



EU Crisis Management



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Preface

While deaths and cases of severe illness due to COVID-19 are dropping in most parts of the EU, the Russian invasion of Ukraine in February 2022 shows that, regrettably, the theme of crisis on the European continent is – and will remain – topical. This is a dark moment for Europe, marked by tremendous human suffering in Ukraine, by the destabilization of the EU’s neighbourhood and by intensified threats to security. Nevertheless, the discussion of how the EU can best manage crises needs to go on.

What can and should the EU do in the event of the next crisis? Is such a crisis just around the corner, for example due to forthcoming energy shortages in EU Member States, or will the EU be able to find solutions that prevent such a situation from becoming a large-scale EU crisis? And will it find ways to conduct its crisis politics while respecting the need for both effective *and* democratic decision-making?

We hope that this anthology will provide some perspectives on lessons learnt from past EU crises, as well as contribute with ideas for how the EU’s crisis management could be improved in future.

Göran von Sydow
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Jonathan White is Deputy Head of the European Institute and Professor of Politics at the London School of Economics and Political Science (LSE). He joined LSE as Lecturer in September 2008, after completing his PhD at the European University Institute in Florence. He has held visiting positions at the Berlin Institute of Advanced Studies (*Wissenschaftskolleg*), Harvard, Stanford, the Humboldt University, the Hertie School, Sciences Po Paris and the Australian National University. Before his PhD he was a research fellow at the Czech Institute of International Relations in Prague, and a lecturer at universities in the Czech Republic and Albania. He was awarded the 2017 British Academy Brian Barry Prize for Excellence in Political Science.

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Executive summary

Thus far in the 21st century the EU has had to deal with several external events that have created political tensions and social or economic shocks in the EU. These events are often referred to as ‘crises’. The most prominent external crises are: the financial crisis with its roots in the US; the migration crisis, caused by large influxes of refugees coming to the EU, and the COVID-19 crisis, which put Union cooperation under real strain when Member States sought to protect public health by unilaterally implementing measures which interfered with the freedoms of movement and goods. In February 2022 Russia invaded Ukraine, bringing war to the borders of the EU. At the time of writing, various types of high-level EU meetings are taking place with the aim of supporting Ukraine and mitigating the effects on the EU. While the Russian invasion is a humanitarian disaster in Ukraine – as the migration crisis was for people fleeing conflict in the Middle East – it remains to be seen whether the invasion will in future be described as an ‘EU crisis’. This will depend on, among other things, how Member States are hit by the economic sanctions against Russia as well as the potential interruption in the supply of Russian gas, and on how the security situation develops on the European continent. But whether it develops into an EU crisis will also depend on how the EU deals with these issues.

The gradual increase in the EU’s efforts to react to common threats can be said to follow the same pattern as European integration in general. As EU cooperation in the treaty-based policy areas deepens, Member States are becoming more and more mutually interdependent. The need for joint European responses to both internal and external threats is expected to increase. However, this is not only a consequence of integration, but also of the broader trends of globalisation. An example of how the EU is attempting to address these trends and challenges is the ongoing discussion on strategic autonomy and resilience. In addition to mutual interdependencies, the increasing frequency and scope of degree of joint crisis measures may also perhaps be understood as evidence of increased solidarity between Member States over time.

What often makes decision-making in the EU difficult during crises is, on the one hand, an unclear division of responsibilities between Member States and the EU and, on the other, finding the right forum for decision-making. According to constitutional and political theory, effective decision-making in times of crisis requires that the executive branch be given a special mandate to act, as it is considered to have the best ability to make quick, effective and informed decisions in an ongoing crisis. Many Member States therefore have special laws defining and regulating states of emergency, with the aim of preventing the abuse of extensive and extraordinary powers. But should this also apply at EU level?

The EU Treaties contain some provisions on different types of potential crisis situations, but there are also many events that the EU must currently confront without clear provisions on which institution should act and which measures may be adopted. This can paralyze the EU in a crisis situation or lead to EU institutions acting outside their assigned powers, and each of these outcomes has detrimental effects on the democratic system. It is also possible that the lack of clear mandates leads to decisions being taken in informal decision-making bodies, which makes it difficult to hold the decision-makers to account. As this volume shows, scholars are however not in agreement that the solution to these problems is an enhanced crisis-mandate for the EU. There is also the view that in times of crisis, when low levels of information are combined with high time pressure, there is a pressing need for executive decisions to be tied to a critical public. This calls for simplified and democratized executive power structures in the EU.

In this anthology, four academic scholars on European governance and integration give their views on how the EU has handled the crises of the 21st century. They give a picture of the strengths and weaknesses of EU crisis management and make assessments of how it can be improved.

After an introduction, this volume continues with a chapter by *Vivien A. Schmidt*, who makes an analysis of the EU's austerity policies during the financial crisis and then compares these with EU actions to support economic recovery in the wake of the COVID-19 pandemic. She argues that the responses to the pandemic, in which the rules of the Stability and Growth Pact (SGP) were suspended and the EU took on significant EU-level debt for the purposes of redistributive solidarity constitute a great leap forward for the EU. Schmidt also finds that this new economic policy represents a tacit acknowledgement that the policies put in place in response to the Eurozone crisis, focused on 'governing by rules and ruling by numbers' with punitive conditionality for countries in trouble, were not fit for purpose. In her contribution, she asks whether the EU now will go back to the status quo ante of the Eurozone, focused on 'rules-based, numbers-targeting governance', with limited common EU instruments for investment in the future. Or, if the EU instead will move beyond the COVID-19 pandemic effectively and democratically, toward more sustainable and equitable growth and prosperity for all Europeans.

In the next chapter, *Jonathan White* discusses how EU governance in crises could be improved in terms of democratic legitimacy. White notes that especially in the last decade, European authorities have regularly resorted to exceptional measures in the name of taming exceptional circumstances. Central to this politics of emergency in the EU, he argues, has been the willingness to overstep various kinds of norm, with potentially lasting implications for the distribution of power. After a brief analysis of the forms of exceptionalism on display, White's contribution examines the scope for addressing the problems

they raise. It considers the case for strengthening the EU's emergency powers in the form of an 'emergency constitution'. It goes on to argue for more radical constitutional change, focused not on regulating the exceptional moment but further simplifying and democratising executive power in the EU, such that those in authority, when hard times arrive, are more closely tied to a critical public. A concluding section discusses what awaits in advance of far-reaching change of this sort.

In the third chapter, *Christian Kreuder-Sonnen* continues the discussion on the absence of rules governing emergency conduct at EU level, noting that there are hardly any such provisions in the EU Treaties. Echoing White's argument, he argues that, absent a regulative idea of emergency powers in the EU's legal order, the extra-legal nature of European emergency politics is prone to creating considerable short- and long-term costs to democracy and constitutionalism. He argues that not only does unregulated emergency politics open the door to the exercise of unchecked power, but that it is also likely to leave permanent marks on the EU's authority structures that undermine its democratic legitimacy and feed the populist backlash. While White advocates changes that imply that the executive is more closely tied to a critical public, Kreuder-Sonnen prefers the idea of constitutionalized emergency powers for the EU. In his contribution, he provides an architecture for such an 'EU constitution', outlining the principles needed to guide it.

In the fourth and final chapter, *Astrid Séville* takes a critical perspective on the narrative of EU crises. She notes that as moments of 'emergency politics', EU crises have demonstrated structural weaknesses in the EU – and yet also a striking resilience. Against this backdrop, she asks why so many actors have repeatedly stirred up a fear that political institutions and organisations might crumble whenever policymakers are confronted with such crises. Furthermore, she asks why policymakers themselves sometimes play on the fears of citizens and voters and invoke emergency and sheer necessity in the face of crises. In her contribution she seeks to address these questions and asks whether talking of exception and emergency really proves to be a valuable political and communicative strategy in crisis management. She also reflects upon how policymakers can and should communicate politics beyond routines.

Introduction: How Should the EU Govern in an Emergency?

Anna Wetter Ryde

So far, this century, Europe has been the site of multiple events which have been understood, narrated and responded to as crises. Over the course of these events the EU has taken on greater responsibility for the emergency protection of its citizens' health, security and economic wellbeing – tasks that have historically been in the domain of Member States. This is not an entirely new phenomenon: in the 1990s the EU took action to address a public health crisis in the form of the Bovine Spongiform Encephalopathy (BSE) outbreak, but its recent actions, i.e. vaccine procurement and measures to support travel and trade during the COVID-19 pandemic were of a different order of magnitude. In the field of security, the EU put in place measures in response to the 9/11 terrorist attacks and later in the aftermath of the bombings in Madrid, London and Paris but here too we see an increase, over time, in the scope and scale of EU action. The Russian invasion of Ukraine – or rather its invasion of those parts of Ukraine which it did not already occupy or control – in February 2022 is already intensifying the debate on how the EU can provide added security for European citizens, which puts the theme of EU crisis management once again at the top of the research agenda. In addition to measures aimed at protecting the lives and security of its citizens, the EU is also deeply involved in decisions that relate to the protection of European economies. In the case of Russia's invasion of Ukraine it may become involved in mitigating the economic damage caused by the measures (sanctions) it has taken in response to the security crisis.

The EU's interest in responding to threats on European territory (internal shocks) and outside (external shocks), appears greatest when such shocks appear instantly and unexpectedly. Often, such shocks trigger a need for prompt reaction to avoid further damage. Nonetheless, many of these threats relate to issues that are closely linked to the national policies of the Member States, for example health or internal security. In consequence the EU only has a few procedures at its disposal for the management of crises, designed to deal with particular circumstances. This means that threats are often dealt with at European level using ad hoc procedures for decision-making, adding pressure on the EU's democratic governance including its system for holding policy-makers accountable.

The gradual increase in the scale of the EU responses in times of crises is however not difficult to understand: it follows the same pattern as European integration in general. As EU integration deepens, Member States become more

interdependent. Thus, the need for common, European answers to both internal and external threats is likely to increase the more integrated the affairs of the Member States become – a product not only of EU integration but also the increased interconnectedness produced by wider globalisation trends. What often aggravates EU decision-making in crises, however, is the absence of clear procedures for how decisions should be adopted. This is not only a problem in relation to the need for effective decision-making in a crisis but moreover, it raises essential questions in relation to democratic governance in crises: which EU institutions should be involved? How should the decisions be executed? And what information should be used for the decisions? When the threat is perceived to require an immediate response the need for effective decision-making tends to trump the search for more democratic and evidence-based decisions. The relative absence of procedures also makes it unclear which political level – i.e. the EU, national or even the local government – is responsible for attempting to resolve the situation. The Eurogroup (the finance ministers of EMU countries) is often used as an example to illustrate the growth of informal executive power in times European crises: its powers and public profile grew considerably with the financial crisis, outside of any formal authority.¹

If decision-making at EU level is already difficult in ordinary times, it is very likely to get worse when crises require leaders to make tough decisions. Leaders may for example need to restrict the rights of citizens, as Member States recently did through the national lockdowns during the pandemic. At national level, decision-making in times of crises and emergencies often follows constitutionalized procedures, whereby the executive may be given more power on a temporary basis to enable swift and effective decisions – often in exchange for additional scrutiny by parliamentary assemblies. As mentioned above, there are a few procedures for times of emergencies in the EU Treaties, but there is no horizontal constitutional architecture for EU decision-making in times of crisis. Whether the EU institutions, including the Member States and the European citizens, would – or would not – benefit from treaty-based provisions to improve the effectiveness and legitimacy of EU decisions during crises and emergencies forms part of the discussion in this volume.

This introduction identifies some questions that are often raised in the literature on EU crisis and emergency politics. It starts by setting the scene after the COVID-19 pandemic, then seeks to define EU crises and emergencies, and in the next section discusses some typical EU crises. It finally describes the purpose of the volume and introduces the chapters.

¹ Yannis Papadopoulos, *Political accountability in EU multi-level governance: the glass half-full*, SIEPS 2021:4, 48.

Setting the scene after the COVID-19 pandemic

Although the EU has been praised, in some quarters, for decisions taken during the COVID-19 pandemic, it is important to note that many of them were prepared using informal structures for EU decision-making and adopted far away from European citizens. This makes the EU responses to the pandemic a good case study in a discussion on EU crises and emergency politics.

The road to today's pandemic situation in Europe is lined with both failure and success: while very few European leaders are proud of the lack of solidarity shown to those Member States that were first severely exposed to the virus in early 2020, many are now keen to highlight the important achievements of a few months later. These include the economic recovery package Next Generation EU (NGEU), the Commission's temporary framework for state aid measures to support the economy, and the common vaccine procurement strategy. These 'EU responses' came rather swiftly but not without (variously) resistance and impetus from national governments. For example, some Member States refused to lift their domestic export bans on medical supplies – even within the EU – unless the Commission, using its delegated competence, could promise that there would be no export of European medical supplies to third countries.² NGEU was proposed by the governments of France and Germany, before being drafted by the European Commission and finally agreed upon by the Council. The European Parliament had only a marginal role in the adoption of the package but did its utmost to squeeze in a conditionality mechanism to ensure compliance with the EU's rule of law principle, and finally succeeded in these efforts (De Witte 2021).³

One way of looking at the COVID-19 crisis is to view it in context of the pressure on EU Member States to protect the lives of their people (a Member State competence) and to accept that national protection(ist) measures may be needed to achieve this goal. Or we could consider that in focusing on the national health mandate Member States failed to see their mutual European/global economic interdependence (by focusing too much on the national health mandate), thus causing themselves and each other more financial harm than necessary. A third perspective is that the EU and its Member States have muddled through the pandemic, solving the upcoming – primarily economic – problems jointly throughout the process, thus bringing the most urgent economic crisis to an end. This might by a valid argument, not the least in light of the extensive economic support package negotiated at the European

² 'EU fails to persuade France, Germany to lift coronavirus health gear controls' *Reuters*, 6 March 2020.

³ Bruno De Witte, 'The European Union's COVID-19 recovery plan: the legal engineering of an economic policy shift', *Common Market Law Review*, 58(3): 635–82.

level. Irrespective of which perspective one prefers, how do we evaluate such crisis decisions in retrospect, when adopted using ad hoc procedures? Alongside their effectiveness, it is reasonable to assess the democratic and constitutional *legitimacy* of these decisions.

Defining EU crises and emergencies

As noted above, the EU Treaties do not include a constitutional architecture for crises and emergencies. In effect, there is no legal guidance on what constitutes a crisis, an emergency or an urgent threat to European interests, except for some sporadic mentions of what might justify the suspension of normal rules in certain fields. Those policy areas where the Treaty drafters have identified a need for specific procedures in times of crisis include migration policy (Article 78.3 TFEU, introduced by the Treaty of Amsterdam), exceptions to state aid regulations (Article 107.3 TFEU, which was already included in the original text of the EEC Treaty), and economic policy, (Article 122 TFEU, introduced by the Maastricht Treaty). These articles include references to ‘emergencies’ (Article 78.3), as well as to ‘serious disturbances’ to the economy of a Member State, (Article 107.3) and to ‘severe difficulties’ (Article 122 TFEU), which might justify the adoption of special measures. All articles appoint the Council as the decision-maker in these situations.

While the presence of specific provisions in a few policy areas could be helpful under those specific circumstances, it is more difficult to draw conclusions from the absence of treaty-based provisions in other areas. One legal interpretation is to assume that these policy areas have been chosen for a reason, meaning that such procedures cannot be applied in other policy areas (the *argumentum e contrario*). This is however not very helpful in the European legal context, where the supreme arbiter of the Treaties, the Court of Justice of the European Union (CJEU), uses a ‘teleological’ legal method instead, i.e. it interprets legislative provisions in light of the broader context (the purpose, values, legal, social and economic goals these provisions aim to achieve).

So the definition of an EU crisis or emergency will not easily be found in the EU legal context (other than in those policy areas already identified), which means that EU institutions must be able to define crises and emergencies to European Union interests using other techniques. This leads us to the broader debate on emergency politics and the literature that identifies pros and cons in defining and framing emergencies *ex ante*. Proponents of clear definitions of emergencies see (for example) a risk of the abuse of power if emergencies are not clearly defined and restricted beforehand. Opponents on the other hand, find that the executive power needs discretionary room for manouevre to be able to come up with effective solutions during emergencies. There is also the view that the wielding of executive power needs to be closely followed and tied to a critical public and that simple, democratic procedures should guide the decision-maker also during crises and emergencies (see for example White, this volume).

What triggers European crises?

While it is easy to see how sudden shocks (both internal and external) may lead to side effects at European level, it is perhaps more difficult to see how the EU's own action or inaction may also trigger European crises. Nevertheless, at EU level the risk of 'institutional crisis' is quite high: the institutional features of the European Union can contribute to exacerbating a crisis that is of external origin, as the development of the financial crisis into a euro crisis may illustrate.⁴ On top of this, the institutional features may also provoke institutional crises, such as the decision-making crisis in the 1960's, often referred to as the 'empty chair', as well as national rejections of EU Treaty revisions in the 1990s and 2000s. In such situations, there is not only the risk that important decisions will not be made but the further risk of a crisis of legitimacy in the European Union. Arguably the migration crisis of 2015 and the ongoing rule of law crisis are examples of this dynamic. This means that there is no neat distinction between exogenous developments and institutional crises. What the two types of crises have in common, though, is that they refer to 'events or developments widely perceived by members of relevant communities to constitute urgent threats to core community values and structures'.⁵

At the time of writing (early spring 2022) Europe is seeing a stable decline in cases of severe illness and deaths from the COVID-19 pandemic. The European economy seems to be stabilizing after COVID-19 (despite high energy prices and the return of inflation) supported by national and EU measures, including the EU's economic recovery package, the temporary framework for state aid measures to support the economy and the widespread availability and uptake of vaccines (in part thanks to the Commission's vaccine procurement programme). Just as hope and stability seemed to be returning to the EU, however, Russia brutally invaded Ukraine, a sovereign European country bordering four Member States. While the invasion and its consequences will be dealt with in separate SIEPS publications, we can nevertheless see it as evidence for Astrid Séville's thesis, presented in this volume, that crises may have become a routine part of modern politics, with one crisis simply replacing another. While this is of course both depressing and worrying, it also reflects the global interdependence of today's world structure – a structure which, paradoxically, also stabilizes regions and strengthens them economically. If it is the case that crises are the norm rather than the exception, it highlights the crucial need to review the EU's modes of governance during crises, and to replace ad hoc forums for crisis management with robust structures, temporary or permanent, that bolster democratic legitimacy. Discussing new modes of EU governance in crises – or in the new normal of continuous upheaval – is what this volume aims to do.

⁴ Bruno De Witte, 'Guest Editorial: EU emergency law and its impact on the EU legal order' (2022) *Common Market Law Review*, 59(1): 3–18.

⁵ *ibid.*

The purpose and contents of this volume

This volume seeks to identify and discuss new modes of European crisis and emergency governance. Four researchers were asked to reflect on the lessons that have been or should be learnt from past crises, and to suggest new ways of governing in crises and emergencies. One challenge for research is to understand the types of external and internal shocks that trigger EU crises, as well as their implications. How does managing repeated crises affect EU institutions and the balance between them? Which EU institutions gain power and which lose it, and what do these shifts mean for citizens and for national parliaments? Furthermore, are crises exacerbated where competence to act is shared by the EU and its Member States, causing unclear mandates? What is the EU's 'crisis management capacity'? What makes a crisis an 'EU crisis'? What 'EU core values' must be threatened?

While straightforward answers to these questions are difficult, there is a growing literature that addresses each of them in light of the EU's previous crises, primarily since 2000. Different answers are given depending on the questions asked. For example: should the EU give precedence to effective decision-making via an executive, despite the weak democratic legitimacy of such decisions, or should it instead allow the decision-making to be processed through the more democratic institutions at the possible cost of urgency and effectiveness? Should the EU opt for a flexible non-constitutionalized structure for crisis management whereby leaders are held politically accountable *ex post* or should it instead provide for clear treaty-based rules for crisis/emergency policies, restricting the decision-maker during the crisis? The purpose of this volume is to address questions of this kind and to put some possible solutions for the future on the table. The contributions draw on past experiences of EU crises and emergencies to discuss the strengths and weaknesses of previous politics.

The volume takes as its point of departure a text by Vivien A. Schmidt, Jean Monnet Professor of European Integration and Professor of International Relations and Political Science at Boston University. Schmidt's contribution compares the EU's economic responses to the COVID-19 crisis and the global financial crisis which impacted the EU mainly in the form of the sovereign debt crisis from 2009 onwards. The text makes a good start for the discussion of EU crisis politics as the EU's predecessors were primarily instruments for economic cooperation, and this remains the field in which EU integration is deepest. In response to the COVID-19 crisis the rules of the Stability and Growth Pact (SGP) were suspended and significant EU-level debt was issued for the purposes of redistributive solidarity. Schmidt reflects on this response and argues that these measures constitute a great leap forward for the EU, while at the same time finding that they represent a tacit acknowledgement that the policies put in place in response to the Eurozone crisis – which focused on 'governing by rules and ruling by numbers' with punitive conditionality for countries in trouble – were not fit for purpose. The contribution also asks whether the EU now will go back

to the *status quo ante*, and once again focus on rules-based, numbers-targeting governance with limited common EU instruments for investment; or whether it will instead move beyond the Eurozone and COVID-19 crisis effectively and democratically, towards more sustainable and equitable growth and prosperity for all Europeans.

In the second chapter, Jonathan White, Deputy Head of the European Institute and Professor of Politics at the London School of Economics and Political Science (LSE), discusses the problems that arise when European authorities regularly resort to exceptional measures in the name of taming exceptional circumstances. He notes that a willingness to overstep various kinds of norm has been central to this politics of emergency in the EU, with potentially lasting implications for the distribution of power. After a brief analysis of the forms that exceptional political action has taken in recent years, the text examines possible ways of addressing the problems they raise. It considers the case for strengthening the EU's emergency powers in the form of an 'emergency constitution' but also discusses other options, for example simplifying and democratizing EU executive power structures. It argues that EU executive power should be more strongly tied to a critical public. A concluding section discusses what we can expect in advance of such a far-reaching change.

In the third chapter, Christian Kreuder-Sonnen, Junior Professor of Political Science and International Organizations at the Freidrich Schiller University in Jena, outlines a model for an EU emergency constitution. The text argues that the absence of a regulative idea of emergency powers in the EU's legal order means that extra-legal European emergency politics is prone to creating considerable short and long-term costs to democracy and constitutionalism. Not only does unregulated emergency politics open the door to the exercise of unchecked power, but, Kreuder-Sonnen argues, it is also likely to leave permanent marks on the EU's authority structures that undermine its democratic legitimacy and feed the populist backlash. While concerns about the EU's current *ad hoc* procedures used in times of crisis are shared by both White and Kreuder-Sonnen, the latter embraces the idea of an emergency constitution, laying down some principles for its design.

The fourth and final chapter is written by Astrid Séville, Assistant Professor of Political Science at Ludwig Maximilian University, Munich and currently Sir Peter Ustinov / City of Vienna visiting Professor at the University of Vienna's Institute of Contemporary History. This contribution focuses on how crises such as the banking and sovereign debt crisis, the so-called migration crisis and the recent global pandemic are communicated or narrated. It asks, for example, why, when faced with what appear to be crises, policymakers sometimes play on the fears of citizens and voters and invoke emergency and sheer necessity. The text discusses whether many of these crises are not, in fact, a routine element of modern politics. She argues that as moments of 'emergency politics' these

crises have exposed structural weaknesses in the EU's political systems – and yet also demonstrated a striking resilience. Séville seeks to address these questions and asks if talk of exceptions and emergencies is really a valuable political and communicative strategy in crisis management – and, if not, how policymakers can and should communicate politics beyond routines. Finally, this chapter takes a critical perspective on the practice and rhetoric of emergency and crisis in politics.

As shown in this volume, the EU has in the past decade gone from a purely regulatory-inspired approach to one based on events.⁶ One effect is that the EU's responses to sudden events – 'EU crises' – are often dealt with outside the traditional decision-making bodies. If the regulatory-inspired decisions involve the ordinary legislators, i.e. the Council and the European Parliament, the event-based decisions are often prepared and negotiated by the 'non-legislators', primarily the leaders of the Member States, gathered together in the European Council, together with the President of the Commission. It is our hope that the contributions in this volume will deepen debates on decision-making in EU-related crises. Arguably, this discussion becomes even more important as EU crises grow in number, or become the 'new normal'.

⁶ See Luuk van Middelaar, *Quand l'Europe improvise: dix ans de crises politiques* (Paris: Gallimard, 2018).

1 Economic Crisis Management in the EU: from past Eurozone mistakes to future promise beyond the COVID-19 pandemic

Vivien A. Schmidt

The responses to the COVID-19 crisis, in which the rules of the Stability and Growth Pact (SGP) were suspended and the EU took on significant EU level debt for the purposes of redistributive solidarity, constitute a great leap forward for the EU. They also represent a tacit acknowledgement that the policies put in place in response to the Eurozone crisis, focused on ‘governing by rules and ruling by numbers,’ with punitive conditionality for countries in trouble, were not fit for purpose. The question for today is: will the EU go back to the *status quo ante* of the Eurozone, focusing on rules-based, numbers-targeting governance, with limited common EU instruments for investment in the future? Or will it instead move effectively and democratically beyond the Eurozone and COVID-19 crisis, toward more sustainable and equitable growth and prosperity for all Europeans?

I argue here that in order to meet the current challenges, including the green transition, the digital transformation, and addressing socio-economic inequalities, the EU should not go back to Eurozone crisis management rules. Much to the contrary, in order to ensure the greatest possible success in the future, the EU needs more instruments to promote EU-wide sustainable development in a context of more flexible and inclusive economic governance. The EU needs to build on the Next Generation EU pandemic response, making the Resilience and Recovery Facility (or its equivalent) permanent and much bigger. Eurozone governance needs to become more decentralised, with fiscal guidelines allowing for differentiated Member State goals in a process that is more bottom up, not just in national capitals but in regional and local governance. Importantly, this process also needs to become more democratic, with greater participation by the social partners, by citizens, and by parliaments at every stage of the process, along with industrial strategies and macroeconomic dialogues to set overall goals.

I first discuss the EU’s management of the Eurozone crisis and then the new initiatives undertaken during the COVID-19 crisis. I next consider in greater

detail some innovative ideas for the European Commission with regard to industrial policy and the European Semester, and then the European Central Bank (ECB) with regard to macroeconomic governance. I conclude by noting potential obstacles and stumbling blocks to any such innovations, and then reiterate the governance necessary for a more sustainable and equitable EU economy.

1.1 The Eurozone Crisis

At the outset of the crisis in the Eurozone, instead of immediately providing some form of debt forgiveness and instituting the mutual risk-sharing instruments necessary for any fixed-currency zone to work, the EU reinforced the rules of the SGP. By mandating austerity and structural reform policies as overseen through the European Semester, the Eurozone came to be characterised as ‘governing by rules and ruling by numbers,’ with the wrong rules and numbers, which didn’t work. This in turn led to what I have called the EU’s ‘crisis of legitimacy,’ in which doubling down on the procedural rules led to poor economic performance and increasingly toxic politics (Schmidt 2020a).

Crisis Management

The EU chose the wrong course in 2010 in its response to the Eurozone crisis. Rather than bold initiatives that would quickly resolve the crisis, EU actors doubled down on the rules, claiming that ‘moral hazard’ was the main danger, and austerity the answer, with harsh austerity and structural reform for countries in trouble. Because the crisis was perceived as asymmetrical and framed as resulting from public profligacy (based on Greece) rather than private excess (as in all other countries forced to bail out their banks), the causes were diagnosed as behavioural (Member States not following the rules) rather than structural (linked to the euro’s design). In consequence, EU leaders initially saw little need to fix the euro or to moderate the effects of the crisis. Instead, they chose to reinforce the rules enshrined in the treaties, based on convergence criteria involving low deficits, debt, and inflation rates, and they agreed to provide loan bailouts for countries under market pressure in exchange for rapid fiscal consolidation and ‘structural reforms’ focused on deregulating labour markets and cutting social welfare costs. These measures did little to solve the underlying problems, and the crisis persisted.

By late 2012, however, as the crisis slowed once ECB President Mario Draghi’s made his famous pledge to ‘do whatever it takes’ to save the euro, which stopped market attacks dead in their tracks, European leaders and officials began to change Eurozone governance slowly and incrementally. They did this by reinterpreting the rules and recalibrating the numbers, albeit mainly ‘by stealth,’ without admitting it publicly or even, often, to one another (Schmidt 2016, 2020a). The Commission became more and more flexible in its application of the rules in the European Semester (such as derogations for Italy and France based on their having primary surpluses), despite continuing its harsh discourse focused on austerity and structural reform. The ECB in the meantime reinterpreted its mandate more

and more expansively, even as it claimed to remain true to its charter, ultimately deploying quantitative easing (QE) by 2015, and thus coming ever closer to becoming a lender of last resort (LOLR). Finally, the Council also began to change its tune. Along with innovative instruments of deeper integration such as the Banking Union and the European Stability Mechanism came acceptance of the need for growth ‘and stability’ by 2012; for flexibility ‘within the stability rules’ by 2014; and for investment in 2015.

Things improved as a result, but because EU actors in the first five crisis years largely reinterpreted the rules by stealth, legitimacy remained in question. Fundamental flaws persisted, with suboptimal rules hampering economic growth and feeding populism, as citizens punished mainstream parties while anti-system parties prospered. Even though most EU actors had begun to acknowledge their reinterpretations by 2015, and growth had begun to return across the EU, the damage had been done.

Economics

With regard to economics alone, academic scholars and policy analysts alike agree that Eurozone crisis management failed to deal effectively with the problems of the Eurozone in terms of policy effectiveness and performance. The United States, which had faced what were arguably even greater economic problems earlier on as a result of the 2008 financial crisis, nonetheless managed to emerge from its crisis more quickly, and without the double-dip recession experienced by the Eurozone (Mody 2018; Tooze 2018). In the EU, economic growth was generally sluggish, and deflation remained a threat in a Eurozone characterised by increasing divergence between the export-rich surplus economies of Northern Europe, and the rest (Blyth 2013; Mody 2018; Tooze 2018).

Europe more generally was also facing a ‘humanitarian crisis,’ affected as it was by increasing poverty and inequality among European citizens, along with continuing high levels of unemployment, especially in Southern Europe and in particular among young people (Council of Europe 2013; European Parliament 2015). The imposed austerity in the south was largely to blame for prolonging the economic crisis in the Eurozone, together with a lack of investment in the north – as even the IMF (2013, 2014) and the OECD (2016) reported. Adding to this were the ‘one-size-fits-all’ remedies implemented in diverse national political economies with different institutional configurations and potential engines for growth (Scharpf 2012; Mody 2018).

Although the economic situation across Europe did improve between 2015 and 2020, and more was done to ‘socialise’ the European Semester and to make it better adapted to the different needs of the Member States (Zeitlin and Vanhercke 2018), the austerity budgeting baked into the rules nevertheless entailed that those without the fiscal space (read Southern Europe) *could not* invest while those with the fiscal space (Northern Europe) *did not* invest. This meant not only

that Southern Europe was unable to invest in growth-enhancing areas such as education, health, training, and R&D, let alone infrastructure (physical as much as digital), but that Northern Europe also did not do enough in these areas, or even in greening their economies. Much of this can be attributed to the debt brake constitutionalised throughout the Eurozone (via the Fiscal Compact) and the obsession with balanced budgets, in particular in Germany, with the *schwarze null* (black zero). An example of the problems for federalised Germany, is that the Länder are responsible for university education and local governments for local infrastructure, but the rules limited new investment for the poorer (and therefore already more indebted) regions and localities, thereby increasing inequalities among sub-federal units and stunting growth potential (Roth and Wolff 2018).

Politics

The EU's comparatively poor economic performance also added to the EU's declining political legitimacy, as demonstrated by citizens' loss of trust in the EU along with their increasing dissatisfaction with, and disaffection from, EU and national politics. Eurobarometer surveys, for example, chart the decline in the positive image of the EU, which fell from 52% in 2007 to 30% in 2012, while the negative image increased from 15% in 2007 to 29% in 2012 – neck and neck with the positive responses (Eurobarometer December 2012). Although in 2019 (before the pandemic), the proportion of those who held a positive image of the EU had gone back up to 45%, it was still lower than in 2007 (Eurobarometer Spring 2019). Citizens came to perceive the EU as more and more remote (read technocratic) (Fawcett and Marsh 2014), and national governments as less and less responsive to their concerns – often as a result of EU policies and prescriptions (Hobolt 2015; Berman 2021). The dilemma facing national governments – caught between the need to act responsibly by implementing unpopular EU policies and the need to be responsive to citizen demands (Mair 2013) – translated into more and more volatile national politics. National elections became increasingly unpredictable, as incumbent governments were regularly turned out of office, and new parties with populist anti-euro and anti-EU messages received attention, votes, and more and more seats in parliaments (Hopkin 2020). Much of this was a function of the growth of Euroscepticism and the mounting strength of the populist extremes, but it also reflects the increasing divisions between winners and losers in the crisis, within Member States as well as between them (Schmidt 2020a).

Such discontent has its origins in a range of long-standing socioeconomic, sociocultural, and political trends, linked to the effects of globalisation and Europeanisation, which were only exacerbated by the Eurozone crisis. The socioeconomic discontent was centred on workers' feelings of being 'left behind' in low-paying jobs with few prospects of better pay, working conditions, and living conditions (Hopkin 2020; Rodrik 2018). Such discontent was particularly in evidence in peri-urban or rural settings, where good jobs were scarce and public services had been dwindling – representing the 'revenge of the places that

don't matter' (Rodríguez-Pose 2018, p. 201). The discontent was also linked to national sociocultural concerns, however, and in particular worries about loss of social status (Gidron and Hall 2017), fears about the 'changing faces of the nation' with larger flows of immigrants (Berezin 2009), and even rejection of more liberal 'post-materialist' values (Norris and Inglehart 2019). This said, a lot of the discontent was purely political, as people feel their voices no longer matter in the political process, and want to 'take back control,' as in the case of Brexit (Berman 2021). These varied sources of discontent have combined to create the 'milieu' in which populist anti-system 'messengers' – including leaders, parties, and activist networks – were able to spread their anti-elite 'messages' via the 'medium' of the social and traditional media in ways that got them votes, seats in parliaments and, in some cases, governing power (Schmidt 2022).

Governance

Governance was also increasingly in question in the Eurozone. The complaints of programme countries focused not only on the counterproductive economic effects of rapid fiscal consolidation and the inefficacy of the structural reforms, they also concerned the opacity and unaccountability of the Troika (and later the 'institutions') involved in dictating the terms of the pro-cyclical reforms required in exchange for the loan bailouts – not to mention the secret letters from ECB President Jean-Claude Trichet threatening to pull the plug on their economies unless they entered a conditionality programme. For the non-programme countries, meaning all the rest, as EU institutional actors became more flexible in their interpretations of the rules from 2013 onwards, the perceptions of citizens and political elites alike were increasingly polarised between the Northern Europeans and Southern Europeans, as 'the saints' versus 'the sinners' (Matthijs and McNamara 2015).

This split in perceptions only added in turn to the increasing politicisation of EU governance writ large. The rising politicisation 'at the bottom' due to increasing national-level Euroscepticism and from 'the bottom up' due to national pressures on Member State leaders in the Council (Hooghe and Marks 2019) was joined by increasing political contestation 'at the top,' within and between EU actors at the supranational level (Schmidt 2019, 2020a). Such politicisation involved not only increasingly acrimonious disputes among Member State leaders in the Council (in particular in the Council of Ministers of Finance) but also between members of the Council and other institutions. In the Council, for example, while some Member State leaders (mainly German, Dutch, and Finnish Finance Ministers) contested the Commission's increasing flexibility with regard to applying the rules in the European Semester, claiming that it was 'politicised,' others defended such action as appropriate administrative discretion. The Commission itself also pushed back against the rebukes of Member State regarding politicisation, at the same time that it declared itself a 'political' body responsive to European citizens after 2015. Meanwhile, the ECB also became increasingly politically sensitive, engaging in more informal dialogue with Council members to gain

tacit agreement for its increasingly bold monetary policy initiatives and in more communication with the ‘people’ (as well as the markets) regarding its increasingly expansive monetary policy. Finally, the European Parliament (EP) also became increasingly politically contestational as it criticised Council and Commission actions in its hearings and reports.

The result was a new politicised dynamics of interaction among EU actors. We could ask whether such politicisation is a bad thing, because the substance of what is said by different EU actors was generally negative, or a good thing, because the process of discursive interaction is what normally happens in democracies, and therefore can be seen to make the EU appear less technocratic and arguably therefore itself more democratic. Whether a good thing or a bad thing, however, it is a ‘thing,’ and here to stay (Schmidt 2019, 2020a). Notably, however, the kind of negative politicisation that took hold during the Eurozone crisis seemed to recede during the COVID-19 crisis, when a more ‘positive’ politicisation ensued.

It is equally important to recognise that as time went on during the decade of the Eurozone crisis, certain governance practices in this period of ‘emergency politics’ (White, this volume) seemed to be legitimised by being normalised, whereas others appeared delegitimised by being rolled back. The monetary policymaking of the ECB is the prime case of legitimisation, with monetary easing not just normalised but progressively ratcheted up during the Eurozone crisis, and even more so during COVID-19. In contrast, the reinforced ‘governing by rules and ruling by numbers’ of the Council and Commission are examples of delegitimisation, as evidenced by the roll back of the stability rules via reinterpretations in favour of growth and flexibility during the Eurozone crisis, and then their suspension during the COVID-19 pandemic (Schmidt 2021).

1.2 The Pandemic Response – A New Beginning?

There was only a major reversal in policy in 2020, as the EU responded to the COVID-19 health pandemic, which was to create an economic shock even greater than that of the sovereign debt crisis. The pandemic crisis response appeared to be in great contrast to the muddling through of the previous Eurozone crisis, with its hit-or-miss policies that were mostly incremental and largely unsatisfactory. Rather than the piecemeal (non-)solutions of the past, and in particular doubling down on the SGP rules, EU pandemic crisis management, after a short period that seemed to foretell a replay of previous crises, appeared to have engineered a major shift in economics, politics, and governance. The Next Generation EU plan, with the Resilience and Recovery Facility that broke the taboo on EU level debt – promising to kick-start sustainable growth throughout the EU by way of the green transition, the digital transformation, and addressing social inequalities – represents a great leap forward in all these domains. Although a game-changer in many ways, however, whether this constitutes a paradigm shift in the EU’s economic governance depends upon what happens next (Schmidt 2020b).

Crisis Management

In the first months of the COVID-19 crisis, the response seemed like a *déjà vu* of the Eurozone crisis, as the hesitations and discordant views of EU actors only made matters worse. EU institutional actors were very slow to respond in the first weeks of the pandemic. The Commission was nowhere to be seen; the EP played no role; the President of the ECB Christine Lagarde (2020) claimed it was not within the ECB's mandate to 'close the spreads' between German and Italian bonds (which triggered an increase in the spreads for Italian bonds); and Member State leaders in the Council failed to act in concert, even as they quickly introduced national policies without EU-level consultation or coordination.

At the national level, the economic policies of Member States constituted a major reversal of Eurozone budgetary orthodoxy. The Member States violated the SGP deficit and debt rules as they provided massive infusions of money to sustain businesses, protect jobs, and support individuals and families. At the same time, their simultaneous closing of national borders without informing neighbouring countries or the EU looked like the refugee crisis *redux*. The export bans on medical protective equipment, ventilators, and pharmaceutical supplies also appeared to violate the spirit of the single market, as well as European solidarity. It seemed as if the Member States had forgotten that the virus did not respect borders, and that the very interdependence of the Eurozone economy required some form of joint action.

Very quickly, however, EU institutional actors stepped up to the plate, as did the Member States. There were symbolic acts, such as patients from Italy and France transferred to German hospitals, but there were also very important initiatives taken by all institutional actors. To begin with, the Commission immediately suspended the budgetary criteria of the European Semester to allow for unlimited government spending; cleared the way for Member States to rescue failing companies by suspending the state aid rules; put into place a temporary European instrument, Support to mitigate Unemployment Risks in an Emergency (SURE), with €100bn to help maintain employment; proposed the creation of an EU-level health authority (EU4Health); and closed the EU's external borders to travellers from outside the EU.

In the meantime, the ECB quickly made up for its initial misstep on the spread between German and Italian bonds by launching the Pandemic Emergency Purchasing Programme (PEPP), at an initial €750 billion in March 2020, later increased to €1.85 trillion, to save the euro. This went way beyond its previous 2015 quantitative easing, and came without the *quid-pro-quo* demands for austerity and structural reforms of the Eurozone crisis. The ECB also abandoned the euro crisis ratio of bond-buying that had limited its ability to help the countries in greatest need, thereby enabling it to better target its bond purchases to those countries potentially under market attack.

Subsequently, in the Council, the Franco-German duo made an initial taboo-breaking proposal for a Recovery Fund of €500 billion in grants on May 18, 2020, and then sent that proposal to the Commission for review and further recommendations. The Commission followed quickly on May 27 by upping the ante with the Next Generation EU proposal containing a Resilience and Recovery Facility (RRF) for €750 billion with two thirds grants and one third loans to be financed by market-based EU bonds as part of a much larger multi-year EU budget (the Multi-Annual Financial Framework, or MFF) in which the EU would gain its own tax-generated resources. The European Council agreement in July consecrated the RRF with €390 billion in grants, and €360 billion in loans, compromising on the generosity of the fund as well as rule of law conditionality to get the package through. Finally, the EP, which had had little influence over the initial pandemic response, had an important role to play in the budget negotiations beginning in October 2020, not only by strengthening the rule of law clause in the compromise but also ensuring more resources, in particular for EU4Health.

Economics

In the economics of the COVID-19 pandemic, the EU's responses with regard to Economic and Monetary Union (EMU) represented a major break from the past, particularly in contrast to the path-dependent trajectory taken during the Eurozone crisis (Ladi and Tsarouhas 2020; Schmidt 2020b). The EU took a great leap forward in economic integration by allowing EU level debt covered by the EU's own resources to pay for EU initiatives for the first time. Notably, these new initiatives were largely focused on fixing the damage incurred by the failures of Eurozone crisis management, as opposed to addressing those resulting from the pandemic. This is evident from the fact that Next Generation EU (NGEU) resources were allocated to countries on the basis of pre-existing economic and political conditions likely to make them more vulnerable to a post-COVID austerity adjustment, as well as to Eurosceptic forces, rather than based on the severity of the pandemic (Armingeon et al. 2022).

It is perhaps still too early to say much about the economic effects of the pandemic response, but one thing is certain: without that response, the EU would have been in dire straits, with the Single Currency under attack, and the Single Market in free fall. Moreover, the Eurozone divergences that had been exacerbated by Eurozone crisis management would have only increased, due to the differing levels of both economic capacity and fiscal space between countries. At the inception of the crisis, as Member States locked-down in order to stop the spread of the virus, Germany launched a major fiscal stimulus in which it promised state aid that constituted over half that pledged by all other Member States combined (51%, at close to €994.5bn). This can be contrasted with France's 17% of all aid (€331.5bn), Italy's 15.5% (€302.2bn), the UK's 4% (€78bn), and Belgium's 3% (€58.5bn (*Financial Times* 18 May 2020)). Had the EU not intervened with the RRF, it would have faced real problems with regard

to ensuring a level playing field for the Single Market, when Northern Europe could spend massively to prop up jobs and businesses in contrast to Southern Europe, which could provide much lower levels of support, and Central and Eastern European countries even less.

As it is, the Eurozone economy appears to have been recovering well. Growth rates have picked up across Member States, with better than expected predictions in cases like Italy, which had a 6.5% growth rate for 2021 – due in large measure to the increased business and market confidence related not just to the boost from the RRF, but also the Draghi-led coalition government. But much remains to be done. The pandemic itself not only revealed the pre-existing major economic disparities in the EU, within as well as between Member States, it also exacerbated them. These disparities have included rising poverty, gender-related inequalities (as women were more likely to have to leave their jobs to care for their children), and youth unemployment (in particular the increase in NEETs) along with a growing digital divide. This has been both geographic – differentiating between urban and rural settings – and class-related – as poorer students lacked both the digital tools and the services to enable them to connect to the internet for online learning.

The main question for the EU's future economic response to the pandemic is: is it enough? Although all of this EU level funding constitutes a tremendous boost to the EU's economic capacity to confront the crisis, it appears very small indeed when compared to the United States' initial \$1.9 trillion of March 2020 (equivalent to 9% of US GDP, and thus five times the size of the NGEU – Stiglitz 2020; see also Armington et al. 2021), leaving aside potential differences due to the massive legislative initiatives by the Biden administration to fund infrastructure as well as to increase social spending. Even if national automatic stabilisers in the EU are more robust than in the US, it is clear that economic divergences among Member States will persist if not increase. More EU funding on a permanent basis will surely be necessary to ensure a robust economic recovery for all, and rather than seeing such funding as increasing EU debt, it should be considered for what it really is: an investment to ensure that the EU will grow its way out of debt. The lesson from the Eurozone crisis is that you cannot cut your way out of debt: investment for sustainable growth is the only way out.

Politics

Political perceptions were divided in the very initial stage of the pandemic. There were those who saw the COVID-19 crisis, much as in the Eurozone crisis, as an asymmetric shock to be dealt with by the Member States in trouble, whereas others felt from the beginning that it was a symmetric shock, and that solidarity was required. The Dutch Finance Minister Wopke Hoekstra was most infamous, blaming the victims, notably Italy, for not having the room for manoeuvre to handle the economic impact of the crisis (*Politico* 27 March 2020) – an

accusation even more egregious when we remember the informal conditionality and SGP rules that had made it impossible for Italy to invest in its health system. Although the Dutch minister was roundly condemned, his comments only fuelled the sense in those initially most hard hit by the pandemic that the EU lacked solidarity or even empathy – leading them to ask why they were part of the EU at all (*Financial Times* 6 April 2020). Southern Europeans, particularly Italy, and also Spain, felt abandoned if not betrayed by the EU and by fellow Member States in March, April, and May 2020.

The mood seemed to shift only once the Franco-German duo came out in mid-May publicly recommending a major grant-based recovery fund, and the Commission came back quickly with an even larger amount. The change in mood was seen not only in Member State leaders, but also in EU citizens, as trust in national governments and the EU overall increased. At the national level, the Edelman Trust Barometer (Spring Update, May 2020)⁷ found an upsurge of trust in government generally, with a 10% increase in Germany from January to May 2020 (46% to 56%), with smaller increases in France (45% to 49%). A Pew survey (27 August 2020) similarly found increased trust in national governments, as judged by citizens approving their country's response, with a large majority seeing it as good in Spain (54%), France (59%), Belgium (61%), Sweden (71%), Italy (74%) the Netherlands (87%), Germany (88%), and Denmark (95%), in contrast to the UK (46%). In the EU, which at the outset of the crisis had little authority in governing the health domain, highly constraining economic rules, and limited fiscal capacities, trust was demonstrated in general citizen support for increasing its powers. A Eurobarometer poll (June 2020)⁸ carried out between 23 April and 1 May 2020, found that the majority of respondents (57%) were dissatisfied with the solidarity shown between EU Member States, and that close to two-thirds (69%) wanted the EU to 'have more competences to deal with crises such as the Coronavirus pandemic.'

This general increase in public trust in national governments and the EU largely continued, despite subsequent ups and downs in public approval, in particular in response to the slow vaccine roll-out and then lock-down measures. Moreover, and perhaps surprisingly, populism was for the most part held at bay across Europe. There is no doubt that anti-system populist parties in many Member States decried government elites, mainly blaming them for being too harsh regarding mask-wearing rules and lockdowns, even as mainstream opposition parties complained that populist governments were too late and lax on lock-down measures. There were also sporadic protest marches against mandates to wear

⁷ <https://www.edelman.com/sites/g/files/aatuss191/files/2020-05/2020%20Edelman%20Trust%20Barometer%20Spring%20Update.pdf>

⁸ <https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/public-opinion-in-the-eu-in-time-of-coronavirus-crisis>

masks, to get vaccinations, and later to use health passes to get into restaurants and theatres or even to places of employment, but the vast majority of Europeans seemed to have accepted the emergency measures to keep people safe. That said, the leaders of some European countries with populist governments exploited the crisis for their own political purposes, for example, to restrict access to abortions or to limit freedom of the press, as in Hungary and Poland.

Governance

While the initial period of pandemic crisis management was largely characterised by the negative politicisation of Eurozone crisis management, a more positive politicisation ‘at the top’ began when France and Germany together proposed a grants-based recovery fund via EU-level bonds. Before this breakthrough, however, the splits in the Council reflected those of the Eurozone crisis, with the ‘frugal coalition’ (made up of Germany, the Netherlands, Austria, Denmark, and Sweden among others) against the ‘solidarity coalition’ (made up of mainly of France and other Southern European countries, joined by some Central and Eastern European countries) (Fabbrini 2021). Once Germany shifted sides, however, by joining the solidarity coalition, the stage was set for more positive politicisation, not only within the Council but also with the Commission, which it empowered to carry out the agreed programmes. This more cooperative relationship constituted another reversal of Council patterns typical of the Eurozone since the Maastricht Treaty, in which the ‘new intergovernmentalism’ of Member State leaders meant that they seemed intent on avoiding empowering the Commission at all costs by establishing administrative bodies outside the control of the Commission, as in the case of the European Stability Mechanism (ESM) (Bickerton et al. 2015).

The story of how Germany moved from the frugal coalition, of which it was a leader during the Eurozone crisis, to the solidarity coalition championed by France, has yet to be told in full. There are those who attribute the change to the German leaders’ reconceptualisation of their interests, both economic, to ensure the continued functioning of the Eurozone’s interdependent economy (in particular as German automotive manufacturers clamoured for an Italian rescue to shore up their supply chains in Northern Italy as much as their sales across Europe), and political, especially once polling showed that the majority of their citizens were actually in favour of creating EU funds to support countries in need (Schramm 2021). Beyond the cognitive shift in interests, however, were norms and values, or even emotions. Chancellor Angela Merkel’s change of heart is arguably similar to her previous change regarding migration policy in 2015, and national nuclear policy, but French policymakers also need to be given a great deal of credit for the breakthrough, as they argued persuasively in the name of Europe for solidarity in a health crisis in which all countries were equally at risk of contagion, but where some had been hit harder than others and did not have the wherewithal to recover economically without support (Crespy and Schramm 2021). The shift itself followed from discursive interactions over a

period of months, from late March onwards, between Chancellor Merkel and French President Emmanuel Macron, backed up by discursive coordination deep in the executive bureaucracies of both countries, as well as with the Commission (Crespy and Schramm 2021; Schramm 2021).

Negative politicisation did not entirely disappear, of course. A case in point was the German Constitutional Court judgment questioning the ECB's actions in terms of quantitative easing (PSPP), which cast a shadow over its pandemic-related PEPP. Needless to say, politicisation also continued in the efforts by the frugal coalition to block EU-level grants in favour of only providing loans with conditionality to Southern European countries in need. There was also the resistance by the 'Sovereignty Coalition' consisting of Poland and Hungary, and other Central and Eastern European countries to any rule of law conditionality linked to the disbursement of RRF funds (Fabbrini 2021). The Council agreement in July 2020 was a compromise in which the frugal coalition failed to scuttle the recovery fund but nonetheless succeeded in altering the ratio of grants to loans at the same time as Poland and Hungary managed to water down the 'rule of law' conditionality clause. Notably, however, the EP, which had had little effect initially, managed to reinsert more robust rule of law conditionality into the final agreement during the budget negotiations, along with more money for EU4Health.

Finally, the Commission not only came through with innovative ideas adopted by the Council. It also overhauled the European Semester in ways that eliminated many of its remaining drawbacks. It is useful to remember that at the inception of the Eurozone crisis in 2010, the Semester was converted from a soft law coordinating mechanism (akin to the 'open method of coordination') to a top-down punitive mechanism of control which was then eased (beginning in 2013) by being applied with greater and greater flexibility in order to ensure better performance, accompanied by an increasing focus on addressing social concerns. Today, in light of the pandemic response, the Commission's mission has been transformed. It has largely left behind its roles as enforcer and then moderator in the Eurozone crisis to become a promoter of the new industrial strategy initiatives through the National Resilience and Recovery Plans (NRRPs). These are more bottom-up exercises by Member State governments, at the same time as the Commission still exercises oversight via conditionality and makes recommendations for reform – such as determining whether certain pre-agreed 'milestones' in terms of economic reform are met before disbursing the next tranche of funding.⁹ This 'conditionality' is a far cry from what it was during the early phase of the Eurozone crisis, however, when structural reform largely meant cutting welfare states and deregulating labour markets. It is focused on attacking

⁹ Marco Buti, Head of Cabinet of Commissioner Paolo Gentiloni, sees it as the move from 'referee' to 'investment enabler.' Talk at the Center for European Studies, Harvard University (14 April 2021).

national economic vulnerabilities and administrative hindrances, as well as social ‘fairness’, by addressing inequalities of opportunities as well as of outcomes.

1.3 What Next? How to Improve EU Economic Governance

As we have seen, after a brief moment of *déjà vu* with the Eurozone crisis, it seemed that the EU had learned its lesson by responding much more proactively to the COVID-19 crisis. A suspension of the rules and numbers was accompanied by massive national bailouts and the EU creation of an unprecedented European recovery fund focused on greening economies, digitalising societies, and addressing inequalities. Legitimacy, which was so much at risk during the Eurozone crisis, seems to have improved as a result of this new EU-level solidarity – but will it last?

Much more needs to be done to ensure a brighter future for the European economy. The EU needs to rethink European economic governance beyond the old ideas, to repair the damage wrought by euro crisis management, with an increased role for ‘state’ actors – both EU and national – as public entrepreneurs to promote growth and provide investment to meet the challenges of the green transition and the digital transformation while ensuring greater social equity. This cannot be done solely as a technocratic fix, however, nor as a top-down process. Rather, economic governance needs to be both decentralised and democratised – with more bottom-up involvement of social partners and citizens at local, national, and EU levels, and greater roles for both national parliaments and the European Parliament.

So how do we get there from here, that is, to effective economic policies and efficient governance procedures that at the same time enhance democracy? To examine this, we take a closer look at some innovative ideas for Commission industrial strategy and the European Semester, as well as for ECB macroeconomic coordination.

Industrial Strategy and the European Semester

The EU has made a great leap forward through the Next Generation EU, focusing on investing in the green transition, the digital transformation, and social equity, together with the temporary Resilience and Recovery Facility (RRF) targeted to Member States most in need, but this kind of industrial strategy needs to be reinforced through the development of permanent EU-level debt that could provide investment funds for all Member States on a regular basis. A permanent RRF can be thought of as an EU wealth fund, akin to national sovereign wealth funds, which issues debt on the global markets for use to invest through grants to the Member States in education, training, and income support; in greening the economy and digitally connecting society; and in big physical infrastructure projects (Lonergan and Blyth 2018, 132–141). It could also be used for redistributive purposes through a range of innovative targeted EU funds, including a common European unemployment reinsurance scheme; a refugee

integration fund for municipalities (Schwan 2020) and a migration adjustment fund to support the extra costs for social services and retraining needs; an EU fund for ‘just mobility’ focused on brain drain; or even a guaranteed (basic) minimum annual income.¹⁰ Such funds would provide carrots rather than just sticks to encourage greater buy-in from Member States in particular, in a range of areas. Different countries would benefit from the funds at different times, and this could be triggered when any one country finds itself overburdened by the extra costs it incurs because of the asymmetric functioning of the Single Market and the Single Currency, or because of its openness to refugees and migrants.

The next question to arise with all such funding initiatives is how to ensure that they succeed. The European Semester is the ideal vehicle for oversight and assistance, but only if we rethink the rules and numbers. Clearly, the Eurozone’s restrictive numbers-targeting deficit and debt rules, reinforced during the Eurozone crisis, did not work, and in any event needs to be changed to meet the new circumstances and goals. The numbers alone are now impossible to apply, given that Member State debt is on average more than 100% of GDPs, and government deficits are way above the previous levels. Rather than simply readjusting the rules and numbers, however, they should be permanently suspended, to be replaced, perhaps, by a set of ‘fiscal standards’ to assess sustainability in context (Blanchard et al. 2021). If this is not feasible, then a much more flexible set of rules needs to be developed, focusing on counter-cyclical economic policy, with more fine-tuned assessments of where individual Member States sit in the business cycle in relation to deficits and debt, as well as growth outlooks and the prospects of meeting investment targets. Flexibility needs to be the watchword, and sustainable and equitable growth the objective.

National level public investments beyond those that are part of NGEU should not be counted toward deficits or debt when deemed to benefit the next generation by improving sustainable growth (e.g., investments in education and training, greening the economy and digitalising society, as well as improving the physical infrastructure). This is known as the Golden Rule for public investment. An IMK (Macroeconomic Policy Institute) report found that if the ‘golden rule’ had been applied for public investment rather than deficit/debt rules from 2010–2017, the four largest economies would have gained in GDP – 1.8% higher for all four, but Spain 3.5% higher GDP, Italy 2% higher, France 1.8% higher, and Germany 1.5% higher (Dullien et al. 2020).

¹⁰ This could be paid for, for example, by the ‘digital dividend,’ by having digital platforms pay for our data (which means establishing our property rights on our data, and licensing private corporations to use it), and then using this as tax pro minimum income (Lonergan and Blyth 2018).

Public debt itself could be ignored if it is sustainable, meaning that the government can borrow at a rate lower than the average rate of growth of GDP – otherwise, taxes could be increased (Lonergan and Blyth 2018). So long as the ratio of debt to GDP is much higher than 60% or even 90% for a while, then why not allow any amount of debt so long as it is sustainable (i.e., the country can service its debt – think of Japan, at 200%), with growth helping to reduce debt in the long term. Why continue to punish countries with higher debt-to-GDP ratios in terms of expenditure rules? One of the lessons of Eurozone crisis management is that you cannot cut your way out of public debt through austerity; the only way out is through growth. In this vein, another initiative should involve eliminating the debt brake from national constitutional legislation. As noted earlier, this was a hindrance not only for those without the ‘fiscal space,’ who could not invest, but also for those who had it, and did not invest. In both cases, it constrained those countries, regions, and municipalities that needed such investment the most.

Decentralising and Democratising EU Economic Governance

European Semester procedures also need to be reimagined. The Semester provides an amazing architecture for coordination, but it remains a highly technocratic exercise that is largely concentrated in the executive branches of national governments in coordination with the Commission. Our question here is: what is the best way to exercise coordinating oversight while decentralising and democratising the process? For this, we need to consider EU as well as national levels.

In its Communication on the 2021 Annual Sustainable Growth Strategy published on 17 September 2020, the Commission (2020, 13) called for Member States to ‘engage as soon as possible in a broad policy dialogue including social partners and all other relevant stakeholders to prepare their national resilience and recovery plans’ in order to ensure national ownership. Given the short timing, however, it was understood that such dialogue would be difficult for Member States to manage in the first year of NRRPs, given the need to ensure speedy action. It doesn’t seem that much has been put into place for the next round, however, in particular because the 2021 cycle of the Semester did not issue new country-specific reports. As a result, whereas powerful industrial lobbies were likely to have been able to exert influence in the design and adoption of NPPRs, the same is not true of social stakeholders. Nor did the Commission itself seem to have done much to ensure this kind of broad dialogue at the EU level. Although social stakeholders were heard (via online communication), how much they were ‘listened to,’ and had an effect on practices, remains open to question (Vanhercke and Verdun 2021).

In view of all this, it would be most important for the Commission to ensure that the national planning processes for the NRRPs are not only democratised by bringing in social partners, civil society actors, and elected officials, but also decentralised to regional and local levels. In this context, the existing fiscal boards

should be transformed into industrial strategy advisers and the competitiveness councils into industrial policy councils. This kind of vast decentralised consultation could be likened to the French ‘Plan’ of the postwar period, which succeeded remarkably well not only because it had clear objectives for targeted funding but also because it brought in the *forces vives* of society, with widespread consultation ensuring common cause, along with the circulation of ideas and information (Schmidt 1996). Bringing in social stakeholders, and the regional and local levels could also help guard against corruption and clientelism.

Beyond encouraging the decentralisation and democratisation of national level dialogues in the context of the NPPRs, the Commission would do well to open ongoing dialogue with all stakeholders on its goals for economic governance, so as to democratise the planning process at the EU level. We could call this the ‘Grand Industrial Strategy Dialogue,’ and task it with recommending overall targets and goals, say, for greener investing, more society-driven digitalisation, and addressing social inequalities in addition to promoting the ‘strategic autonomy’ of the EU economy. This could arguably build on the existing Economic Dialogues and Monetary Dialogues regularly organised by the EP with EU executive actors, but be more inclusive with regard to bringing in civil society actors, and more ambitious in terms of setting objectives for sustainable and equitable growth.

This kind of dialogue could also serve a larger purpose, by providing a venue for more democratic debate and deliberation on EU macroeconomic governance. Alternatively, there could be a separate macroeconomic dialogue. The ‘Great Macroeconomic Dialogue’ could be a yearly or biannual conference to outline grand economic strategies, making for a space for all EU institutional actors – including the EP, the Commission, the Council, and the ECB – along with representatives of industry, labour, and civil society from across Europe. It could be the venue for considering the general targets for the Eurozone on an ongoing basis – as a substitute for the currently suspended SGP rules and numbers. Additionally, it could provide the ECB with more public input and legitimisation on moving forward in terms of its secondary objectives. Such objectives include targeting full employment on a par with fighting inflation; ending ‘neutral’ bond-buying (no longer buying bonds from polluting industries); creating green bonds for the environment; or even providing so-called ‘helicopter money’ to offer direct support to households in need. The ‘political guidance’ offered through the Great Macroeconomic Dialogue would not impinge on the ECB’s independence, and it could provide legitimacy of the kind afforded to national central banks, which operate in the shadow of national politics, by putting the ECB more clearly in the shadow of EU level politics.

More inclusive EU level dialogues focused on industrial strategy and macroeconomic governance, accompanied by a more bottom-up approach for the NPPRs, are likely not only to promote better economic performance but

also much more political legitimacy. At the national level, the decentralisation and democratisation of the NPPRs would put responsibility for the country's economy back in the hands of the Member States while opening up economic planning to all potential stakeholders – thereby ensuring real national 'ownership.' This could also help counter the populist drift in many countries, as the political parties of the mainstream right and left could begin again to differentiate their policies from one another, with proposals for different pathways to economic health and the public good. At the EU level, moreover, it would allow for more democratic deliberation regarding goals for sustainable and equitable development, while helping to combat populist claims that they are the only 'democratic' alternative to EU-led technocratic rule.

1.4 Conclusion

All in all, the pandemic response was certainly a radical break with the Eurozone crisis response, and a historic achievement, although not a 'Hamiltonian moment.' The RRF is a temporary fund focused on the pandemic, rather than the fabled 'Eurobonds' that many had hoped for during the Eurozone crisis, let alone the 'Coronabonds' France and Southern Europeans had called for in first month of the pandemic. The 'governing by rules and ruling by numbers' of the SGP is also only suspended, not officially revoked, and the Eurozone still lacks many of the instruments it needs to ensure optimal performance. The populist revolt that stemmed in large part from citizens' negative reactions to the Eurozone crisis is not over, but the response to the COVID-19 crisis, which reverses some of the Eurozone's worst legitimacy lapses, is at least a very good start!

Notably, the COVID-19 pandemic response further legitimised the emergency politics of the ECB with Eurozone monetary policy, which not only normalised its increasingly expansive programmes of quantitative easing but further galvanised them in 2020. In contrast, it delegitimised the emergency politics of the Council and the Commission with regard to the SGP's fiscal rules and numbers, which, having been slowly rolled back since 2013, were suspended in 2020, accompanied by the taboo-breaking mutual risk-sharing of NGEU. As a result, we could conclude that the EU's decision-making process during COVID-19, fraught as it was, may very well be what Séville (this volume) defines as 'modern politics.' Unlike during the Eurozone crisis, the EU system, albeit under stress, found a positive solution that avoided the coercive imposition of emergency measures to which it had resorted during the Eurozone crisis (see also White, this volume).

That said, the EU faces many possible obstacles and stumbling blocks with regard to moving forward. The question of how the EU repays the NGEU debt, and with which 'own resources,' remains on the 'to-do' list. Moreover, political divisions remain in the EU Council, particularly between members of the frugal coalition and the other Member States, on future developments. How things play

out depends in large measure upon whether the Resilience and Recovery Facility proves successful in spurring growth while clearly being effective, efficient, and devoid of corruption. If it fails to deliver on growth or if the extra investment is not used wisely in the main countries targeted (Italy and Spain), or if rule of law issues emerge, with money going to government cronies (Hungary and Poland), then enthusiasm will wane, and the likelihood of creating a permanent fund will diminish.

The austerity hawks are likely to be back once things settle into some kind of new normal. If the rules are not changed, or at least relaxed, the exit from the ‘escape clause’ of the SGP will have deleterious consequences for those countries that still need time to grow their way out of deficits and debt. Without formal changes in the rules, or at least informal agreements on reinterpretations of the rules, the ‘austerians’ will have legal grounds to take the Commission to court. This is also a problem because the restrictive rules and numbers are written in so many different places in the treaties and legislation – the Fiscal Compact imposed the institution of the debt brake on national constitutions, the Six-Pack and Two-Pack codified not just the numbers on deficits and debts, but also the sanctions to be applied (Jones 2020). And how does one change the treaties if even one Member State is against it, given the unanimity rule on these issues? This can create almost unsurpassable roadblocks.

It is in large part because of these obstacles and stumbling blocks, economic, political, and institutional, that we need to think innovatively with regard to the future of Eurozone economic governance. Eurozone governance requires a Commission able to deploy a permanent fund to invest in the key areas necessary for sustainable, equitable growth, while coordinating the efforts of Member State via flexible guidelines for differentiated evaluations of Member State economies. It would do best through dialogues that establish general industrial strategy goals as well as macroeconomic targets, but in addition to all of this, it also needs greater bottom up decentralisation and democratisation, which alone could combat the deteriorating politics ‘at the bottom’ in which citizens vote for populists out of frustration with their lack of voice and choice. Only by bringing European economic governance closer to the citizens can the EU be sure to build a more sustainable and equitable EU.

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2 Before the Next Emergency

Jonathan White

Throughout the crisis politics of recent years, critical assessment of the EU has tended to focus on its effectiveness. For their economic measures, border policies, vaccine procurement or geopolitical interventions, those acting in the EU's name are judged on their capacity to get things done. This is understandable for an organisation which tends to be approached instrumentally. Because the construction of the EU was a political choice – something made rather than inherited from the past – it tends to be held to a consequentialist standard. It did not, as it were, have to exist: its rationale is to help solve problems.

The risk of assessing the EU by its outcomes is that one downgrades the importance of *how* these outcomes are attained: ends can obscure the means. This is the argument of those who call for more attention to how EU crisis decision-making employs the rhetoric of emergency and shows a willingness to overstep legal and political constraints. A hallmark of EU politics over the last decade has been the use of actions exceeding norms and rules, rationalised as necessary responses to exceptional and urgent threats – the use, that is, of emergency politics (White 2015, 2019; Kreuder-Sonnen 2019; cf. Goetz and Sindbjerg Martinsen 2021, 7ff.).

In the days after the Russian invasion of Ukraine on 24 February 2022, the EU and its Member States adopted a striking series of emergency measures, including severe economic sanctions on Russia, military support for Ukraine, the opening of borders to Ukrainian refugees, and a push for accelerated candidate status for the country.¹¹ Such moves involved dramatic shifts in long-standing European and national security policy, notably towards greater militarisation. To many these measures seemed more than justified – the arguments in support of them were powerful. But amid the enthusiasm for an EU speaking with one voice, it was easy to ignore some basic constitutional questions. Does one want major decisions that reverse decades of previous policy, pose major hardships for civilian populations, and have the potential to escalate to nuclear war, taken in and around the European Council over a single weekend? Who gets to decide, and on what grounds, which situations are to be handled this way and which not – when migrants are to be welcomed or, as in the Mediterranean, forcibly turned away? Who should be held accountable for these policies and for those

¹¹ <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/>. This paper was finalised on 6 March 2022.

that lead up to them – for the inactions and actions that shape preparedness for extreme circumstances, sometimes their very existence? How can one ensure that decisions are taken with adequate debate about their risks? If similar scenarios are to be avoided in future, and perhaps especially if one doubts that they can be, it is important to examine such questions. There is a need to think about how to structure and constrain these expanding powers, and how to strengthen democratic control over their deployment.

This paper starts with a brief overview of the transnational politics of emergency, the challenges it raises and the factors that drive it in the EU. Continuities are traced from the economic malaise of the 2010s through to the public-health and security crises of the 2020s. The paper then moves to its central question – how the constitutional issues arising might be responded to. It considers the case for granting the EU a defined set of emergency powers and constraints on their abuse – the case for an ‘emergency constitution’, made recently by practitioners and scholars. Judging such an addition would raise more problems than it solves, the text explores the case for a more radical transformation of the EU’s constitutional structure. Rather than legitimise exceptional responses to exceptional circumstances, it would aim for stable executive authority anchored in a parliamentary regime. It would involve only those supranational arrangements that could be endorsed on a permanent rather than temporary basis. Given the preconditions for such a transformation still seem remote at present, the paper concludes with remarks on how emergency politics can be constrained under existing structural conditions, notably through the intervention of critical movements and parties.

2.1 EU emergency politics: forms and origins

Emergency politics in the EU takes different forms. Sometimes exceptionalism challenges the norms of domestic politics, such as those concerning national sovereignty and democratic processes. Sometimes it challenges the EU legal framework itself. Sometimes it empowers executives at the supranational level and sometimes those at national level acting in concert. Here I focus on two kinds of emergency politics – *supranational* and *multilateral* (cf. Kreuder-Sonnen and White 2021) – to highlight some of the patterns and their causes. Expressions of each can be seen throughout the 2010s and beyond. While they are not equally present at all times – pandemic politics for instance varied in important ways from the handling of Eurozone instability, with some governing features more prominent and others less so (Schmidt 2021) – the factors that enable them endure. My assumption is that each remains a persistent possibility, whatever the patterns of a particular moment, and this is the key point when considering the constitutional questions they raise and the possible responses.

When supranational authorities cite urgent threats to sidestep the constraints that normally bind them, we are dealing with emergency politics of a *supranational* kind. In the 2010s, the standout example was the Troika – a composite body made

up of the European Central Bank (ECB), the European Commission and the International Monetary Fund (IMF), designed to restructure national economies and fiscal systems in the European South. Using the pressure of conditional lending, the Troika enabled supranational authorities to overcome established norms of EU politics concerning the exclusive competence of Member States in economic and fiscal affairs, using crisis conditions as the warrant. The Troika's activities were supported by separate unilateral extensions of ECB powers over Eurozone economic policy, from letters of intimidation to national governments to the reinterpretation of the Bank's core mandate (Kreuder-Sonnen 2019, 117–151; Lokdam 2020). In the pandemic response from spring 2020, ECB officials continued to expand their discretion with initiatives such as the Pandemic Emergency Purchase Programme (PEPP), related only in the most elastic fashion to the Bank's founding mission, given coherence by the goal of stabilising the EU economy in the face of disorder (van't Klooster 2021). The ECB reserved the right to continue its policy until 'it considers that the COVID-19 crisis phase is over'.¹²

One also finds supranational emergency politics in fields beyond the economy. A similar pattern can be seen in the handling of migration issues since 2015, as Frontex and the Commission have come to exercise new powers in the name of crisis response. These include the use of extra-legal 'push-back' actions to deter migrants at sea, and the expansion of airborne capacities with drone technology.¹³ Some of these are expected to be regularised with a new Pact on Migration and Asylum, but the Pact itself is set to establish far-ranging and semi-regulated new powers in the area of migrant 'returns'.¹⁴ In such ways, COVID-19 – both as a health emergency and as a threat to social and economic stability – has been used to press for new supranational powers, albeit discretionary in character and intended to reinforce existing policies under pressure (cf. Tesche 2021; Goetz and Sindbjerg Martinsen 2021).

Multilateral emergency politics, by contrast, involves EU Member States enhancing their discretion collectively by creating new structures outside the EU. In the early 2010s, the creation of ad hoc lending facilities during the Eurozone crisis (the European Financial Stability Facility [EFSF], the European Stability Mechanism [ESM]) were notable cases, which allowed states to avoid the constraints posed by EU Treaties while also avoiding the constitutional challenges of revising them. Such standalone formats have been coupled with considerable reliance on informal governance to circumvent EU procedures. Summits between heads of state provide a forum for off-the-record discussion and negotiation, as does the

¹² Decision ECB/2020/17 of 24 March 2020, <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html>

¹³ <https://fragdenstaat.de/en/blog/2021/08/24/defund-frontex-build-sar/>

¹⁴ 23 September 2020. See also the 'New EU Strategy on voluntary return and reintegration' (27 April 2021), to be supported by Frontex (https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1931). For a critical assessment, see: <https://www.stiftung-mercator.de/content/uploads/2021/05/MEDAM-Assessment-Report-2021-1.pdf>, pp. 61ff.

Eurogroup, the name given to informal gatherings of Eurozone finance ministers, whose uncodified character allows fewer constraints and burdens of publicity. A regular feature of the 2010s, the Eurogroup would be used again in spring 2020 to fashion the EU's economic response to the pandemic, in particular the early steps in designing the Recovery Fund. Throughout recent years, the European Council has also been a central locus of decision-making – an organ which is today a formal EU body, but which for much of its existence offered the same benefits of informality that state representatives now seek in the Eurogroup.

Common to emergency politics in both its supranational and multilateral forms are a range of problems. One concerns functionality: decisions achieved in this ad hoc fashion are often inefficient. Whereas crisis decision-making ideally benefits from scripts of action, so officials under pressure can coordinate and act coherently, the elastic formats of EU emergency rule offer little of this. While there is no guarantee a more efficient EU decision-making structure would serve progressive ends, one can assume a piecemeal approach obstructs them. Beyond these considerations of functionality, so often the focal-point of critical assessment, are others that can be summarised as follows:

1. Emergency measures tend to be adopted with little democratic input (White 2019; Goetz and Sindbjerg Martinsen 2021; Auer 2021). Adopted swiftly to meet an urgent threat, in secret or informal contexts, there are typically few opportunities for public deliberation. Because they are rationalised as responding to exceptional circumstances, decisions are hard to trace back to the views aired and debated in electoral or parliamentary contests. They are cast as responses to necessity rather than expressions of normative commitments. The value-choices they entail – about what should be protected in adversity – are glossed over.
2. Power comes to be further concentrated in executive institutions, both political and technocratic, at the expense of parliaments and courts. More precisely, it is passed to key figures at the apex – to leaders and the networks they form. Even where these are not acts of self-empowerment, they weaken accountability structures due to their ad hoc character and opacity (Papadopoulos 2021; White 2021). Who is in control, and what criteria they apply to decision-making, often become difficult to discern, even more so to contest.
3. The authority and coherence of law – national, European, international – is weakened (Auer and Scicluna 2021; Scicluna 2018). As formal rules of procedure are evaded, and informal and ad hoc modes of government arise, a mismatch develops between how the polity is meant to work and how it works in practice. Law becomes misaligned with how things are done on the ground.
4. Though typically presented as temporary, exceptional measures, these actions have lasting consequences (Kreuder-Sonnen 2019). Reversing

them tends to be difficult, either because they benefit certain agents, or because no agent wishes to reopen the crisis that occasioned them. The policies and practices of emergency rule tend to get locked in, whether they be welcome additions or regressive measures entrenching an unjust status quo.

Why does this happen? Aside from exogenous factors, a structural feature encouraging EU emergency politics in all its forms is the softness of its constitutional rules, combined with the diffusion of power across multiple executives. The avoidance of relations of hierarchy and sovereignty has been a defining feature of the EU: power is spread across numerous sites, including states, the EU's core institutions, and numerous functional agencies. Processes of coordination are based on conventions of consultation rather than codification. This means there is little to deter agents, singly or collectively, should they seek to improvise in how they exercise power. As long as a critical number can agree on the ends, they can bend the EU framework to their agenda or sidestep it if preferred. Both the European Parliament (EP) and the Court of Justice can offer little consistent resistance (Papadopoulos 2021; Kreuder-Sonnen 2021; see also below). The diffusion of power also creates an *incentive* to concentrate power when difficult situations arise. Impromptu decision-making forums allow more powerful agents to apply pressure more effectively on the recalcitrant. Allowing, or threatening to allow, small crises to escalate into larger ones helps keep non-conformists in line and sharpens the pressure on all parties to find agreement and act (on Eurozone 'governing by panic': Woodruff 2016). The appeal to exceptional and pressing circumstances becomes a way to focus minds and unite agents behind a common decision. Exceptionalism, in other words, becomes a way to keep European integration on course.

Note also that supranational authority accords a prominent role to technocracy. It foregrounds those with a problem-solving ethos, whose notions of success tend to be defined in terms of maximising on a particular metric (e.g. monetary stability, effective border management). For those with such an outlook, achieving certain outcomes 'whatever it takes' is likely to take priority over procedures and norms when a trade-off is felt to exist. There is a priority of ends over means. Cultivating an atmosphere of emergency is also a way to seek public acceptance for technocratic decision-making (Rauh 2021). Transnational authorities such as the Commission and ECB have reason to embrace emergencies as opportunities to show their worth before sceptical onlookers and to head off concerns about unelected power.

These remarks about EU exceptionalism – about the methods employed in the making of policy – should not imply indifference to the outcomes. On the contrary, one reason to take interest in these procedural aspects is because they are relevant to the outcomes produced. Policies formed in informal settings, with power concentrated on executives and sub-groups among them, are liable

to reflect the priorities of the few rather than the many. They may reflect, for instance, priorities to do with the maintenance of the common market over public health, which the Commission was accused of in 2020.¹⁵ Or they may be so piecemeal that they reflect no particular agenda, with all the costs to coherent policy this entails. Even when the policies are none of these things – when they can be judged as desirable interventions – they rest on a fragile basis if dependent on executive discretion. This is especially true given that the EU and its Member States seek to become more active in security matters, revising long-held policy commitments and trialling significant new formats like the ‘European Peace Facility’: it is crucial that there be constitutional structures that can ensure debate of the ends pursued.

Nor should these remarks about EU exceptionalism be taken to express a liberal distaste for political agency and a laissez-faire preference for inaction. On the contrary, and as explored further below, the pathologies of emergency politics are a reason to reorder and strengthen political agency, including at the EU level, both to reduce the temptations of exceptionalism and to reshape the underlying political and socio-economic conditions to which emergency rule responds. With climate change unfolding, and a range of short- and long-term policy adjustments to come with it, it is vital to think about these issues now. We should be willing to consider augmentations of transnational authority, I suggest, but always against the yardstick of what is consistent with a democratic order.

2.2 Is an EU emergency constitution the answer?

In view of the EU’s reliance on improvised and irregular methods, some argue the need for equipping it with better fire-fighting capacity. What the EU requires, in this view, is an agreed set of procedures for handling exceptional situations, allowing its representatives to act quickly and efficiently while also maintaining their accountability. Former senior Commission official Martin Selmayr is one person to have put this case.¹⁶ In a reflection on the EU’s experiences from the Eurozone crisis to COVID-19, he observed: ‘I think it would be useful to have in the EU a mechanism, ready to be activated in times of crisis, that temporarily allow it to make decisions in a simpler and faster way to respond to crisis situations with determination. ... Perhaps we should enable a temporary shift to the European Union level in crisis situations. Of course, the risk is that we can be right or wrong. But the world is moving too fast to make decisions too slow. ... If you want the legal basis for that, it is under Article 352 which could be a basis for establishing a European crisis mechanism, for all future crises, to be faster and more efficient when the next crisis comes.’¹⁷

¹⁵ <https://verfassungsblog.de/principled-generosity-mixed-with-unmanaged-market/>

¹⁶ See also Tucker 2018, chapter 23.

¹⁷ <https://geopolitique.eu/en/2021/04/27/the-european-commission-as-a-political-engine-of-european-integration-in-conversation-with-martin-selmayr/>

In its more worked-out forms, such a proposal for a codified mode of crisis governance goes by the name of an *emergency constitution*. In addition to specifying who should do what in a crisis situation (or the procedures for determining this on the spot), an emergency constitution offers mechanisms for deciding what kind of situation merits this response, what checks should be in place to prevent abuses of power and how such periods of exceptional rule should be brought to a close. The merits of such an arrangement have been widely debated at the national level, especially in the context of the ‘war on terrorism’ (Ackerman 2006; Ferejohn and Pasquino 2004; Ramraj 2008). Some proposals rely on strong executives checked by the judiciary, while others look to the legislature and public opinion as the regulators of emergency rule. Common to all is the idea of an exceptional regime for exceptional times, codified in advance and intended both to enable and constrain the actions of decision-makers. This model of codified emergency response differs both from a model that leaves emergency rule largely uncodified, its excesses to be dealt with after the fact, and from a model that seeks to design governing mechanisms for all seasons rather than on the logic of norm/exception/norm.

A sophisticated proposal along these lines for the EU has been laid out by Kreuder-Sonnen (2021, see also chapter 3 in this volume). Critical of the irregular methods employed by EU executives, and conscious of their tendency to be locked in later, Kreuder-Sonnen advocates a set of principles and procedures with which to make EU emergency rule more regularised, less harmful to law and more reversible once conditions permit. In this scheme, emergency actions are to be circumscribed *ex ante* and maintained within a legal framework, even as normal procedures are suspended. Wary of relying on courts alone, given their weakly democratic and often deferential character, Kreuder-Sonnen emphasises the role of the legislature and of elected national representatives. The argument builds on similar proposals nationally, but with adjustments made for the peculiarities of the EU, notably its mix of national and supranational power and its multiple organs of executive power.¹⁸

Coherent and compelling as this proposal may be, I want to consider some of the arguments against it. As with all efforts to reform the EU, there are first questions of feasibility (cf. Auer and Scicluna 2021). These need highlighting not because they are unique to proposals of this sort, but because arguments for emergency powers can often seem attractively realist, attuned to the messy imperfections of the world. It is important to examine if this is so. Recall that the argument for an emergency constitution is generally two-pronged: an argument for the (temporary) *augmentation* of power, paired with *constraints* on decision-making so that these capacities are not abused. It is the latter that presents a conundrum. If we have reason to worry that executives might abuse

¹⁸ Notably, Kreuder-Sonnen (2021, p. 9) argues the power to identify exceptional circumstances in the case of the EU should generally lie with the Council rather than the Parliament.

their exceptional powers, do we not also have reason to doubt their willingness to accept constraints? Would they not block their introduction? The idea of an emergency constitution depends on a spilt view of authorities – a sense on the one hand that their motivations or goals are not to be trusted (they can be ‘right or wrong’, in Selmayr’s words), coupled with a belief that they are sufficiently enlightened to embrace procedures that tie their hands. There is the risk, in other words, of advocating a solution that the relevant actors will not accept if the problem is accurately described (Vermeule 2006).

In the EU, one has particular reason to doubt whether the relevant executive actors – notably the European Council and Commission – would be willing to endorse an emergency constitution, given the extent to which they have historically relied on exceptionalism as a way to manage crises, introduce new policies and advance European integration. In an age of increasing public dissensus, they have reason to retain these methods (cf. Patberg in Heupel et al. 2021).¹⁹ Such a difficulty applies not just to the initial introduction of an emergency constitution but its maintenance. Just as executive agents in the EU have shown themselves willing to evade ‘normal’ constraints on their power when exceptional conditions can be cited, there is every prospect they would evade the constraints of an emergency constitution – either because they are power-hungry, or because they believe effective government depends on their retaining discretion. This could take the form of trying to revoke its legal basis or, less provocatively, of bending its provisions. What, for instance, might the Council do if the EP called against its wishes for the termination of a period of emergency rule? Plausible answers would be that it ignores the EP, pressures it to change position or allows one period of emergency rule to lapse only to press for a new one. Possibly the Court of Justice of the European Union (CJEU) could sometimes step in to contain this, if given a clear mandate to police these powers, but the record of the courts on this front is not good. An emergency constitution would probably be side-stepped should it get in the way of the major powers. If it were an adequate solution, there would not be a problem in the first place.

More interesting than issues of feasibility are those of desirability. To what extent would an emergency constitution be welcome if viable? There are some reasons for scepticism. First, creating emergency powers is likely to foster the appetite to use them, beyond what is strictly necessary. In any political system, once the possibility of declaring an emergency exists, it will seem tempting to do so and often negligent not to. Faced with difficult circumstances, those opposing the use of emergency powers will have a major burden of argument, being easily positioned as complacent or soft (Tribe and Gudridge 2004, 16). Even if the power to identify an emergency is formally separated from the power to act on it, informal pressure can be brought to bear on those responsible for the former – in

¹⁹ The problem is also thoroughly discussed by Kreuder-Sonnen (2021), leading him to express doubts about the practical viability of the model he advocates.

the EU case especially, where the parliament is currently weak and little able to count on public support. The temptation to invoke exceptional measures is only likely to increase as they are used over time. If one goal of invoking emergency powers is to convince the public that actions are being taken, regularly resorting to these powers becomes attractive as a way to maintain the visibility and relevance of decision-making. The effect is to normalise a mode of rule that grants great power to executives at their moment of least transparency.

This has implications not just for the conduct of rule but for public discourse. Establishing the possibility of expedited decision-making in hard times encourages political claims to be phrased as emergency claims. That is, it encourages claims to be phrased in non-negotiable terms, something both intrinsically corrosive of public debate and likely to prompt a response equally intransigent (White 2019, ch. 6). While an emergency constitution might resolve some practical issues, one may assume it would also escalate the rhetoric of emergency.

Note also that the argument for an emergency constitution has often relied on the idea that emergencies will be short-lived. The ancient Roman institution of ‘dictatorship’, employed mainly in the context of war, was premised on the natural limits associated with the military campaigning season. Today’s emergencies, in the EU and more generally, typically emerge from long-term pathologies of politics, capitalism and climate, giving them a temporally unbound character – a reason one should be wary of their classification as exceptional. If there is no natural boundary between normal and abnormal times, the risk is either of short, superficial responses to deep problems or of a permanent politics of emergency. The very existence of emergency powers, one should note, incentivises leaving such problems to fester. When authorities know that they can invoke extra powers when the going gets tough, they have less reason to pursue the far-reaching reforms that might get to the core of things: they have a fallback option to rely on.

Another potential drawback of an EU emergency constitution relates to the EU’s distinctive nature. An emergency constitution could be expected to interact negatively with one of its idiosyncrasies in particular – the way much of its politics is a turf war. Because the EU’s procedures have never been constitutionally fixed, its leading figures have tended to be permanently seeking to safeguard or extend their powers. All major decisions in the EU typically have a dual dimension: they are about the particular issue at hand (e.g. the regulation of a certain policy field), but they are also about the general question of where power lies. Introducing an emergency constitution into such a system would provide a new front for such clashes. If the EP were granted the power to declare an emergency, and thus to empower executive actors such as the Council or Commission, it is likely that it would take such decisions not just on criteria related to the matter at hand but on unrelated issues about the institutional balance of power – what is likely to further supranational or intergovernmental authority. Likewise, if

calling the emergency were in the hands of the Council, its representatives would most likely hesitate before empowering the Commission, and would seek to exert informal pressure on it if they did. In such ways, a mechanism set up for the manifest purpose of handling crises would most likely be used for latent purposes, interfering with its public rationale and distorting whatever problem-solving capacity was achieved.

I conclude that the idea of an EU emergency constitution is one to be wary of. The strong merit of the proposal is its engagement head-on with the deficiencies of recent EU emergency politics and the presentation of a coherent and detailed alternative. It sharpens our thinking about the criteria for EU reform, including the importance of bolstering parliamentary power. Yet one may fear that, if enacted, the capacity of such a mechanism to restrain emergency politics would be limited – and indeed, that it could generate new problems. One may leave open the question of whether such arrangements are desirable at the national level – clearly some of these points would suggest not, but others are tied to the specificities of today's EU (cf. Auer and Scicluna 2021). One may also leave open whether an emergency constitution would be desirable in the context of a radically transformed EU. My argument is that, from the vantage-point of present-day reality, it is not an emergency constitution that should be the objective of political reform. Emergency powers are sovereign powers, and a great deal is risked by bolting them onto a highly imperfect order. Much else about the EU would need to change before such a thing could be considered, and it is these kinds of change which should occupy us first – not least because they might also make an emergency constitution less necessary.

2.3 Radical reform

What, then, are the alternatives for shaping the exercise of power in extreme circumstances? Setting aside questions of feasibility for a second, arguably the first thing the EU needs is not an *emergency* constitution but a reinvigorated constitution as such. The task is to design a ‘normal’ regime that is able to handle crises and to do so in an acceptable fashion. If weakly defined constitutional relations are one of the structural vulnerabilities of the transnational sphere to emergency discretion, and tendencies towards shape-shifting one of the more pernicious outcomes, then a priority is to ensure institutions have clearly defined roles to which they adhere and defined channels of coordination. Let us start with some general principles.

One thing such an EU constitution would need to provide is a more simplified structure of executive power – not just in ‘exceptional’ times but more generally. The complex diffusion of power across multiple executive agents both hinders the capacity to act in a way that is not reactive to events as they arise, and loosens the constraints on authorities when they do act. A more integrated transnational executive would be less prone to informality and the ad hoc concentration of power. To the extent that it still lapsed into arbitrary or unresponsive methods, it

would be a more visible target of critique. The attribution of responsibility would be improved. Combined with a sharper codification of the relations between national and supranational institutions, one would have a clearer delineation of the locus of power and thus a clearer basis for public identification. Unlike an emergency constitution, which grants the executive exceptional powers in extreme circumstances, this model would aim for continuity in the powers available to the executive – in other words, it would break with the norm/exception/norm model.

Redesigning EU executive power in this way would have to be coupled with radically strengthening the EP, such that it would have sovereign authority over the ends to which supranational agency is put. Embedding executive power in a parliamentary system gives it a stronger basis in public opinion and debate – it requires policymakers to make a case for the measures they adopt and in accessible rather than technical terms, thus broadening consent for the measures taken and discouraging those unlikely to carry support. It also gives executive power a stronger basis in partisanship, such that policy ends can be contested at the level of principle (Hix 2008). The trade-offs to be made in difficult times, and in the restructuring required to keep difficult times at bay, would be aired more thoroughly. A parliamentary EU would be better equipped to change its economic priorities in line with changing circumstances and public opinion. Instead of executives setting their own goals, or quietly reinterpreting existing ones while claiming fidelity to treaty commitments, the ends of policymaking would be set in a context where they could be openly debated.

One of the lessons of COVID-19 at the national level is that countries with strong parliamentary systems have tended to respond at least as effectively, and more procedurally and democratically, than those centred on a dominant executive. In countries such as Finland, Belgium or Taiwan, parliaments not only played an immediate role in managing the crisis, by scrutinising emergency legislation and keeping tabs on the transfers of power, but were involved in debating and passing socio-economic measures to address the inequalities exacerbated by the crisis, and measures to reinforce healthcare and public health.²⁰ The key principle of governing in extreme circumstances is arguably not *speed*, as tends to be said by those advocating untrammelled executive authority. It is *consent*, something that parliamentary involvement can better offer. Not only is this more consistent with democratic norms, but it increases the prospects for public compliance in the short term, and in the longer term, offers a way to gain public support for the structural changes and shifts in priorities needed to reduce the likelihood of further such crisis episodes.

²⁰ <http://bostonreview.net/politics/asli-u-bali-hanna-lerner-power-parliaments>

In its current form, the EU exhibits a kind of presidentialism – formally, in terms of the powers enjoyed by the heads of the EU's major institutions, and informally, in terms of how power tends to become concentrated on executives in crisis moments at the expense of the institutions they lead. Not only do presidential systems have a natural affinity with executive discretion, but they encourage power to be judged on personal criteria (character, charisma, competence) rather than the ends to which it is put. Strengthening parliamentary power allows abstraction from the qualities of individual rulers to the ideas promoted by wider collectives. Less dependence on state-based legitimacy claims would mean less reliance on convoluted and opaque processes of negotiation and a more organised contestation of the direction of policy. Again, the point is not simply to ensure the EP controls the allocation of *exceptional* (emergency) powers, but to ensure it controls the policy process more generally, in good times and bad.

How might this concretely look? Quite different from the EU as currently configured. Treaty commitments would have to be made revisable (Grimm 2015) and executive authority reshaped. One option would be to make the Commission part of the EP by, for example, requiring their members to be MEPs, too (cf. Lacey 2017, 221–223). Rather than tentatively politicising the Commission at the very top, in the heavily personalised manner of the *Spitzenkandidaten* process, the effect would be to politicise the institution as a whole, which would be more in keeping with the informal politics that already permeates it (Mérand 2021). The right of legislative initiative would be in the hands of elected representatives, along with the capacity to define and enact policy. One would see something closer to a unitary elected government of the EU and a target as such for party control.²¹ The Council of Ministers would meanwhile persist as a secondary chamber, with a scrutinising rather than executive function, similar to the UK House of Lords or the Bundesrat. The European Council would be abolished, and para-legal formations such as the Eurogroup would not be recognised as official authorities and interlocutors. Such an arrangement would maximise the prospects that executive power is put to the good of the many rather than the few, in extreme and peaceful circumstances alike.

This would entail, of course, major transfers of power and a major reconfiguration of today's institutional balance. Those hesitant about a federal EU would have plenty to object to. But unlike in the case of a supposedly temporary arrangement, such as an emergency constitution, the stakes would be clear to all at the moment the changes were enacted. Whereas a putatively short-term arrangement, agreed at a moment of high stress, might be approved with insufficient attention to its long-term implications and shortcomings, the prospect of an enduring new constitutional order is likely to attract more than enough critical scrutiny. It

²¹ The nationality principle applied to the composition of the Commission could be retained in this system, albeit with the expectation that its importance would decline as partisan differences become more prominent.

would be approved only to the extent its arrangements are acceptable as permanent features rather than as temporary deviations from constitutional normality, thereby avoiding some of the critical ambiguities associated with emergency rule in both its more and less codified forms.

A major constitutional overhaul of this kind would have to be regarded as an exercise of constituent power, and therefore a process led by citizens (Patberg 2020). The problem of feasibility is clearly pronounced, just as with other reforms. The 2003–4 experiment in developing a constitution for the EU failed badly. This was partly for contextual reasons – before emergency politics became central to EU affairs, it was possible to see a constitution as unnecessary. There was no sense of urgency to which it might respond (Grimm 1995). Unlike today, where some leading governments seem, at least rhetorically, willing to contemplate major reform,²² there was little appetite for a change in direction. The constitutional convention was also pursued in a heavily top-down fashion, with established authorities able to rein in its demands.²³

In the swirl of current events, the prospects for meaningful change may be better. But it is important to recognise the scale of the challenge. Many citizens in Europe are alienated from institutions and from the principle of representation, and can hardly be relied on to press for constructive changes. The empowering of the legislature over the executive is a meaningful project for a minority at best; for many, these are largely indistinguishable expressions of far-away power – and for existing authorities, it is convenient that they should be seen this way. The extent to which the Conference on the Future of Europe has been domesticated by elites is an indication of the difficulties of challenging the status quo. A new constitutional settlement would most likely have to be imposed on existing authorities against their will, and the opportunities for this are rare. A sense of urgency would be required to mobilise support, but not so much as to destroy all deliberative credentials.

If such a transformation still deserves our attention, it is because there are problems of feasibility attendant on all projects of EU reform – small as well as large. If one is going to entertain the possibility of any revision, then one should accept the radical perspective needed. Given the obstacles that exist even to a reformist measure such as the codification of EU emergency powers, there is little reason to discount more transformative change.

²² See e.g. the German governing coalition agreement of December 2021 (https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf), pp.131ff.

²³ Ensuring, not least, that it would be a constitutional interstate *treaty* rather than the basis of a federal order.

2.4 In the interim

What are we left with in the meantime? The very phrasing of the question is somewhat optimistic – what is difficult today may be difficult always – but let us continue the line of thought. In discussions of emergency rule, a third model is sometimes promoted, which entails leaving emergency government largely uncodified, allowing it to unfold as actors choose and then contesting their actions where necessary *post hoc*. Such an approach entails granting executives great discretion to act as they see fit – accelerating decision-making, bypassing procedures, even overriding the legal framework – and then holding them to account later on, whether that means undoing their policies, removing them from office, or endorsing their actions and extending their authority. For its advocates, this approach acknowledges the realities of emergency pressures while containing the excesses of exceptional rule, by encouraging its contestation, preserving the dignity of law and giving leaders reason to act circumspectly (Gross and Ní Aoláin 2006). Such a model retains the structure of norm/exception/norm, but with a focus on retrospective rather than pre-emptive constraint.

It is hard to see this model as an ideal. One of the problems with it is that the constraints on decision-making tend to kick in rather late. By the time executive authorities are held to account, they have been able to reshape the landscape with a largely free hand, with little to ensure this advances the public good or fits democratic preferences (Scheuerman in Ramraj 2008). There is also little to ensure coherence of decision-making. Superimposed onto the existing EU, such a model would depart little from the chaotic and unchecked emergency politics of recent years. The EP remains too weak to offer meaningful retrospective contestation, while in national parliaments there can be no certainty that EU issues will feature prominently. Moreover, reversing policy measures in the transnational context may be even more difficult than domestically, given the number of actors that must give their consent: the fragile unity marshalled in the heat of a crisis may be harder to replicate later.

Yet it may be that this retrospective approach is the best the EU can currently offer. In a transnational polity dominated by various forms of executive, and given the weak institutionalisation of public opinion, it may be that one can hope for no more than the retrospective contestation of emergency measures by an ad hoc assortment of critical actors. Such actions would aim for targeted steps of disintegration that unpick unwelcome past emergency measures, as well as discourage them in future (Patberg 2021). For all its challenges, it would be rash to suggest that no constraint can be exercised this way. Insofar as the EU's response to the COVID-19 pandemic avoided some of the excesses of the Eurozone crisis – notably the use of a new extra-treaty formation such as the Troika – this may partly be the consequence of the critical politicisation of these measures in the 2010s. Denunciations of the EU's 'Caesarian' modes of rule by

Greece's Syriza in 2015,²⁴ and the chord this struck with many at the time, will have fed into the calculations of how best to act in 2020. There are moments of contestation to be had even in an emergency context (Truchlewski, Schelkle and Ganderson 2021).

What kind of agents should one look to for the retrospective contestation of emergency rule? Strong political parties are indispensable. Warding off arbitrary and undemocratic actions depends ultimately on political culture, and intermediary organisations such as parties are key to it. Parties of opposition are in a position to cultivate vigilance towards abuses of power. One of the shortcomings of many critical approaches to emergency rule is that they place the burden of scrutinising executives on a broad public. The mainstream media or 'the people' in general may be too quick to accept political exceptionalism. Engaged partisans are potentially an important intermediary, especially in the weak public spheres of the transnational realm. More politically engaged than citizens at large, partisans are well placed to press leaders to act responsibly in the face of challenging threats and to challenge them when they do not.

One may also hope that parties can act directly on executive power, influencing executive institutions from within. Organisationally, parties offer resources for binding elites to a larger structure. Mechanisms of intra-party democracy are one way the discretion of the few may be constrained. As associations defined by a programme, parties can help to embed decision-making in explicit and shared normative principles. Certainly, the EU sphere has long been an unhospitable terrain for partisanship. Many of its leading institutions have deliberately been insulated from partisan influence – the Commission and ECB are styled as 'independent' institutions, while the Council is structured on the national principle, subordinating partisanship to ideas of national interest (Vauchez 2016). But even in advance of any major strengthening of the EP, there are possibilities for using partisan pressure to influence the decisions of individual governments in the European Council, and for partisan alliances to be formed between two or more governments. While the low public visibility of such activities limits their direct contribution to the democratisation of executive power in the EU, they can be viewed as 'preparatory' of further, more far-reaching changes (Wolkenstein 2020; cf. Patberg 2020, ch. 9).

Such a model depends first and foremost on partisans getting their own houses in order so that these possibilities can be actualised. Many parties today are in bad shape – they are 'cartel' parties (Katz and Mair 2009), dominated by a small coterie of leaders and lacking in ideological profile. It is no coincidence that authorities' embrace of emergency modes of rule by authorities goes along with the weakness of these intermediary organisations. But parties retain untapped

²⁴ <http://www.alexisstipras.eu/index.php/10-speeches/49-alexis-tsipras-speech-rome-7-02-2014?showall=&start=1>

resources for renewing their identity as associations of principle. Ongoing experiments with intra-party deliberation, the recall of representatives and the networking of parties with wider social movements are some of the most significant, and the basis for future, more democratic iterations of the party form (White and Ypi 2016, ch. 10; Invernizzi Accetti and Wolkenstein 2017). A central element of the cartelisation thesis is that mass publics are increasingly indifferent to political affairs and have withdrawn into private concerns: the ‘populist’ mobilisations of recent years against established political authorities, whatever their shortcomings, suggest this depoliticisation thesis is overstated. Dissatisfaction with the experiences of EU emergency politics itself provides ample context for further politicisation.

What does this perspective offer to those whose primary concern is the EU’s functionality? Does the partisan contestation of emergency politics promise a more coherent and progressive policy response in challenging conditions? The prospect of later censure may encourage the policymakers of the day to avoid resorting to exceptional measures where they possibly can and to exercise their powers responsibly. It can help ward off the over-zealous embrace of exceptionalism. To the extent that executive power itself falls under partisan sway, it may also encourage more coherent decisions, as shared outlooks and habits of coordination develop (Wolkenstein 2020). It may help ensure that if exceptionalism is embraced, it does not merely serve the priorities of status quo agents but those of a wider public. Ultimately, however, its greatest contribution would be to cultivate the will for the more fundamental transformation that the EU requires.

2.5 Conclusion

In assessing the EU as a crisis manager, many focus on its policy outcomes. Its representatives are praised for their effectiveness, called on to do better (perhaps with new powers) or told to make way for a return of the state. Any rounded assessment must take into account the governing methods employed to these ends. In recent years, these have tended to include a willingness to break with established rules and norms and concentrate power informally, with a range of problems associated. Even when one endorses the policies made, it is important to ask how far they could be debated and their alternatives weighed, who can be meaningfully held accountable, and how distinctions with analogous cases are made.

An emergency constitution that makes special provision for difficult times is an intriguing proposal but of questionable benefit. Not only would it be hard to institute – that much applies to almost everything EU-related – but it could make matters worse, amplifying some of the EU’s existing dysfunctions. Creating more capacity for emergency rule under conditions where executive agents are weakly embedded in democratic structures would just add new ingredients to the crises we confront.

The more radical change needed involves redrawing the EU's constitutional structure, making executive authority less baroque in its form and more firmly subordinated to the European legislature. Such changes would reflect the reality that the policy challenges of the present amount not to a series of passing emergencies, short-lived and exceptional, but to enduring problems of politics, society and economy that should be engaged on a fundamental and open-ended basis. Recent events suggest an EU that is becoming more militarised and economically assertive: it needs a constitutional overhaul to match. In the absence of reform on this scale, what one can aim for is a more vigilant public, cultivated by critical movements and parties.

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3 The Case for an EU Emergency Constitution

Christian Kreuder-Sonnen

The early months of the COVID-19 pandemic made the European Union (EU) look just like any other international organization. Member State governments willingly sacrificed common norms and rules in a myopic attempt to put their nation first when competing for health security. Uncoordinated, unilateral border closures and widespread domestic export bans on medical supplies and equipment – in violation of the most basic rules of the common market – were the most forceful expression of the powerlessness of the EU in the face of such dynamics. Of course, important achievements such as the economic recovery package ‘Next Generation EU’ (NGEU) or the common vaccine procurement strategy later improved the assessment of the EU’s crisis management, but the first three months of the pandemic laid bare a European *impuissance* in regulating the free movement of people and goods, when push comes to shove. As a consequence, EU leaders now advocate greater crisis authority to be allocated to EU institutions. For example, the President of the European Commission, Ursula von der Leyen, announced in February 2021 that she was preparing a Single Market Emergency Instrument that would give the Commission greater powers in times of crisis to ensure the free movement of goods, services and people by means of fast-tracked decision procedures.²⁵ Moreover, the Commission also established the new European Health Emergency Response Authority (HERA).²⁶ In case of a public health emergency at Union level, HERA would ‘quickly switch to emergency operations, including swift decision making and the activation of emergency measures, under the steer of a high-level Health Crisis Board.’²⁷ In other words, the EU is seeking emergency powers to govern future crises.

While such calls for formal EU-level emergency powers are new, de facto EU emergency politics – that is, ‘actions breaking with established norms and rules that are rationalised as necessary responses to exceptional and urgent threats’ (White 2015, 300) – are not. The decade of crises in the EU has also been a decade of European emergency politics. During the euro crisis in particular, a range of supranational and multilateral measures were adopted that carved out

²⁵ European Commission, Opening speech by President von der Leyen at the EU Industry Days 2021, Brussels, 23 February, URL: https://ec.europa.eu/commission/presscorner/detail/en/speech_21_745

²⁶ Commission Decision of 16 September 2021, 2021/C 393 I/02.

²⁷ Commission Press Release of 16 September 2021, URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4672.

additional executive discretion at odds with existing rules and in circumvention of democratic procedures (Kreuder-Sonnen and White 2021). The self-empowerment of the European Central Bank (ECB) to act as a lender of last resort to Eurozone members and to influence their fiscal policy stands out as an example, as do the emergency credit facilities (especially the European Stability Mechanism, or ESM) created outside the EU's legal framework whose strict conditionalities were administered by the informal 'Troika' of the European Commission, the ECB, and the International Monetary Fund (IMF). A key distinguishing feature between domestic and European-level emergency politics is that the latter is mostly unregulated. That is, whereas almost all domestic constitutional systems provide for some legalized avenue to entrust and rescind emergency powers, there are hardly any rules governing emergency conduct at EU level. Absent a regulative idea of emergency powers in the EU's legal order, the extra-legal nature of European emergency politics is prone to creating considerable short- and long-term costs to democracy and constitutionalism. Not only does unregulated emergency politics open the door to the exercise of unchecked power, it is also likely to leave permanent marks on the EU's authority structures that undermine its democratic legitimacy and feed the populist backlash (Kreuder-Sonnen 2018).

The simplest way to address this problem would be to not ever resort to emergency rule beyond the nation-state. However, this proposition is not only at odds with empirical trends, but also theoretically questionable. After all, any center of political authority is vulnerable to the emergency *problematique*, that is, the possibility of being confronted with extraordinary threats that defy containment in a normal mode of (democratic) rule. COVID-19 recently demonstrated as much. This also pertains to the European Union. The Commission's current bid for limited emergency powers over the single market is thus not to be rejected as a matter of principle. The question is, or so I argue in this contribution, how EU emergency powers are anchored legally, according to what criteria they are constituted and constrained, and how we can ensure that the constraints are enforced. The claim developed here is that the best way to enable the EU to confront future crises effectively, but without the immense normative costs of unregulated emergency politics, is to equip the EU legal order with an 'emergency constitution'. In general, an emergency constitution can be conceived as formal provisions in a legal order that detail the polity's governing mode in times of crisis. We use the term 'constitution' to underscore that the provisions ought to be enshrined in the order's basic or primary law. In the EU, the corresponding level is Treaty-law. A well-designed EU emergency constitution could alleviate some of the main problems associated with unregulated emergency rule by delineating clear normative boundaries for emergency conduct; detailing procedures for the conferral and termination of emergency powers to prime bodies with higher democratic legitimacy, and strengthening the role of judicial review to ensure compliance with the substantive rules set out in the emergency constitution.

To substantiate this proposition, the first section further introduces the concept of the emergency constitution and shows how its main tenets address core problems of the current European emergency regime. The second section then elaborates a proposal for how to design an EU emergency constitution. It lays out foundational principles that should guide the design of any emergency constitution dedicated to standards of proportionality and specifies concrete proposals for implementing these in the EU context. The third and final section acknowledges obstacles to the realization of the proposal and recommends paths of action short of constitutional overhaul that would still help rectify some of the most problematic aspects of present day ‘emergency Europe.’

3.1 The concept and promise of the emergency constitution

If we accept that the EU can in practice wield authority in an emergency mode akin to the well-known domestic state of exception, it may be useful to inform the EU-level debate with insights from long-standing literatures regarding the state level. It is here that the concept of the emergency constitution was coined, denoting a chapter in a constitution which lays out the terms of operation when normal politics needs to be suspended to fend off an existential and imminent threat. It typically contains the legal rules for constituting and constraining emergency powers, that is, it specifies the procedures to declare an emergency and vest special powers in the executive to contain the emergency, and it specifies the scope and reach of those powers, including the means to keep them in check (Ackerman 2004). A fully-fledged emergency constitution should thus provide answers to the following questions (Ferejohn and Pasquino 2004, 230): who decides that an emergency exists and what is to be done about it? Who is entrusted with the exercise of emergency powers? What are the legal limits to the reach and intrusiveness of emergency powers? Who may review and control the exercise of emergency powers based on these legal limits? What are the procedures to terminate an emergency and restore constitutional normalcy?

Of course, these questions can be answered in very different ways. Theorists disagree on the extent to which emergency constitutions should allow for executive discretion or put rulers on a tight leash during emergencies (Scheuerman 2006). At one end of the continuum are liberal-constitutionalist approaches that see emergency powers as a necessary albeit generally unwanted tool of last resort which they seek to keep at bay as far as possible (e.g. Rossiter 1948; Ackerman 2004; Stone 2004; Dyzenhaus 2006). Their main concern is with preventing the abuse and perpetuation of emergency power, which is why the focus is on constructing dense webs of checks and balances to constrain emergency power and to secure a return to the constitutional status quo once a threat abates. At the other end of the spectrum are political realist approaches that see discretionary emergency powers in the hands of the executive as necessary for the state’s survival in the face of extraordinary threats. Their concern is not so much with an excess of executive discretion or its perpetuation, but rather with the obstacles posed by constitutional norms and democratic politics for swift and effective

emergency reactions. Carl Schmitt is probably the most radical proponent of what has been termed ‘exceptional absolutism’ (McCormick 2004, 204): the basically unlimited discretion and dictatorial power of the executive to decide on the exception (Schmitt 2005 [1922]). But some contemporary constitutional theorists still find appeal in mostly unbound executive discretion in times of crisis (Posner and Vermeule 2007).

These extremes represent the tension between the two main goals inscribed into the regulative ideal of emergency powers, namely political discretion and constitutional containment: on the one hand, the state of exception is meant to allow for a larger executive room for manoeuvre to be able to effectively counter existential threats that defy the application of normally valid rules and procedures. On the other hand, exceptional powers are seen to be legitimate only for very specific purposes and under specific conditions. Given the inherent danger that unregulated sovereign power poses to democratic governance and the protection of individual rights, its commitment to such purposes and conditions needs to be secured by way of legal and institutional arrangements checking the emergency powers. The trick obviously lies in balancing these two goals so as to neither inhibit an effective crisis response nor infringe excessively on individual rights. As a consequence, the main goal of an emergency constitution should be to find *de jure* rules and procedures allowing for an extraordinary amount of executive discretion but at the same time binding executive power to standards of proportionality.

In the absence of such rules and procedures, several normative problems arise from the adoption of de facto emergency rule. First, the constitution of emergency powers is bound to take the form of *extra-legal (self-)empowerment*. The arrogation of authority during an emergency is effectuated by executive actors themselves and is inevitably at odds with legal or constitutional normalcy. Short of outright constitutional breach, actors seek to circumvent legal constraints or bend existing rules to provide a veneer of legality to their empowerment. In the EU context, this is illustrated by the expansive reinterpretation of the ECB’s mandate in order to legally justify its self-empowerment during the euro crisis (Schmidt 2016) as well as the creation of the European Financial Stability Facility (EFSF) and the ESM outside the legal framework of the EU, and the establishment of the Fiscal Compact as a separate treaty under international law (Tomkin 2013). As a consequence, authority is usurped undemocratically, and more-or-less permanent structures created. An emergency constitution could address this issue by providing legal avenues for the constitution of emergency powers that are not only pre-regulated but also tied back to democratic processes.

Second, in the absence of constitutional regulations constraining the reach and intrusiveness of emergency powers, unregulated emergency politics opens the door to the exercise of *domination*. Particularly if backed by the interests

of powerful states, EU emergency measures may be directed against weaker states and their societies, and impose authority or rule that is arbitrary from the perspective of the addressees (Eriksen 2018). That is, their rights as political equals would be suspended. Both the sovereignty rights of states and the liberal or republican rights of individuals in those states may be compromised. Operations by the Troika during the euro crisis are emblematic of this type of problem. Entrusted with the task of enforcing the political will of the creditor towards the debtor states, the Troika issued detailed reform lists to countries such as Greece, Portugal, and Spain in politically salient issue areas. Given their dependence on the financial aid administered by the Troika, these states could hardly refuse the demands and were thus in practice stripped off their fiscal sovereignty and budgetary autonomy (Dawson and Witte 2013, 825). An emergency constitution would promise to alleviate the problem of domination. While power imbalances and institutionalized inequality are nearly impossible to overcome in international institutions, an emergency constitution could provide absolute boundaries for the exercise of authority to protect rule-addressees from arbitrary interference. That is, the emergency constitution would allow for extraordinary powers during a crisis, but it would also define limits for the reach and intrusiveness of these powers.

Third, there is a problem of *judicial deference*. Given the recurrent extra-legality of unregulated emergency politics, courts are put in a near-to-impossible situation when asked to adjudicate on the legality of emergency measures. With no legal regime constituting and constraining extraordinary powers, courts are put between a rock and a hard place. If they stick to the letter of the law, and rule the emergency powers unconstitutional, they may contribute to a deterioration of the threat or crisis that the emergency powers were intended to avert. On the other hand, if they rubber-stamp the self-empowerment as legal, they constitutionalize the new authority permanently, including its authoritarian baggage (Suntrup 2018). In the case of the euro crisis, the Court of Justice of the EU (CJEU) was drawn onto the scene at a time when the crisis was at its peak. Both its landmark judgments – in *Pringle* regarding the legality of the ESM, and in *Gauweiler* regarding the legality of the OMT program – were handed down under severe pressure from states and market actors who warned that annulments by the Court would have catastrophic consequences. In both situations, the CJEU deferred to the rationale of necessity and accepted the legal reinterpretations of the authority-holders (Joerges 2016). As a consequence, it contributed to the legal normalization of originally exceptional powers. Arguably, only an emergency constitution that explicitly empowers courts to judicially review acts of authority adopted as emergency measures could avert such perverse effects. With legal constraints on emergency conduct clearly laid out in the emergency constitution, and with a clear mandate for the court to enforce these constraints, deference to the argument of necessity becomes far less likely.

3.2 Design principles for an EU emergency constitution²⁸

If we accept that political responses to extraordinary threats and challenges may require deviations from the normally applicable legal framework, the goal of an emergency constitution should be to have these deviations incur the lowest possible costs to democracy and human rights. The standard of proportionality provides normative guidelines to this end. Its intrinsic logic is to allow certain actions only *if and so long as* the means-end relationship is positive-sum. In zero- or negative-sum constellations, that is, when the costs outweigh the benefits, actions are disproportionate. The standard of proportionality thus provides a normative point of entry to the problem of aligning the simultaneous goals of enabling and constraining emergency political action in times of crisis. As I have argued elsewhere, for exceptional measures to be considered proportionate, they would need to be *necessary, appropriate, and functional* (Kreuder-Sonnen 2019, 61–63). First, emergency measures deviating from the normal legal framework need to be an *ultima ratio*. Only if, in face of a severe crisis, the goal of preserving security and political order cannot or can no longer be reached by normal means may the executive resort to exceptional measures – and may do so only for the period of time in which this condition applies. Second, the intrusions into the rights of the rule-addressees effectuated by emergency measures may not go beyond what can reasonably be justified as appropriate to confront the problem. In other words, derogations may not be excessive. Third, the emergency measures must show some likelihood of success. That is, if the adopted policy is not at least potentially apt to remedy the issue underlying the crisis (or certain aspects of it), the constitutional costs would be disproportionate.

The question is how an emergency constitution could be designed in order to best realize these normative guidelines in the context of the EU. In the following, I propose four basic design principles to approach this goal and discuss their practical implications for the EU's authority structures.

Principle 1: The authority to decide on the existence of an emergency (A1) and the authority to decide on the measures to overcome it (A2) should be placed in different organs. A1 should be held by a representative body and decided by qualified majority. A2 should be held by an executive organ.

As was already known in the ancient Roman Republic (Rossiter 1948), the first and foremost measure to prevent abuse of emergency powers and to increase the likelihood of their proportionate exercise is to separate the authority to determine the existence of an emergency (A1) from the authority to wield discretionary power to confront the emergency (A2). Given the increased freedom of action and the additional competencies that executives acquire during states of emergency, there is a clear danger of self-interested or misguided ‘false positives’

²⁸ This part is based on (Kreuder-Sonnen 2021).

in the determination of such states if the proclamation is left to the wielders of emergency powers themselves. The declaration of a state of emergency has potentially far-reaching consequences not only for the constitutional structures in a given polity, but also and especially for the political autonomy of the rule-addressees. In order to legitimize such a rupture, it therefore seems necessary to tie the authorization back to democratic institutions as much as possible. A1 should therefore rest in the hands of an inclusive representative body. Moreover, this representative body should be able to exercise A1 only on the basis of a qualified majority that ensures support beyond the governing party or coalition for the determination that an emergency actually exists.

Which European institutions should play which role in an emergency would depend mostly on the executive agent to be empowered. If the scenario is about delegating emergency powers to supranational executives such as the ECB, the Commission, or an EU agency such as the European Center for Disease Prevention and Control (ECDC), both the Council of the EU and European Parliament (EP) could claim sufficient democratic credentials to assume the authority to declare an emergency and thus confer special powers to supranational EU organs. Co-decision might provide the soundest basis for the delegation of emergency powers. However, it would also run the risk of fueling the main counter-argument to principle 1, namely that making the declaration of an emergency subject to democratic deliberation could lead to dangerously long delays in the management of crises and even to potentially fatal ‘false negatives’ in the determination of emergencies (Posner and Vermeule 2007). Arguably, the EP, like any parliament, is in short supply of the executive knowledge required to adequately assess a given threat, and the institutionalized role of opposition will inevitably hamper overly swift action which, in normal times, is a feature rather than a flaw. Therefore, the most convincing candidate to hold A1 in this scenario is the Council as a body whose representatives are not only (indirectly) linked to domestic electorates, but also combine the intelligence of all national executives and can thus be expected to move more swiftly in the face of impending crisis. In order to address the danger of domination by one group of states over another, the majority requirement for the declaration of an emergency would need to allow less powerful states to amass a blocking minority, short of unanimity.

While the EP would thus take a lesser role at the moment of activating the emergency constitution, its role in monitoring and potentially rescinding emergency powers should be all the more important (see principle 2 below). The one situation where this setup would need to be altered is a scenario in which emergency powers are not delegated to supranational executives but to the Council – or any of its subgroupings – itself. Considering the exceptional measures adopted by the Eurogroup or the exercise of authority through institutions like the EFSF – which are the Council but with a different ‘hat’ – it is conceivable that a European emergency constitution might also reserve some

exceptional discretion to the Council acting as a collective executive. In this case, the EP would need to be the one declaring the emergency and thus granting extra authority to the Council in order to prevent self-empowerment.

The most important benefit of implementing principle 1 would be to introduce a transparent, legal procedure to the activation of emergency rule by supranational EU bodies. It would provide a clear separation between normal politics and the state of emergency and, by clearly allocating responsibility, allow constituents to hold decision-makers to account. The risk of both self-empowerment and of delegation to eschew political blame would be reduced.

Principle 2: The persistence of emergency powers should be under reserve of continued acceptance by a representative body (A3); and should require periodic renewal with increasing majority thresholds over time.

Two major threats to the proportionality of emergency powers are excessive intrusiveness and excessive duration. Excessive intrusiveness refers to executive overreach that fails to meet the standard of appropriateness. This standard is violated if a policy goal could have been reached with a less intrusive measure than the one adopted. Excessive duration refers to the persistence of emergency powers beyond the period in which they are acutely necessary to cope with an ongoing crisis. It is thus about the separation of emergency powers from the empirical circumstances that gave rise to their creation. The most promising avenue to keep both problems of excess at bay is to place the persistence of emergency powers under the reserve of their continuous acceptance by a representative body (Ackerman 2004). The effect would be that those actors who wish to extend the conditional grant of authority would need to convince a majority of representatives of the necessity, appropriateness, and functionality of the measures. All other things being equal, this should increase the likelihood that emergency powers functionally correspond to external crisis conditions and that all less intrusive means have been exhausted. The odds are increased in particular by reviewing emergency powers *periodically* after their initial adoption. Initial emergency declarations often coincide with acute moments of threat and uncertainty in which legislators and the broader public tend to defer to the judgment of the executive and accept greater executive discretion (Dyzenhaus 2006, 72). Revisiting the initial decision with the benefit of hindsight and under less tumultuous circumstances makes sure that emergency empowerments are not (or at least do not remain) the result of fearful acquiescence to unsubstantiated arguments of security and necessity. Moreover, it ensures continuous oversight and transparency in the exercise of emergency powers. If the body or bodies enjoying A2 wish to have their exceptional powers prolonged, they will have to provide the information that the representatives demand. Finally, this system increases the likelihood that emergency powers are rescinded, and the *status quo ante* reverted to at some point. It thus reduces the risk of an indefinite extension of emergency powers.

In domestic emergency constitutions, the authority to declare an emergency and thus grant exceptional discretion to government (A1) is typically held by the same body that also has the authority to revoke emergency powers (A3) (i.e. Parliament). This is a sensible approach as parliaments conferring emergency powers to the executive disempower themselves almost by implication – and thus have an intrinsic motivation to keep the extraordinary grant of authority as short and shallow as possible. At the EU level, it might be necessary to split A1 and A3, however. As argued above, it makes sense to entrust the Council of the EU with A1 that is time-sensitive (in most instances), but it is questionable whether the Council would also be the best entity to hold the power to revoke the emergency powers from the supranational EU body (A3). Unlike in the case of domestic parliaments, the Council's delegation of emergency powers to supranational actors hardly serves to disempower the Council. Quite to the contrary, we have seen in past instances of European emergency politics how the Council used the tool of delegation to have policies enacted on its behalf. Arguably, here, the powers of principal and agent grew in tandem. We thus cannot unequivocally assume that the Council has a self-interested motivation to constrain emergency powers. Therefore, the better option is to entrust the EP with A3 in all instances of emergencies declared by either the Council or the EP. Because the EP stands to lose immediate policy control under virtually all circumstances during emergencies, its members should be eager to closely monitor and constrain the exercise of A2.

An additional procedural twist to increase protection from excessive duration and especially excessive intrusiveness lies in premising the periodical renewals of the emergency regime on increasing majority requirements over time – the so-called supermajoritarian escalator (Ackerman 2004). By making the continuation of emergency powers dependent on the consent of a growing majority of representatives, emergency powers are not only unlikely to extend beyond the duration of the crisis that has made them necessary, they are also unlikely to be overly intrusive. The requirement to convince ever greater numbers of representatives disincentivizes executive excess. Most importantly, it also progressively reduces the likelihood that emergency measures disproportionately target weaker subjects and underrepresented minorities whose rights the majority may be willing to sacrifice (Stone 2004, 531). The prospect of requiring also the consent of minorities could deter the holders of A2 from discriminatory emergency measures.

Principle 3: A list of non-derogable individual and collective rights should be defined. Areas of exclusive competence to subsidiary levels of governance that are not to be encroached upon by emergency measures should likewise be defined.

An additional layer of protection from executive excess in times of emergency consists in the codification of absolute legal boundaries to the reach and intrusiveness of emergency powers. While one purpose of an emergency

constitution certainly is to allow for political measures that do not normally fall within the remit of executive authority (thus widening discretion), another purpose is to define final limits even for these exceptional measures (thus delimiting discretion). Apart from an institutional system of checks and balances to tie emergency powers to the principle of proportionality politically, the delimiting function is also served by way of legal obligation. Principle 3 works on the assumption that there are legal goods that should be excluded from the reach of emergency powers because of their character; they represent ‘absolute’ rights in the view of the affected community. It is assumed that measures encroaching upon these rights cannot be proportionate due to the absolute value accorded to them. According to this principle, the International Covenant for Civil and Political Rights (ICCPR), for example, sets out a number of rights from which states can never derogate, even in times of public emergency (Article 4 ICCPR). These include but are not limited to the right to life, the prohibition of torture, the prohibition of slavery, and the principle of legality in criminal law.

Without seeking to lay out a full list of non-derogable rights to be included in a European emergency constitution here, the specific character of the EU as an international organization, still allows for a few general observations. While the EU is the international organization with the highest level of political authority worldwide, it still lags far behind states in this regard – most importantly in terms of capacity and enforcement (Genschel and Jachtenfuchs 2014). It would thus be unwise to model rules for the EU on the domestic example where limits are imposed on democratic governments which enjoy a monopoly on the use of force. The constraints on supranational authority should be much more far-reaching to curtail the EU’s ability to interfere with or even suspend rights. Given the limited reservoir of democratic legitimacy at the EU’s disposal, its authority is already precarious in normal times. Expansions of this authority during an emergency should thus be extremely limited in their intrusions on the rights of the rule-addressees – both states and individuals. While it might be proportionate to grant a number of new executive functions or additional tasks to EU agencies that do not normally fall within the scope of their authority, it is hard to see, for example, how an encroachment on individual rights by EU actors could be justified. With the exception of the right to free movement (Article 45),²⁹ the entire Charter of Fundamental Rights (which enshrines economic and social rights) could be declared non-derogable when implementing EU emergency powers. A further line would need to be drawn with regard to the sovereignty rights of Member States. While the problem of domination would be limited by supermajority requirements and the other institutional provisions mentioned above, a European emergency constitution should nevertheless define a list of policy areas under the exclusive competence of Member States even in times of emergency.

²⁹ The coronavirus crisis highlights how there might be grounds for temporarily suspending the right to free movement on EU territory. While currently such a decision lies with Member States alone, there are good functional reasons to coordinate such emergency measures at the EU level.

Principle 4: All legal acts based on emergency powers should be subject to judicial review according to provisions of the emergency constitution.

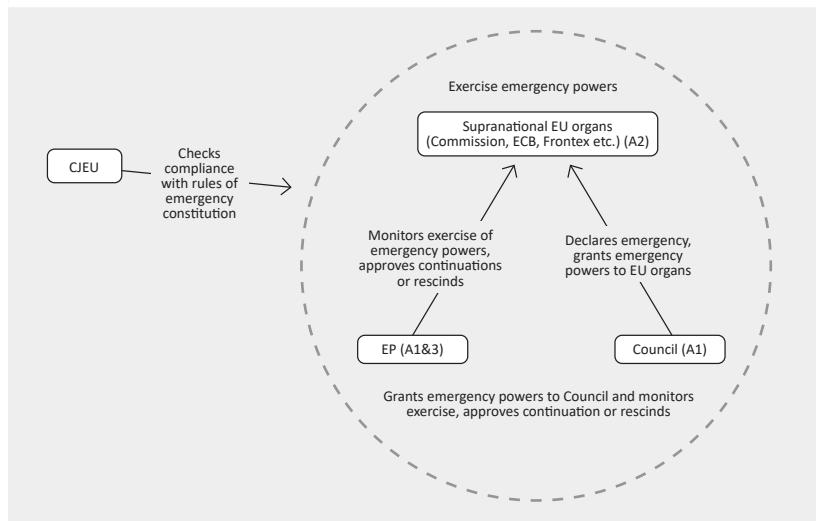
The outer limits of the emergency constitution, that is, the rules delimiting executive conduct even when entrusted with emergency powers, will be fully effective only if they are judicially enforceable. It is thus of utmost importance to make the granting and practice of extraordinary powers under the emergency constitution subject to judicial review. Indeed, whether and to what extent courts can and should mount judicial checks on the executive during emergencies is intensely debated. Political realists hold that courts should not interfere with executive discretion in times of crisis, because to do so risks undermining critical capacities to avert a given threat (Posner and Vermeule 2007). Critical scholars, by contrast, fear that courts might simply defer to executive judgments of necessity in times of crisis, not least due to information asymmetries between the executive and the judiciary (Cole 2004; Scheppelle 2012). Importantly, however, both concerns have mainly been raised with regard to the US, where the legal system lacks a formal emergency constitution and where emergencies are a matter of wide executive discretion. Judicial review might well hold limited promise in contexts that leave the question of where the legal limits to de facto emergency powers lie an open, political one. More optimism is warranted if an emergency constitution exists that clearly delineates absolute boundaries for emergency powers and specifies procedures for their conferral and control (Ginsburg and Versteeg 2020). Courts should in that case be much less likely to bow to executive judgement, since the limits have been drawn up for precisely that purpose and with the idea that they can be tested in courts made explicit.

An EU emergency constitution should designate the CJEU to be the final authority adjudicating disputes arising under its provisions. This includes the process of empowerment (i.e. to exclude circumventions of principle 1) as well as the list of non-derogables (principle 3). A counterfactual example might illustrate the difference that an emergency constitution could make for judicial review of European emergency conduct. Absent any formal rules constituting or constraining emergency powers during the euro crisis, the CJEU was an ineffective judicial check. On the one hand, when it came to legal limits on the mandates of European institutions, the Court succumbed to political arguments of necessity and deferred to executive judgment (Joerges 2016). On the other hand, it arguably lacked jurisdiction to adjudicate on claims of human rights violations as the subject of those claims – the Troika – operated outside the legal framework of the EU (Kilpatrick 2014). A European emergency constitution designed according to the principles proposed here would likely have yielded different results. First, it would have provided the CJEU with both the procedural and the material norms necessary to determine legality with a higher degree of certainty. Boosted by the regulative ideal behind the emergency constitution, the Court would have insisted on imposing its legal assessment irrespective of

political pressures. Second, the delegation of emergency powers to supranational EU agencies (e.g. in the Troika) would have remained within the remit of EU law. Given the emergency constitution's explicit prohibition to derogate from the Charter of Rights, the CJEU would not only have heard complaints by affected individuals, it would potentially also have ruled the intrusion into their economic and social rights unconstitutional.

In sum, observing the four principles laid out in this section would yield a European emergency constitution that could theoretically alleviate some of the major concerns about unregulated emergency politics as increasingly witnessed in the EU over the past decade. It would bind crisis responses to the rule of law, increase transparency, and provide political as well as legal accountability. It would not foreclose the possibility of circumvention, but by providing legal avenues to emergency action within the EU's legal order it would make it much less likely. While allowing for an extraordinary amount of executive discretion and political measures that would not be permitted under the Treaties in normal times, the European emergency constitution would create its own system of checks and balances among the institutions (see Figure 1) that should work to ensure that the assumption and exercise of emergency powers meets the standard of proportionality at all times.

Figure 1 Competence allocation in an EU emergency constitution



3.3 Short of constitutional overhaul: what can be done immediately?

As should be clear, the proposed emergency constitution would create the envisioned regulatory power and would be robust against political abrogation only if its rules and procedures really enjoyed 'constitutional' status. That is, it would

need to be introduced into the EU legal order at the treaty level. Additionally, in order to enjoy the social legitimacy required for such a conditional grant of invasive authority, its introduction would need to follow open, deliberative democratic procedures beyond executive multilateralism (see also Patberg 2016). As with all EU Treaty revisions, national parliaments would need to ratify the amendments. These requirements pose obvious obstacles for the realization of the proposal in the near future. Given the growing ‘constraining dissensus’ surrounding EU authority transfers and the growth of Eurosceptic attitudes in Member State societies, treaty reform seems like a daunting undertaking and is thus being avoided by governments fearing referendum failure and electoral punishment. What is more, Member State governments might even lack interest in a constitutionalization of EU emergency politics. After all, it was unregulated crisis politics which allowed Member States to permanently fill integration gaps in the institutional setup of the Union over the past decade. The status quo orientation of the emergency constitution would undercut this ability. While this type of integration by stealth comes with very high long-term costs, it might seem too enticing to governments on the short term to forego.

However, even if the introduction of a comprehensive emergency constitution for Europe is not immediately within reach, the containment of EU-level emergency politics remains an important task. As I intend to show in this concluding section, both the uncovering of the problems of emergency politics as well as the elaboration of a proposal to keep them in check contain the seeds for behavioural change that can be implemented without institutional reform.

At least three different but complementary normative demands for different actors can be derived from this article. First, parliamentarians, both European and domestic, need to better understand the ramifications of their actions when voting on de facto emergency powers for EU institutions or de novo bodies. The good arguments for decisive action in crisis notwithstanding, they should not rubber-stamp political measures that will subsequently be beyond their control. For example, during the euro crisis and without much ado, the EP signed off on the ‘six-pack’ of legislation to introduce the Excessive Imbalances Procedure permanently empowering the Commission to take discretionary action vis-à-vis Member States with large current account deficits (Scharpf 2013). Similarly, national parliaments seemed eager to please when approving the ESM and Fiscal Compact in fast-tracked ratification procedures. Instead, parliaments should use their veto position – whenever it materializes – to trade competence for control. That is, transferring additional and extraordinary authority to intergovernmental or supranational institutions should be premised on additional monitoring and control rights for parliament, including the ability to revoke the conditional grant of authority. As a matter of principle, significant political measures during emergencies should be approved only if they contain a sunset clause, allowing democratic institutions to evaluate and reconsider the policy or institutional innovation outside ‘fast-burning’ moments of crisis. Here, political debate is not

as easily eclipsed by arguments of necessity. If there *is* sufficiently broad political support to make an emergency competence permanent, it should be effectuated through formal treaty reform.

Second, the CJEU, too, should be more aware of the implications of its rulings in times of crisis. Courts are often confronted with legal challenges to emergency measures in the midst of a crisis. Absent clear regulations governing emergency powers, they are put between a rock and hard place. Either they quash the measures and risk exacerbating the crisis or they find interpretations of the law that accommodate the measures within the normal legal framework, in practice constitutionalizing exceptional measures. Or so the options seem. However, little indicates, for example, that the firm protection of individual rights outlined above would seriously hamper any European crisis response. In line with its *Kadi* jurisprudence,³⁰ the Court should actively seek to protect individual rights against intrusions even if questions of jurisdiction and competence are not entirely clear. Moreover, in light of the legal creativity deployed by executive authority-holders to assume emergency powers, the judiciary should consider the option of declaring itself incompetent to rule on authority expansions – along the lines of a new political question doctrine. It would allow the CJEU to signal discomfort with giving a constitutional blessing to extra-legal action and force political actors to take responsibility, without, however, undermining the short-term crisis response.

Third, executive actors themselves should realize the extent to which the practice of integration through emergency politics is self-undermining in the long-run. If the stealth mechanism of self-empowerment and normalization risks provoking popular backlashes and further losses of legitimacy for the EU, those who rule during and via emergencies should be transparent about what they are doing and in what relation their actions stand to the law. Oren Gross (2003) has denoted as ‘extra-legal measures model’ the normative approach to emergency politics in which executives do what they deem necessary, even if outside the law, but publicly acknowledge that their actions might lie beyond the scope of their constitutional powers of normal times. It is then up to parliament and the wider public to sanction this behaviour *ex post* – either giving it a democratic blessing or rejecting it as disproportionate. In the EU, acknowledgement by both national and supranational leaders that emergency measures are not always ‘within our mandate’ would open the door to more political accountability and broader deliberation, thus providing less of a target for polity contestation. Of course, this would require political leadership that is not predominantly office-seeking in nature.

³⁰ C-402/05 P; C-415/05 P [2008] known as ‘Kadi and Al Barakaat’.

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4 How to Do and Communicate Politics Beyond Routines: reflections on political exceptionalism in the COVID-19 pandemic

Astrid Séville

The European states and the institutions of the European Union have turbulent decades behind them. Time and again, they have had to manage and overcome crises and exceptional situations for which they were not prepared, which attacked their foundations and endangered the cohesion of the European partners. We can think of at least four major crises which have challenged the EU in recent times: the banking and Eurozone crisis (2008–2012), the so-called migration crisis (2015/2016), the crisis of European and transatlantic relationships as a result of the Brexit referendum and the election of Donald Trump as American president (2016–2020); and, since 2020, the global pandemic due to COVID-19. In recent weeks we have seen the emergence of a fifth, whose ongoing management is not discussed in this essay: the Russian invasion of Ukraine. This could be considered – especially from an Eastern European perspective – to be the eruption of crisis which has been unfolding since the invasion and occupation of Crimea and the outbreak of war in Donbas, in 2014. To continue this list of daunting challenges, the ongoing climate crisis is yet to be fully acknowledged and tackled.

In these crises, political conflicts have emerged, normative ideals have collided, time pressure has been stiff, and quick and swift actions were crucial. As typical in crises, politicians must find compromises and make decisions that they very often formulate at the last minute in extraordinary meetings and consultations. In these situations, again and again, the demise of the European Union is invoked; again and again, politicians utter that these were and are exceptional situations, exceptional times, real emergencies, and crises for which there has been no political recipe. Politicians, whether on the national, transnational or the supranational level, have to muddle through and find ways of political coping (Lindblom 1959, 1979; Schimank 2011).

Thus, it was only coherent that, amidst the Eurozone crisis and with regard to the highly controversial measures to consolidate crisis-ridden state finances in

the European periphery, José Manuel Barroso, former President of the European Commission, claimed in 2011: ‘These are exceptional measures for exceptional times’ (Barroso 2011). Others, like German Chancellor Angela Merkel or Christine Lagarde, then President of the International Monetary Fund (IMF), argued that ‘there was no alternative’ but to bail out banks and dismantle the welfare state in Southern European states (Séville 2017a, 2017b); otherwise, the European Union would simply fail.

Ten years later, in the current pandemic, people started talking about a pre- and post-corona time in the EU’s governance, calling the present situation a genuinely exceptional one. Since its outbreak in 2020, the pandemic has been widely received as a moment of disruption, challenging political institutions, procedures, routines, and everyone’s daily life. For politicians and political observers alike, it has also revealed painful truths about the effects and repercussions of globalisation, about the state of transnational cooperation, about fragile solidarity and the structural weaknesses of existing institutions. For instance, the British journalist and commentator Simon Jenkins (2020) declared: ‘The corona-crisis has exposed the truth about the EU: It’s not a real union.’ The EU, some prophesied, could eventually collapse since Member States pursued their own agenda and closed borders unilaterally.

However, the EU Commission launched ‘Next Generation EU’ as a (more than €800 billion) temporary recovery instrument to help repair the economic and social damage caused by the pandemic. This was the largest stimulus package ever set up by the EU; some called it a Hamiltonian moment for the EU.³¹ The European Union is more than just still standing; the crisis may have shaken the institutions and procedures of the EU as well as the individual Member States, proving their structural weaknesses – but it has also proved their robustness. Hence, one might ask why so many people stir up the fear that political institutions and organisations might struggle or even collapse whenever policymakers are confronted with a crisis. Why do many prophesy doom and demise in a crisis? Why do policymakers sometimes play on the fears of citizens and voters and invoke emergency and sheer necessity in the face of a crisis? And is this a valuable political and communicative strategy for crisis management? In the following, I aim to address these questions and suggest a critical perspective on the practice and rhetoric of emergency and crisis in politics.³²

³¹ The Hamiltonian moment is a common reference in EU crisis politics, not least frequently used by critics of the EU’s handling of the financial crisis in 2008. Some critics have argued that the EU missed the moment. The Hamiltonian moment refers to the first American Secretary of the Treasury, Alexander Hamilton, who established a central bank after the American civil law, which helped monetise the departments of the individual states. The then German Minister of Finance, Olaf Scholz (SPD), referred to the NGEU as a Hamiltonian moment in May 2020 (see Dausend and Schieritz 2020).

³² The following argumentation builds on a recent publication which also asked why the public discourse too often refers to the idea of a state of exception or emergency (Séville 2021).

4.1 Modern normality – or, are crises nothing special?

Without denying or downplaying the scope of crises and crisis experiences in recent years, we can argue that crises are indeed part of the inherent experience of modernity. Modernity is, if you will, a crisis-ridden one. In 1755, a catastrophic earthquake and subsequent tsunami consumed Lisbon. For some philosophers, this event gave birth to modernity. Philosophers like Kant, Voltaire and Leibniz started questioning divine providence, morality, reason and rationality as they stood bewildered in front such an incomprehensible and devastating disaster. How could this happen? How could God let this happen? The catastrophe disclosed the absurdity and brutality of a world ripe for disenchantment. It produced an awareness of profound insecurity – everything could change or come tumbling down. After that, the narration of crises and overcoming them became a characteristic of modernity (Koselleck 1988). This consciousness of profound insecurity also led to a reflection on the role of public and political authorities: public authorities are compelled to manage such crises as natural disasters, financial crashes, political upheavals or revolutions, and they need to decide on procedures to govern such critical situations. They have to prove their capacity to find collectively binding solutions and yet stick to procedures and rules even in moments of crisis. Indeed, the litmus test for any political order is how it enables and constrains authorities in the governing of extreme circumstances. Should governments be allowed to suspend laws? What kind of constitutional roadmap for crises and emergencies can be developed? And how is crisis governance reshaped in an age of transnational and international authority – for instance, when a nation state is part of an institutional construction such as the European Union? What is legitimate for any political authority in times of crisis management?

Legal and political theorists have discussed these questions and, of course, arrived at different conclusions. Proponents of states of emergency and strong executive power, such as the famous German legal and political theorist Carl Schmitt (1888–1985) or German novelist and essayist Ernst Jünger (1895–1998), have often had an affinity for war. We will come back to Schmitt's thinking. Wars are states of exception that suspend the ordinary political procedures and routines; they impose an all-encompassing purpose, a vision of 'oneness' for the whole of society. Why is this an attractive idea for conservative, reactionary minds, especially in modern times?

Modern societies are typically composed of a variety of sub-systems – political, economic, legal, medical, aesthetic and so on – each with different functions, logics and programmes (Luhmann 1995; Parsons 1951). Social scientists call this the 'functional differentiation' of modern society. Extreme circumstances are able to counter this differentiation and evoke a unified collective purpose beyond it. To be sure, recent crises such as the Eurozone crisis or the so-called migration crisis in 2015 are not at all comparable to a war. These crises did not suspend ordinary functions, conflicts and differentiation within society. Politics

continued to be political, academic institutions produced knowledge, priests prayed, doctors treated and cured people. People behaved and spoke differently in a church, in a hospital, or in a seminar at university.

However, the COVID-19 pandemic has indeed been discussed as a moment of genuine emergency in which medical concerns trumped all political, economic, and educational considerations. This, some argued, overrode the usual functional differentiation. Political decisions had to consider medical – i.e. epidemiological – consequences; schools, restaurants, churches and universities were either closed or their services promptly digitalised due to medical concerns. Many European states decided in favour of a sometimes more, sometimes less strict lockdown.

The Swedish way of managing the pandemic was portrayed as a *Sonderweg* (a special path), particularly as Sweden did not use extraordinary measures. Hence, from the European perspective, one could formulate the paradox that non-extraordinary measures became extraordinary while extraordinary measures had become a standard operating procedure. Unlike other countries, the Swedish government chose soft methods to stop the spread of the coronavirus. The country did not close its national borders; nor did the government implement a lockdown. Policymakers decided that recommendations rather than regulations promised to be an effective strategy. However, Sweden has recorded more cases and deaths per million inhabitants than the other Nordic countries.³³

Although the Swedish way of managing the pandemic has been distinct from others, we see that the question of how to contain the virus has dominated political decision-making. As argued above, the usual functional differentiation was challenged or even overridden like never before. Hence one might ask whether the circumstances of a pandemic fulfil the criteria for a state of exception. Do we finally have good reason to speak of a historical moment in which governments needed to use all their power to govern a state of exception? Can we detect something like executive exceptionalism (White 2019, 2021) as executives usurped power?

When answering these questions, it proves helpful to differentiate between the concepts of crisis and state of exception. This conceptual differentiation is not only an academic trick or intellectual mannerism; it can help to inform and orient the political communication of policymakers and elucidate crucial notions for their policy discourse. This might prove profitable since the public debate hastily uses notions and images that build on the idea of exceptionalism and thus remind us of Carl Schmitt's dangerous thinking.³⁴ But the current talk of a state of exception that we find in political discourses is misleading.

³³ This was still true in November 2021. For current figures and the situation in Sweden, see <https://covid19.who.int/region/euro/country/se>.

³⁴ The idea of danger refers to Jan-Werner Müller's intriguing book *A Dangerous Mind* (2003) on Carl Schmitt and his academic followers.

4.2 What's the difference? Emergency and the state of exception

The pandemic that broke out in 2020 and the crises cited above were all experienced as profound. They seemed beyond the grip of elected politicians. They shook well-established patterns of social action, exposing structural and systemic failures and problems. In short, circumstances appeared to be constraining (external) forces beyond political control. In a financial crisis, gaining and maintaining financial stability is a primary goal. In a global pandemic, containing the virus is the *raison d'état*. Such crises immanently have a transnational dimension; financial markets are international, migrants and viruses cross borders. Whether one approves of regional and global solutions or insists on national and local approaches, recent crises have challenged any nation state's capacity to solve problems unilaterally. What is more, the recent crisis brought competing authorities at different levels to the fore. For some scholars, the transnational management of the recent crisis has exposed 'a dispersed emergency regime rather than a clearly authored state of exception' (White 2019, 34). Jonathan White's diction builds on a distinction, and it is helpful to elucidate concepts such as state of exception, emergency and crisis to understand his point.

The canonical author on states of exception is still the already cited Carl Schmitt. His 1922 book *Political Theology I* approached emergency politics as a quasi-theological, mythical moment of anomie, in which an authority emerges that heroically creates (new) laws and a new status quo. For Schmitt, no legal norm can handle an emergency. The strict application of 'normal' law in extraordinary times could even make matters worse (Schmitt [1922] 2005). Instead, law will often need to be suspended in what is known as a state of exception. Schmitt insists that such a process is impossible to codify – that it is about powerful individuals seizing the moment. Constitutions may define who will decide in the case of exception, but they do not provide public authorities with procedures as such. Schmitt famously characterises the modern state in terms of this monopoly of decision. 'Sovereign is he who decides on the exception' (Schmitt [1922] 2005, 5).

From Schmitt we can learn a conceptual sharpness: a state of exception may be defined by the idea that the constitutional order normally in force does not apply. To resolve a crisis, public bodies with the capacity to act swiftly and effectively are empowered, and rights are suspended to facilitate their actions. Yet, Schmitt – a legal theorist! – discarded constitutional options to handle a state of exception based on formulating legal conditions that constrain the emergency competences of political agents. This contempt for regulating something that he considers beyond the scope of regulation limits the appeal of his account today. The fact that many scholars in social sciences (for example, Honig 2009; Kreuder-Sonnen 2019; Kreuder-Sonnen and White 2021; White 2019) quote him or make reference to his work when analysing contemporary political phenomena and smoothly talk of exceptionalism in quasi-Schmittian

terms thus creates a lot of difficulties: Schmitt's work is arguably not especially helpful for understanding today's 'emergency politics' in consolidated, liberal democracies and in the transnational arrangements in which liberal democratic states participate. It takes some conceptual twisting to make use of his argument. His concepts and analyses are stylistically brilliant but compromised by his ideological leanings, by a reactionary, existentialist and Catholic anti-liberalism. Schmitt collaborated with National Socialists (Müller 2003).³⁵

So let us be clear. Nothing in the Western hemisphere in recent times resembles Schmitt's idea of a state of exception; nothing has been radically exceptional and unforeseeable, and nothing has suspended all existing legal norms and revealed a genuine political sovereign beyond legality. Thus, there is an important point to make: for all the public talk of states of exception, recent circumstances should better be called crises.

4.3 Crises as crucial moments of political narration and intervention

The notion of crisis allows for a more pragmatic and less dramatic reading of today's events and their political handling in both the national and transnational sphere. Complementary to the notions of emergency and exception, a crisis can be understood as 'a process', as 'a moment of decisive intervention, a moment of transformation' (Hay 1996, 254). A crisis implies more than a rupture or breakdown: it refers to a situation in which people – politicians, policymakers, state agents, public and transnational authorities – need to intervene and make decisions. And any intervention requires an identification of the crisis, of its roots, and of possible dynamics and solutions. Policymakers need to present a narration and interpretation of a crisis: '[s]uch narratives must recruit the contradictions and failures of the system' (*ibid.*). Failures are constructed and represented in crises. It matters how one tells a story: defining a crisis already means to frame the range of feasible or suitable coping strategies and interventions. Therefore, it makes a difference if policymakers narrate the Eurozone crisis as a crisis of different growth models clashing in one monetary union, if they narrate the crisis as one of the moral decadence of 'lazy Southern Europeans' or as an outcome of the institutional mismatch of monetary integration without institutionalised fiscal coordination. The story policymakers tell is indeed telling: it conveys perspectives and motivations for action.

Accordingly, some scholars argue that even frequently cited structural necessities and constraints are politically manufactured (Hay 2007; for a discussion, see Séville 2017b). Consequently, we can call for narrations that explicitly name

³⁵ For a critical analysis of Schmitt's work see, for example, Scheuermann (1996) or McCormick (1997). To understand his political affiliation and his ideological position with regard to National Socialism, I recommend reading Schmitt (1934). There, we find his legal, yet brutal, defence of antisemitism and of a racist, murderous ideology in the name of law.

the structural, systemic and endogenous roots of recent crises. Every crisis needs to be put into context, and to find strategies for its resolution is to analyse and identify fundamental systemic contradictions and longstanding failures. Or, to put it rather bluntly, to highlight and insist on the truly exceptional nature of problems in a crisis is to depoliticise the underlying, structural, systemic, longstanding issues that led there.

Furthermore, political discourses that frame crises as exceptional emergencies play into the hands of agents, groups, authorities and organisations that long for vigorous, more authoritarian responses. These discourses of emergency facilitate efforts to sidestep norms, routines, and (legal) procedures and to exercise pressure on agents involved in decision-making processes. If politicians or representatives repeatedly refer to the exceptional nature of pressing issues and invoke emergency measures, they provoke a desire for a heroic, quasi-miraculous political response. They raise neo-Schmittian fantasies and suggest that political agents may (temporarily) suspend the differentiation that is characteristic of modern society.³⁶ This is a fantasy of far-reaching political agency, of the ability to steer societies unbound by constraints and to leave behind the mechanisms of differentiation. We find this fantasy in many right-wing populist movements that seek to politicise everything. Here, fantasies of heroic political agency flourish.

And yet, political agents tend to disappoint this desire by citing necessity, functional demands and international limitations, and by muddling through with weak and undecisive crisis management. Indeed, speaking of necessities and urgency fosters a post-heroic discourse at odds with political agency. Politicians themselves contribute to the impression that they are powerless, forced by events, disempowered by international obligations, pressured by factors beyond their control (Séville 2017a, 2017b). The rhetorical invocation of constraints, inevitability and time pressure in turn provides a target for those who contest a ‘principle of necessity’ (White 2019, 129) with a ‘promise of agency’ (White 2019, 127). This interplay between neo-Schmittian fantasies of political power and managerial approaches focused on mere problem-solving seems to be symptomatic of modern politics (Nassehi 2012, 42), and the effect is even to aggravate political conflicts and mobilise populists.

Against this backdrop, it might be interesting to look for a middle ground. I suggest that we search for national institutions and norms that may have proved robust and resilient in recent times, especially in the case of a global pandemic. Therefore, sticking to my field of expertise, I propose to highlight the very

³⁶ Of course, sometimes they may be drawn to the opposite strategy of denying or trivialising a crisis. Jair Bolsonaro’s or Donald Trump’s reaction to the COVID-19 pandemic, for instance, was to downplay the scale of the health crisis. They sought to appear heroic and stronger, especially having fought the virus themselves, thus signalling that the virus posed no great threat or emergency, that it could be managed by a robust and masculine leader.

particular case of Germany's management of the COVID-19 pandemic and ask whether its legal framework is well designed for handling a crisis like this. I do not argue that this is exemplary, but that it helps us to debunk the myth about an 'emergency regime', usurping power and ultimately leading to a 'corona dictatorship'. This is one of the stories that conspiracy theorists, right-wing populists and radical right-extremists want to make people believe (Nachtwhey, Frei and Schäfer 2020).

4.4 The role of the rule of law: Germany as one possible model of handling a crisis

So far, we have argued that speaking of emergency too hastily may be counterproductive. Against this backdrop, we might contrast the public talk of emergency and exceptional times with a perspective on the role of law, highlighting its potential robustness in times of crisis.

The example of German crisis management of COVID-19 shows that the invocation of a state of exception is not only potentially dangerous but also out of tune with the astonishing flexibility and resilience of law. The handling of the pandemic in the German context has remained within the boundaries of legality. It is true that rights have been curtailed. German regional governments decided on restrictions and regulations, and some were even enforced by ministerial decree. But these actions still had a legal basis in the German *Infektionsschutzgesetz* and thus remained within the bounds of the Basic Law.³⁷ Contrary to Carl Schmitt's expectations, the constitution has shown itself well prepared to legally contain and control an emergency (Kaiser 2020).

Perhaps for these reasons, the vast majority of the German population has supported the measures taken by the government.³⁸ Citizens have continued to invoke their fundamental rights, and courts have had to decide whether the restrictions conform to German (constitutional) law, from time to time ruling against them. The principle of proportionality has generally been complied with – and in a crisis like a pandemic, proportionality is itself contingent on the dynamics and temporality of the crisis (Kersten and Rixen 2020). Legal scholars rightly stress that legislators and courts need to find answers to questions of

³⁷ The Infection Protection Act (IfSG) came into force on 1 January 2001 and established a system of notifiable diseases in Germany. The IfSG regulates which diseases are to be reported in the event of suspicion, illness or death. Furthermore, the law specifies which information is to be provided by those required to report and presents reporting channels, forms and instructions. During the pandemic, the Bundestag and Bundesrat passed amendments to the Infection Protection Act (IfSG) and other laws. They established an 'epidemic emergency of national scope', allowing regulations and protective measures such as restrictions for private gatherings, public spaces, workplaces, etc. However, the rules have always been limited in time.

³⁸ For a representative survey in August 2020, see <https://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2020/august/>; for continuous monitoring, see the so-called "COSMO – COVID-19 Snapshot Monitoring" at <https://projekte.uni-erfurt.de/cosmo2020/web/>.

appropriateness and to balance interests, and in Germany they have arguably done so. Once more, the German example highlights the relative importance of strong, independent courts, and particularly the legitimacy and authority of a constitutional court. This is just one of the ways in which Germany's domestic crisis management benefits from features absent at the transnational level. If emergency politics can still be constrained in the domestic setting, it is arguably on account of some of the very things missing in the transnational realm. Yet, Germany highlights a model that can work. Admittedly, on the national scale and in a particular case, it shows the advantages of the constitutional inclusion of emergency rules instead of a (neo-Schmittian) re-enactment of exceptionalism (see, for example, Ferejohn and Pasquino 2004; Gross and Ní Aoláin 2006).

Germany also exemplifies crisis management in a federal state where power is dispersed, and where (state) governments of different party affiliations need to cooperate while competing political motivations and designs collide. Whether the intricacies and benefits of federalism combined with a robust constitution can provide us with a model for the multi-level, transnational crisis politics that we need on the European scale is a matter that needs further scrutiny (Kreuder-Sonnen 2019; Kreuder-Sonnen and White 2021).

4.5 Conclusion: Analysing and routinising crises

The current pandemic has shown that restrictions on freedom are possible under the rule of law. This suggests that we need to discuss the possibilities of legitimate crisis management and how extraordinary means of crisis management can be legalised and justified, and properly communicated. Firstly, there are several ways in which constitutions and legal frameworks can domesticate emergency politics (Kaiser 2020). The legal accommodation of exceptional powers may prevent public authorities turning to the grey zones of the law or even to illegality. But, of course, the containment of emergency powers remains contingent on political practices, on the functioning of institutions, on the set-up of international institutions, and, yes, on the behaviour of political agents and policymakers within these institutions (Kreuder-Sonnen 2019; Schindler 2014).

Secondly, another political way to contest exceptionalism and the politics of emergency is to understand the (regrettable) regularity, recurrence, and comparability of crises. As argued above, modernity, democracy and capitalism are crisis-ridden. This crisis-proneness is a structural characteristic of modern societies, and policymakers should not fall into alarmism as soon as a new crisis emerges. Of course, this is easily said from an academic position. But it is important to stress for any politician, communicator and policymaker: instead of inciting neo-decisionist fantasies by flirting with exceptionalism and talking of emergency, political decision-makers and communicators should tackle crises as regular yet critical junctures. One could formulate the paradox that crises must become a political routine to debunk the myths and temptations of exceptionalism. Coolness is a political strategy.

But is there any value in the talk of emergency at all? Indeed, to dramatise rhetorically can be one political strategy to mobilise support or to force reluctant actors to decide and act. To stir up fear by invoking an emergency can politicise the public, enhance vigilance, or put pressure on other political players. The pressure to communicate pressure can be understood as quite a plausible reaction in political crisis management, since in crises such as the pandemic we witness a gap, a discrepancy between the existing and binding laws and political responsibility (van Middelaar 2021, 28).

Responsibility and accountability are political categories, and they are linked to a call for action, argues Luuk van Middelaar (2021, 60). Assuming responsibility means considering and accepting the possible consequences of one's actions and decisions; accountability implies being evaluated on one's performance, highlighting the idea that people (as voters) can reward or sanction politicians. Both terms refer to political actions, decisions and policies. Middelaar, a Dutch historian and philosopher, contends that assuming political responsibility in a crisis means something different from the idea of 'competence with which (EU) lawyers and officials are familiar. Unprecedented crises, by definition, require a degree of authority and capacity to act that goes beyond the usual competences; such situations are an appeal to personal responsibility' (van Middelaar 2021, 60). In critical moments, politics must 'creatively build bridges, bring about reforms' (van Middelaar 2021, 28). Such an event may force politics, the institutional order, into a 'new form' (*ibid.*).

Especially in moments of crisis, nation states such as Germany or Sweden, and a complex political organisation such as the EU, must satisfy quite different demands. Policymakers need to find ways to combine legal certainty, predictability and trust in their will to cooperate on the international and transnational level with possibilities to increase their ability to act and react quickly. This goes hand in hand with stressing the political category of responsibility, and assuming responsibility implies politicisation. Political actors must make decisions under conditions of great uncertainty, then (re-)present them publicly. Policymaking entails making decisions and passing laws that risk judicial review and withdrawal or revision while insisting on political, democratic legitimacy (van Middelaar 2021, 116). In the end, this means that conflict between a political and juridical logic and between the functioning of different institutions and the expectations of the public comes to light. Searching for a constructive communication strategy amidst a current crisis thus also entails communicating these intricacies, and highlighting political stances and decisions as both firm and contingent and contestable. This, we could finally say, is the biggest challenge for democratic communication in crises.

Finally, it comes as no surprise that the current pandemic has exposed the problems, shortcomings, and challenges for contemporary societies. But the pandemic has not, so far, resulted in authorities and agents demolishing liberal

and democratic institutions (Ginsburg and Versteeg 2020). Nevertheless, attention needs to be drawn to power shifts between institutions, organisations and branches in the political system, as well as the dispersion of power in informal, opaque and unaccountable forums. This paper has tried to make the point that it would help us contest such power shifts in national and transnational governance arenas if policymakers did not perpetuate the hasty narratives of emergency and exceptionalism that support those shifts and make them plausible for some people.

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Sammanfattning på svenska

Under 2000-talet har EU behövt hantera flera externa händelser som har skapat spänningar i EU-samarbetet. Inte sällan betecknas dessa händelser som ”kriser”. De mest framträdande externa kriserna är finanskrisen, med början i USA, migrationskrisen, orsakad av att stora flyktingströmmar sökte sig till EU, och covid-19-pandemin, som inte minst satte unionssamarbetet på hårt prov när medlemsstaterna valde olika åtgärder för att skydda folkhälsan. I februari 2022 utbröt därtill ett krig i Europa när Ryssland invaderade Ukraina. I skrivande stund pågår olika typer av EU-möten med syftet att hantera de EU-gemensamma effekterna av invasionen. Att den ryska invasionen är en humanitär katastrof i Ukraina – liksom migrationskrisen var för de flyende människorna från Mellanöstern – är ett faktum, men det återstår att se om invasionen i framtiden kommer att beskrivas som en EU-kris. Detta kommer bland annat att bero på hur de ekonomiska sanktionerna och avstängningen av rysk gas kommer att slå mot EU-länderna samt hur det säkerhetspolitiska läget utvecklas på den europeiska kontinenten. Huruvida det utvecklar sig till en EU-kris förväntas också bero på hur EU i så fall kommer att hantera dessa frågor.

Den gradvist ökande omfattningen av EU:s insatser i kristider kan sägas följa samma mönster som den europeiska integrationen i allmänhet. I takt med att samarbetet inom de fördragsfästa politikområdena fördjupas blir medlemsstaterna alltmer integrerade – och mer ömsesidigt beroende av varandra. Således förväntas behovet av gemensamma, europeiska svar på både interna och externa hot att öka. Detta är dock inte bara en konsekvens av europeisk integration utan också av bredare globaliseringstreder. Exempel på hur EU hanterar dessa trender och utmaningar är de pågående diskussionerna om strategisk autonomi och resiliens. Utöver det ömsesidiga beroendet kan den ökande omfattningen av gemensamma krisåtgärder möjligen också förklaras av att solidariteten mellan medlemsstaterna ökar med tiden.

Vad som ofta försvårar beslutsfattandet i EU under kriser är dels otydlighet när det gäller ansvarsfördelningar mellan medlemsstaterna och EU, dels oklarhet om vilka av EU:s institutioner som ska leda krishanteringen. Enligt konstitutionell och politisk teori förutsätter ett nödtilstånd att den exekutiva makten får ett särskilt mandat att agera, eftersom den anses ha bäst förmåga att fatta snabba, effektiva och välgrundade beslut i en pågående kris. Många, men inte alla, medlemsländer har därför särskilda lagar som reglerar nödsituationer. Eftersom maktdelegationer kan leda till maktmiss bruk förespråkar forskare att stater på förhand inför tydliga regler för vad som ska gälla om ett nödläge uppstår. Men gäller detta även i EU?

I EU:s fördrag finns ett fåtal bestämmelser om olika slags krislägen, men det finns också många händelser som EU behöver hantera utan ett tydligt mandat.

Detta kan både förlama EU i ett krisläge eller leda till att EU agerar utanför sina tilldelade befogenheter, med effekter på det demokratiska systemet. Det är också möjligt att svårigheterna att komma överens om vilken politisk nivå som ska agera – och hur – leder till att besluten tas i informella beslutsorgan. Informella beslutsprocesser är särskilt utmanande då de bland annat gör ansvarsutkrävandet mindre effektivt.

I den här antologin ger fyra europeiska forskare sin syn på hur EU har hanterat kriserna under 2000-talet. De ger sin bild av styrkor och svagheter i EU:s krishantering samt gör bedömningar om hur den kan utvecklas.

Efter en inledning följer ett kapitel av *Vivien A. Schmidt* som analyserar EU:s åtstramningspolitik under finanskrisen för att därefter jämföra den med EU:s återhämtningsplan under covid-19-pandemin. Schmidt betraktar återhämtningsplanen som framgångsrik ekonomisk politik och menar att EU nu bör bygga vidare på den och göra faciliteten för återhämtning och resilien (eller motsvarande) både permanent och större. Hon betonar att dessa typer av instrument både ökar möjligheterna att främja en hållbar utveckling i hela EU och möjliggör en mer flexibel och inkluderande ekonomisk styrning. Schmidt menar också att denna typ av ekonomiska styrning är särskilt viktig för att hantera de pågående utmaningarna, inklusive den gröna och den digitala omställningen samt de socioekonomiska ojämlikheterna inom och mellan EU:s medlemsstater. Samtidigt som Schmidt ger tummen upp för återhämtningsplanen menar hon att styrningen av euroområdet behöver bli mer decentraliserad, med finanspolitiska riktlinjer som möjliggör differentierade mål för medlemsstaterna. Beslutsprocessen behöver också bli mer demokratisk, menar hon, med ett ökat deltagande av arbetsmarknadens parter, medborgare och nationella parlament i varje skede av processen.

I det andra kapitlet beskriver *Jonathan White* inledningsvis hur EU:s beslutsfattare under det senaste decenniet regelbundet har vidtagit exceptionella åtgärder för att stävja exceptionella omständigheter. Han menar att den europeiska krispolitiken på olika sätt har rubbat EU:s demokratiska system, genom att bland annat sätta den institutionella balansen i gungning. I sitt bidrag undersöker White hur EU kan komma till rätta med problemen. Han diskuterar bland annat möjligheten att stärka EU:s beslutsförmåga i nödsituationer i form av nya befogenheter för EU i krislägen, men drar slutsatsen att EU i stället behöver förenkla och demokratisera den verkställande makten i EU. Mot denna bakgrund föreslår han radikala förändringar i EU:s konstitutionella struktur som utgår från att det behöver bli tydligare att den verkställande makten är underordnad den europeiska lagstiftande församlingen. Han menar att när EU:s krishantering utvärderas finns risk att man fokuserar alltför mycket på resultaten, medan formerna för styrningen går under radarn. Detta innebär risker för det demokratiska systemet, varför White förespråkar att EU:s beslut också i kristider behöver knytas närmare till en kritisk allmänhet.

I antologins tredje kapitel fortsätter *Christian Kreuder-Sonnen* diskussionen om hur EU:s sätt att hantera kriserna riskerar att påverka det demokratiska styrelseskicket i ett mer långsiktigt perspektiv. I motsats till White förespråkar han att EU ges tydliga krisbefogenheter för att på så sätt motverka de demokratiska kostnader som dagens europeiska krispolitik innehåller. I sitt bidrag ger han en tydlig bild av vilka grundläggande principer som bör vägleda utformningen av nöd tillstånd i EU och betonar även vikten av proportionalitetsprincipen i detta sammanhang. Kreuder-Sonnen bedömer samtidigt att möjligheten till de fördragsändringar som skulle krävas för att få till stånd konstitutionella bestämmelser för EU i ett krisläge är små. Han föreslår därför några mindre ingripande åtgärder som skulle kunna bemöta några av dagens största utmaningar i förhållande till EU som krishanterare.

I antologins fjärde och sista kapitel beskriver *Astrid Séville* hur de turbulenta årtionden som EU har bakom sig har visat på strukturella svagheter i EU:s system, samtidigt som EU har uppvisat en slående motståndskraft. Hon funderar över varför man så ofta utgår från att kriserna kan leda till att de politiska systemen kollapsar, i stället för att betona de styrkor som systemen kan manifestera i kristider. En annan central fråga är varför beslutsfattarna själva väljer en retorik som innehåller att de bidrar till medborgarnas rädslor, med effekten att kriserna riskerar att fördjupas. I detta ljus frågar sig Séville om några av de kriser som EU har genomgått inte lika gärna kan betraktas som ett normaltillstånd i modern politik. I sitt bidrag analyserar Séville också Tysklands svar på covid-19-krisen och reflekterar över om den kan säga oss något om hur kriser kan hanteras på ett bredare plan. Hon menar att legalitetsprincipen, det vill säga det offentliga systemets bundenhet av lagarna, har varit tongivande för de tyska makthavarna. En effekt av detta är att medborgarna har kunnat bibehålla de flesta av sina rättigheter, inte minst genom att domstolarna har kunnat kontrollera att åtgärderna är proportionerliga. Mot denna bakgrund diskuterar Séville alternativ till de nödlagar som ger den verkställande makten större befogenheter.

'The gradual increase in the EU's efforts to react to common threats can be said to follow the same pattern as European integration in general. As EU cooperation in the treaty-based policy areas deepens, Member States are becoming more and more mutually interdependent. The need for joint European responses to both internal and external threats is expected to increase. However, this is not only a consequence of integration, but also of the broader trends of globalisation.'



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