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**T**he eurozone crisis has had a profound impact on the project of European integration – but what is the nature of that impact? **Has the crisis spurred deeper integration among the members of the Economic and Monetary Union (EMU) (Ioannou et al. 2015)?** Has it defied the ‘constraining dissensus’ (Hooghe and Marks 2009) that accompanies politicisation to deliver concrete integrative measures, such as a banking union? Has it confirmed the resilience of the single currency, safeguarded by the European Central Bank (ECB) and its ‘big bazooka’ (Brunnermeier 2018: p. 225)? Has it undermined democracy at the European level and within member states, particularly the debtor states of the Eurozone’s periphery (Armingeon et al. 2015)? Has it pushed the EU into a political and socio-economic quagmire, from which escape seems impossible (Thompson 2018)?

**Arguably, the eurozone crisis has done all of these things.** To borrow from Donald Puchala (1971), one’s impression of ‘the nature of the beast’ will depend on which aspect of the crisis – and the crisis response – one chooses to emphasise. In this contribution, I focus on the effect of the crisis on the role of law in the EMU. Applying this perspective to the changing role of the ECB, I argue that the crisis has damaged the EU’s legal-constitutional order. Indeed, **the crisis response has given rise to a distinct integrative mode, namely ‘integration through crisis’ (ITC)**, which may be contrasted with the integration through law (ITL) that characterised the pre-Maastricht development of the European integration project.

## **From integration through law to integration through crisis**

The crucial insight of ITL concerned the dual nature of law in the EU: **law was both the object and the agent of integration** (Cappelletti et al. 1986). In other words, ITL conceptualised a project of integration *by law* (i.e. the court-driven constitutionalisation of the EU’s founding treaties) and *towards law* (i.e. towards a closely integrated and legally bound union of people and peoples).

**As it was framed by the Maastricht Treaty, EMU adapted the logic of ITL but did not adopt it in its entirety.** EMU was envisaged as a ‘community of law’, in which fiscal discipline would be guaranteed by formally binding rules. However, EMU norms do not have a direct effect and are not subject to the kind of judicial dissemination that so effectively constitutionalised the single market. Instead, implementation of EMU norms relied on there being the political will, at both the national and European level, to transform the economic cultures of the eurozone states to bring about the fiscal convergence necessary to make the single currency work.

*Two trends characterise ITC. First, the coercive turn, which is a belated and misguided attempt to address some of the EMU’s dysfunctions. Second, the over-reliance on technocratic, non-majoritarian policymaking at the expense of democratically accountable institutions and processes.*

**The structural flaws that were inherent in the EMU from the outset became dramatically and painfully obvious when the eurozone crisis hit.** In the lead up to the first Greek bailout in 2010 (and, in fact, ever since), the perceived urgency of *saving* the euro has taken precedence over the equally important task of *reforming* it. It is in this context that we may think of a transition to ITC, the key characteristics of which are as follows:

- It is ends-driven (aimed at preserving the EMU without the departure of any member);
- It is extra-constitutional (utilising novel legal and political instruments to avoid treaty change);
- It exacerbates a pre-existing preference for technocratic governance by concentrating power in the hands of executives and non-majoritarian bodies;
- It places greater emphasis on coercive enforcement of ‘the rules’;
- It is justified through emergency rhetoric.

## **The ECB in the crisis**

**The ECB’s transformation from the ‘most independent central bank in the world’,**

**to ‘one of the most politicized’ (Wilkinson 2015: 1071) is a good illustration of the operation and pathologies of ITC.** To be sure, one may argue that the ECB’s interventions were necessary to stabilise the Eurozone and restore market confidence in some of its heavily indebted members, but the way in which the Bank came to play the role of EMU’s saviour is deeply problematic. Without any formal change to the ECB’s mandate, there has been a significant *de facto* expansion of its powers. As a result, the ECB is responsible for taking highly political decisions, often with distributional consequences.

Two brief examples suffice to illustrate the problems inherent in this transformation. First, we may take the ECB’s decision, in mid-2015, not to increase the level of Emergency Liquidity Assistance (ELA) to Greek banks. The decision was made on 28 June, the day after Prime Minister Alexis Tsipras announced a referendum on Greece’s bailout terms. It resulted in a three-week closure of Greek banks, which began days before the referendum. 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 legitimate resources to take such a consequential action, not to mention one that places it in the role of disciplinarian and enforcer of austerity.**

**A second example concerns the Outright Monetary Transactions (OMT) programme announced by Mario Draghi in September 2012.** Although it has never been activated, OMT allows the ECB to buy the bonds of indebted euro states in potentially unlimited quantities, subject to the state in question engaging a conditionality-linked bailout from the European Stability Mechanism (ESM). The constitutionality of the OMT programme has been tested, and confirmed, by the Court of Justice of the European Union (CJEU). Putting aside the peculiarities of the Court’s decision (see e.g. Joerges 2016; Scicluna 2018), the outcome is that **the ECB has been given extraordinary leeway to define monetary policy and, thereby, to set the outer limits of its own mandate.**

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*character, which further undermines the EU's legitimacy.*

These examples illuminate two of the trends that characterise ITC. First, the coercive turn, which is a belated and misguided attempt to address some of the EMU's dysfunctions. Second, the over-reliance on technocratic, non-majoritarian policymaking at the expense of democratically accountable institutions and processes.

### **Implications of the turn to ITC**

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, such as those in the ECB. This is not to equate the two modes of integration. **ITC operates according to an emergency rationality – urgent, discretionary, sensitive to market forces, and not beholden to internal consistency – that is, in many ways, the antithesis of the legal rationality that underpinned ITL.** Still, the continuities between them matter because both ITL and ITC have tended to crowd out 'the political', leaving little space for the kind of democratic contestation the EU sorely needs (Auer 2019).

Thus, the euro crisis has created a 'postfunctionalist dilemma' (Hooghe and Marks 2018) for European elites. Functional pressures continue to push governments towards more integration – bailout mechanisms, banking union, fiscal surveillance, and so forth. However, **growing popular resistance to 'more Europe' has made it all but impossible to adopt and embed crisis initiatives into the existing framework of EU constitutionalism via treaty change.** Consequently, the EU's 'emergency politics' (White 2015) has taken on a distinctly extra-constitutional character, which further undermines the EU's legitimacy.

Perhaps EU leaders judged ITC to be the 'path of least political resistance' (Hooghe and Marks 2018: 117). However, this judgement is likely to prove incorrect over the longer term. 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.

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By Nicole Scicluna

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