet, deferral to expertise cannot be limitless, and the *Gauweiler* case was surely an opportunity for the Court to make clear that while the EU treaties may be interpreted flexibly, their letter and spirit cannot be blatantly disregarded (Joerges 2016).

As it is, the *Gauweiler* decision has left the ECB's discretion to interpret its own mandate effectively unchecked. Now that the CJEU has endorsed the Bank's unorthodox policy manoeuvres, only treaty reform, with all of its prohibitively high barriers, 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 2015: 593–9). Meanwhile, the FCC declined to

follow up on its implied threat to overrule a binding interpretation issued by the CJEU. In its final ruling on the *Gauweiler* case, delivered in June 2016, the German Court cast doubt upon the CJEU's reasoning, but it nevertheless accepted the Court of Justice's conclusion.[7]

Ultimately, then, *Gauweiler* further damaged the cause of law in the crisis response. While the litigation's outcome reinforced the ascendancy of technocratic governance in the eurozone, the process underlined the difficulty of applying legal rules and legal standards to emergency politics. These problems were foreseen by the two dissenting FCC judges, Justice Lübbe-Wolff and Justice Gerhardt, who argued against the admissibility of the *Gauweiler* case on the grounds that the fundamentally political questions raised by the plaintiffs were not amenable to adjudication by a German national court.[8] To repeat a point we have made elsewhere in this paper, law cannot replace politics; and to overburden the law is also to undermine it.

In other words, political choices of the type faced by the German government in the midst of the euro crisis cannot be determined by legal rules, which must be clear and knowable *ex ante* in order to merit the label 'law'. As Justice Lübbe-Wolff argued, the matters raised in *Gauweiler* were simply 'beyond the limits of [the FCC's] judicial competence under the principles of democracy and separation of powers.'[9] To be sure, Lübbe-Wolff did not claim that what cannot be decided by the FCC cannot be decided by *any* court, since the 'limits of justiciability' necessarily vary between national and transnational courts according to the 'legal bases of their competence and implementing power'.[10] Yet, it is beyond the powers of even the CJEU to resolve the conflicts and contradictions of Europe's currency union. EMU's *lex imperfecta* could

only be completed through a democratically-legitimated political process (Joerges 2016: 111). This seems a remote possibility.

At any rate, by constitutionalising the ECB's regulatory overreach, the *Gauweiler* litigation has contributed to the EU's shift from a *Europäische Rechtsgemeinschaft* (European community of law), premised on voluntary cooperation, to a *Zwangsgemeinschaft* (community under duress), which emphasises coercive enforcement (Bogdandy 2017). The ECB is becoming both the subject and object of the transformation of the European monetary system, largely by-passing due political process. We consider how this trend has manifested below.

The ECB and the coercive turn in EMU governance

The second characteristic of ITC on which this paper focuses is its tendency to emphasise coercive enforcement of 'the rules', however those rules may have come into existence. Again, the ECB is implicated in this 'coercive turn' in EMU governance. Echoing Bogdandy's critique of EU law as being 'revolutionary' in character, we suggest that the ECB overstepped its role by making itself an agent of the radical transformation of the monetary union. We concur with Joseph Lacey (2017: 137) in his assessment that the ECB has become 'simultaneously much too powerful and much too detached from democratic institutions'. Three examples shall suffice to illustrate this claim.

We firstly point to the ECB's intervention in Cyprus. On 19 March 2013, the Cypriot parliament rejected a ten billion euro bailout negotiated between the government and the 'Troika' of creditors (comprising the European Commission, the IMF and the

ECB itself), which controversially required the imposition of a tax on all Cypriot bank deposits over 20,000 euros. The ECB responded by issuing an ultimatum on 21 March that Cyprus either secure a new bailout before 25 March, or lose its ELA funding (Wearden and Amos 2013). The amended bailout package was duly adopted a few days later, in a form that did not require parliamentary approval (Smith 2013). Thus, the ECB was able to use the ELA programme 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 contributed to the undermining of democratic oversight in Cyprus by encouraging the Cypriot government to adopt policy in a way that bypassed the parliament.

The second example concerns the ECB's decision, in mid-2015, not to increase ELA to Greek banks to a level that would be necessary to counter the capital flight that the country's banking system was experiencing. This decision was taken in the midst of a fierce contestation between Greece and its creditors over whether it would receive further financial assistance and under what conditions. In fact, the ECB made its decision on 28 June, the day following Greek Prime Minister Alexis Tsipras's announcement of a referendum on the bailout terms offered by the creditors. It resulted in a three-week closure of Greek banks, which began days before the referendum was held. It is debatable whether the ECB was simply applying the ELA eligibility rules in a technical manner (with unfortunate timing), or whether it was deliberately signalling to Greeks the consequences of voting to reject austerity. In some ways, it does not matter. A decision that shuts down a country's banking system days before a major vote in that country is a political decision. The ECB simply lacks the legitimacy resources to take such a consequential action.

To be sure, we do not mean to defend Tsipras's decision to call the referendum. The haste with which it was organised raises serious questions about its procedural legitimacy. The amenability of the question itself to decision by popular vote is also doubtful. Moreover, it is arguable that the timing of the referendum was, itself, an attempt to force the ECB to extend a credit line before political leaders had reached agreement on a bailout extension. In this sense, had the ECB raised the ELA level that, too, would have rightly been regarded as a 'choosing of sides' in a political contest. Nevertheless, this caveat reinforces our central claim; namely that the ECB has been politicised to a problematic extent.

Moreover, while the referendum debacle offers a particularly dramatic illustration of our point, it was only the culmination of attempts by Greece's creditors to put pressure on the newly elected Syriza government to toe the line. In fact, the process of wearing down opposition to Troika-prescribed austerity policies had begun weeks before Greece's snap parliamentary elections, held on 25 January 2015. In December 2014, with polls predicting a Syriza victory, the Greek central bank stayed its hand in the face of a slow run on Greek banks, thus increasing their reliance on the ECB's emergency lending (Tooze 2018: 517). In an interview on December 27, the then-Greek finance minister Gikas Hardouvelis warned voters against electing a party keen on adopting confrontational tactics in negotiations with the Troika, admitting that 'the ECB holds the key' and 'this key can easily and abruptly turn off bank funding and strangle the Greek economy in a split second' (Waterfield and Tzafalias 2014). And on 4 February 2015, the ECB demonstrated its power by withdrawing an earlier arrangement under which Greek banks used Greek government bonds as collateral to

obtain funds (Mody 2018: 416). Once again, this seemingly technical measure had far-reaching political consequences as it dramatically weakened the negotiating position of the Greek government vis-à-vis its creditors.

The final example of the ECB's coercive approach concerns the infamous Trichet-Draghi letter that was sent to the Italian government of Silvio Berlusconi on 5 August 2011 (Mody 2018: 300–301). In the letter, which was meant to be secret but was later published by an Italian newspaper, the former and current ECB presidents outlined a number of reform measures, which they urged the Italian government to undertake with the utmost speed. The ECB had, and has, no legal basis make such a request, which called for comprehensive and detailed legal reform in areas including the labour market, public administration and fiscal policy – all areas of national competence. It was, rather, an attempt at coercion enabled by the ECB's leverage over national banking systems and justified by the prevailing atmosphere of emergency (Sacchi 2015).

What all three examples have in common is that they involve the technocratic, non-democratically accountable ECB playing the role of teacher and disciplinarian in order to 'discipline and punish' (Kundnani 2018) the eurozone's delinquent member states. Such attempts at coercive enforcement betray the EU's purposes and values, and contribute significantly to the degradation of democracy in Europe, particularly in the countries of the eurozone's periphery. Other cases could have been cited, such as the banking crisis in Ireland in late 2010, in which Trichet once again 'had the whip hand' (Tooze 2018: 362). To be sure, there are differences in the governing styles of Trichet and Draghi, with the former appearing to be more temperamental and

assertive. Yet, our key focus is on the underlying dynamic of these processes and the explanatory logic used to justify them, which has remained remarkably constant through the crisis years.

The limits of technocratic reason

We noted above the tendency among scholars and observers of the EU to allow the ECB considerable room to manoeuvre on the grounds of 'necessity' (see, e.g., Borger 2013; Petch 2013; Wilsher 2013). We noted, too, that this argument is not universally accepted. However, even if the Bank's actions are deemed necessary, we must ask why this is so. The fact that no other EU institution could act so decisively exposes the EU's lack of actorness; its weakness as a political construct. It also exposes the anti-democratic, market-beholden logic that has driven the crisis response: The need to placate 'the markets' (explicitly invoked, e.g., in the Trichet-Draghi letter) is treated as considerably more important than the need to placate disaffected voters.

A recent illustration of this phenomenon occurred in May 2018, when it looked like Italians would have to return to the polls for the second time in a matter of months to resolve a government formation deadlock. In an interview with *Deutsche Welle* (2018), Günther Oettinger, the European Commissioner for Budget and Human Resources, suggested that the markets would teach Italians not to vote for Eurosceptic populists. Such sentiments, however carelessly expressed, reflect the underlying teleological assumptions that many practitioners, as well as scholars, continue to hold about the purpose and end point of European integration. These assumptions may be summarised in the idea that more integration is the solution to any and all of Europe's

problems. Deviations from the path towards ever closer union are exactly that – deviations; mistakes in need of correction.

It is in this context that technocrats take on ever-expanding political roles. If national publics, and even national governments, are fickle and short-sighted, then it is for technocratic experts – dispassionate, objective, far-sighted – to keep the process of European integration on the right track. However, these attitudes are very much part of the problem. They are based on the fallacy of technocratic reason. No less a figure than Friedrich von Hayek (1974) warned against the widespread 'superstition' in economics 'that only measurable magnitudes can be important' – an approach that oftentimes 'produced a policy which has made matters worse'. Similarly, the limited wisdom of the Maastricht Treaty criteria (reaffirmed in the subsequent Stability and Growth Pact) is reminiscent of Hayek's suspicion of 'a vain search for quantitative or numerical constants' in areas of human activity that are far too complex to be captured by mathematical methods, much less written into legal or political compacts. Excessive reliance on technocratic logic tends to impoverish democracy and fuel the turn to populism within member states. In fact, populism and technocracy are better seen as posing a twin danger to democracy, rather than being in opposition to each other (Bickerton and Accetti 2018).

Thus, the idea that the EU could regulate itself out of crisis– that restoring confidence and stability to the eurozone was primarily a matter of putting the right policy settings in place – was misplaced and misguided. The technocratic approach to the euro crisis, of which the ECB has been at the forefront, overestimated fidelity to the rules and to the idea of the 'rule of rules' amongst member states. It underestimated the extent to

which acceptance of, and adherence to, rules was contingent on there being a virtuous circle of cumulatively causal integration (Jones 2018). In short, the technocratic approach to crisis was based on a misunderstanding of the nature of the EU as a community of law. The EC/EU worked relatively well as a voluntary community of law eliciting compliance through powerful instrumental and normative logics without the need for hard enforcement. However, the euro crisis has severely disrupted the economic benefits-driven virtuous circle that powered European integration. EMU's 'coercive turn' has only made the integration project's problems worse.

Technocratic *and* highly politicised

The paradoxical effect of the euro crisis is that it has led both to more politicisation *and* more technocracy. As a result, the EU is still a regulatory state, but not of the sort that Majone (1994) envisaged, i.e. one focusing on areas of high technical complexity and low political salience. The EU today is a *highly politicised regulatory state* in which democratic politics – and publics – are not trusted. This was seen in the Troika's treatment of Greece in 2015 and it was evident in the reaction of many eurocrats to the Italian elections in 2018. There is a sense in which the euro and the integration project are too important to be left to the voters.

Much has been written about how the technocratic approach to EU governance impoverishes democratic politics at both the national and supranational levels (e.g. Jones and Matthijs 2017; Kreuder-Sonnen 2018a; Scharpf 1999, 2009; Schmidt 2006, 2016; Tucker 2018). Famously described by Vivien Schmidt (2006) as 'policy without politics', the problems inherent in this mode of governance have been exacerbated by the crisis, which has increased the political salience of economic and

monetary policy-making in the eurozone much more than it has increased the opportunities for genuine political contestation. Indeed, particularly in the highly indebted countries of the eurozone's periphery, the combined impact of the crisis and EU-level crisis management has been to *limit* the choices available to national governments and national electorates (see Armingeon et al. 2016; Matthijs 2017).

If the crisis has not increased the scope for genuine political contestation in the eurozone, then one of its clearest outcomes has been the empowerment of technocratic agencies and institutions. Bodies such as the ECB have taken on new roles and expanded existing ones – all without a formal change of mandate. The 'necessity' argument referred to above assumes acceptance of the technocratic logic. That is, that the policy problems to which the ECB has responded are best regarded as problems of coordination and/or maximising resource allocative efficiency, and that they are to be solved by applying the correct policy settings. The ECB itself has taken this line, for example, by justifying the OMT programme as a corrective response to a 'disturbed' financial system (Draghi 2012).

However, the problems uncovered by the euro crisis are political conflicts with clear distributional consequences (Tucker 2018: 305). The crisis response, with its emphasis on bailouts in exchange for austerity, has created winners and losers within and between member states. In this context, the ongoing weakness of democratic accountability of key institutions, such as the ECB, is itself disturbing. The ECB's lack of embeddedness in a political system – long flagged as problematic (Majone 2012: 14) – becomes unsustainable from a legitimacy perspective. In other words, the ECB's (self-)empowerment fails the key test that would protect a democratic polity

from the creation of an over-mighty citizen: 'whether it can solve socially costly credible commitment problems without venturing into major choices of wealth or society's values' (Tucker 2018: 556).

Concluding remarks

The attempt to rule Europe by law has backfired, undermining the EU's legitimacy in the process. In response to a series of crises that enveloped the European project over the last decade, the EU has turned towards an authoritarian mode of governance that lacks political authority. Democracy has suffered as a result at both national and European level. To be sure, government by regulation in the EU has always entailed some trade-offs in terms of democratic accountability. The EU-as-regulatory-state (Majone 1994) has long eschewed political contestation in favour of the application of technical expertise, masking conflicts of interest within and between member states without resolving them. This is a method that may have worked well in normal times, but as we have shown, it has proved highly problematic in times of crisis. With emergency governance becoming Europe's new normal, the question of the legitimacy of 'unelected power' (Tucker 2018) gains new urgency.

Thus, the euro crisis has created a 'postfunctionalist dilemma' for European elites. Functional pressures continue to push national executives towards integrative steps – bailout mechanisms, banking union, fiscal surveillance, etc. However, growing popular resistance to 'more Europe' has made it impossible to adopt and embed crisis initiatives into the existing framework of EU constitutionalism via treaty change. Consequently, emergency politics in the EU has taken on a distinctly extra-legal character (Hooghe and Marks 2017: 8-9). To put it differently, over the last several

years extraordinary policies have been adopted via extraordinary means. These policies are then embedded via a ritualistic insistence (usually made by EU institutions and creditor states towards debtor states) on the need to follow the rules – an insistence which ignores the dubious ways in which the 'rules' that make up the EU's emergency politics came into existence. Both ITL and ITC are problematic from a democratic standpoint – the former empowered courts to decide on fundamentally political questions, while the latter empowers executives and technocratic experts. Combined with politicisation and disregard for maintaining the coherence of EU constitutionalism, ITC further damages the EU's legitimacy.

As we have argued in this paper, the case of the ECB is particularly illustrative. Without any formal change to its narrow, monetary policy-focused mandate, its role has been significantly expanded and politicised. The ECB is guarantor of the euro's continued existence. It is lender of last resort for the eurozone's troubled banks and sovereigns. And it is teacher and disciplinarian to those governments and publics that attempt to escape the dictates of austerity. Perhaps national executives and EU leaders judged the technocratic approach to the euro crisis to be the 'path of least political resistance' (Hooghe and Marks 2017: 9). However, this judgement is likely to prove incorrect over the longer term. Just as European integration is cumulatively causal, so too is disintegration (Jones 2018). As domestic-level political resistance – expressed, for example, via the election of eurosceptic populists – accumulates, the constraining dissensus that operates at the European level is strengthened. As European elites continue to push against the constraining dissensus, so national-level democracy is undermined, and EU-level legitimacy weakened.

In this paper, we have attempted to diagnose the nature and causes of EMU's current malaise. Our diagnosis is twofold. Firstly, an overburdening of law and concomitant underdevelopment of political structures in the initial construction of EMU (adapting the logic of ITL). Secondly, a misguided turn towards governance via technocratic prescriptions, coercively enforced (i.e. ITC). There is no easy way out of this predicament. If, as we suggest, ITC has passed its high point, then the possibilities for what comes next run the gamut from semi-permanent crisis, to stagnation, to (partial) disintegration. As for what ought to follow ITC, we offer no definitive answer, except to say that it must involve a scaling back of ambitions so that the demands made of member states and peoples are commensurate with the legitimacy resources of the EU.

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Notes

[1] This situation makes Carl Schmitt's insights into governance in the state of emergency 'alarmingly relevant' (Joerges 2012a: 377). In fact, what is presented as 'law' in the crisis response may be more accurately described as Schmittian *Maßnahmen* (we are grateful to an anonymous reviewer for this point). Schmitt, the controversial 'Theorist for the Reich', differentiated between *Gesetze* (laws) and *Maßnahmen* (measures), a distinction that became a cornerstone of his 'legal interpretation of presidential emergency powers in the Weimar Republic' (Bendersky 1983: 20). While the lat ter are 'merely temporary means to a specific end', the former 'represent more permanent and general legislation'. For a Schmittian perspective on the crisis see (Hufeld 2011, Joerges 2012a: 377–381).

[2] The German Federal Constitutional Court (FCC) is implicated in the fallacy of EMU's legalisation. In its famous Maastricht Treaty decision, the FCC not only endorsed EMU's construction as a legally structured and de-politicised currency union, it made this construction a precondition of German participation (Joerges 2012b: 10–11).

[3] BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1 – 116), available at www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html.

[4] BVerfG, 2 BvR 2728/13 vom 14.1.2014, Absatz-Nr. (1 – 105) available at www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html, paras. 36-43.

[5] Case C-62/14, *Peter Gauweiler et al. v Deutscher Bundestag*.

[6] Ibid, para. 68

[7] BVerfG, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 decision from 21.06.2016.

[8] There are two points here. Firstly, the subject matter is too inherently political to be justiciable. Secondly, it would be of a 'questionable democratic character' for a handful of independent German judges, interpreting German law, to decide on the question for the entire eurozone. BVerfG, 2 BvR 2728/13 vom 14.1.2014, Absatz-Nr. (1 – 28) (Dissenting Opinion of Justice Lübbe-Wolff), para 28.

[9] Ibid, para 3.

[10] Ibid, para 10.

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