

European courts have allowed EU law to become subject to the demands of free market economics.

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The Eurozone crisis has encouraged the reform of European institutions and the spread of austerity policies across struggling Eurozone economies. [Michelle Everson](#) assesses the role of European courts in this process, noting that they have shown an unwillingness to put legal obstacles in front of agreements generated as part of the EU's crisis management. While this may be justified in the short-term, she argues that the fact these changes appear to be permanent raises serious questions about the legitimacy of European law. Moreover, it implies that the law itself has become subject to the pressures of financial markets.



To myself and a great many other academic and practising lawyers, the current Eurosceptic obsession with the European Court of Human Rights (ECtHR) is incongruous, if not frankly weird. Certainly the ECtHR is grappling with a very new geo-political constellation, having lost its prime function of reminding once-communist East Europe of the moral superiority of the West. Similarly, it is still prone to the critique that its judges, cum functionaries, are not of the best possible quality. Nevertheless, its judgements – if read without the usual politically-obsessive lenses – seem to be a model of pragmatic propriety, leaving member states of the European Council a host of wriggle room to, for example, deny as many prisoners as possible their civic rights. Why then does the ECtHR attract so many and such visceral attacks?

The question is particularly valid given the increasing academic – and to a very small degree, political – disquiet about the judgements and reasoning of other Courts within Europe, both at the supranational and national level. Above all, the financial crisis within the Eurozone has undoubtedly claimed a further victim in its destruction of ‘the rule of law’ at both national and European level; yet, national constitutional and European judges have often and spectacularly failed to cry foul about growing illegality within the governance of crisis. The basic problem is that the new regime departs significantly from European law and governance as we once knew it, and at the same time strains established principles of national and European law.

Crisis summits have become routine and the drafting of ever more ersatz-legislation – or international law substituting for European Union law – as well as memoranda and policy papers cause much concern. First, through the supervision and control of budgetary imbalances, crisis law disregards the principle of enumerated powers (Article 13 TEU) and, by the same token, disrespects the democratic legitimacy of national institutions: in particular, the budgetary powers of parliaments. Second, in its departure from the ‘one-size-fits-all’ philosophy orienting European integration in general and monetary policy in particular, it nonetheless fails to achieve a variation, which might be founded in democratically-legitimated choices. Quite to the contrary, individualised scrutiny of national administrations is geared to the objective of budgetary balance and seeks to impose an accompanying discipline, whereby member states are left with only one response to the conditions of monetary unity – austerity measures.

Third, the machinery of the new regime is necessarily indeterminate in nature, establishing a ‘political administration’ outside the realm of democratic politics, which defies accountability under the rule of law. This is not least because the core concepts deployed by new economic governance to assess macro-economic balance within member states cannot be defined with any precision, either by economists or by lawyers.

In view of all of this, recent judgements cannot help but surprise public lawyers, who are inconveniently minded to be worried about the unchecked spread of executive powers. First, the [German Federal Constitutional Court](#) (FCC) affirmed its reputation as the ‘Court that barks but never bites’ by deciding that the German Parliament retained sufficient powers to scrutinise the conditionality criteria imposed on transfers to debtor nations, and therefore that

the principle of democratic sovereignty of German citizens had not been infringed. Equally the Court of Justice of the European Union (CJEU) in *Pringle*, examining transfers to Ireland (Case C-370/12 *Pringle v Ireland*, Judgment of 27 November 2012), proved to be more faithful to the institutions of our new European regime than the rule of law. The CJEU decided, for example, that the commitment to price stability under Article 125 TFEU had not been infringed by transfers because: '[T]he purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union, in particular in the area of the coordination of Member States' economic policies, those measures being designed, *inter alia*, to ensure that the Member States pursue a sound budgetary policy (paragraph 18)'.

At one level, these two judgements – neither of which expressly condemned the unchecked growth in the powers of a European executive – might, exactly in the manner suggested by the troubling German Jurist of the 1930s, [Carl Schmitt](#), be considered to be an expression of the strength of the rule of law in its disapplication. After all, economic collapse would be the most immediate result of Courts within Europe doubting the legality of current emergency measures. Nevertheless, simple pragmatic acceptance of functional disregard for the rule of law within a 'state of exception' must likewise be balanced against the need to return to 'normal constitutionality'. It is here, where CJEU and FCC jurisprudence is placed in a slightly longer context of market-oriented judgements, that significant doubts must arise about the overall health of the rule of law within the European Union.

Neither judgement makes room for, admittedly unawfully, expressions of ambivalence. The new regime is not a tragedy that we must briefly endure. Instead, it is a technical marvel; a perfect expression of economic science, which, in application of the yardstick of conditionality will ensure the future wealth and health of the globally competitive European market. To this degree then, the CJEU in particular is building upon economic principles of allocative efficiency which it has increasingly pursued over the last decade within its free market jurisprudence. At times this was to the detriment of labour rights, including those of the right to strike. At others, it brought damage to national cultural values through the imposition of market forces. For a lawyer, the notion that law should be subsumed by free market economics is horrifying, regardless of individual political leanings. Yet, political dissent is largely noticeable only by its absence.

Is this then the real explanation for the frenzy of attacks upon the ECtHR? In our modern world, real politics about real issues – together with its attendant public law – has ceased to matter. Instead, markets and economics are our sovereigns. Under these circumstances, politics – in particular, Eurosceptic politics – is an exercise in smoke and mirrors, unnecessary posturing which distracts from its own pointlessness, just as it hastens to attack the law.

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of the London School of Economics.

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