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## Contesting Austerity: On the Limits of EU Knowledge Governance

MARIJA BARTL\*

*Lacking robust democratic foundations, EU authority is founded on output legitimacy – delivery of (economic) prosperity through rational governance. Yet current austerity policies are the epitome of irrational governance. While this volume highlights the EU's limited ability to deliver rational output through law and legal rationality, I argue that, without democracy, the EU cannot deliver the desired output through knowledge and technical rationality either. In fact, embedding expert institutions in democratic institutional settings plays a crucial epistemic role, contributing to the production of more reflective, socially inclusive knowledge. Lack of such democratic input in the EU's knowledge production is one of the root causes of its crumbling output legitimacy and the creation of many disenfranchised (internal) peripheries. Three recent challenges of Brexit, TTIP, and austerity may be seen as attempts to reclaim the democratic responsiveness of EU technocratic rule. However, the strategies of exit and voice have not been available in all these cases: in the Greek tragedy, contesting austerity ended in subjugation: a mirror image of 'rational' governance if unaided by inclusive democratic process.*

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## I. RATIONALIZING AUSTERITY

### 1. *Austerity and legal rationality*

In this volume, the contributors understand austerity as a political rationality, or as Mattei puts it, ‘a rationality that is intrinsically theory and practice, policy and pedagogy’. They are, however, very much aware that austerity is a *messy* rationality. The purity of theory behind austerity is not a goal in itself; instead, hybrid practices emerge in order to bend EU reality to theory, and theory to EU reality, ultimately allowing for an unchecked exercise of power in the EU.

European law has played an important role in mediating austerity. Menéndez’s intervention shows that EU law has certainly not been a backstop if one were intent on controlling the powers of various EU institutions or selected member states. If anything, it has been used as a tool facilitating the practices of austerity, while often undermining our basic intuitions about the rule of law. Schepel’s contribution demonstrates that the Court of Justice of the European Union (CJEU) is, ironically, naturalizing the market at the very moment when we see it failing. In its case law, the CJEU uses positive law to read rationality and regularity into market ‘laws’ in order to turn those into instruments regulating the conduct of EU member states. In his intervention, Kaupa deconstructs the alleged links between EU law and any particular economic theory. The Treaty mandates no particular economic theory. We *choose* to read such economic theory into the Treaty as a matter of political choice.

While the contributors to this volume expose current practices of austerity in the EU as the poster-example of the naked exercise of power, rather than an attempt at rational governance, EU law has largely been used to enable and rationalize these practices. Failing to protect the constitutional rule of law (Menéndez), or legally constructing market rationalities in order to attribute them regulative power (Schepel), the contributions add further support to Kaupa’s argument regarding the indeterminate character of the EU constitution, which on its own cannot save us from sliding into collective irrationality.

### 2. *Austerity and technical rationality*

If legal rationality does not shield us from governance turning into a pure exercise of power, does technical knowledge perhaps perform better in steering EU governance toward rational outcomes? Mattei, an economic historian, offers a much needed historical perspective – how did the theory and practice of austerity ‘work’ in the past? Her account is unequivocal: whether measured by economic performance or distributive impacts, austerity has never served us well. López and Nahón, both economists, give us a more contemporary account from outside Europe. They discuss

Argentina's 'sovereign debt crisis' that – contrary to the EU – focused on sustainable debt levels and expansionary policies, and succeeded, both in terms of repaying debt and obligations to creditors as well as putting the country's economy back on its feet.

Given the historical and empirical knowledge available, why did Europe not rely on this knowledge? In fact, the Argentinian case has had remarkably limited influence on EU public debate. In response, one could perhaps point to differences in Europe's case. The times are different now, while the Argentinian experience has little relevance for the EU because of various constraints in the EU's legal-institutional design. Europe had to adopt 'downturn' austerity (Kaupa) since it needed to preserve the euro while, at the same time, avoiding too much solidarity.

Yet how do European institutions actually 'know' this? How do they produce such knowledge and interpretations? The final contribution to this volume focuses on the technical rationality of EU governance. If legal rationality has not been able to prevent us from sliding into collective irrationality, to what extent has scientific/technical rationality – the other stronghold of EU legitimacy – shielded EU governance, despite its limited democratic legitimacy, from becoming an exercise in naked power?

I will argue that technical rationality, and the EU's administrative legitimacy,<sup>1</sup> can go only so far, because EU institutions engaged in knowledge production processes have been largely dissociated from inclusive democratic process.<sup>2</sup> Because of this, EU governing knowledge will often suffer from (unintentional) bias and/or irrelevance for a growing number of peripheries, not only failing to create output legitimacy, but also becoming easy prey to the pursuit of authoritarian projects.

The article proceeds as follows. I start by analysing institutional conditions for the production of knowledge in liberal democracies, as compared to the EU (part II). I then compare the three recent challenges to EU knowledge governance – Brexit, TTIP, and austerity – which may be seen as attempts to reclaim the democratic responsiveness of EU technocratic rule (part III). The strategies of *exit* and *voice* utilized by various actors in these contestations have, however, not been available across all three examined cases: in the Greek tragedy, the contestation of austerity has ended up in a state of subjugation. (part IV). I conclude, however, on a moderately optimistic note.

1 P.L. Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 *Columbia Law Rev.* 628–738.

2 By governing knowledge I mean knowledge produced by the governing institutions in order to make sense of the outer world, to articulate the problems and possible solutions. Sheila Jasanoff, for instance, talks in her work about 'regulatory knowledge', which is knowledge produced in a regulatory process as a basis for regulatory choices: S. Jasanoff, *Science and Public Reason* (2012).

## II. *TAKING KNOWLEDGE SERIOUSLY*:<sup>3</sup> ON THE EPISTEMIC ROLE OF DEMOCRACY

In this part I argue that governance through knowledge – technocratic or administrative modes of governance – cannot on their own deliver what they promise: objectively best knowledge and ‘rational’ governance. While a significant consensus may be built around the premise that *knowledge contestation* is a precondition of democratic politics in modernity, I show why equally the *democratic* contestation of governing knowledge is a precondition for the epistemic validity, or ‘true-ness’, of such governing knowledge.

### 1. *Knowledge in politics*

In the liberal democratic state, disagreements about knowledge represent a crucial element of ideological struggles. To gain political support for their programmes, political parties summon not only alternative scales of value, but also alternative bodies of knowledge. For instance, to substantiate claims regarding the desirability of progressive taxation, privatization of public services or free trade, political parties need to mobilize different bodies, or even paradigms, of knowledge. Thus, politics is as much about production and contestation of knowledge as it is about values and principles.

### 2. *Politics in knowledge*

The reason why *democratic* contestation of governing knowledge is crucially important relates to the nature of knowledge. Knowledge always has a certain discretionary political or normative dimension.<sup>4</sup> Expert judgement, however well meant, can never be entirely objective and neutral. Rather, experts form various expectations and assumptions dependent on their

3 Report commissioned by the Directorate-General for Research: U. Felt et al., *Taking European Knowledge Society Seriously* (2007) DG for Research, EUR 22, at <[http://ec.europa.eu/research/science-society/document\\_library/pdf\\_06/european-knowledge-society\\_en.pdf](http://ec.europa.eu/research/science-society/document_library/pdf_06/european-knowledge-society_en.pdf)>.

4 M. Foucault, *Security, Territory, Population* (2007); S. Jasanoff (ed.), *States of Knowledge: The co-production of science and social order* (2004). In legal scholarship, any challenge to the modernist views of knowledge as objective and neutral has only very slowly reached the mainstream. Quite to the contrary, faced with the ‘real politics’ of globalizing governance, with its discourses of truth, knowledge, objectivity, and expertise, the modernist belief in expertise seems to have only gained more traction in the past decades. Several arguments justified this approach. Our more complex worlds and lives demanded increased deference to experts in various areas. The same concern for complexity has driven the institutional formation of public governance, the proliferation of standardization bodies, scientific/evidence-based governance, the juridification of politics, and the shift to market forms of governmentality further supported the expertization of governance.

personal situatedness (the expectations that relate to their belonging to social networks, social classes, their educational level, and so on), their institutional affiliation (with a particular institution, a broader institutional framework, or a state of origin) or disciplinary belonging (discourses, frames, assumptions).<sup>5</sup> These expectations and assumptions will also have their normative and distributive (interests) dimension – as scholars in critical (legal) theory of gender, race or sexuality have abundantly shown.<sup>6</sup>

If we accept that values and interests map onto such expert-produced governing knowledge, then it follows that limiting the contestation of knowledge will become *epistemically* problematic.<sup>7</sup> Such knowledge can accumulate various sorts of biases that relate to experts' belonging to various social groups, various institutions in which they are embedded, or broader ideologies.

The significance of democratic contestation of knowledge goes beyond the concern with bias only. The contestation of knowledge also has an important steering function: it steers the governing bodies toward certain questions and concerns that experts may not otherwise entertain – either because they are differently situated or because they are embedded in particular epistemic communities and discourses. Thus, democracy has a checking function but also – just as crucially – a steering dimension.

An excellent example of the steering role of democratic institutions, and the importance of the embeddedness of expert institutions in a broader socio-politico-economic context, may be found in a recent speech by the Chief Economist of the Bank of England, Andrew G. Haldane.<sup>8</sup> Haldane tries to reconcile post-crisis data, suggesting an exemplary economic recovery in the United Kingdom, with the much more negative picture shared with him by people and organizations during his visits to peripheral regions of the country. Disaggregating the statistics regarding the changes in income, wealth, region, age, and housing situation after the crisis, he shows that the data behind the recovery story miss important distributive implications: the improved economic performance of the United Kingdom has not 'lifted all boats', and certainly not in the same way.<sup>9</sup> Beyond the academic merits of

5 Support for this claim can be found in organizational sociology, sociology of knowledge, theories of power, but also in the studies of risk regulation and administrative governance.

6 For instance, C.A. MacKinnon, *Toward a Feminist Theory of the State* (1989); R. Delgado and J. Stefancic, *Critical Race Theory: An Introduction* (2012).

7 Support comes from the sociology of knowledge, science and technology studies, and organizational sociology. Liberal philosophy of science, most notably the work of Karl Popper, would also underline the role of contestation for the *quality* of knowledge. The project of 'open society', however, does not acknowledge the political element of all knowledge – instead, this is equated with politicization of knowledge, in turn, associated with totalitarianism.

8 A.G. Haldane, 'Whose Recovery?', speech delivered on 30 June 2016, at <<http://www.bankofengland.co.uk/publications/Documents/speeches/2016/speech916.pdf>>.

9 id.

that contribution, the question as to what has prompted this high official to reconsider his epistemic framework in reaction to the inconsistent picture presented by peripheral constituencies, is of crucial importance for understanding the constraining and steering role of embedded expert institutions.

### 3. *Institutions of knowledge contestation*

The most important institution for contesting governing knowledge in liberal democratic states is ‘political opposition’.<sup>10</sup> Opposition serves not only to politicize a particular articulation of the common good, but also to problematize knowledge produced to support the majority’s conception of the common good, and to produce conflicting knowledge. To challenge the policies of progressive taxation, privatization of public services or free trade, the opposition will always mobilize different bodies of knowledge alongside (and often more importantly than) different scales of value.

The contestation of governing knowledge does not end however with opposition and parliamentary politics. The institutional structures of knowledge contestation extend to the media, the public sphere, bureaucracy, various agencies, and social and political movements. Ultimately, these institutions include the ‘street’: protests are a crucial element of democratic politics, and as the TTIP case shows, an important means to channel popular sentiment into knowledge production and policy making.

Now, the openness of governing knowledge to democratic contestation is ultimately related to the embeddedness of expert institutions in the political, economic, and social contexts of the governed polities. This embeddedness gives experts and expert institutions cultural material to determine meaning, but it also constrains them in deciding what kind of meaning is *socially acceptable*.<sup>11</sup> For instance, a claim that monetarism is ‘true’ knowledge makes far more sense in Frankfurt than in Athens.

Political exchange, the public sphere, the media, protests, the street, or just ‘seeing’ the material reality of the people,<sup>12</sup> will have an impact on how experts exercise the discretionary or value-based element of knowledge production. Democratic contestation provides both a popular check on governing knowledge and a sense of direction, raising concerns and issues

10 I. Ley, *Opposition Im Völkerrecht: Ein Beitrag zur Legitimation internationaler Rechtserzeugung* (2015).

11 The contribution of Sheila Jasanoff on ‘civil epistemologies’ is very instructive in this regard. She discusses how the general public provides an important steering function when it comes to the direction of technological development and the desirability of certain scientific knowledge: S. Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (2005) ch. 10 (‘Civic Epistemology’).

12 Disembedded expert institutions are to democratic governance what gated communities are to the city. See R. Atkinson and J. Flint, ‘Fortress UK? Gated communities, the spatial revolt of the elites and time-space trajectories of segregation’ (2004) 19 *Housing Studies* 875.

possibly crossing disciplinary and institutional boundaries. The production of governing knowledge, therefore, cannot be dissociated from the democratic process without losing both its legitimacy *and* its validity.

#### 4. *European institutional deficit in knowledge production*

Europe's democratic deficit is a problem for its democratic legitimacy but also for the epistemic validity of the knowledge through which it governs. The *input* and *output* perspectives merge in this case. Dissociated from democratic institutions, the EU's governing knowledge is prone to bias on the level of articulating both goals and means.<sup>13</sup>

The contestation of knowledge in EU governing institutions is constrained in several different ways. A large-scale juridification of EU objectives and purposes in the EU Treaties legitimizes the depoliticization of EU operations (see, also, Menéndez in this volume), while the EU's expert governing bodies further mask the contentious, political character of the (usually economic) knowledge that is necessary in order to interpret the EU's legal commitments.

The exchange in 'political institutions', such as the European Parliament, is also at a certain level depoliticized. The discussion in the Parliament often remains deeply embedded in the legislative frame proposed by the Commission, focusing on details and small gains instead of problematizing goals.<sup>14</sup> Any more fundamental contestation is often limited on the level of *Yes–No* Europe, with little space for fundamental contestation from within.<sup>15</sup> The glaring institutional deficiency in this regard is the lack of political opposition. The depoliticization of the European Parliament is amplified by secretive negotiations in the Council which, as the recent sovereign debt discussions have shown, give free rein to bargaining in the shadow of (economic) power.<sup>16</sup>

Ultimately, the failure to democratize the EU has been a failure to re-embed the EU in a democratically more inclusive manner. Years ago, when discussing the two grand pre-crisis projects – the EU Constitution and EU Civil Code – Hans Micklitz argued that both projects failed because they did not respond to the challenge that the EU has so far favoured organic solidarity,<sup>17</sup> and mobile, active, educated, and young market citizens, while

13 M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' *European Law J.* (forthcoming, doi/10.1111/eulj.12122).

14 M. Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit (2015) 21 *European Law J.* 23 (doi:10.1111/eulj.12115).

15 C. Green-Pedersen, 'A Giant Fast Asleep? Party Incentives and the Politicisation of European Integration' (2012) 60 *Political Studies* 115.

16 U. Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (2014).

17 As introduced by Emile Durkheim.

leaving too many others behind.<sup>18</sup> The ‘Brussels Bubble’ is the expression commonly used to represent the EU as selectively re-embedding through elite circles of post-national institutions and big businesses, while failing to provide voice to many peripheries (be it the European periphery, or peripheries within the core states).

My hypothesis is that this disembeddedness is detrimental not only to the EU’s democratic legitimacy (input) but also to the quality (output) of its governing knowledge. On this account, EU ‘output legitimacy’ is a chimera, which cannot be achieved in an institutional design that does not allow for the democratic contestation of governing knowledge.

### III. THE INSTITUTIONAL CONDITIONS OF KNOWLEDGE CONTESTATION IN EUROPE *WRIT LARGE*: THE UNFOLDING OF THREE CASES

Brexit, the breakdown of TTIP negotiations, and the attempts at resisting austerity have often been portrayed as the responses to the negative consequences of economic globalization. Disenchanted internal peripheries in the United Kingdom, or the disappointed citizens of peripheral EU member states such as Hungary or Poland have struck back by means of national politics. The contestation of mega-regional trade agreements, such as the TTIP and CETA, builds on previous anti-globalization movements. Economic crisis and austerity seem to be the outright consequences of economic integration beyond the state, built upon market mechanisms rather than solidarity (see, also, Christodoulides in this volume).

In the following, however, I lay out these three challenges as also, importantly, *epistemic struggles*. These struggles over the content of EU governing knowledge have a particular importance in a polity which draws much of its legitimacy from governing through knowledge while, as argued above, hardly *taking knowledge seriously*.<sup>19</sup> I analyse the possibilities for the contestation of EU governing knowledge both *within* its institutions as well

18 ‘Leaving behind’ in legal scholarship has often encapsulated the concerns about selective citizenship (see D. Kochenov, ‘Neo-Mediaeval Permutations of Personhood in the European Union’ in *Constructing the Person in EU Law: Rights, Roles, Identities*, eds. L. Azoulay, S. Barbou Des Places, and E. Pataut (2016); reverse discrimination (the undermining of the provision of public services through the CJEU’s fundamental freedoms case law, see M. Dougan, ‘Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?’ (2005) 42 *Common Market Law Rev.* 943); or access to justice (A. Somek, ‘From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination’ (2012) 18 *European Law J.* 711).

19 The Commission has itself commissioned interesting reports on the nature of knowledge and knowledge society. These reports seem to have had limited, if any, impact on the way EU sees governing knowledge: see Felt, op. cit., n. 3.

as from *without*: from non-institutionalized corners (for instance, street protests) to more anti-systemic forces (for example, exit from the EU).

### 1. Case I: *Brexit*

Possibly one of the most famous Brexit phrases, ‘British people are tired of listening to experts’, was uttered by Michael Gove in response to Faisal Islam (Sky News), who had warned about the negative economic impacts of Brexit. The Leave voters – if we are to judge by the outcome of the referendum – did not take ‘expert’ warnings seriously. Why?

Expert bodies – this global knowledge elite – emerged as the harbingers of the negative changes associated with economic globalization.<sup>20</sup> The British public disregarded the (possibly well-founded) economic warnings of institutions such as the City of London, the British Treasury, the European Commission, the OECD, PricewaterhouseCoopers, and so on. Their predictions were considered unreliable both because this very elite had contributed to the current malaise and because these actors would profit from the perpetuation of the status quo.<sup>21</sup> While slogans such as ‘taking back control’ have been interpreted as a concern for sovereignty, one may also see them as the resistance to elite articulations of futures which leave too many behind.

Brexit epitomizes a strategy contemplated by many challengers from the far right. Currently, different parties on the right of the political spectrum in Europe call for *exits*, for instance, Geert Wilders for *Nexit*, or Le Pen for *Frexit*. Hungary and Poland have both also opted out in a certain way – albeit by distancing themselves from the EU mode of thinking rather than the EU itself. Viktor Orbán openly characterizes the form of democracy in Hungary as an ‘illiberal democracy’.<sup>22</sup>

The causes and response to the shift to right-wing populism is perhaps one of the major contemporary ‘knowledge’ disputes. Is the shift a consequence of economic malaise, which politically eventually calls for a more egalitarian Europe and greater redistribution? Or has it been caused by lack of education, which renders masses prone to populism – so that Europe simply needs

20 S. Watkins, Editorial, ‘Casting Off’ *New Left Review*, July/August 2016, at <<https://newleftreview.org/II/100/susan-watkins-casting-off>>.

21 The British public seems to have been more willing to buy into bogus claims by the domestic Leave campaigners than the knowledge produced by the elite governing bodies. One of the reasons may be that the elite institutions have professed the miraculous recovery of the United Kingdom post-crisis, which many of the Leave voters have not seen: see Haldane, *op. cit.*, n. 8.

22 For a translation of one of Orbán’s speeches, see <<http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>>. See, also, M. Bánkuti, G. Halmi, and K.L. Scheppele, ‘Hungary’s Illiberal Turn: Disabling the Constitution’ in *The Hungarian Patient: Social Opposition to an Illiberal Democracy*, eds. P. Krasztev and J. van Til (2015) 37.

to explain better what it does? Or is the shift caused by a justified concern with immigration, which endangers economic security, personal safety, and cultural integration, and thus Europe should reconsider the disruptive effects of its economic and immigration policies?

Whatever the outcome of this discussion, it will likely not take place within the EU's institutional framework.<sup>23</sup> None of these concerns (and the knowledge that supports them) are easily brought up in the EU's political spaces. Equally, the solutions for these broader challenges are not offered as part of the toolbox of 'the possible' in the EU. Yet, ironically, the EU remains a major force shaping the very same (economic) conditions that are not considered changeable within its own institutional framework.

## 2. Case II: TTIP

The epistemic challenge is readily observable in the movement against the Transatlantic Trade and Investment Partnership (TTIP) and, to a lesser extent, against the Canada Europe Trade Agreement (CETA). The renewed post-crisis EU trade policy, with stress on bilateral trade agreements, was seen as one of the major instruments to respond to the economic malaise.<sup>24</sup> Powered by the representatives of the Directorate General for Trade (DG Trade), who saw exports as the best way of ensuring EU economic growth, the European Commission embarked on the negotiation of several bilateral trade treaties, including the two mega-regional agreements: the CETA, and the TTIP.<sup>25</sup>

The growing social movement did not accept the framings offered by the Commission's trade experts, or their consultancies, as to the benefits of these agreements or their democratic implications. Large-scale mobilizations have incorporated everything, from challenging the numbers that are deployed to justifying the alleged economic benefits of the TTIP to questioning the possible impacts on environmental and social regulation.<sup>26</sup> The quarter of a

23 Concerns regarding the deficiency of EU institutional structures in dealing with the causes of Brexit were also expressed in many academic contributions: see, for instance, the Special Issue of the *German Law J.* on Brexit, at <<http://www.germanlawjournal.com/brexit-supplement/>>. See, also, A. Menéndez, 'Can Brexit be turned into a Democratic Shock? Five Points' (2016) ARENA Working Paper 4/2016.

24 P. Defraigne, 'Departing from TTIP and Going Plurilateral' (2014) Madariaga Paper 3/2014, at <<http://www.madariaga.be/images/madariagapapers/october%202014%20-%20defraigne%20-%20departing%20from%20ttip%20and%20going%20plurilateral.pdf>>.

25 F. De Ville and G. Siles-Brügge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (2015).

26 Some of the most vocal critiques of the treaties have come from NGO alliances such as STOP TTIP, NGOs such as Corporate European Observatory or BEUC, but also parliamentary groups (such as GUE/NGL or Verts/Ale), all of which have produced or commissioned reports on the trade agreements, from the estimation of economic

million protesting in Berlin made it clear: no, there is no good knowledge that supports the Commission's position that the world would be better off because of the TTIP; that each family will be 540 euros per year richer; and that regulations coming out of the TTIP bodies are going to respect the environment. These claims were both political and epistemic, for, as discussed in the previous chapter, in modernity politics is staged against the backdrop of knowledge; political claims are often (also) knowledge claims.<sup>27</sup>

Now, in order to understand the available space for the contestation of knowledge from within the EU institutional structures, we need to consider how the European Commission operates. The logical place to create the EU trade vision and policy was 'obviously' the DG Trade. Trade officials, coupled with the so called 'regulatory affairs officials',<sup>28</sup> framed the TTIP debate – including goals, benefits, and the structure of the agreement. These two groups of officials positioned themselves at the centre of any future regulatory cooperation between the two blocks.<sup>29</sup>

Discussion within the EU institutions was limited in several ways. The 'consultations' before the start of the negotiation process (the *Report of the High Working Group*)<sup>30</sup> overwhelmingly featured (big) business.<sup>31</sup> The successful 'citizen's initiative' challenging the TTIP has been sidelined on formal grounds.<sup>32</sup> The Commission's officials have been largely con-

benefits and harms (see, for instance, <<http://www.guengl.eu/news/article/ttip-myths-shattered-by-new-gue-n-gl-backed-report>>) to substantive issues such as trade agreements and the EU data privacy regime (at <[https://edri.org/files/dp\\_and\\_trade\\_web.pdf](https://edri.org/files/dp_and_trade_web.pdf)>).

- 27 This is indeed to collapse the construction that knowledge provides information for politics: claims that progressive taxation is going to bring more or less economic growth, or that monetary policy has to be prudent in order to improve economic performance, are drawing their power from the knowledge on which they rely rather than from values and principles.
- 28 By regulatory affairs officials I mean those government members who are responsible for what the European Commission calls 'regulatory analytics'. This includes the administration of impact assessments and reviewing regulations. In the United States, these are the representatives of the Office of Information and Regulatory Affairs (OIRA) and in Europe, the members of the Secretariat General of the European Commission. Cooperation among those officials has been taking place for years. See, for instance, F.G. Nicola, 'The Politicization of Legal Expertise in the TTIP Negotiation' (2015) 78 *Law and Contemporary Problems* 175.
- 29 M. Bartl, 'Regulatory Convergence through the Back Door: TTIP's Regulatory Cooperation and the Future of Precaution in Europe' (2017) *German Law J.* (forthcoming).
- 30 See <[http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc\\_150519.pdf](http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf)>.
- 31 For the empirical analysis of the participants in consultation, see M. Bartl and E. Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' in *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders*, eds. E. Fahey and D. Curtin (2014) 210.
- 32 See <<http://www.euractiv.com/section/trade-society/news/commission-opposes-european-citizens-initiative-against-ttip/>>.

descending to the public response in various public meetings and conferences.<sup>33</sup> European Commissioner Malstrom has even called the democratic opposition practically Luddite.<sup>34</sup> To the extent that MEPs want to exercise oversight, access to documents was first limited to a certain number of MEPs, broadened to all MEPs in December 2015.<sup>35</sup> Furthermore, the MEPs can only access these documents in a high-security setting, while the documents themselves were often said to be incomplete.<sup>36</sup>

Unable to use institutional channels to challenge EU trade policy, public watchdogs have orchestrated an enormous social mobilization. Anti-TTIP protests numbered tens of thousands of participants. Reified, and often rather questionable justifications facilitated such social mobilization. Concern over investor-state dispute settlement (ISDS), never fully justified by the EC, was later followed by concerns about regulatory cooperation and the over-representation of businesses in negotiations and regulatory cooperation. Public media offered relatively comprehensive coverage of the challenges, and not necessarily in a manner hostile to the protesters.

The TTIP mobilization has created a space for contestation, and opposition to trade knowledge, qua this social mobilization. This movement can claim several achievements. First, in response to significant criticism regarding the lack of transparency, the Commission has slowly but gradually made its position papers available, initially as a response to ‘leaks’, whereas from circa 2015 in a pre-emptive mode.<sup>37</sup> Second, due to increasing contestation, the Commission, also in 2015, opted for a public consultation on the ISDS. The result was that the Commission received more than 150,000 mostly negative answers.<sup>38</sup> This amounted to a historically unprecedented reaction that could not be disregarded. Soon after, the Commission came up with a – rather notorious – proposal for an Investment Court,<sup>39</sup> which sought to address some of the deficiencies of the previous system.<sup>40</sup> Lastly, perhaps

33 I have been personally present at many occasions where the Commission’s officials have condescendingly addressed the social movement against the TTIP, implying that these people were not getting it.

34 See Commissionaire Malstrom’s Opinion Piece, (‘Don’t believe the anti-TTIP hype – increasing trade is a no-brainer’ *Guardian*, 16 February 2015, at <<https://www.theguardian.com/commentisfree/2015/feb/16/ttip-transatlantic-trade-deal-businesses>>.

35 See <<http://www.europarl.europa.eu/news/en/news-room/20151202IPR05759/all-meps-to-have-access-to-all-confidential-ttip-documents>>.

36 See <<https://www.theguardian.com/commentisfree/2015/aug/31/transparency-ttip-documents-big-business>>.

37 Position papers are different from negotiation documents, to which only a limited number of MEPs have access, under strict security conditions.

38 The Commission’s analysis of responses to public consultation is available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234>>.

39 The TTIP Chapter on Investment contains this proposal in sub-section 4: see <[http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)>.

40 How far the proposal removes the deficiencies is, of course, the object of fierce controversy. Be that as it may, the proposal has been an important element in securing the signing of CETA.

the most important achievement from the perspective of this social movement was to delay the prospect of completing TTIP negotiations before the end of President Obama's term. The recent election of Donald Trump seems to have sealed the dismal fate of TTIP.<sup>41</sup>

The TTIP contestation may be seen as a successful democratic challenge to foreclosed EU knowledge production processes: an example of healthy, liberal democratic institutionalism. However, two questions remain open. First, street protests are an emancipatory, but rather costly, form of democratic governance. How big does the social mobilization have to be in order to bring about some reflexivity in the way the EU does business? Secondly, if this is to become a more prominent way of generating contestation of EU governing knowledge and practices, how far is the TTIP experience replicable? I return to these questions in the following part.

### 3. Case III: Austerity

The challenge to austerity in the EU, most vocally made by Syriza in 2015, was an epistemic challenge at its core. The Greek Minister of Finance and former academic, Yanis Varoufakis, challenged the intellectual premises of EU conditionality and austerity politics, and of EU debt management.<sup>42</sup> With regard to the latter, Greeks have made a case for what López and Nahón in this volume call 'sustainable debt' while, with regard to the former, they have fought for more fiscal space to support economic growth. The epistemic challenge to austerity in Greece has not only come from the so-called 'radical left' politicians. Renowned academics<sup>43</sup> as well as world economic institutions such as the International Monetary Fund (IMF) have amplified this challenge to the EU position.<sup>44</sup>

41 The challenge to CETA was less successful, and the agreement was recently signed and placed into provisional application (before ratification). The decision of the Council can be found at <<http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/>>.

42 The Greek position can be reconstructed on the basis of articles by Yanis Varoufakis, see <<https://yanisvaroufakis.eu/>>. His reflections on the conflict with German Finance Minister Schäuble are also interesting, see <<https://www.project-syndicate.org/commentary/germany-versus-france-italy-by-yanis-varoufakis-2015-10?barrier=true>>; also <<https://yanisvaroufakis.eu/2015/08/31/varoufakis-on-schauble-extract-from-stephan-lambys-swr-adr-documentary/>>.

43 Here one may count people such as Krugman, Stiglitz, Lance Taylor, groups of economists such as Euromemorandum Group, and so on. For an interesting review of the work by Varoufakis, Galbraith, and Stiglitz on the future of Europe, see A. Moravcsik, 'Europe's Ugly Future: Muddling Through Austerity' *Foreign Affairs*, November/December 2016, at <<https://www.foreignaffairs.com/reviews/review-essay/2016-10-17/europe-s-ugly-future>>.

44 In a recent article, (J.D. Ostry, P. Loungani, and D. Furceri, 'Neoliberalism: Oversold?' *Finance & Development*, June 2016, at <<http://www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm>>), IMF fellows Ostry, Lungani, and Furceri highlight the fact that 'austerity policies not only generate substantial welfare costs

Qua output, if we are to trust Mark Blyth, saving Greece (and the Eurozone) in 2009 would have cost 50 billion euros.<sup>45</sup> Due to the compound effect of policy decisions taken thereafter, these costs have grown exponentially, leaving Greece with a sovereign debt of such proportions that it will never be able to repay it (see, also, the introduction to this volume). Under EU-imposed austerity and structural reforms, the Greek economy has contracted to an unprecedented degree, while everyone is losing, creditors included. This rather simple fact has been stressed by Nobel laureates in economics,<sup>46</sup> by the Syriza government,<sup>47</sup> by the IMF,<sup>48</sup> and by the United States administration, which has consistently urged Europe to reconsider its economic policies.<sup>49</sup>

If austerity policies have aggravated the performance of Greece on each and every economic performance criterion, why has the power engine of EU knowledge governance – the European Commission – continually supported rather than contested the austerity frenzy in recent years? Why does it still go with the Schäuble-led coalition – despite the economic failure of such an approach?

A quick response to this question goes as follows: ‘political realities’ – or Schäuble – *forced* the Commission to act in this way. But that barely makes for a sufficient response. As any institution, the Commission is subject to various forms of internal and external accountability, constitutional purposes, and legal constraints, which did not entirely cease to operate in the context of the economic crisis. Ultimately, we can hardly imagine that the Commission has ceased to see itself as a guardian of EU interest instead of, for instance, the interests of Germany.

So why did the Commission neglect the growing evidence regarding the economic problems of austerity policies vis-à-vis Greece? A part of the response to this question may be found in the institutional design of the EU,

due to supply-side channels, they also hurt demand – and thus worsen employment and unemployment.’

45 See M. Blyth, *Austerity: The History of a Dangerous Idea* (2013).

46 For instance Joseph Stiglitz: see J. Stiglitz, ‘Austerity has been an utter disaster for the eurozone’ *Guardian*, 1 October 2014, at <<https://www.theguardian.com/business/2014/oct/01/austerity-eurozone-disaster-joseph-stiglitz>>; J. Stiglitz, *The Euro and its threat to the future of Europe* (2016). Or Paul Krugman, see P. Krugman, ‘The case for cuts was a lie. Why does Britain still believe it? The austerity delusion’ *Guardian*, 29 April 2015, at <<https://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion>>.

47 See, for instance, <<https://www.theguardian.com/world/2015/jan/28/greek-people-wrote-history-how-syriza-rose-to-power>>.

48 See Ostry et al., *op. cit.*, n. 44 and the commentary at <<https://www.theguardian.com/business/2016/may/27/austerity-policies-do-more-harm-than-good-imf-study-concludes>>.

49 President Barack Obama has been one of the vocal critiques of the EU policies: see <[http://www.repubblica.it/esteri/2016/10/18/news/obama\\_austerity\\_measures\\_contributed\\_to\\_slower\\_growth\\_in\\_europe-150019546/](http://www.repubblica.it/esteri/2016/10/18/news/obama_austerity_measures_contributed_to_slower_growth_in_europe-150019546/)>.

discussed in section II.4. Furthermore, we need to consider (see (a)–(c) below) the institutional characteristics of the European Commission itself, (d) the role played by EU law and institutional design, (e) the problem of reification of knowledge production and path dependencies, and, finally, (f) the ‘democratic’ argument against the Greek contestation of austerity.

(a) The contestation of knowledge in the European Commission is limited, thanks to its institutional character. The Commission is a *bureaucracy* with an internal hierarchical structure and correspondingly limited spaces for *internal* contestation of knowledge. In such an institution, the voices contesting the course of action from within could likely be neutralized in the bureaucratic hierarchy.

(b) At the same time, the Commission may be seen as an expert institution *disembedded* from many of the spaces that it governs. This means that Commission officials are exposed to the lived reality of the European peoples only to a limited extent. This makes it easier to stick to whatever knowledge the Commission has adopted, and ignore any resulting hardships.

(c) Now, we have seen the introduction of various institutionalized forms of ‘*public consultation*’ as an attempt to respond to the problem of knowledge.<sup>50</sup> However, this was a far from successful experiment. To the extent that consultation is about knowledge input and contestation, the pre-framed issues allowed only marginal contestations to be voiced.<sup>51</sup> To the extent that the consultations are the response to disembeddedness, the dominance of entities with concentrated interests and large resources<sup>52</sup> will tend to exacerbate the disembeddedness (as it has been seen in the context of the TTIP).

(d) The contestation of knowledge within EU structures also hinges on the placement of the Commission within a broader EU institutional design. For instance, the deference to the European Central Bank (ECB), in combination with seemingly strict rules on fiscal and monetary discipline (see Kaupa in this volume), may have shut off certain avenues of contestation. The ECB itself, on the other hand, located in Frankfurt and embedded in German economic discourse and political context, has all too often relied on legal argumentation concerning its mandate, exclusively

50 Especially once re-termed as ‘participatory democracy’. See B. Kohler-Koch and C. Quittkat, *De-Mystification of Participatory Democracy: EU-Governance and Civil Society* (2013); J. Mendes, ‘Participation and the role of law after Lisbon: A legal view on Article 11 TEU’ (2011) 48 *Common Market Law Rev.* 1849.

51 *id.*

52 See, for instance, D. Carpenter and D.A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (2013); also, M.G. Cowles, ‘The Transatlantic Business Dialogue and Domestic Business-Government Relations’ in *Transforming Europe: Europeanization and Domestic Change*, eds. M.G. Cowles, J. Caporaso, and T. Risse (2001) 159.

related to price stability, in order to fend off any challenges to its governing knowledge – unless such a challenge is mediated through the markets.

(e) The contestation of knowledge is constrained due to a certain ideological path-dependency: the European Commission has for a long time and rather eagerly implemented neoliberal economic prescriptions, insofar as these have resulted in the expansion of the Internal Market, and consequently, of the Commission's own powers.<sup>53</sup> Austerity's affinity with (neo-)liberal political rationality (see Mattei in this volume), including a belief in 'market logic', evidenced also in the case law of the Commission's long-term co-traveller, the CJEU (see Schepel in this volume), may have rendered the shift away from the default neoclassical position more difficult.

(f) In the wake of a democratic challenge to the governing knowledge mounted by Syriza, certain prominent scholars have argued that respecting the outcomes of Greek elections and the referendum – the outcomes of Greek democracy – would in fact undermine pan-European democracy, insofar as the majority of EU citizens wanted Greek profligacy punished.<sup>54</sup> On this argument, the Commission's indifference to evidence may have been a populist democratic move.

Still, on what concept of democracy do we rely in such an account? If Europeans had a 'pan-European' public debate on Greece, it was limited to elites. In national public spheres, Greece and other PIIGS were presented as the profligate 'other' – rather than members of a polity, to whom we owed something like respect or solidarity. Since these 'others' were irresponsible childish peoples, they surely did not deserve voice, and instead deserved punishment, discipline, and control. Without respect or solidarity, however, we can hardly speak of liberal democracy.

#### IV. THE THIRD TRANSFORMATION OF EUROPE

In 1991, Joseph Weiler's landmark article 'The Transformation of Europe' used the binary of *exit* and *voice* to describe the dynamics of EU integration.<sup>55</sup> In the first period of EU integration, the less *exit* (non-compliance) was an option, the more *voice* (unanimity) became vital. During the second transformation of Europe, with the introduction of qualified majority voting, the member states' voice was reduced. The institutional hope may have been, however, that a strengthening of the EU democratic institutions would

53 N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (2006); Bartl, *op. cit.*, n. 13.

54 See the interview with Brigitte Laffan, Director of the Robert Schuman Centre, European University Institute, at <<https://www.youtube.com/watch?v=rDuQ4hGAKfA>>.

55 J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law J.* 2403.

compensate for such loss – shifting *voice* thus from the EU member states to the peoples of Europe. In that heyday of institutional enthusiasm for democracy and market capitalism,<sup>56</sup> no one could have envisaged that the voice of some in Europe could wither altogether – heralding a third transformation of Europe.<sup>57</sup>

The three cases presented above may be seen as different responses to the failure of the EU to give voice to the peoples of Europe. An important point that I have attempted to make is that failing to give voice, to institute channels for democratic input into knowledge governance, will not only likely result in frustration – but also in the creation of numerous peripheries and dwindling output legitimacy. The democratic and epistemic deficits in the EU are in this sense interrelated: the lack of democratic checks on the EU governing knowledge renders it vulnerable to various biases – with likely distributive consequences.

Now, a first strategy for the EU's failing input and output legitimacy has been *exit*. Brexit presents an example of how the creation of peripheries, even if certainly not attributable only to the EU, may result in their turning to national institutions in order to, however illusorily, 'take back control'. Countries such as Hungary and Poland may also be seen as adopting an exit strategy – even if their exit is more factual than *de jure*.<sup>58</sup>

The case of the TTIP shows us a more optimistic picture – a way to *create voice through large-scale transnational mobilization* (input), which has successfully challenged trade knowledge and policy (output). The TTIP may be, however, quite an exceptional case in this regard, making it a shaky precedent in the battle for the democratization of Europe. First of all, the common interest (for example, eating healthy food) converged across EU member states, and also across groups within these states, irrespective of class-belonging. More significantly, however, the common interest demanded relatively little economic solidarity among EU countries and citizens. There were no real 'costs' implied insofar as the purpose here was to stop certain action. Any successful transnational social mobilization in the near future could draw inspiration from the TTIP story on how to create a public issue for such mobilization.

56 F. Fukuyama, 'The End of History?' *The National Interest*, Summer 1989, 3.

57 M.A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 *European Law J.* 313.

58 Much can be said for the disappointment of eastern member states who have eagerly implemented all the 'shock therapies' prescribed by the Washington institutions after the fall of communism, as well as implementing *acquis communautaire* at later stages, without, however, ever even coming close to catching up with their western counterparts. It is interesting to see that public support for Viktor Orbán in Hungary rises considerably whenever he takes measures that aim to constrain financial capitalism – rather than when promoting some xenophobic policies. The latest referendum failure is an interesting example thereof.

The case of austerity and Greece does not fall within either of the aforementioned strategies. Exit was hardly an option for Greece. First, the Syriza government had a Europeanist orientation, which made exit seem regressive. At the same time, exit was also economically impossible: the threat of state bankruptcy meant that Grexit was hardly an attractive option.

If exit was not an option, the Greeks should have had some voice. But the question is whether they did. The choice of Yanis Varoufakis as a Finance Minister, though controversial or even frowned upon, does not in itself justify the disregard for the economic arguments he presented in his official capacity. On the contrary, such disregard is, if anything, worrisome. On several occasions, this Minister of Finance was excluded from the Eurogroup meetings, on no grounds but power, while the Greek arguments regarding austerity ('austerity does not work') were not answered on their merits, but by moralistic claims regarding the irresponsibility or laziness of Greeks, or their profligacy.

Viewed from the perspective of democracy, the *democratic* choices of the Greek people in their national elections regarding their economic destiny have not been respected. What is more, Greeks were gradually excluded from the European and national public spheres. Instead of commanding a measure of respect and solidarity from their fellow-European citizens, they were depicted as the disturbing 'other', that needs to be controlled, disciplined, and punished.

Besides, the case of austerity in Greece failed to give rise to a pan-European transnational mobilization, capable of contesting austerity politics. This may be due to the sharply different interests of labour unions in many EU core states. Supposing that labour unions do still wield power, they did not exercise it in a manner that could credibly lend support to the Greek cause.<sup>59</sup> The same goes for the liberal and left-leaning middle classes. This does not mean to say that no support whatsoever was expressed, yet it was not enough to challenge the governing knowledge.

With the withering of the Greek voice altogether, we have ended up with *domination* within Europe: peoples who cannot exit, but whose voices can not be heard. Whatever term we use for such a condition – internal colonialism, authoritarianism, subjugation, domination – it presents a cataclysm for European values and principles.

This collection offers an account of why law, or EU governing bodies, have performed so disappointingly in safeguarding EU constitutional principles and values even though effectiveness, democracy, justice, and the EU Treaties require them to do this.

Law, similarly to governing knowledge, rather than imposing constraints on this abdication of European values, has been used to rationalize austerity,

59 This has been one of the explanations why, for instance, relatively strong German Labour Unions did not engage in expressions of solidarity with their Greek counterparts, when their labour and collective bargaining rights were being infringed.

to present it as *necessity*. What is more, as we have seen throughout this volume, the creation of such necessities was hard work, requiring many resources.

At the same time, the collection has unwrapped numerous ways of thinking about the contestation of EU governance *within the EU*: it shows the openness of EU Treaty norms, the amount of political choice heralded in both law and knowledge, and, ultimately, popular avenues to challenging governing discourses. TTIP offers an important model for such popular challenge by means of transnational social mobilization, leaving us thus with some hope in the face of despair.