Politicization without democratization: The impact of the Eurozone crisis on EU constitutionalism

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Abstract

This paper shows how the European integration process overburdened EU law in an attempt to overcome political deficiencies, with negative consequences for the Union’s democratic legitimacy. The analysis is framed by the ‘twin crises’ of twenty-first century EU constitutionalism: the defeat of the Constitutional Treaty and the Eurozone debt crisis. Part of the legacy of the first crisis was a retreat from the ideal of democratization via politicization. Now, as a result of the second crisis, the integration project has become politicized and European policies highly salient for national voters. However, this process has occurred largely against the will of EU leaders, who have sought technocratic solutions to what are inherently political problems. Thus, over the past decade, the EU has moved from an unsuccessful attempt at democratization via politicization, to an unintended politicization without democratization.

1. Introduction

Law has long been an important vehicle for promoting supranational integration in Europe, sometimes at the expense of democratic politics, which remains underdeveloped at the Union level. Now the law-politics balance is changing as a result of the euro crisis, but not necessarily for the better. Instead, the crisis is fuelling two separate, though interconnected, dynamics. Firstly, strict adherence to the rule of (Union) law is being superseded by other tools of non-majoritarian and technocratic governance – a trend that Christian Joerges referred to as the ‘de-legalization’ of Economic and Monetary Union (EMU). Second, the politicization of EU policies in crisis-related areas (that is, their increased salience with voters) has occurred without a corresponding democratization of EU policymaking, since the European

Parliament and the ‘Community method’ of lawmaking have been largely sidelined. In this paper, I consider both trends and their implications for the integration project.

Law’s prominence in the EU is reflected by the extent to which the integration project was judicialized from its beginnings, largely by the path breaking constitutional jurisprudence of the European Court of Justice (ECJ). This phenomenon is described in section 2, along with one of its more problematic legacies – the entrenchment of non-majoritarian modes of governance as the norm at the expense of European-level, democratic political contestation. The 2004 Constitutional Treaty (CT) was an attempt to redress this imbalance between law and politics, as the Constitution’s framers sought to publicize and politicize the EU, in order to democratize it. However, in what may be regarded as the first of the ‘twin crises’ of twenty-first century EU constitutionalism, ratification of the CT failed and European leaders subsequently returned to a ‘de-constitutionalized’ and de-politicized style of treaty making with the Lisbon Treaty.

Section 3 then analyzes how the ‘democratic deficit’ inherent in the EU’s institutional design is being exacerbated by the euro crisis, the second of the ‘twin crises’ of contemporary EU constitutionalism. In an inversion of the situation described in section 2, initiatives such as the European Stability Mechanism (ESM) have a significant capacity to undermine the rule of law in the EU. This potentiality is examined further in section 4, which notes that the ‘Community method’ of lawmaking that was instrumental in molding the European Community’s constitutional framework from the 1960s to the 1980s is being increasingly bypassed. In its place is emerging a new system, which Jürgen Habermas termed ‘post-democratic executive federalism’, and which relies on a combination of intergovernmental decision making in the European Council (largely spearheaded by a small group of Member States, above all Germany) and formally apolitical, technocratic institutions such as the European Central Bank (ECB).

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2 Eurobarometer data from autumn 2012 showed that awareness of EU institutions had reached an all time high (91% of respondents having heard of the European Parliament, 85% of the Commission and ECB, 71% of the Council). However, trust in these institutions remains low (44% tended to trust the Parliament, 40% the Commission, 37% the ECB, and 36% the Council). Overall, 45% of respondents expressed dissatisfaction with the way democracy works in the EU, compared to 44% who expressed satisfaction. See STANDARD EUROBAROMETER 78, PUBLIC OPINION IN THE EU – AUTUMN 2012.

Such developments threaten the democratic quality, legitimacy and, ultimately, sustainability of the European project. As noted, EU policies have become much more highly salient, but, at the same time, policymaking has become less accountable and transparent. In sum, over the past decade, the EU has moved from an unsuccessful attempt at democratization through politicization (the Constitutional Treaty) to an unintended politicization without democratization (the euro crisis).

2. The judicialization of politics and its impact on European integration

The story of European integration through law is well known and need not be recapitulated here. Suffice it to note that it is remarkable for three main reasons. Firstly, for the central role played by the ECJ in creating and promoting a coherent and enforceable system of Community law, with only limited guidance from the Treaty of Rome. Secondly, because integration through law proceeded largely by stealth during its formative, pre-Maastricht Treaty period. Thirdly, and perhaps most importantly, supranational legal integration was notable for its success in turning the EU from a treaty-based international organization centred on a common market into a constitutionalized non-state actor par excellence. Moreover, for achieving this feat in the absence of comparable political integration and a strong sense of a common identity amongst Member States and citizens.

Nevertheless, law’s integrative power – and its ability to compensate for political deficiencies – is finite. By ignoring constraints on the scope and depth of European integration that were inherent in the judicially-driven model, law was overburdened by the ever increasing demands made upon it, particularly by the currency union. Understanding the judicialization of European integration is,

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therefore, key to understanding why the euro crisis is also a crisis of law and politics in the EU.

R. Daniel Kelemen used the term ‘Eurolegalism’ to describe how ‘the judicialization of politics in Europe has led courts to become involved in nearly every sort of major political and policy dispute imaginable’.\(^{7}\) While it has its advantages, one negative outcome of this phenomenon is its tendency to overtax EU law by tasking it with disproportionate responsibility for legitimating supranational governance. This manifests itself in what Damian Chalmers described as ‘the cumbersomeness of EU law’.\(^{8}\) In order to justify the existence of its institutional machinery, EU law is compelled to promise goods that would be otherwise unattainable by other levels of government or other forms of transnational cooperation. These overinflated claims are also partly an attempt to make up for the lack of strong affective ties between the EU and its citizens. The strategy relies on a politics of betterment, which can ‘[lead] to an escalation of expectations of government and of the citizen that will not only never be met but can also generate perceptions of breakdown or crisis’.\(^{9}\) Thus, in times of weak growth and economic tumult, such as Europe currently faces, the EU’s seeming impotence is exacerbated by the unrealistic standards it has set itself.

Still, there were good historical reasons for privileging juridified modes of governance in the European Union.\(^{10}\) The rise of Eurolegalism in post-war Europe coincided with a re-evaluation of ideal modes of democratic governance at the national level. Unfettered parliamentary democracy had been widely discredited in continental Europe by the experience of fascist parties seizing power through democratic processes and then using their power to destroy liberty and democracy. Many post-war European governments responded by creating strong and independent constitutional courts charged with protecting individual human rights and given

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\(^{9}\) Chalmers, *Gauging the Cumbersomeness*, supra note 8, at 8-10.

\(^{10}\) For example, see J. H. H. Weiler, *The political and legal culture of European integration: An exploratory essay*, 9 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 678, 687 (2011).
extensive powers of judicial review, whilst also constraining popular sovereignty and its most important manifestation, the directly elected parliament.\textsuperscript{11} In broad terms, West European politics after the Second World War was characterized by a shift from a democratic model heavily centered on representative institutions, to liberal, constitutional democracies, or, as Jan-Werner Müller termed them, ‘self-disciplined democracies’.\textsuperscript{12}

Developments in the constitutional practices of West European states were complemented by events at the European level. The European Coal and Steel Community (ECSC) was an early example of elite-driven integration overseen by non-majoritarian institutions. Under the ECSC’s system of governance, authority over Member States’ coal and steel sectors was ceded to a supranational High Authority, forerunner of the European Commission. This body consisted of unelected technocrats accountable to national executives as represented in the Council of Ministers. Though the ECSC featured an Assembly comprised of national parliamentarians, its powers were weak and its membership nominated rather than elected. Even after the entry into force of the Treaty of Rome on January 1, 1958, the Assembly (and later, parliament) remained marginal to the process of European integration.\textsuperscript{13}

Like the institutional changes that occurred at the national level, the belated and incremental empowerment of the European Parliament may be partly explained by the post-war aversion of continental European elites to the excesses of majoritarian democracy. An elected legislature was not essential to an enterprise that was preoccupied with constraining peoples and preventing their backsliding into authoritarianism.\textsuperscript{14} In the pre-Maastricht Treaty period, law ‘function[ed] as a mask for politics’, allowing the achievement of policy results that could not have been obtained through political channels. In a sense, law filled the role that

\begin{footnotes}
\item[12] Müller, Contesting Democracy, supra note 11, at 125-130; Kelemen, Eurolegalism and Democracy, supra note 7, at 63-64.
\end{footnotes}
neofunctionalists had postulated economics would play in promoting centralized regulation at the European level.15

Such an institutional design may have been prudent – and highly successful – at the time, but the implications for the EU today are profound. Simply put, ‘[d]emocracy was not part of the original DNA of European integration’, and its absence will not be remedied by any amount of tinkering at the margins.16 Moreover, over the past several years, the democratic deficit has been exacerbated by the euro crisis, as strict obedience to the rule of law ceded ground to economic necessity as the driving force behind supposedly apolitical and exceptional measures.

3. The new economic governance – legal and legitimate?

Since the euro crisis first erupted, EU leaders have adopted a series of rescue measures in rapid succession. The fact that they have often sought to avoid EU law and the ‘Community method’ in doing so speaks to inadequacies in the Union’s constitutional order and the mismatch between legal capabilities and political aspirations. As the most acute phase of the emergency passes (for the time being, at least), what is emerging is a more flexible, less democratic, internationalized EU legal order in which Member State executives are the key decision makers.

The immediate trigger for this constitutional transformation was the poor economic situation in Greece, which came to a head in early 2010 when the new government revealed that the country’s budget deficit was far worse than had been previously reported. Once financial markets began to doubt the government’s capacity to service its debt, Greece’s access to capital markets dried up.17 Given the potentially dire consequences of a Greek default, EU leaders began to discuss the possibility of putting together a ‘rescue package’, though in a way that would avoid the potential legal roadblock of the ‘no-bailout clause’ (Article 125 TFEU). In May 2010, the euro area heads of state and government agreed the details of just such a financial assistance package. The deal took the form of a series of bilateral loans between Greece and other euro area states, meaning that it formally bypassed the framework of

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15 Burley and Mattli, Europe Before the Court, supra note 4, at 44.
16 Weiler, The political and legal culture of European integration, supra note 10, at 694.
EU law. However, the European Commission was tasked with supervising the lending operation, which somewhat muddied the issue of the EU’s involvement.18

Though convenient, the bilateral loan model was considered a temporary solution, especially as the sovereign debt crisis engulfed Ireland and Portugal and threatened to spread further. Therefore, on 9 and 10 May 2010 at an extraordinary meeting of the Economic and Financial Affairs Council (Ecofin) two mechanisms were initiated in order to institutionalize more formally financial assistance arrangements. The first of these, the European Financial Stabilization Mechanism (EFSM), was established by Council Regulation No. 407/2010 and based on Article 122(2) TFEU.19 That treaty provision allows the EU to grant financial assistance to a Member State that ‘is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control’.

The second initiative involved the creation of an additional, and considerably larger, European Financial Stability Facility (EFSF) to coordinate loans and guarantees from euro area states. In contrast to the EFSM, the EFSF was established by a decision of the representatives of the euro area states only. Moreover, the representatives were wearing their intergovernmental hats and, as such, acting in their capacity as states rather than as members of the European Council.20 Thus, the EFSF, like the first Greek bailout, did not formally involve the EU and was not given a legal basis in the treaties. It was established as a ‘Special Purpose Vehicle’, a private company based in Luxembourg and jointly controlled by euro area states. It was established for a period of three years, with a total lending capacity of 440 billion euro, compared to the EFSM’s 60 billion euro.21

Both of these financial assistance mechanisms were legally questionable. Two major objections could be raised against them; the first of which was the question of the EFSF’s compatibility with the ‘no bailout’ clause of Article 125(1) TFEU. Prima facie, it appears that Article 125 was breached, firstly by the Greek bailout of 2 May.

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20 Rather convolutedly, the decision was described in Council document 9614/10 of 10 May 2010 as a ‘Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union’.
21 de Witte, The European Treaty Amendment, supra note 18, at 6.
2010 and later by the creation of the EFSF.\textsuperscript{22} Nevertheless, scholars and European leaders have advanced arguments for the consistency of the rescue measures with EU law. These include the assertion that the phrase, ‘shall not be liable for…’ in Article 125 means that the Union and/or the Member States shall not be \textit{compelled} to assume the debts of another Member State, but that the clause does not prohibit the \textit{voluntary} assumption of such liability. However, this reasoning is contrary to the rationale behind Article 125, which was about using the discipline of financial markets to force Member States to live within their means.\textsuperscript{23} Another potential counter-argument is that the EFSF facilitated the provision of loans and guarantees, rather than direct financial aid.\textsuperscript{24} However, this reasoning, too, is dubious, as there is no plausible reason to interpret Article 125 so narrowly.

Potential justifications aside, the rescue packages were controversial because they violated the spirit, if not the letter, of Article 125. Similarly, they were not in keeping with public expectations of how the provision ought to be interpreted. This was particularly true of Germany and other ‘Northern’ Eurozone members, where the clause’s inclusion in the Maastricht Treaty was intended to placate critics who worried that the introduction of a common currency would lead to a ‘transfer union’, in which better performing states subsidized economically weaker members.\textsuperscript{25}

The second major query over the legality of the measures adopted in May 2010 was whether or not Article 122(2) TFEU was really capable of supporting the EFSM (the EU law based pillar of the Eurozone’s financial firewall). At issue was what may constitute ‘exceptional occurrences beyond [a Member State’s] control’. Since the governments of heavily indebted states had contributed to their own predicaments through economic mismanagement and poor decision-making, it could be argued that their circumstances were not beyond their control.\textsuperscript{26} However, more flexible interpretations of Article 122(2) were also advanced. Jean-Victor Louis, for example, argued that it ought to be interpreted as a ““counterweight” to the no-bailout clause’, and, further, that the severe degeneration of conditions in Greece in 2010, the

\begin{itemize}
  \item \textsuperscript{22} Matthias Ruffert, \textit{The European Debt Crisis and European Union Law}, 48 COMMON MARKET LAW REVIEW 1777, 1785-1787 (2011).
  \item \textsuperscript{23} Ruffert, \textit{The European Debt Crisis}, supra note 22, at 1785-1786.
  \item \textsuperscript{24} de Witte, \textit{The European Treaty Amendment}, supra note 18, at 6.
  \item \textsuperscript{25} Louis, \textit{The No-Bailout Clause}, supra note 17, at 982; Ulrike Guerot, \textit{The euro debate in Germany: Towards political union?}, EUROPEAN COUNCIL ON FOREIGN RELATIONS (2012).
  \item \textsuperscript{26} Ruffert, \textit{The European Debt Crisis}, supra note 22, at 1787.
\end{itemize}
spread of the crisis to Ireland and the threat of further contagion, did mean that the situation was ‘exceptional’ and beyond the control of the Member States concerned.27

Thus, opinion was divided on the legality, not to mention legitimacy, of the temporary stability mechanisms. It was partly that uncertainty that prompted euro area states to create a permanent European Stability Mechanism (ESM) backed up by an amendment to the treaties. The German government was especially insistent on this point, as it was worried about the potential reaction of the German Constitutional Court. Its view eventually prevailed, despite the reluctance of many governments to reopen the treaties so soon after the long and torturous process of constitutional reform that had ended with the Lisbon Treaty.

The proposed amendment to Article 136 TFEU was tabled at the European Council meeting in December 2010. The new treaty paragraph specifically authorized the establishment of a stability mechanism by euro area states (rather than by the EU as a singular entity).28 This paved the way for the new institution to be run along intergovernmental lines, as an institution of the euro area in which non-euro area Member States could participate on an ad hoc basis. In keeping with this approach, the main decision-making body of the ESM is its Board of Governors, comprising the euro area Finance Ministers. EU institutions are represented at Board-level via the participation of the European Commissioner for Economic and Monetary Affairs and the President of the ECB as non-voting observers.29

The ESM is located in Luxembourg and is governed by public international law. Its legal framework leaves little scope for input from supranational institutions, such as the ECJ and the European Parliament, through the channels traditionally provided by EU law.30 The European Commission, however, was given an important role in facilitating the ESM’s operation. In particular, the Commission, in conjunction with its troika partners, is tasked with assessing the public debt situation of a Member

27 Louis, The No-Bailout Clause, supra note 17, at 983-985.
28 The new paragraph reads as follows: ‘The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality’.
29 See EUROPEAN COUNCIL CONCLUSIONS, EUCO 10/11/1 REV 1, ANNEX II (24/25 March 2011).
30 It has been suggested that as the crisis cements a ‘two-speed Europe’, the ESM will become the nucleus of a set of euro-area-only institutions paralleling those of the EU-28. See Piotr Buras, The EU’s Silent Revolution, ECFR POLICY BRIEF/87, (September 2013).
State that requests financial assistance, negotiating a ‘macro-economic adjustment programme’ for the state concerned and monitoring the state’s compliance with that programme. The Article 136 amendment was adopted as European Council Decision 2011/199 on 25 March 2011 and entered into force on 1 May 2013. The new provision sits alongside the ‘no bailout’ clause – perhaps a little uncomfortably – but does not alter it. Therefore, its insertion still leaves several questions unanswered, not the least of which is what the new financial stability regime means for the future of the Community method of decision-making.

Given that the purpose of the amendment was to legitimize the ESM and inoculate it against legal challenges, it is worth noting that it only became operational several months after the permanent bailout fund itself. The ECJ considered the legality of this time lag in November 2012 on a preliminary reference from Ireland’s Supreme Court. It held that the amendment to Article 136 TFEU only confirmed a power already held by Member States and did not confer any new power. Accordingly, a Member State’s right to ratify the ESM Treaty was not subject to the amended TFEU provision’s prior entry into force. On one level, the ECJ’s verdict renders the new Article 136 superfluous (though, as noted, the enterprise was undertaken primarily with an eye to Karlsruhe, not the Court in Luxembourg). However, of more concern than a potentially unnecessary treaty revision is the growing impression that the Eurozone rescue measures are undermining the Union’s legal coherence in the name of expediency. The ECJ’s approval of the ESM does not assuage these concerns. On the contrary, the financial crisis is weakening the power and influence of the Court since it is international law, rather than European law, that ‘is being used as a tool for the development of the European integration process’.

The implications of this trend are considered in the following section.

4. Shifting from a legal to a technocratic mode of governance in a state of emergency

From the European Economic Community’s inauguration in 1958, the ECJ quickly established itself as a key pro-integrationist force and significant political

31 EUROPEAN COUNCIL CONCLUSIONS, supra note 29.
32 See Case C-370/12 Pringle v Ireland [2012], paragraphs 183-185.
33 de Witte, The European Treaty Amendment, supra note 18, at 8. A similar point may be made in relation to the Fiscal Compact, also adopted outside of the auspices of the EU treaties.
actor, despite its ostensibly judicial mandate. More than five decades later, it seems that integration via court-led constitutionalization has passed its high point. There are several reasons for this, chief amongst them the greater political salience of European issues in the age of ‘constraining dissensus’. The expansion of EU-level competences into politically sensitive areas helped to explode the fiction that Community law was merely the apolitical, technical instrument of a self-contained supranational legal system. Just as it was impossible to maintain a separation between economics and politics, so too it has proved with law and politics.

The euro crisis has further altered the dynamics of EU constitutionalism by creating a state of exception in the Eurozone and the EU more broadly. Flexibility and decisiveness are critically important in a situation in which the solvency of individual states, and the stability of the currency union as a whole, hinge on the reactions of volatile markets. The urgency of the state of exception has exposed the limitations of the Union’s legislative mechanisms, which work via a long and slow process of interest consultation and institutional bargaining. The bypassing of those mechanisms, in turn, affects the ECJ’s jurisdiction and its ability to play a role in the EU’s future.

Thus, the euro crisis has contributed to the ECJ’s transformation from vanguard of European integration to laggard. Pringle v Ireland illustrates this point. The case arose out of a complaint brought by Thomas Pringle, an independent Irish parliamentarian, against the ESM Treaty. In particular, Pringle asserted that the Treaty’s ratification should have been put to a referendum in Ireland, as is required by Irish law whenever sovereign powers are transferred to an international organization. The Irish government, however, had decided that a popular vote on the ESM Treaty was unnecessary, because it was authorized by an EU treaty provision (the revised Article 136 TFEU) that had been adopted under the simplified revision procedure in Article 48(6) TEU. As decisions taken under that procedure cannot increase the EU’s competences, they should not trigger Ireland’s referendum requirement. The Irish government argued that this logic extended to its ratification of the ESM Treaty.

Pringle’s case eventually reached Ireland’s Supreme Court, which found that the ESM Treaty did not involve an impermissible transfer of sovereignty.

34 Hooghe and Marks, A Postfunctionalist Theory of European Integration, supra note 22.
Nevertheless, it referred three questions to the ECJ for a preliminary ruling.\textsuperscript{36} Firstly, was European Council Decision 2011/199 (by which Article 136 TFEU was amended) valid? Secondly, was an EU Member State permitted to enter into an international agreement such as the ESM Treaty, having regard to the existing body of EU law? Thirdly and finally, if Decision 2011/199 were valid, was a Member State’s right to ratify the ESM Treaty subject to the prior entry into force of the amendment to Article 136 TFEU?\textsuperscript{37}

The ECJ delivered its verdict on \textit{Pringle v Ireland} on 27 November 2012. The Court’s answers to the three questions were, respectively, yes, yes, and no. The decision was, therefore, a ringing endorsement of the ESM, though one given a full two months after the permanent bailout fund had already entered into force. Less kindly, the verdict could be described as an unnecessary (if still welcome) assurance given to a new EU vanguard rapidly disappearing from the ECJ’s view. Simply put, courts – slow, process-driven and dependent on legal norms – are not capable of deciding on the exception. Jeremy Rabkin summarized these shortcomings eloquently:

\begin{displayquote}
Remote, mysterious, essentially bureaucratic, the ECJ is a mirror of the EU, itself: it can process a vast range of technical questions but is not designed to face the supreme crises that may still confront Europeans in the course of human events.\textsuperscript{38}
\end{displayquote}

Rabkin’s description of the ECJ is almost a negative mirror image of the picture drawn by Eric Stein more than thirty years ago.\textsuperscript{39} It is as though the physical and metaphorical aloofness that allowed the ECJ to implement a pro-integrationist agenda steadily and stealthily for so many years has transformed into a disconnectedness, which handicaps the Court as it tries vainly to lead from behind.

\textsuperscript{36} \textit{Thomas Pringle v The Government of Ireland, Ireland and the Attorney General} [2012] IESC 47.
\textsuperscript{37} Case C-370/12 \textit{Pringle v Ireland} [2012], paragraph 28.
\textsuperscript{38} Jeremy Rabkin, \textit{The European Court of Justice: A Strange Institution}, in \textit{KEY CONTROVERSIES IN EUROPEAN INTEGRATION} 94 (2012).
\textsuperscript{39} Stein, \textit{Lawyers, Judges and the Making of a Transnational Constitution}, supra note 4, at 1.
4.1. The ECB as heir to the ECJ?

The diminishing importance of courts and the use of international treaties, rather than the existing framework of EU law, to establish crisis management tools are two examples of how the Community method has been bypassed during the euro crisis. The increasing politicization of the ECB is another manifestation of this trend. As the ability of courts to shape the integration project wanes, the ECB is emerging as a potential successor to the ECJ’s pro-integrationist mantle. The same structural asymmetries that once privileged judicial law making (due to the difficulty of taking political action at the European level), now favor a new group of economically-focused delegated authorities, including the ECB and the recently-inaugurated ESM. The causes of this transformation date back to the currency union’s creation.

EMU represented both the denouement of Franco-German reconciliation, and a bold, new step forward for a post-Cold War European project brimming with confidence and optimism about the future. It was also symbolic of the presumed relationship between economic and political integration that has informed much of integration theory. In line with the neofunctionalist concept of spillover, monetary union was regarded as an important step towards economic and political union. However, despite a significant narrowing of bond yields within the Eurozone in the early years of monetary union, the creation of EMU did not lead to real economic convergence amongst national economies, or to greater supranational fiscal coordination amongst Eurozone members. On the contrary, the ‘sheer incongruousness of the euro’s membership’ proved to be a constant problem, which the current crisis has only made more visible.

The decision to proceed with European-level monetary union without a commensurate level of fiscal and political union meant that the ECB was always operating in sub-optimal conditions. Though often viewed as technocratic regulatory institutions par excellence, national central banks are also important cogs in national political machines. The ECB, on the other hand, is ‘politically and socially “disembedded”’. Politically, in that there is no central fiscal authority with which the Bank can coordinate its policies. Socially, in that it is disconnected from the

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40 Fritz Scharpf, The Double Asymmetry of European Integration. Or: Why the EU Cannot Be a Social Market Economy, MPIfG WORKING PAPER 09/12 5-13 (2009).
42 Majone, Rethinking European Integration, supra note 35, at 14.
public debates that surround monetary policy in a national context and that require national central banks, though formally independent, to operate with some level of responsiveness to public opinion.43

This lack of embeddedness in a co-extensive political system is one of several interesting parallels between the ECB and the ECJ. Another similarity is that both have narrow bases of legitimacy, which rely on the assumption that they are adhering to rules that were negotiated and ratified by Member State governments as the democratically elected representatives of European citizens. A third parallel is that both institutions are formally independent and apolitical, yet both have morphed into important political actors. This phenomenon may be illustrated in relation to the ECB by a few specific examples.

In May 2010, while Member States were initiating the first Greek rescue package and the temporary stability mechanisms, the ECB was also moving to stabilize euro area economies. Perhaps most significant was the Bank’s decision on 10 May to buy the debt instruments of struggling euro states on secondary markets. According to then-ECB President Jean-Claude Trichet, the so-called Securities Markets Programme was launched in response to ‘exceptional circumstances prevailing in the financial markets’, including the dramatic widening of sovereign bond spreads and the almost total loss of liquidity in some government bond markets.44 By intervening in secondary markets, the ECB avoided legal prohibitions on direct monetary financing. However, the move was still highly controversial, especially considering that indirect purchases of government debt instruments – while not strictly prohibited – cannot be used to circumvent the ban on direct financing.45

The Securities Markets Programme also raised questions about the strength of the Bank’s much vaunted independence in the face of mounting external pressure to act. In this respect, the ECB’s cause was not helped by inertia, uncertainty and division amongst European political leaders, as the shortcomings of the EU’s highly fragmented system of governance became abundantly clear. Trichet acknowledged as

43 Richard Bellamy, Democracy without democracy? Can the EU’s democratic ‘outputs’ be separated from the democratic ‘inputs’ provided by competitive parties and majority rule?, 17 JOURNAL OF EUROPEAN PUBLIC POLICY 2, 11 (2010).
45 Ruffert, The European Debt Crisis, supra note 22, at 1787-1788.
much at a speech in Vienna on 31 May 2010, when he urged euro area governments
to live up to their responsibilities. After emphasizing the importance of ‘governments
implement[ing] rigorously the measures needed to ensure fiscal sustainability’,
Trichet claimed that it was only ‘in the context of these commitments’ that the Bank
had launched its initiative.46 He insisted further that the Securities Markets
Programme aimed strictly at the correction of ‘malfunctioning’ markets and, as such,
was not a substitute for proper budgetary discipline and could not and would not be
used to circumvent the EU treaties.47

Despite Trichet’s protestations that the ECB was incapable of solving the
Eurozone’s deeper problems, the Bank’s activities have taken on an increasingly
political character. At times, the ECB has appeared to be the only EU institution
capable of showing decisive leadership. This trend is illustrated by current President
Mario Draghi’s announcement on 6 September 2012 of a vastly expanded bond-
buying programme to prop up shaky sovereigns. Under the new measure, called
Outright Monetary Transactions (OMTs), the Bank would purchase the bonds of
vulnerable Eurozone members in unlimited quantities, albeit subject to strict
conditions, including affected states’ engagement of the ESM.48 In justifying the
move, Draghi spoke in the same terms that Trichet had more than two years earlier,
arguing that the bond purchases did fall within the ECB’s mandate because they were
necessary for the ‘restoration of the proper functioning of monetary policy
transmission’.49 Also like his predecessor, Draghi has drawn on the rhetoric of
exceptional circumstances. In a speech before the German Bundestag in October
2012, he outlined the ‘increasingly disturbed’ state of the euro area financial system,
which led the ECB to conclude that ‘action was essential’, despite the inevitable
criticism that would follow.50

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46 Trichet stated further: ‘Since our inception, we have always called upon
governments to respect budgetary discipline. We had a lot of difficulty with several
governments during the last ten years… This period is over. We expect from
governments strict respect for the principle of budgetary discipline and effective
mutual surveillance’ Trichet, The ECB’s response, supra note 44.

47 Trichet, The ECB’s response, supra note 44.

48 Dammbuch: EZB kauft unbegrenzt Staatsanleihen [Dam break: ECB buys
unlimited government bonds], DIE WELT, 7 September (2012).

49 Philip Faigle and Marlies Uken, Mario erklärt Makroökonomie [Mario explains
macro-economics], DIE ZEIT, 24 October (2012).

50 Mario Draghi, Opening statement at Deutscher Bundestag, ECB PRESS AND
INFORMATION DIVISION, 24 October (2012).
Draghi, himself, has emerged as one of the key leaders of the European integration project and one of the few with the power and credibility to make claims about the Eurozone’s future. Hence the positive reaction of financial markets when, in July 2012, he declared that the euro was ‘irreversible’ and that, within its mandate, the ECB was ready to do ‘whatever it takes’ to preserve it. It was put to the ECB President that the very fact that he found it necessary to make such statements suggested an attempt to make up for the failure of politics. 51 To be sure, Draghi denied this charge, but it is not without substance. The crisis has exposed inadequacies in the EU’s designated political bodies – the Council and the Parliament – that are enabling, even pushing, Draghi and the ECB to take a bigger role.

Thus, even putting aside the question of the legality of the OMT programme, it is a remarkably bold move for a non-majoritarian institution to take. Given that there is no consensus about what ought to be done to resolve the crisis and billions of euros riding on the outcome, it cannot plausibly be argued that the ECB has simply selected the ‘best’ policy option in an objective or technocratic manner. Instead, it is a profoundly political decision, which highlights and exacerbates the Bank’s lack of accountability to European citizens. The ECB’s expanded role will also expose it to severe political pressure in the future, as its decisions on whether or not to offer support (and under what conditions and for how long) could make or break a vulnerable euro state’s financial viability, with the attendant consequences for the national economy and political and societal stability.

There are, then, some echoes of the ECJ in the ECB’s assumption of a more active role in shaping the integration project. However, the context in which the Bank operates today has changed dramatically from the Court’s heyday. Unlike the 1960s, when the ECJ delivered some of its most consequential constitutionalizing verdicts, the Europeanization ‘revolution’ today is no longer quiet, and Frankfurt is certainly no ‘fairyland Duchy of Luxembourg’. 52 The big questions of European integration –

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51 To the suggestion that he was speaking like ‘the Chancellor of Europe’, Draghi responded: ‘I am communicating this message as the President of the ECB to all stakeholders… Investors need a long-term vision because they undertake long-term commitments. For them, it is very important that our leaders and governments are determined to keep the euro irreversible. So, if I say this, I am saying what our political leaders are fundamentally saying’. See Alexander Hagelüken and Markus Zydra, Interview with Mario Draghi, SÜDDEUTSCHE ZEITUNG, 14 September (2012).

52 Stein, Lawyers, Judges and the Making of a Transnational Constitution, supra note 4, at 1.
how far should it go? What form should it take? – are very much contested within and across Member States. Entrusting so much responsibility for the Eurozone’s financial management to the ECB may seem expedient, but it is not sustainable.

5. Concluding remarks: Politicization without democratization?

The EU is a fundamentally contested project, a fact that is nowhere clearer than at the intersection of law and politics that is the EU’s constantly evolving constitutional framework. Notwithstanding the remarkable achievements of judicially led constitutionalization in the second half of the twentieth century, that mode of integration has peaked. EU constitutionalism over the last decade has been instead framed by the twin crises of the failure of the Constitutional Treaty, and the euro crisis. Both the CT and EMU illustrate the tendency of EU leaders to place undue faith in law as a means to furthering the political objectives of European integration, and their crises illuminate the successes, failures and future prospects of the integration project.

The CT was drafted with the interrelated aims of filling the symbolic lacuna of EU constitutionalism, facilitating the growth of a European demos, and bringing the remote, mysterious and bureaucratic EU closer to its citizens. Its defeat in 2005 was a failure on all three counts, and served instead to highlight the large and growing elite-public gap over the desirable scope of further integration. The introduction of EMU may also be analyzed in terms of its symbolic and functional dimensions. The euro is both a symbol and instrument of European integration and the Eurozone crisis has consequences for both dimensions. Symbolically, the disintegration of the Eurozone would be a major blow to the EU’s self-perception as a project dedicated to the attainment and maintenance of peace, prosperity and unity for Europeans. The functional implications of the faltering currency union are even more profound and even more dangerous to the idea of ‘ever closer union’. They include institutional reconfiguration, the exacerbation of both national and European level democratic deficits and even the possibility of a Member State exiting the EU.

Many of these problems have their origins in the design of EMU. The decision to frame the currency union in highly legalistic terms – despite the project’s inherently political nature – overburdened the law. This was made clear little over a

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decade after the euro’s launch when, faced with interlocking sovereign debt, banking, and macro-economic crises, law broke down. Since 2010, EMU has been ‘de-legalized’ and law ‘replaced by governmental and administrative operations outside the rule of law’. This is what makes the Eurozone crisis a Schmittian ‘state of exception’. EU leaders have repeatedly stated their determination to do ‘whatever it takes’ to save the currency union, but this vow comes with significant risks, including the risk of entrenching ‘post-democratic, executive federalism’ as the EU’s primary mode of governance. Moreover, the content of the euro-rescue policies – which to date have had a heavy austerity focus – will be beyond the reach of national political contestation. Therefore, the EU’s legitimacy is being stretched both procedurally (input) and substantively (output).

These claims should not be taken as a repudiation of the integral role of law in the European integration project. On the contrary, my intention is to highlight the need for a more realistic appraisal by European policymakers of what law is and what it can do. The rule of law is an important part of any liberal constitutional order, but it is not a panacea and it cannot substitute for politics and political culture. The rules – regarding budget deficits, debt ratios, etc – in the Maastricht Treaty and in the Stability and Growth Pact could not and did not prevent the euro crisis. Indeed, their legitimacy had been undermined by multiple unpunished violations, including by France and Germany, years before the crisis so openly revealed their flimsiness. There is little reason to think that beefed-up agreements, such as the Fiscal Compact, will be any more effective.

Where does this leave EU constitutionalism? In some ways the euro crisis appears to be furthering pre-existing trends, including the turn towards intergovernmentalism. However, the intergovernmentalism of the euro crisis response measures is very different from that envisaged by the Lisbon Treaty – it is centralized at the European level, concentrating power in new non-majoritarian institutions, such

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54 Everson and Joerges, Reconfiguring the Politics-Law Relationship, supra note 6, at 646-649; Joerges, Recht und Politik in der Krise Europas, supra note 1, at 1015-1016.
57 Fritz Scharpf, Monetary Union, Fiscal Crisis and the Preemption of Democracy, LEQS ANNUAL LECTURE (2011).
as the ESM and existing ones, such as the ECB; it is very much executive; and it is
dominated by the preferences of a small group of powerful states, particularly
Germany. Unfortunately, then, the crisis response measures have superseded, rather
than advanced, many elements of the Lisbon Treaty’s constitutional settlement,
including its parliament-friendly initiatives. Indeed, even the traditional method of
amending the EU treaties via intergovernmental conferences had to be jettisoned in
favor of international agreements to which not all EU Member States are party and
which, consequently, sit uncomfortably adjacent to the body of EU law.

Finally, the euro crisis has magnified the divide between elites and publics, as
the latter become increasingly frustrated and disillusioned with unresponsive and
ineffective policymaking. Twenty years ago, Joseph Weiler described public dissent
over the Maastricht Treaty as ‘deliciously hostile’, because it drew attention to a
process that had too long gone unnoticed and unremarked by most Europeans.
Popular debates sparked by Maastricht, particularly as they cut across national lines,
were to be celebrated because they indicated the emergence, at long last, of a
European public sphere.\(^59\) Now, there is no shortage of public debate and hostility in
relation to the handling of the euro crisis, but it is no longer delicious. On the
contrary, the fragility of the financial and economic situation in the Eurozone
combined with inadequate EU-level democratic outlets and official policy responses
that tend towards executive federalism are fostering conditions under which the
integration process may well become reversible.

\(^59\) WEILER, THE CONSTITUTION OF EUROPE, supra note 4, at 4.